Pedagogies of justice : critical approaches to public legal education

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Critical approaches to public legal education

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Declaration

I hereby declare that the work presented in this thesis is my own, except where explicit reference is made to the work of others.

Abstract

Public legal education is generally understood as a set of informal educational practices aimed at improving access to justice and social cohesion that predominantly focus on marginalised or disadvantaged populations. Public knowledge of law and its associated informational and educational practices provide a decisive locus for the legitimizing function of the normative ideal of the rule of law with its underpinning assumptions of security and stability. These ideals occlude a legacy of violence and political oppression that haunt the legal order, an erasure that is perpetuated when legal education is inattentive to its political-philosophical underpinnings. The pivotal role of public legal knowledge also carries the possibility of alternative critical engagements with justice systems that fundamentally interrogate the juridical-political order. This alternative possibility is explored in light of readings drawing from Critical Theorists of the Frankfurt School (Walter Benjamin, Theodor Adorno, Max Horkheimer), through whom we encounter a reading of the problem of law as evidence of the violent founding (and preservation) of any political community. Their insight not only helps us to think differently about the inherent instability of the liberal legal order, but also suggests alternative pedagogical approaches attuned to the danger of the positivistic and technocratic rationalities of law. What these thinkers share, above all, is a lack of faith in progress in the advance of human civilization and modern institutions of justice. The refusal of a linear historicism of law (as process, trial or as tradition becoming law) also engages a negative utopianism that offers a way to think about public legal education as a form of counter-education. This opens a space of contestation with the presuppositions of law and legal orthodoxies, as community educators attempt to work with and against law. A sustained concern of the thesis is to reconceive the public's ability to analyse and critically engage with law and the justice system as fundamental to the constitution of the body politic, and to explore the development of counter-hegemonic educational strategies.

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Introduction

This research project has evolved over two decades of working at the intersections of law, education and poverty. It began in the North East of England in the 1990s with the Citizen's Advice service supporting people with a multitude of complex and interrelated legal issues; helping them to secure welfare entitlements, defend evictions and negotiate with creditors. Working in welfare rights and subsequently teaching and supporting others in the field, provided an early grounding in law and education, albeit only with a partial and limited knowledge of the workings of the justice system. What became increasingly urgent to attend to in the daily work of advocacy and legal advice was the abject effect that a lack of knowledge of rights and entitlements alongside a basic understanding of the legal system had on people's lives. Moreover, with a limited supply of expert advice how this lack of knowledge served time and again to compound marginalisation and trap people in cycles of poverty and disadvantage. It also led to growing discomfort about the power imbalances, dependencies and hierarchies inherent in the relation between adviser and client. In later years, this led to a growing interest in the value of legal education as a way of intervening more holistically in the lives of people who would repeatedly encounter legal problems. Developing strategies for self-advocacy and legal techniques to defend and protect the rights of the most disempowered people against more powerful actors became central to my work and research interests. What was most fascinating, then and now, in the creation of *ad hoc* educative spaces, was the fertile ground they provide for reimagining what law means and how alternative voices exploring and engaging with the justice system could serve to remake and rethink the political and legal landscape. This thesis has grown out of those spaces and from those people, from the belief that the most fertile imaginaries for justice come from those for whom justice can't be taken for granted.

Over the last decade this belief has guided my research and teaching endeavours. In 2011, I co-founded a charity and education foundation to support public legal education in the United Kingdom. A decade of designing and testing

public legal education practices left many structural and theoretical questions unanswered. The purpose of this thesis is to address the central research question of how political and philosophical theories influence public legal education practices, and how, in turn, these practices come to shape the juridical-political order in which they are deployed. The emphasis on political-philosophical underpinnings results in some limitations to the scope of the project, in particular the lack of systematic exposition of public legal education practices as they exist today or that might be gleaned from a systematic literature review of global practices. Moreover, the approach to political theory has focused on the development of liberal and subsequently neoliberal legal theory, its proponents and detractors. Wider research into the Roman law origins and ancient Greek emergence proved incredibly fruitful but have also largely been discarded due to the confines of scope. Other critical theoretical perspective have also much more to offer in this field, in particular postcolonial responses to Western liberal legal tradition and its imperial origins.[1] and Some of the core subsidiary questions with which the study engages are how public legal education practices contend with and are implicated by an ever more juridified world? How can law be demystified for people who encounter it in their everyday lives, often at times of crisis, and how can they bring to bear their own understanding of law, which is grounded in lived experience and through immensely plural perspectives encompassing moral, religious and ethical views? What pedagogies are suited to the need not only to provide tangible material help to those who are reliant on law, to enable them to access basic entitlements and services, but also to recognise the limits of law and its political contingency? Is it possible to create a space of critique in which law is revealed as a site of struggle and contestation, while being attentive to the immediate problems people have? These interests and concerns derived from challenges in practise have guided the research topics with which this thesis contends. The necessary limitations of space leave a wider, more empirically based enquiry into the range of practices and outcomes in the field, particularly beyond the more readily accessible literature on Western theories and practices for another day.

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[1] Peter Fitzpatrick, P. (2001). Imperialism. In *Modernism and the Grounds of Law* (Cambridge Studies in Law and Society, pp. 146-182). Cambridge: Cambridge University Press.

Exploring and addressing these concerns has thrown up more questions than answers. The research has traversed a number of fields to provide a critique of public legal education by situating it within historical, philosophical and theological frameworks. These interdisciplinary frames aim to be faithful to the rich seams of thinking and voices of individuals whom I have had the privilege to teach about the law outside of the formal educational settings of law schools and academies. While knowledge of law is taken to mean the knowledge of some aspect of the body of enforceable rules within a given society, and the processes through which enforcement is given effect, this can be a constraint to more critical engagements about how the law in action works, and how it might change. As Roscoe Pound would direct us to consider, the profound distinction between law in the books and the law in action, between the formal rules that purport to govern societal relations and those that in fact govern them, so too the challenges for public legal education practices become more complex.[2] Discussions in communities engage with legal history, religious beliefs and problems of morality, the power imbalances that occur when negotiating legal relations, and the social and economic contexts in which problems are experienced and resolved. Unlike the experience of teaching at law school, these discussions often take on an enormous sense of urgency, given the problems at hand – which may include the risk of losing home, liberty, income, an important relationship or any combination of these. Precisely because of the difficulties at practice level to shift focus away from the pressing material problems that communities who participate come with, the thesis takes on the task of keeping in view the proximity of individual experiences of material deprivation and suffering within a much wider horizon of historico-philosophical thought. This emphasis has offered some ways (rather than a single, purposeful path) to think about how educational encounters can avoid the closures of purely positivist and stultified, instrumental teaching about the law, and in doing so to open up alternative educational encounters with the law.

The thesis begins by developing a working definition of public legal education as a range of information and education practices aimed at building the knowledge, skills and confidence in the general population of laws and legal processes. Improving understanding of rights and legal issues, together with the

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[2] Roscoe Pound, "Law in Books and Law in Action ," American Law Review 44, no. 1 (January-February 1910): 12-36

confidence and the practical skills to take action on a legal problem seeks to help individuals and communities to deal with disputes and gain access to justice. Modern practices can potentially encompass any of the body of enforceable rules that govern society. The enormous potential scope of public legal education inevitably creates definitional challenges which are discussed as they arise in different jurisdictions in Chapter One. While generally excluding the commonly understood practices of lawyering which involve tailored legal advice, advocacy and representation, the diffuse nature of practices can involving face-to-face non-legal assistance such as form filling or information sharing, mediums such as television and radio as well as community based education and digital information activities amongst many others. The field becomes muddied further when we consider the fact that while many non-lawyers engage in practices, lawyers frequently do support interventions from teaching in the community to peer reviewing legal information. This wide scope opens important questions about the varying motivations of actors engaged in the field. Probing the motivations behind a range of public, private and civil society actors invites an exploration of the complex political, economic and social forces within which public legal education is evolving, and reveals the polyvalent forms and uses of legal education that abound in the field. The various permutations and evolutions will be the focus of the first two chapters. Chapter One begins with an investigation of the differing and partially competing rationales for public legal education through the early civil rights and Poor Law movements in the US and Canada, and the subsequent law centre movement in the middle of the 20th Century. Over this period, the empirical framework of legal needs studies

emerged as part of a wider scholarly shift to socio-legal studies, with an increasing number of small-scale and population wide legal needs studies that are analysed along with the access to justice literature for their salience to public legal education practices. More than half a century of scholarship and activism could not overcome the problem of extensive legal exclusion and failed routes to justice.

Despite the agitation and activism of the early years, even when the political will to mobilise to enforce rights is present, the gaps and failings of access to justice initiatives are palpable in the studies we encounter. When the political will is absent, as became the case with the collapse of the Poverty Law movement, and is now a feature of the contemporary post-crash legal landscape, hard won

rights to equality and welfare have become ever more illusory.[3] Legal needs studies over forty years reveal that unequal distribution of legal knowledge is also attended with wider systemic issues of competence and capability relating to social class, educational background, race and disability. These factors were, and still are, entrenched barriers to accessing justice. The diagnosis of Abel-Smith in 1973 remains entirely apposite today, "Many - if not most - people cannot - at least do not - overcome them [these entrenched barriers] for most types of legal claims."[4] Little has changed in the assessment of needs and associated hurdles that the most disadvantaged groups encounter.[5]

We discover the persistence and acceleration of the lack of knowledge of laws and legal processes in modernity precisely accompanies the rise in new rights, and the growth in both civil and criminal law within increasingly complex societies and their social and economic arrangements which have led to the proliferation of laws. This fact of modernity gives rise to a more penetrating question about the

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[3] For an analysis of post-crash labour reforms, see Clauwaert, S. and Schömann, I. *The crisis and national labour law reforms: a mapping exercise,* 20 Working Paper 2012.04 European Trade Union Institute. For a study into the decline of global social and economic rights see Ignacio Saiz, "Twenty Years of Economic and Social Rights Advocacy Marking the Twin Anniversaries of CESR and the Vienna Declaration and Program of Action," Centre for Social and Economic Rights (2015), 7.

[4] Brian Abel-Smith, Michael Zander and Rosalind Brooke, *Legal Problems and the Citizen: A Study in Three London Boroughs*, (London: Heinemann Educational Books,1973). See also Michael Cass, *Legal needs of the poor: Research report*. Law and poverty series, (Australian Government Publishing Service, 1975), Jerome E Carlin and Jan Howard, "Legal representation and class justice," 2 UCLA Law Review (1964-1965): 381.

[5] The surveys that fall within the *Paths to Justice* tradition have recently been reviewed by Pleasance. P., Balmer. L. and Sandefur. R., *Paths to Justice: A Past, Present and Future Roadmap* (2013). http://www.nuffieldfoundation.org/sites/default/files/files/PTJ%20Roadmap%20NUFFIELD%20Published.pdf Accessed 19th May 2014. See also American Bar Association, *Legal Needs and Civil Justice: A Survey of Americans: Major Findings from the Comprehensive Legal Needs Study* (Chicago: American Bar Association, 1994); Barbara A. Curran, *The Legal Needs of the Public: The Final Report of a National Survey* (Chicago: The Foundation, 1977); Hazel Genn, *Paths to Justice: What People Think and Do about Going to Law* (Portland, OR: Hart Publishing, 1999); Margaret Y. K. Woo, Mary E. Gallagher eds, *Chinese Justice: Civil Dispute Resolution in Contemporary China*, (Cambridge: University Press, 2011).

ambiguity that follows from the impetus to advance social equality and freedom through law. As Teubner observes, following Habermas:

> The ambivalence of juridification, the ambivalence of a guarantee of freedom is made clear in the telling phrase "the colonisation of the life-world," which was coined by Habermas. Social modernization at the expense of subjection to the logic of the system and the destruction of intact social systems is the essence of this idea.[6]

The insights of one of the later scholars of the Frankfurt School become more pressing with a feature of modernity that the analyses move on to explore. The final part of the first chapter considers the increasing orientation of public legal education toward an economic-juridical rationality. This idiom of public legal educations exhibits an orientation of the rule of law to the exigencies of liberalised and competitive economisation. Thus, we find education and awareness raising become increasingly prominent in the development context, as part of international investment strategies releasing 'dead' capital via the expansion of international rule of law efforts.[7] The re-emergence of interest in public legal education after a period of decline following the earlier movements of the 60s and 70s shows a renewed interest in the connection between public legal education and the rule of law. In part, this has been in response to reduced public expenditure for public legal assistance, but the fundamental link to public knowledge about the law and the

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[6] Gunther Teubner, "Juridification: Concepts, Aspects, Limits, Solutions" in Robert Baldwin, Colin Scott, and Christopher Hood, *A Reader on Regulation* (Oxford, Oxford University Press, 2019), 4.

[7] Stephen Golub, "Beyond the Rule of Law Orthodoxy: The Legal Empowerment Alternative", *Rule of Law Series, Democracy and Rule of Law Project Number 41* (2003), https://carnegieendowment.org/files/wp41.pdf. [accessed on 18th February 2019]. It should be noted that, as a feature of legal empowerment initiatives, these practices are a critique of 'top down' rule of law orthodoxies: see Pilar Domingo and Tam O'Neil, *The Politics of Legal Empowerment: Legal Mobilisation Strategies and Implications for Development* ODI (2014), https://www.odi.org/publications/8485-politics-legal-empowerment-legal-mobilisation-strategies-and-implications-development [Accessed 18th February 2019]. On the contested expansion of rule of law as a development tool more generally, see Daniel Zolo, "*The Rule of Law: A critical Appraisal"* in The *Rule of Law History, Theory and Criticism* Editors: Costa, Pietro, Zolo, Danilo (Dordrecht: Springer, 2007, 31).

universal applicability of law is also discernible in policy debates.[8] In the United Kingdom, the liberalisation of laws to allow commercial enterprises to enter legal practice has been framed in terms of consumer and citizen empowerment, a trend toward liberalisation that is likely to be taken up elsewhere.[9] This accompanies rapid technological change and large-scale reforms, driven by digital justice initiatives in which legal information is crucial.[10]

We take up these examples of privatisation, austerity and liberalised markets in a theoretical vein with a critique of neoliberalism, pursued by Wendy Brown, following Foucault. Their analysis points to a catastrophe in which a new world-ordering rationality that demands sacrifice in the name of progress and growth is revealed, and to which public legal education becomes a conduit. Citizen-consumers are tasked with competing for the legal 'goods' with which equality, welfare and protection against more powerful actors and the state is promised. For the losers in this game of un-equals, the resulting losses caused by rights and entitlements that cannot be vindicated are cast as necessary sacrifices for the good of community:

> As we are enjoined to sacrifice to the economy as the supreme power and to sacrifice for "recovery" or balanced budgets, neoliberal austerity politics draws on both the religious and secular, political meanings of the term. We appear to be in the orbit of the second, secular meaning of the term insofar as sharing is called for, rather than

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[8] The reduction of public funding occurred under the auspices of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

[9] Legal Services Act 2007, (1) (g). For a comparative perspective and agenda for reform in the United States and Canada see Deborah L. Rhode and Alice Woolley, "Comparative Perspectives on Lawyer Regulation: An Agenda for Reform in the United States and Canada," *Fordham Law Review*. Volume 80, Issue 6, (2012).

[10] Yaniv Roznai and Nadiv Mordechay, "Access to Justice 2.0: Access to Legislation and Beyond," (December 22, 2015). The Theory and Practice of Legislation, Forthcoming; Hebrew University of Jerusalem Legal Research Paper No. 16-12. Available at SSRN: https://ssrn.com/abstract=2707360 The proposal for online courts is detailed in Michael Briggs L.J., *Civil Court Structure Review Final report*, Courts and Tribunals Judiciary referencing the over-arching need for public legal education (2016), 62. https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf [Accessed 2 May 2017].

> assumed, the call itself is issued in a moral-political idiom, and the call implies overcoming self-interest for the good of the team. …sacrifice Girard writes is "a deliberate act of collective substitution performed at the expense of the victim and absorbing all the internal tensions, feuds and rivalries pent up within the community.[11]

Legal education in the public realm becomes a strategy of economic innovation, smoothing the conflicts of daily life in order to facilitate market expansionism. In this conception, the state itself steadily develops the contours of the firm, and its citizens adopt the role of entrepreneurial subject, to be either winners or losers in the game of survival. Welfare, redistribution, reparation are all to be dismantled under a neoliberal regime of legal and economic rationality. These structural features become intrinsic to our understanding how and why public legal education can appear at once as a set of radical political practices aimed at securing political representation and agency, while immediately after becoming co-opted as a mode of socialisation and to repress political change.

The second chapter takes up these themes by considering how classical liberal conceptions of the rule of law deployed and construed legal knowledge. Rather than a marginal concern of jurisprudence, the question of what people know about the law within a given population is a fundamental aspect of the rule of law, both in formal and substantive constructions and by extension is a central argument for the advancement of public legal education initiatives. The modern liberal legal formulation, with its putative safeguards for individual liberty and institutional and procedural oversight has been in decline in the West since its restatement as an Enlightenment ideal.[12] Liberal legality with its roots in conquest and colonisation howeverYet in an era of populism and political polarisation, its rhetorical and symbolic force continues to be lauded by both right and left, while notably remaining a growth industry in the developing world.[13] The chapter subsequently

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[11] Wendy Brown, *Undoing the Demos: Neoliberalism Stealth Revolution* (New York, Zone Books, 2015) 216-7. The theme of sacrifice will be revisited in chapter three as we consider the inauguration of law in proto-religious communities in Greek myth and tragedy explored by both Max Horkheimer, Theodor Adorno and Walter Benjamin.

[12] Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 60-72.

[13] The UK and US together account for 60% of global legal services revenue, half of the Global 100 firms are based in the US and 14% in the UK. Recent years have seen a major expansion of US and UK law firms into China, other Asian countries, and sub-Saharan

traces the concerns for public knowledge of the law in rule of law theories, from classical to natural law and subsequent positivist accounts. The critique emphasises the role of publicity at the heart of the legitimating assumption of the universal applicability of law.

We will trace the shift between natural law theories maintaining a direct relation of the divine origins of political authority to the promulgation of law as an extension of the providential plan. Natural law, with its corollary of natural reason in which all humans partake, must be accompanied with the dissemination of civil laws, since nature alone (and natural reason) provides insufficient security and stability for an evolving political community. Following first Hobbes, then Locke and Rousseau, we explore how the rights of property and individual liberty come to form the basis of the social contract between citizen and state. For our purposes, legal education and publicity of laws forms a pivotal and transitive legitimising function for political sovereignty. Whereas classical liberal theory constructs this in ways that recognise, at least in principle, a juridical-political episteme of popular sovereignty as an element of constitutive import, this is increasingly undermined, reaching an apotheosis in the twentieth century. The economisation of the state and of governance *tout court* is evidenced through the growth of limited knowledge of legal rules imbued in the population in order to facilitate economic competition and the free flow of capital.

The Enlightenment offers a crucial nexus through which to analyse the shift to the notion of the reasoning subject who becomes the source and subject of the law. For Kant the motto 'dare to know' links the will or the courage to know, to come to understanding, with the opposite condition of self-incurred subordination or tutelage.[14] The individual will must become part of a collective process; a prerequisite to enlightenment is that both the individual and society as a whole need to participate in this movement of will, of the urge to come to reason. This ideal of universal subjectivity shaped through education provides a core element of the critique we will move on to. Rather than bring about individuation and fostering autonomous subjects in the interest of governing together, the contention we will consider with the Frankfurt school is whether the kind of democratic and

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Africa (UK Legal Services in 2015, The CITYUK http://www.thecityuk.com/research/our-work/reports-list/legal-services-2015/). Accessed 26 July 2015.

[14] According to the translator's note, the term was first coined by the Roman poet Horatio, *Epodes I,* 273.

legal education envisaged by Kant in fact served to subsume individuality under the sign of universality and in the blind pursuit of instrumental reason.

A subsequent theoretical reading of the association of law, legal knowledge, and legitimation of the state engages substantively with the work of Walter Benjamin and the group of writers associated with the Frankfurt School. The third chapter brings to bear a constellation of concepts and critical dialectical tools to understand the difficulty posed in the vexed and contested space in which the paucity of legal knowledge in the public domain is linked to the constitutive and constituted function of the law and the modern state. The central question posed concerns how the nature of the polity being produced through educational practices is conceived. We firstly investigate the assumption of the peaceable, predictable and democratic functions of the rule of law by introducing the interdisciplinary strands of critical theory that emerged from the *Institut*, home to a group of predominantly German Jewish thinkers including Max Horkheimer, Theodor Adorno and, more distantly, Walter Benjamin. The writings emerging from the *Institut* would come to have a significant impact on educational theory both in Europe and the U.S.[15]

Critical Theory offers several strands of critique responding to liberal legal theory during the fall of the Weimar Republic and the rise of fascism. Contrary to 'traditional theory', Critical Theory aims to disrupt the logic of progress inherited from Enlightenment thought and challenges us to think about the increasingly irrational conditions of modernity brought about by late capitalism that provide the conditions in which public legal educators practice. Of importance to developing alternative strategies in the realm of education and law is the historical and philosophical exegesis that disavows historicism presented as the inevitable progression of past to present. The task of a negative dialectical critique is to break with a mechanistic and instrumentalised world-view and to place necessity (i.e., that law is a naturalised feature of life and that things must be as they are) and contingency (of the political and social constitution of reality) into dialectical tension to allow new configurations to emerge.

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[15] The educational salience of critical theory will be explored in more detail in chapter four. For an introduction into links between critical theory and critical pedagogy see Nigel Blake and Jan Masschelein, "Critical Theory and Critical Pedagogy" in *The Blackwell Guide to the Philosophy of Education*, Eds., Nigel Blake, Paul Smeyers, Richard Smith and Paul Tandish, (London, Blackwell, 2009).

Critical Theory thereby seeks to locate tensions and contradictions between the encompassing social apparatus and awareness of the alienation of the individual's power to fashion the world according to their rational powers. In this contradiction of human life, being simultaneously the product and producer of law and society (while being subjected to social cultural forms from which the rational individual is incapable of being freed), lies the potential, if not fully realisable, for Critical Theory to conceive of another possible world. By repudiating claims to improvement, productivity and use value attached to theories of Enlightenment progress and to the liberal ideal of the rule of law, Critical Theory aims to reveal the underlying conditions that perpetuate social injustice.

We extend these ideas somewhat further by bringing to bear an alternative theoretical framework through a reading of Walter Benjamin's *Critique of Violence*.[16] Violence is analysed through its relation to law in either its law-making or law-preserving characteristics. Law (*Recht*)[17] maintains an inexorable relation to violence, in which violence is always interred within the legal order as the instrument or mechanism of law's self-preservation. By conflating law with justice, legal theories mask this self-preservation. Benjamin's *Critique* exposes the inherently unstable process of formation and decay of all legal and political institutions. He refutes natural and positive law theories since natural law consigns justice to transcendentalism, whereas positivistic accounts (while offering a more credible ground) nevertheless degenerate into historical violence. Both fail to secure justice in the concrete conditions of oppression that concerned Benjamin.[18] The analysis of legal violence, in turn, introduces the problem of fate - a central concept of myth - which is unequivocally aligned by Benjamin with the order of law.

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[16] Walter Benjamin, *Critique of Violence, Selected Writings, Volume I*. 1913-1926 (Belknap Press: Harvard University Press, 1996).

[17] In German *Recht* is distinguished from *Gesetzt*, the former relates to concepts of rights and obligations in the abstract rather than concrete sense of particular laws, and appears as the primary reference for Benjamin. Rather contrary to the English, the whole normative sphere is called by the name: Recht, droit, dritto, and not law, loi, legge. Translators note in Giorgio Agamben, '*The Time that Remains, A Commentary on the Letter to the Romans*' (2005) 119.

[18] Walter Benjamin, *The Right to Use Force*, Selected Writings, Volume 1, 231. Benjamin explains: "it is never reason that decides on the justification of means and the justness of ends: fate-imposed violence decides on the former and God on the latter." 247

Mythic violence and legal violence coincide in establishing uncontrolled rule over life and death in Benjamin's analysis, a threat that both orders are unable to relinquish. Mythic violence encompasses all manner of manifestation of legal and political institutions, insofar as they are a source of power or force that must be projected as the basis of their self-legitimisation. His critique identifies the role that the intelligibility or occlusion of law plays in the legitimisation of state and its attendant violence. Benjamin weighs mythic and legal violence in tandem by pointing to the legal maxim that ignorance of laws (*das Unkenntnis des Gesetzes*), much like blind fate, brings no relief from punishment.[19] Law achieves its extortive force because the boundaries of mythic and secular orders rely on a deliberate ambiguity precisely to foreclose infringement of their respective spheres as their necessary condition of self-preservation. Benjamin's contention is that modern sovereignty, and thus modern law attempts to emulate a theological structure. This results in an array of what Benjamin terms phantasmagoria – mystifications and mythifications that obscure the important ethical and political demands that profane justice places on us.

Myth forms a central motif in Benjamin's philosophy, and his exposition of quotidian reality that is, in his view, inexorably entangled with the archaic forms of thought that have been marginalised from philosophical-historical enquiry.[20] Their continuing role secures law's foundations with devastating consequences for the attribution of culpability for individual transgressions and the legitimacy of the modern legal order as such. The analysis points to a precondition of law in which guilt is the cipher for the capture of life in law: "The cipher of this capture of life in law is not sanction (which is not at all an exclusive characteristic of the juridical rule) but guilt…in the original sense that indicates a being-in-debt – *in culpa esse*."[21] What is important for the present enquiry is the illumination of guilt or indebtedness that is presupposed and maintained by law.

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[19] "Von diesem Geiste des Rechts legt noch der moderne Grundsatz, dass Unkenntnis des Gesetzes nicht vor Strafe schuetzt." Contrary to what the word ignorance suggests, the concern is not an epistemological one, but rather is a problem internal to the sphere (to the rule) of law. I am grateful to Anton Schütz for clarifying this important point.

[20] Winfried Menninghaus, Walter Benjamin's Theory of Myth, in, On Walter Benjamin, Critical Essays, and recollections, ed Gary Smith (Cambridge, MA: The MIT Press, 1988).

[21] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (1998: Stanford University Press), 26.

The chapter reveals that guilt is an operative mechanism through which life itself becomes the focus of the juridico-political order, and through which sacrifice can readily be potentialised. Human life is thus juridified and indebted to the law for survival:

> The state must kill, not once but over and over again, each time establishing not only its right to exist but even the fact of its existence. We learn from this that archism, for all the supreme confidence that it projects, is both deeply anxious and deeply vulnerable and in this way we can start to think about ways to resist and possibly even defeat the endlessness of all manifestations of archism (including neoliberalism, fascism, liberalism and capitalism).[22]

In this sense, the thesis contends that education in law may either serve to reaffirm a particular normative order or offer strategies to disrupt the problematic relation between the presupposed guilty form of life captured in law's operation. It will be argued that a critical pedagogical approach to legal education needs to find other avenues if it is to provide a space in which practices can distance themselves from the predetermined end of the application of law as the means of remedying systemic social and economic disadvantage, itself a product of the operation of the juridico-economic rationality of modernity. My study will examine the underlying juridical and political intersections in Benjamin's reading on law, violence and fate to make a preliminary argument in which this relation between law and life is presented as the problem that any educational intervention would pose at its core.

The final chapter takes up a closer analysis for the educational philosophies revealed through a categorical selection of public legal education practices. Despite the sparse literature in this arena, a somewhat more schematic approach enables us to review these through a number of fields including law-related education or civics education originating in the middle of the Twentieth Century, development-oriented accounts of legal education and a relatively new aspect of legal capability literature since 2000 in the Anglo-American context. We find that the adaptive and socialising features of the education models frequently fall into a disciplinary frame insofar they seek to insert newcomers – either by birth or as migrants - into the normative order. The difficulties which these practices fall into variously concern the co-opting of programmes to suit changing state objectives, or the inability to sustain work where the political motivation involves

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[22] James Martel, "Why does the state keep coming back? Neoliberalism, the state and the Archeon." *Law and Critique* Volume 29, Issue 3:359-375 (2018), 370.

precisely critique of power relations that stray into the terrain of the political – juridical realm.

Later critical theories that adopted the work of the Frankfurt School to the field of education are explored with a specific concern for their capacity to fundamentally decenter or problematize the structural problems raised by inserting subjects, albeit for emancipatory goals into a progressive reading of law and history. The utopian horizon which dialogically builds agency between teacher and student is reimagined through an alternative negative construction following the stance of Max Horkheimer and Theodor Adorno. While later proponents, particularly Jürgen Habermas would argue that to debunk instrumental reason results in an aporetic project devoid of normative ground with no other instance of human rationality to appeal to, this thesis argues for the need to re-evaluate the pedagogical space that emerges through a dialectical reimagining of the past, in the interest of the present.

The primary inspiration for final pedagogical readings in Chapter Four originates from references to education and the concept of study in the writings of Walter Benjamin. He describes an educative power that "stands outside the law"[23], that carries with it the potential to interrupt the violent imposition of law. This will suggest that a return to the negative utopian roots of Benjamin's writings offers an alternative avenue to the positive emancipatory utopian orientations of later critical pedagogy theories. The thesis concludes by examining the concept of educative power which is related to the study of law through a number of elusive references in Benjamin's 1934 essay on Franz Kafka.[24]

Kafka's work provides an exemplary depiction of the way in which the secrecy and ambiguity of law is deployed and operates with murderous force. His literary representations of the hidden structures of power draw from his perception of the archaic modern in which the primordial past maintains itself in the present. His allegories unearth the necessary occlusion of law so as to hide its groundlessness, and thereby arouse suspicion as to the mechanism or machinery of self-legitimation. Yet through this brutal and relentless presentation of the administrative and bureaucratic state, we also glimpse an alternative reading in which an educative frame for law emerges that does not re-establish or reapply

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[23] Walter Benjamin, '*Critique of Violence*', Selected Writings, Volume I, 250.

[24] "Law that is studied, but no longer practiced", is not justice but "only the gate that leads to it" Walter Benjamin, 'Franz Kafka', *Selected Writings* Volume II, 815.

law's violence. The figure of the student and the question of study appear in numerous short stories and novels by Kafka.[25] Study is conceived variously as a reversal, an unburdening from future goals, lacking a preordained object and appears to be free to leave a violent sovereign behind.[26] The curious figure of thought appears that, according to Giorgio Agamben, points to the deactivation of law, "to a law that is studied but no longer practiced"[27] The thesis puts forward that this concept of de-instrumentalised learning, which refuses the necessary application of law clears the ground for a counter-hegemonic engagement with the law. Educational possibilities open up in this space of legal education in which a mode of thinking about and critique of the law reveals the self-grounding operations of the legal order and its foundational myths.

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[25] The major novels include, *Amerika*, *The Trial* and *The Castle*, as well as numerous short stories including, "A Report to an Academy," in *Collected Works* (Norderstedt: Books on Demand, 2015) and "The New Advocate," in *Metamorphosis and Other Stories*, trans Michael Hoffman (London: Penguin, 2015).

[26] Ibid. 816

[27] Agamben, *State of Exception*, 2005.

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The radical roots of public legal education

This chapter traces the 'radical' roots of public legal education over the last half century in the occident.[28] The focus on the predominantly Western, European and North American examples by no means suggests that these are the only practices of importance or indeed the best examples of work in the field. The exclusion of wider material stems from the problem of sheer scope, the proliferation of predominantly grey literature and oral practices which mitigates systematic review, as well as limitations arising from the many linguist challenges. The literature review has therefore followed a more creative or transformative methodology sourcing material from eras of political or societal upheaval.[29]

Public legal education emerged alongside the activism and reform tied to the civil rights movement and the development of legal services for the poor. At a time of prominence for public legal education advocacy around the world,

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[28] In relation to public legal education, Lois Gander adopts term 'radical' as follows: "its meaning was never fixed…to Saul Alinsky, foremost radical of them all, a radical was an irreverent 'political relativist' who constantly searched for the causes of man's plight and for explanations of his irrational world but who was never satisfied with his own findings. "The Radical Promise of Public Legal Education in Canada", (MA diss, University of Alberta, 1999), 7. https://www.cplea.ca/wp-content/uploads/2017/01/radpromofple.pdf [Accessed October 9 2014]. According to Foucault, the term 'radical' dates from the end of the seventeenth century from the English assertion of original rights deriving from a time prior to the Norman invasion. Unlike revolutionary claims which were structured around the rights claimed from public law (derived from natural rights), radical claims: "consisted in the assertion of original rights…a position which involves continually questioning government, and governmentality in general, as to its utility." *The Birth of Biopolitics, Lectures at the College de France* 1978-1979. Michel Senellart, ed., trans. Graham Burchell (Chippenham and Eastbourne: Palgrave Macmillan 2008), 41.

[29] Jill K Jesson, Lydia Matheson and Fiona M Lacey. *Doing Your Literature Review: Traditional and Systematic Techniques*. London: Sage Publications (2011)

particularly the last decade, these historical and political antecedents reveal pressing challenges in the contemporary field.[30] These challenges emerge with a revival in public legal education as a corollary of the retrenchment of legal aid in the wake of the global financial crisis and global narratives of austerity, the advance of disruptive digital technologies in the legal sector and investment oriented expansion of rule of law programmes.[31] In response, at one end of the

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[30] In the United Kingdom an independent Task Force was commissioned to explore the role and value of legal education for the public; see Public Legal Education and Support Task Force (2007) Developing Capable Citizens: The Role of Public Legal Education. www.pleas.org.uk/uploads/PLEAS%20Task%20Force%20Report.pdf [accessed February 2015]. Efforts are recorded in the context of legal reform in China, see Randall Peerenboem, "The New China Model for the Era Post Global Financial Crisis" in *Routledge Handbook of Asian Law*, Christopher Antons ed. (London: Routledge, 2017), 66. European Parliament members made calls for action to promote legal literacy in 2013 "to give every citizen of the Union the opportunity to acquire a basic knowledge of legal matters." Written declaration, under Rule 123 of Parliament's Rules of Procedure, on promoting legal literacy, European Parliament 0013/2013. http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+WDECL+P7-DCL-2013-0013+0+DOC+PDF+V0//EN&language=EN [Accessed 24th January 2019].

[31] The trend toward limiting legal aid expenditure has accelerated but predates the global financial crisis and was already in evidence as a European consensus to establish a minimum level of legal assistance was not achieved despite attempts at harmonisation. See Christopher Hodges, "The Europeanisation of Civil Justice: Trends and Issues" *Civil Justice Quarterly*, Volume 26, (2007) and Kiraly, L and Squires, N, "Legal Aid in the EU: from the Brussels Convention of 1968 to the Legal Aid Directive of 2003," Coventry Law Journal, Volume 16 number 2 (2011), 27-46. On comparative changes in legal aid provision see Richard Abel, "Law Without Politics: Legal Aid Under Advanced Capitalism, UCLA Law review, Volume 32, (1984-85) 474 - 643. Nevertheless, there is surprisingly little research in the comparative availability of legal aid funding, see *International Comparison of publicly funded legal services and justice systems*, MoJ Research Series 14/09, October 2009 http://www.justice.gov.uk/publications/docs/comparison-public-fund-legal-services-justice-systems.pdf. Some European reports suggest that while there has been an overall increase of legal aid across those states providing data between 2008 and 2010, this represents increased spending on individual cases with a reduction in cases overall. "All in all, in the member states there seems to be a tendency to grant more aid to a smaller number of users." (European Commission for the Efficiency of Justice Evaluation Report of European Judicial Systems, 2010), 82.

spectrum public legal education and legal empowerment activities are construed as grass-roots driven, legally inspired tools for resistance. At the other end, education and information initiatives are portrayed as ameliorating limited access to advocacy and representation in the courts[32] while also aiming to promote order, prevent crime and cement social cohesion.[33] Moreover, the contemporary shift in emphasis to self-help and increasing citizen responsibility for resolving their own legal issues is noteworthy among a wider array of market-oriented processes that have accompanied the turn to neoliberalism since the 1980s.[34] In this configuration,

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http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport_en.pdf [Accessed 17th May 2014]. Rule of law and democratic accountability arguments predominate in the associated field of international development. Examples include the Commission for Legal Empowerment of the Poor hosted by United Nations in 2008. Reporting that up to four billion people around the world are effectively excluded from the rule of law, the Commission argues that legal empowerment requires that states: "foster and institutionalize access to legal services so that the poor will know about laws and be able to take advantage of them." "Making the Law Work for Everyone," Working Group Reports, (New York: UNDP, 2008) Vol 1.p 6.

[32] As Hodges comments on emerging European trends: "The provision of significant government expenditure on legal aid is no longer consistent with the prevailing economic policy." Hodges, "The Europeanisation of Civil Justice: Trends and Issues," 107. See also Julie Macfarlane, *Identifying and Meeting the Needs of Self-Represented Litigants*, The National Self-Represented Litigants Project. Treasurer's Advisory Group on Access to Justice (TAG) Working Group Report (2013). https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/s/self-represented_project.pdf [Accessed 18th February 2019].

[33] The socially integrative function of public legal education has a long pedigree that will be explored at greater length as an aspect rule of law theories in chapter 2 and adaptive educational theories in chapter 4. For the present purpose, the development of public legal education as a means of containing political unrest is noted by Garth, *Neighborhood Law Firms,* 197. Further, some of the earliest programmes developed under the auspices of the Office of Economic Organisation were couched in terms of juvenile delinquency prevention. On the evolution of the U.S. programmes see Earl Johnson Jnr, *Justice and Reform: The Formative Years of the OEO Legal Services Program,* (New York: Russell Sage Foundation 1974), 23-24.

[34] These regimes of neoliberal governance will be more fully examined in the following chapter. On the range of practices and tactics associated with neoliberal governance see Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (New York: Zone Books, 2017), 201-213.

public legal education is becoming a more formal part of top down justice reform strategies, in contrast to the 'radical' movements of the 1960s and 70s.[35] As a consequence, tension between potentially expedient solutions serving to undergird neoliberal policy, and radical alternatives that undermine or subvert legal orthodoxies will be a central focus for this thesis.

The chapter proceeds by introducing the definitions and scope of public legal education in its various manifestations around the world. The broad terrain reveals a complex history that has formed and shaped the movement in divergent ways over the last half century. As the attempt to define the genre reveals, many practices and approaches arise out of oral traditions and informal activities, which by their nature have escaped full exposition; nor indeed have they produced much in the way of theoretical exegesis. This has rendered research into the field challenging and has necessarily resulted in a somewhat fragmented view of the landscape.

The chapter moves on to explore the history of public legal education movements in the Anglo-American context of the civil rights struggles with which they were closely associated. The study will focus on the shifting political terrain in which public legal education emerged that enabled early educative efforts to flourish. In this idiom, public legal education is charged with political and social activism. The genealogy reveals how the movement developed in parallel with early attempts to establish legal services for the poor. The historical analysis of the Anglo-American experience of public legal education aims to offer insights into how contemporary development in the field of public legal education can reconnect with its more radical precursors and reflect on how to sustain practices in light of declining publicly funded services.

A strand of literature through which to consider the development of public legal education consists in the socio-legal scholarship that has influenced much of the thinking around public legal education today, as well as providing an empirical evidence base for public legal education policy initiatives.[36] The literature

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[35] It is also worthwhile to note how these strategies fundamentally differ from community-based strategies of self-help; indeed, these narratives run in quite opposing directions insofar as presenting participants as political influencers. Lisa Wintersteiger and Tara Mulqueen, "Decentering law through public legal education." *Onati Socio-legal Series*, volume 7, number 7 (2017).

[36] For example, Pleasence *et al*, *Causes of Action: civil law and social justice*, (Legal Services Research, 2004) was cited in the proposal for a national strategy for public legal

highlights a remarkable continuity from the earliest legal needs studies in the 1930s to the present, painting a picture of widespread legal exclusion in which large sections of the population are unaware of basic legal rights and the processes through which legal redress can be sought.[37] The literature reveals how traditional legal services with a primary focus on advice and representation fail to address the systemic underlying knowledge and skills gaps evidenced across numerous legal needs studies.[38] In the U.K., for example, historically high per capita expenditure

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education, see "Toward A National Strategy for Public Legal Education: A Discussion Paper," Legal Action Group, Citizenship Foundation and Advice Services Alliance 2004. https://lawforlife.org.uk/wp-content/uploads/2013/05/towards-a-national-strategy-100.pdf [Accessed 19th February 2018]. Australian examples include legal needs surveys to bolster best practices for public legal education. Law and Justice Foundation of New South Wales, "Justice Made to Measure: NSW legal needs survey of disadvantaged areas – Access to justice and legal needs," Volume 3 (Law and Justice Foundation of New South Wales, 2006), 104 cited in Johann Kirkby, A Study in the Best Practices of Public Legal Education, A Report for the Winston Churchill Memorial Trust Australia (Victoria Law Foundation, 2010),16. https://www.victorialawfoundation.org.au/sites/default/files/resources/Churchill%20Report_Joh_Kirby_WEB_0.pdf [Accessed 20th February, 2018].

[37] Hazel Genn, *Paths to Justice: What People Do and Think about Going to Law* (Oxford: Hart Publishing, 1999). Nigel Balmer *et al*, "Knowledge, Capability and the Experience of Rights Problems," (London: PLENET, 2010) http://lawforlife.org.uk/wp-content/uploads/2010/05/knowledge-capability-and-the-experience-of-rights-problems-lsrc-may-2010-255.pdf [accessed 12th November 2014]. Collard, S, Deeming, C, Wintersteiger, L, Jones, M & Seargeant, J, *Public Legal Education Evaluation Framework*, (Bristol: University of Bristol Personal Finance Resource Centre, 2010). http://www.bristol.ac.uk/media-library/sites/geography/migrated/documents/pfrc1201.pdf [Accessed November 2014].

[38] A useful review of legal needs surveys over the last 30 years is available in Access to Justice and Legal Needs Volume 7: Legal Australia-Wide Survey, Legal Need in Australia, Coumarelos *et al*, 2012 (Law and Justice Foundation of New South Wales). The surveys that fall within the *Paths to Justice* tradition have recently been reviewed by Pleasance *et al* Paths to Justice: A Past, Present and Future Roadmap, (2013). http://www.nuffieldfoundation.org/sites/default/files/files/PTJ%20Roadmap%20NUFFIELD%20Published.pdf Accessed 19th May 2014. However, once legal advice has been accessed, lack of knowledge appears to have no bearing on the outcome, with capability effectively handed over to the lawyer or advisor Nigel Balmer, Alexy Buck, Ash Patel, Catrina Denvir, Pascoe Pleasence, *Knowledge, Capabilities and the Experience of Rights*

on legal aid relative to comparable jurisdictions has not appeared to make any significant impact on levels of legal knowledge in the public sphere.[39] What renders the continuity in legal need less remarkable, perhaps, is the persistence and intensification of juridification in modernity. Juridification paradoxically registers a significant expansion of social and economic rights at the same times as a substantial contraction of freedom. The current revival in public legal education is driven by this proliferation of law and the juridification of entirely new spheres of existence that have resulted in an ever-widening gap between the public's knowledge of the law, and the legal frameworks that bind them as legal subjects.[40]

This dilemma was already apparent to the pioneer legal activists attempting to advance minority rights in the early days of the civil rights movement, a dilemma they construed as an aspect of the crisis of the rule of law. It

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Problems Legal Services research Centre, (2010): 43 https://lawforlife.org.uk/wp-content/uploads/2010/05/knowledge-capability-and-the-experience-of-rights-problems-lsrc-may-2010-255.pdf [accessed on 11th March 209]

[39] Roger Bowles and Amanda Perry, *International comparison of publicly funded legal services and justice systems* (Ministry of Justice series 14/2009), https://webarchive.nationalarchives.gov.uk/20100208125113/http:/www.justice.gov.uk/publications/docs/comparison-public-fund-legal-services-justice-systems.pdf [accessed March 11th 2019]. National legal needs surveys focused on the problem of knowledge of legal systems and legal rights suggest that the majority of the population is unaware of basic legal rules and processes, with the associated difficulties for individuals to vindicate their rights and the risk of experiencing civil justice problems Buck *et al*., "Do Citizens Know How to Deal with Legal Issues? Some empirical insights," *Journal of social policy*, Volume 37 Issue, 4 (2008), 661–681 (2008). Sean Hannon Williams, "Sticky Expectations: responses to persistent over-optimism in marriage, employment contracts, and credit card use." *Notre Dame Law Review*, Volume 84, Issue, 2, (2009): 733–791.

[40] On the expansion of litigation and the growth of lawyers alongside a rapid increase in financial transactions see Marc Galanter, "In the Winter of Our Discontent: Law, Anti-Law, and Social Science *Annual Review of Social Science*, Volume 2 (2006), 5 and Marc Galanter, "Law Abounding: Legalization around the North Atlantic, *The Modern Law Review*, Volume 5 Number 1(1992). Jurgen Habermas, *The Theory of Communicative Action*, Vol. 2, Boston: Beacon Press, 1987, p. 359. Scott Veitch, Emilios Christodoulidis, Marco Goldoni, *Juridification* in *Jurisprudence* (Abingdon, Routledge, 2018) 312-318. Gunther Teubner, "Juridification: Concepts, Aspects, Limits, Solutions" in Robert Baldwin, Colin Scott, and Christopher Hood, *A Reader on Regulation* (Oxford, Oxford University Press, 2019).

was a crisis that demanded nothing less than fundamental political democratic change – a call which, however briefly, captured the imagination of U.S. politics.[41] Fifty years on, these features of the legal landscape have been intensified in such a way as to suggest a profoundly altered relationship between citizen and state, a relationship that marks the 'great turn' from classical liberalism to new political and regulatory forms of governance following the end of the cold war.[42] Rather than revisiting the extensive literature on legal need as such, the chapter aims to draw together the particular perspectives that offer critical purchase for questions engaging with public knowledge of the law specifically. Public knowledge of the law, which is here distinguished from knowledge gained through specialist study or professional pursuit of legal training, encompasses an understanding of the legal system and broad awareness of legal rights and processes.[43] While initially appearing as epistemological-juridical concerns, that is to say the concern of people's lack of awareness of their rights and entitlements and the ability to access them in the courts, this underlying problem soon begins to reveal a more fundamental juridical-political concern. This poses a more pressing question: how is law configured as binding the relation of citizen and state?

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[41] For 1960s activist lawyers and subsequently presidential speechwriter, Edgar Cahn and his wife Jean, the explosion of rights and grievances without redress alongside the widening discretion of officials were all contributing factors that render law increasingly impotent as a tool to mount progressive defense of poor and disadvantaged communities. See Edgar S Cahn and Jean Camper Cahn, "Power to the People or the Profession? The Public Interest in Public Interest Law" *The Yale Law Journal*, Vol. 79, No. 5 (April 1970): 1005-1048.

[42] Although rooted earlier in the century, rapid expansion of policies associated with the dismantling of the social state and the alignment of legal and economic policies directed toward the privatization of public spheres came in the 1970s and 80s, see Pierre Dardot and Christian Laval, *The New way of the World: On Neoliberal Society*, Trans Elliott, (London/New York: Verso, 2014), 147 – 155.

[43] Legal need can broadly be understood as the gap between the instance of problems with a legal dimension—for which some kind of legal remedy exists (justiciable problems)—and the frequency with which those experiencing problems access legal help. See Genn, Paths to Justice, 1999. A conceptual framework, albeit not exhaustive, of the competencies involved in legal knowledge have been offered by Collard *et al*. *Public Legal Education Evaluation Framework* (2010).

The study finally moves to focus on the United Kingdom to consider the last decade of reforms that include a range of liberalising and privatising features in which public education is tied to the rule of law. Deregulatory policies in the legal services sector appear to respond to a new demand to ensure the public have a better understanding of their rights and duties, a concern given impetus by a broader rule of law objective.[44] The global financial downturn of 2008 and ensuing austerity measures simultaneously provided conditions for the retrenchment of public investment in legal assistance, leading to substantial reductions in access to advice and legal services for low to middle income populations. This correlates with an increase in the numbers of people involved in court proceedings without the help of a lawyer. Liberalising reforms in the legal services sector reveal a turn away from classical *laissez-faire* toward increasingly expansive regulatory activism. As large parts of the welfare system come under wholesale attack, the sharp increase in drivers for population groups seeking assistance with legal problems is coeval with competition-oriented reshaping of the legal services market. In conjunction with these changes, the impact of reforms toward a 'digital by default' justice system and the implementation of an Online Court has driven the need for members of the public to understand legal rules and procedures in order to use online justice systems. These various factors illustrate a complex and often contentious intersection of public knowledge of law and the rule of law that can be read within a set of governmental strategies and rationalities.

Defining public legal education

Public legal education commonly involves multidisciplinary and largely informal educational practices that exist at the margins of the legal academy and legal profession.[45] As a consequence, much remains undocumented, and much of

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[44] The objective of enhancing the citizen's rights and duties was enshrined in the Legal Services Act 2007 (1) (g).

[45] Lisa Wintersteiger, *Legal Need, Legal Capability and the Role of Public Legal Education* (London, Law for Life, 2015). Susan Macdonald, "Beyond Caselaw - Public Legal Education in Ontario Legal Clinics," *Windsor Year Book of Access to Justice*, Volume 18, Number 3 (2000).

what follows needs to be construed as remnants of a richer, larger but discontinuous tapestry:

> [T]he understanding of PLE has been maintained largely through oral tradition and action rather than in written commentary or analysis. To describe PLE it is necessary to come at that understanding through a review of key events, organizations, activities, products, ideas, values, and issues that have shaped or emerged from the PLE experience.[46]

The literature that has been retrieved should also be considered in light of what is missing; oral practices rarely made it to formal curricula and few academic scholars took an interest in the field. Its proponents and practitioners were outsiders, its early pioneers were often women, sometimes black – and most of their stories did not make it into either law or history books.[47] Moreover, informal and non-formal learning is itself contrasted with and de-valorised against the formality of learning in schools and academic settings precisely for its tendency to elude stringent recording. While the contrast is less insistent in today's life-long learning society, historically at least we can note that:

> As enlightenment-based rationality and science were applied to learning, ways were sought and developed to improve upon the supposedly more primitive and simple everyday learning. Formal learning, when effectively provided, was assumed to have clear advantages. It opened up the accumulated wisdom of humankind, held in the universities. This sort of accumulated, recorded and propositional knowledge allowed each generation to know more and better than their predecessors, as science (or art) advanced.[48]

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[46] Gander, "Radical Promise", 13.

[47] I am grateful to Lois Gander for emphasising this important point in discussion about the literature that does exist, which is largely produced by male academics and does not reflect the experience of practitioners active in the field during the 1960s.

[48] Helen Colley, Phil Hodkinson, and Janice Malcolm, *Non-formal learning: mapping the conceptual terrain, a consultation report* (University of Leeds, 2002). For a discussion and critique of life-long learning approaches see Gert Biesta, *The Beautiful Risk of Education* (London: Paradigm Publishers, 2013), 43-59 http://www.infed.org/archives/e-texts/colley_informal_learning.htm [Accessed 20th February 2019].

Public legal education encompasses a raft of activities spanning television and radio, information leaflets, community teaching and awareness raising campaigns, to grass-roots organising on specific issues that include a legal component, such as domestic violence, stop and search, housing possessions and welfare entitlements.[49] Neither aimed at vocational legal learning nor providing formal educational qualifications, the field nevertheless has come to be recognised in its own right, even if it remains resolutely 'homeless'.[50] The broad terminology applied to the field contributes to difficulties in defining the genre and also varies significantly across jurisdictions and therefore remains, to an extent, contested. Various terms by which it has become known include justice education, law-related education, legal literacy, legal empowerment and community legal education.[51] The lack of clear boundaries has been attributed to the 'fluidity' of the concepts it comprises ('public', 'legal', 'education'), leading to some confusion as to whether public legal education is, "an activity, a discipline, a field, a network, or a social movement."[52] A clear definition thus remains somewhat elusive.

Public legal education is directed toward improving knowledge of laws and legal processes in the general population. While some fields are attentive to the intersection of plural traditions in which traditional laws intersect and in some

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[49] Public Legal Education and Support Task Force (2007) *Developing Capable Citizens: The role of Public Legal Education*, www.pleas.org.uk/uploads/PLEAS%20Task%20Force%20Report.pdf [accessed February 2015]. Pat Pitsula, *Review of the Role of Public Legal Education in the Delivery of Justice Services* November 4, 2002): 2. Mojab S., McDonald S. (2008) "Women, Violence and Informal Learning" in: Kathryn Church, Nina Bascia, Eric Shragge eds., *Learning through Community*, Springer, (Dordrecht: Springer, 2008).

[50] According to Pat Pitsula, "PLE has not yet found a natural 'home' – whether in advice or legal services, education or elsewhere." Review of the Role of Public Legal Education in the Delivery of Justice Services (Vancouver: Ministry of the Attorney General, 2003) 19. The scope of activities involved in public legal education often overlaps with other disciplines. Some closely associated fields include citizenship education, legal information and advice (though not advocacy), as well as financial capability.

[51] Although terms can be used somewhat interchangeably, Anglo-American practices largely fall under public legal education or law-related education for younger audiences. Australians prefer the term community legal education, European examples apply the term legal literacy, and international development models encompass public legal education in the wider context of legal empowerment initiatives.

[52] Lois Gander, "The Radical Promise."13.

cases are overlaid by colonial legal systems, defining the nature of legal knowledge is relevant. Often people misunderstand their legal rights, are apply wider judgments or fairness, cultural norms or morality to what they understand the law to be. This has been a prominent finding of legal needs surveys that have focused attention on the public's understanding of law and legal services as well as legal capability in order to understand how people experience legal problems in their lives.[53] The specific focus on legal rights and legal processes can include a vast array of topics within the civil and criminal fields. In practice, its reach tends to be restricted by focusing on groups that are particularly prone to legal problems and who struggle to access or exercise their rights. The participants and beneficiaries of public legal education programmes are commonly from marginalised groups experiencing specific barriers to justice such as minority groups, young people, prisoners and welfare recipients.[54] Particularly as it appeared in the middle of the twentieth century in North America, the demand to improve legal education and prevent legal exclusion was shaped by an idealistic and subversive strategy for resisting legal and social hegemony and aimed at breaking cycles of poverty and political disenfranchisement.[55] The disparate popular education movements that have emerged around the world since have sought recognition for legal education

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[53] See Pascoe Pleasance, Nigel Balmer and Catrina Denvir, "How people understand and interact with law" (The Legal Education Foundation, 2015). https://www.thelegaleducationfoundation.org/wp-content/uploads/2015/12/HPUIL_report.pdf [Accessed 24th February 2019]. For a recent review and guidance on legal needs surveys and their relationship to access to justice see Legal Needs Surveys and Access to Justice Open Society Initiative and Organisation for Economic Co-Operation and Development (2019) https://www.oecd-ilibrary.org/sites/g2g9a36c-en/index.html?itemId=/content/publication/g2g9a36c-en [Accessed September 2019].

[54] Carol McEown and Gayla Reid, *Public Legal Education review: reflections and recommendations on public legal education delivery in BC* (Legal Services Society, BC. May 2007). Suzie Forell and Hugh McDonald, *Beyond great expectations: modest, meaningful and measurable community legal education and information*, Justice Issue 21. (Law and Justice Foundation, 2015). http://www.lawfoundation.net.au/ljf/site/articleIDs/D1D67F87F681ECBACA257F0F0021C08A/$file/JI_21_Beyond_great_expectations.pdf [Accessed 22nd January 2019].

[55] Lois Gander, "The Radical Promise." Bryant Garth, *Neighbourhood Law Firms for the Poor: A Comparative Study of Recent Developments in Legal Aid and in the Legal Profession* (Dordrecht, Kluwer,1980).

as a fundamental aspect of access to justice. The need for concerted efforts to expand education provision has also been articulated as intrinsic to democratic accountability, the promotion of human rights, poverty alleviation, and combating social exclusion and structural inequality.[56] As we will explore in greater depth in chapter two, the wider discourse that has emerged on public legal education and the rule of law reveals complex and conflicting objectives of popular education about the law in an increasingly 'law-thick' world.[57]

In the United Kingdom, a concerted effort to grapple with the definition and scope of public legal education was undertaken by a broad coalition of agencies under the auspices of the Public Legal Education and Support Task Force, convened in 2006. The Task Force developed a working definition for public legal education:

> Public legal education provides people with the awareness, knowledge and understanding of rights and legal issues, together with the confidence and skills they need to deal with disputes and gain access to justice. Equally important it helps people to recognize when they need support, what sort of advice they need and where to get it.[58]

The Task Force definition also places an emphasis on legal capability as the goal of public legal education interventions:

> Public Legal Education is the tool we need to achieve legal capability. It has a key role in helping citizens to understand the law and to use it more effectively in their daily lives, bringing many different individual and social benefits. PLE is the missing element in the creation of the legally-enabled citizen.[59]

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[56] On the association of legal need and social exclusion and inequality see Pleasance *et al., Causes of Action*: Civil Law and Social Justice (2011), see Rebecca Sandfur, "Access to Civil Justice and Race, Class, and Gender Inequality," *Annual Review of Sociology*, Vol. 34: 339-358.

[57] Gillian K Hadfield, "Life in the Law-Thick World: The Legal Resource Landscape for Ordinary Americans," in Samuel Estreicher and Joy Radice eds. *Beyond Elite Law: Access to Civil Justice in America* (Cambridge: Cambridge University Press 2016).

[58] PLEAS Task Force (2007), 13.

[59] PLEAS Task Force (2007), 15.

Subsequent efforts to map and conceptualise legal capability in the United Kingdom have provided a framework for evaluating practices.[60] Alongside social agendas including crime reduction, social justice and human rights efforts, the Task Force definition encompasses the wider capacity of citizens to engage with government. However, this function is couched in terms of "capacity to enhance public understanding of how government can configure support, information, and help."[61] The definition falls short of a wider democratic element linking the practices with participation in political life. Of further note in the U.K. is the fact that public legal education was placed on a tentative statutory footing under the auspices of the Legal Services Act 2007. The Act aimed to liberalise the legal services market and improve consumer confidence by increasing public understanding of the citizen's legal rights and duties, an innovation in the regulatory sphere which will be explored in greater depth in chapter two.[62]

The statutory contexts in which public legal education appears in different jurisdictions vary according to how practices are framed and the periods in which legislation incorporating elements of public legal education occur. Australian literature employs the terminology of community legal education. This is defined as: "a learning process about the law which empowers people who share common problems or issues through knowledge, skills and/or attitudinal changes to be able to do things differently."[63] It enjoys a more integrated role within wider legal services provision than in the U.K., having been written into legislation establishing legal aid commissions in Australia in the 1970s.[64] In the United States, the 1970s also brought about legislative innovation in the field. The terminology of public legal education and law-related education are used somewhat

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[60] These comprise four domains, each of which combine elements of knowledge, skills and attitudinal aspects of recognising and contending with legal issues. See Collard *et al*, *Public Legal Education Evaluation*, (2010).

[61] PLEAS Task Force (2007), 12.

[62] Legal Services Act s1 (g). The wider implications of placing public legal education within the framework of regulatory objectives is explored in greater depth in Chapter 2.

[63] Cassandra Goldie, *Community Legal education Handbook*, Second edition. (Law Foundation of New South Wales,1997), 11. The Australian development is closely aligned to the emergence of Neighbourhood Law Centres and is explored in more depth in the following section.

[64] Forell and Mcdonald, "Beyond Great Expectations," 2015.

interchangeably, with activities closely tied to civic engagement. The U.S. Law-Related Education Act of 1978 defined such activities as: "education to equip nonlawyers with knowledge and skills pertaining to the law, the legal process, and the legal system, and the fundamental principles and values on which these are based."[65] The American Bar Association, active in the field since the 1950s, describe their work in supporting law-related education as: "education about the rights and responsibilities of citizens in our constitutional democracy; it is education about the role of law in the democratic adventure; and it is education about how the rule of law protects our freedoms."[66] The history of public legal education as it emerged in Canada and the United States will be explored in greater depth below, but it is worth noting at this point the early adoption of a statutory basis for public legal education and their framing of legal education as a feature of constitutional democracy.

Another field of activity of public legal education can be found in the international development sphere. Of note is the recent insertion of access to justice activities under Goal 16 of the United Nation Development Goals.[67] International development literature includes public legal education as a means of building legal literacy or legal awareness, aimed at improving the capacity of minority groups to seek legal protection despite barriers caused by language, general literacy and geographical remoteness. Examples from African women's rights initiatives

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[65] Educating the public about the law: the work we do and why, Division of Public Education American Bar Association https://www.americanbar.org/content/dam/aba/migrated/publiced/pedbrochure.pdf [accessed 25th January 2019].

[66] American Bar Association, "What is Law-Related Education?" https://www.americanbar.org/groups/public_education/Programs/national-law-related-education-conference/past_conference_programs/2013_law-relatededucationconference/law-related_educationconferencehistory/ [Accessed on 24th January 2019]. See also Whitler, John D. "Public Legal Education," *Journal of Family Law* Volume 12 (1972): 269.

[67] For example, Goal 16 of the United Nations Sustainable Development Goals targets include promoting the rule of law at national and international levels and ensuring equal access to justice for all. Further, to ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements. "About the Sustainable Development Goals," United Nations, http://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-16-peace-justice-and-strong-institutions/targets.html. [Accessed 23rd January 2019].

document a variety of practices, including dissemination of multi-lingual materials, posters and t-shirts, and training aimed at raising awareness of customary and statutory law.[68] Methods including radio programmes, dance, song, and drama have offered means of reaching women and embedding a culture of women's rights by educating policy makers, police, prison guards and the judiciary.[69] Another branch of development-oriented practices are encompassed under a broader rubric of legal empowerment. Legal empowerment comprises: "the use of legal services, often in combination with related development activities, to increase disadvantaged populations' control over their lives."[70] This wider definition of legal support responds to the failure of traditional legal aid services to meet the needs of poor and marginalized communities. Conceived as alternatives to 'top down' rule of law initiatives, delivery strategies focused on education, building legal literacy and awareness raising are a growing feature of the legal landscape in the global south. These models also seek to remedy the lack of trust in the justice system by disadvantaged communities in both civil and criminal jurisdictions.[71] According to Maru, legal empowerment:

> [G]rows out of the tradition of legal aid for the poor and seeks, as legal aid has sought for centuries, to help people protect their rights. For much of the world's population, legal aid in its classic form is either impractical or inadequate: lawyers are costly and scarce; lawyers are ill equipped to deal with the plural legal systems prevalent in most

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[68] Jean Kamau, Jane Wambui Kiragu, Cheryl L Cooper, "Review of Strategies for Promoting Legal Literacy," Economic Commission for Africa, African Women's Centre (1997), 15. http://repository.uneca.org/bitstream/handle/10855/15794/bib-64287.pdf?sequence [accessed 23rd January 2019].

[69] Kamau, "Strategies for promoting legal literacy", 25-27.

[70] Benjamin van Rooj, "Bringing Justice to the Poor, Bottom-Up Legal Development Cooperation," *Hague Journal on the Rule of Law,* Volume 4 (2012) 4: 286. https://doi.org/10.1017/S1876404512000176

[71] For an analysis of the empowerment perspectives that challenge rule of law orthodoxies, see Stephen Golub "Beyond the Rule of Law Orthodoxy: The Legal Empowerment Alternative", *Rule of Law Series, Democracy and Rule of Law Project Number 41* (2003) https://carnegieendowment.org/files/wp41.pdf [accessed 18th February 2019].

> countries; and many people do not prefer the solutions afforded by litigation and formal legal process.[72]

Legal empowerment efforts consequently aim to provide legal aid in a way that is practical, flexible, and responsive to socio-legal context.

As the various settings and contexts above suggest, the field of reference for public legal education is vast, contributing to its lack of clear distinction as an educational endeavor. This is further complicated by the fact that public legal education also includes provision of information embedded in wider legal aid services. The blurring of boundaries between information, education and advice leads to confusion, in particular when provided by state actors or agencies. In this sense it comes close to, but remains distinct from, the promulgatory activities associated with lawmaking.[73] The need to differentiate between general information about laws and regulations and more explicitly educational interventions is tackled in some instances by focusing on the outcomes of different interventions. For instance, the extent to which knowledge is linked to individual empowerment or collective consciousness raising is explored in some studies, in others distinctions

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[72] Vivek Maru, "Allies Unknown: Social Accountability and Legal Empowerment," *Health and Human Rights*, Volume 12. No 1 (2010). A practice in Malawi, which has been adopted in numerous other jurisdictions, is paralegal training for non-lawyers. The paralegal aid clinics (PLCs) form the core work of the paralegals in prisons, prepared by an experienced practitioner in forum theatre. The introduction of participatory learning techniques and forum theatre empowered prisoners to argue for bail, enter a plea in mitigation, conduct their own defense and cross-examine witnesses. Attendance levels at the clinics rose dramatically, not so much because they were thought to be entertaining as because prisoners noticed that their friends were not coming back from court. They were being sent home, whether on bail or having already served their sentence on remand." See Adam Stapleton, "Empowering the poor to access criminal justice: A grass-roots perspective, (2010) 11-12. Legal Empowerment Working Papers, International Development Law Organization. https://www.files.ethz.ch/isn/138112/LEWP_Stapleton.pdf [Accessed 19th February 2019]

[73] For a discussion of the proximity of public legal education and promulgation see Lisa Wintersteiger and Tara Mulqueen, "Decentering Law Through Public Legal Education," *Oñati Socio-Legal Series* 7, No. 7 (2017): 1557-1880.

are drawn by virtue of the role of information and education directed towards group or class interests.[74]

> Legal information is important because many people are powerless in particular situations primarily through lack of knowledge – knowledge is power. This is [community legal education] at its most basic level. Information without education, however, may not achieve the objectives of [community legal education]. Legal education encourages a critical understanding of the law and the legal system and allows an assessment of its impact or usefulness. It is contended that education must be a mechanism for consciousness raising, not simply an unquestioning acceptance of the status quo.[75]

The orientation toward class interests appears more cognizant of the wider structures within which rights function, while emphasising that education and information should not be conflated.

Reflecting on the range of motivations behind public legal education reveals some definitional challenges, which merit being construed in light of their particular and often contingent political, historical and geographical contexts. This preliminary exploration already foregrounds the competing visions of the normative and socially adaptive purposes of public legal education, in contrast to practices that aim to defy, subvert or challenge legal orthodoxies. Garth's important comparative analysis of neighbourhood law firms provides us with a useful illustration of these divergent definitions and their potential consequences.

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[74] "Guidelines for the management of community legal education", Australian National Community Legal Education Advisory Group, National Association of Community Legal Clinics, 1995:1. http://www.naclc.org.au/cb_pages/files/13%20National%20CLE%20Guidelines%20%28Oct%202009%29%282%29.pdf [Accessed 6th February 2019]. The recognition of class or group interest makes for a more sophisticated approach to legal need and the mechanisms through which access barriers can be addressed. Infra Mauro Cappelletti and Bryant Garth eds. *Access to Justice: A World Survey, Volume 1 Book 1* (Milan: Sijthoff and Noordhoff, 1978).

[75] National Community Legal Education Committee, 1995. In contrast, recent research from Australia contends that the self-help aspect of community legal education requires a sustained focus on procedural and practical issues (often identified with legal materials produced by for-profit CLE providers), and loses efficacy when including the contextual aspects of legal systems.

Public legal education serves to build "awareness of legal procedures and approaches to problems"; "counteracts relations of dependency between lawyers and clients"; helps to "mobilize individuals and groups to pursue their rights"; "fosters self-help activities"[76]; demystifies law and counteracts the "myth of rights"; and supports the autonomy of groups to pursue other forms of political and social action.[77]

Balancing collective demands for social and political action with individualized liberal rights frames produces varying and sometimes antithetical objectives. The sheer breadth of goals, methods and of the motivations of the actors involved in public legal education has, as we will further explore, created discernible tensions affecting the development of public legal education in a number of jurisdictions.

The Anglo-American emergence of public legal education

The previous section introduced the wide genre of public legal education as it has appeared around the world in recent years. The narrower focus of the following discussion will examine the public legal education movement that manifested as an aspect of the counter-culture of the 1960s. Emerging in North America from grass-roots activism and agitation for social reform, radical educational practices were able to flourish outside of institutional frameworks and

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[76] The divergent notions of self-help are also instructive. For example, the Adamstown Law Centre in Wales, who were devising strategies to support self-help report: "Handing out leaflets should not be confused with working with the client in a way that can increase the client's awareness and abilities. The promotion of self-help requires at least as much professional input as a conveyance or a court appearance. The professional skills needed are rather different, but they should not be disparaged or under-resourced merely for that." Adamstown Community Trust 1978 cited in Bryant Garth, Neighborhood Law Firms for the Poor: , A Comparative Study of Recent Developments in Legal Aid and in the Legal Profession (Alphen aan den Rijn, Netherlands: Sijthoff and Noordhof International Publishers, 1980), 170.

[77] Garth, *Neighborhood Law Firms*, 193-198.

were a feature of a wider progressive movement for change. Education practices were used as a strategic tool in liberation battles - getting legal information to those who refused to fight in the Vietnam war, vagrants, women's liberation movements, and people fighting police oppression - in short, "bringing law to the people."[78] Poverty law, out of which public legal education grew, was itself an outgrowth of the civil rights movement.[79] It was conceived as a direct challenge to the systemic inequalities of the law in the conservative tendencies of mainstream liberalism, and that also served to entrench poverty and oppression within the legal order.[80]

In the U.S., important conceptual precursors emerged under the auspices of 'preventive law', long before the War on Poverty of the Johnson administration. The growth of preventive law dates to the turn of the twentieth century and a shift to case law methods of teaching in law schools. Changes in academic legal education were accompanied by evolutions in the practice of law. Advice and consultation were becoming a feature of legal practice, in contrast to practices centred solely on litigation and advocacy. These changes were a far cry from the political activism aimed at poverty alleviation, since preventive law was closely associated with commercial and criminal law.[81] But they would in due course become integral to the general practice of law. According to Willard Hurst, the incoming Professor of Harvard Law School in 1870, Christopher Columbus Langdell, marked a key moment, both in the orientation of law schools toward the case method and of a change in the orientation of legal culture. It is this change that interests us: "[B]oth in their own eyes and in the common opinion of laymen,

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[78] Lois Gander, "The Radical promise of Public Legal Education in Canada," (MA diss., University of Alberta, 1999): 13, and "The changing face of Public Legal Education in Canada", News & Views on Civil Justice Reform, no. 6 (summer 2003): 4.

[79] Martha Davies, "The Pendulum Swings Back: Poverty Law in the Old and New Curriculum," Fordham Urban Law Journal, Volume 34, Issue 4 (2006): 1391-1415.

[80] For a concise overview of the various programmes that emerged in the U.S in the context of the 'War on Poverty' in the era of civil rights, see Frank Munger, "Rights in the shadow of class: Poverty, welfare, and the law," in Austin Sarat ed., *The Blackwell Companion to Law and Society* (Oxford: Blackwell Publishing, 2004): 330-353. The effect of the collapse of the war on poverty on research efforts is discussed further below.

[81] Bruce J Winick, "The Expanding Scope of Preventive Law," Florida Coastal Law Journal Volume 3, Issue (2001): 189-204. For the development of the idea of preventive justice and the security state see Andrew Ashworth and Lucia Zedner, *Preventive Justice*, (Oxford: University of Oxford, 2014).

lawyers' distinctive business was contest in court…The years after 1870 showed…increasing effort to use law and lawyers preventively."[82] What was critical to this preventive approach was the realisation that clients had to know when a fact has legal salience:

> Every person in our society must be able to determine (a) whether his activities do or do not involve law, and (b) if they do, whether the activities are sufficiently significant to engage professional guidance…the practice of preventive law by actors-at-law presupposes that there are guideposts and warning signals to enable a person, based on his own experiences and knowledge, to determine when he is an actor-at-law, and that there are rules of hygiene which he may safely follow.[83]

This basic conceptual premise was readily adaptable to the early emergence of legal aid societies working with poorer communities. Information and awareness raising work by the New York Legal Aid Society began as early as 1904, distributing pamphlets for domestic servants. Kansas City Legal Aid Bureau produced multilingual information on legal questions in 1912, and materials for soldiers and sailors were widely distributed by the Red Cross after the First World War.[84] Some of the most strident legal aid advocates construed their activities not only as preventive but as a crucial process of social integration in rapidly expanding urban populations.[85] A leading light of Boston Legal Aid Society,

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[82] Willard Hurst, *The Growth of American Law: The Law Makers* (Boston: Little, Brown and Company1950), 302, cited in Brown, Louis M. "The law office. A preventive law laboratory," *University of Pennsylvania Law Review* 104, no. 7 (1956): 940. On the links with later student radicalism and the continuities and contestations with legal realism see also Laura Kalman, *The Yale Law School and the Sixties: Revolt and Reverberations* (North Carolina*:* University of North Carolina Press, 2005).

[83] Brown, Louis M. "The law office. A preventive law laboratory," *University of Pennsylvania Law Review* 104, no. 7 (1956): 940-953.

[84] Munger, "Rights in the shadow of class" (2004: 4). John Whitler, "Public Legal Education," *Journal of Family Law,* Volume 12 (1972): 269.

[85] See Reginald Herber Smith, *Justice and the Poor: A Study of the present denial of justice to the poor and of the agencies making more equal their position before the law with particular reference to legal aid work in the United Sates* (Carnegie Foundation for the Advancement of Teaching, 1919), 7.

Reginald Smith, whose seminal study *Justice and the Poor* became widely influential, considered work to make law available to poor immigrants as vital to assimilation and to avoid the danger of political radicalisation. The rule of law was "an important element in the Americanization of immigrants…access to the legal system not only 'taught' new Americans about democratic values but also dampened the prospects of radicalization."[86]

The early movement was also bolstered by a growth in poverty law literature and a rapid expansion of poverty law curricula in law schools.[87] A notable feature of poverty law scholarship is its preoccupation with power, which, alongside the critical legal studies movement emerged in the higher legal education milieu of the same period. A rich undercurrent of critical thought combined social and political theory with the concerns of concrete legal realities. The nature of legal advocacy and the prospect of empowerment in legal relations became the subject of critical legal scholarship since its traditional methods were accused of "reproducing indefensible status hierarchies inimical to professed ideals of equality in their own institutions and in the profession."[88] The structural forms of inequality, the constitutive function of law and society,[89] and problems of agency and the personal capacities of individuals were included in this potent mix.[90] Finally, the idea that the poor require 'treatment' came under attack by critical scholars in the 1960s. Their critiques specifically countered the notions of 'legal hygiene' that

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[86] Jon M.A. Di Pippa, "Reginald Heber Smith and Justice and the Poor in the 21st Century," *Campbell Law Review*, Volume 40, Issue 1 (2018): 73-110. Indeed, the fear of communism was one of the radical scourges that Smith sought to guard against.

[87] Martha Davies, "The Pendulum Swings Back," 1392.

[88] See Anthony V. Alfieri, "The Antinomies of Poverty Law and a Theory of Dialogic Empowerment,". *New York University Review of Law and Social Change,* Volume 16 Issue 4, (1987) 659-712. Alfieri argues poverty lawyering risks sustaining existing structural inequalities when it is inattentive to underlying class consciousness and the associated need to support community organising.

[89] See Duncan Kennedy, "Legal Formality," *Journal of Legal Studies,* Volume 2 (1973): 351 and Duncan Kennedy, "Legal Education as Training for Hierarchy," in David Kairys, ed. *The Politics of Law* (New York: Pantheon, 1990).

[90] Munger, "Rights in the shadow of class," 334 -37, in Mauro Cappelletti and Bryant Garth eds. *Access to Justice: A World Survey, Volume 1 Book 1.* (Milan: Sijthoff and Noordhoff, 1978) 17, 50- 54, Marc Galanter, "Why the Haves Come out Ahead: Speculation on the Limits of Legal Change," *Law and Society Review* Vol. 9:95, (1975).

grew out of the preventive law frames.[91] The idea of treatment, they argued, "entails a conception of the poor as having problems rather than grievances and of needing treatment not justice. More fundamentally, however, it reflects an image of the poor as essentially incompetent, as incapable of knowing their interests or asserting them."[92]

The links between the legal and social consciousness of the 1960s placed legal aid at the top of the law reform agenda, culminating in the announcement of the War on Poverty by President Lyndon B. Johnson in his State of the Union address on January 8, 1964. The Legal Services Programme of the Office of Economic Opportunity (OEO) was created in 1965. Reform continued throughout the world during the 1970's.[93] As the War on Poverty took hold, an array of neighbourhood legal services were established, centred on community action programmes delivered by Community Action Agencies.[94] Community education and organising functions for the neighbourhood legal services flourished, helping to make the new legal services viable. "From humble beginnings these educative initiatives spread to encompass community legal education; professional education for intermediaries; law related education in schools; and widespread public education about the law."[95] The concern to improve access to justice had - in its early days at least - engendered a form of radical education that could break the monopoly of legal knowledge, bring legal knowledge to those fighting liberation battles, and serve as a tool for holding power to account.[96]

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[91] See above at footnote 81.

[92] Jerome Carlin, Jan Howard and Sheldon L Messinger, *Civil Justice and The Poor: Issues for Sociological Research* (New York: Russell Sage Foundation, 1967), 25-26.

[93] The links between the Office of Economic Opportunity and the emerging public legal education movement during this time can be found in Gander, "Radical Promise" (1999).

[94] By the end of 1965, the Office of Economic Opportunity had funded approximately 600 community action agencies and, by 1969, over 1000, mostly private nonprofit agencies, in every state and in all the major metropolitan areas that had high concentrations of poor people. See Gander, "Radical Promise," 1999: 23 and 35.

[95] Gander, "Radical Promise," 91-115

[96] Changing theoretical conceptions of access to justice, from the formal right to litigate to a demand for recognition of social and economic rights and public interest litigation are also notable features of this landscape; see Cappeletti and Garth, "*Three Waves,*" 1978: 6-10 and 35-50.

A feature of the early movement was to attempt to conjoin education and information with strategic litigation and class actions. Victories in the U.S. Supreme Court for enforcing racial equality were accompanied by materials disseminating information about newly won civil rights.[97] However, quite early on the limitations of educational endeavours also became apparent. Lack of coordination in provision, suitable levels of detail, and the impasse created by inadequate routes to legal redress compounded the difficulties[98] Basic misunderstandings of what motivated low income groups to attend preventive sessions, poor preparation of sessions and teaching methods all served to hinder practices. Despite the initial radicalism, early examples of neighbourhood law services also pursued models that provided an easy fit with existing political structures – education in these forms followed a black letter approach that precluded any real attempt to consider the political structures in which legal inequality and injustice were embedded.

Legal education could readily be conceived in more conservative terms; its preventive focus need not be construed as an expansion of minority rights and its aim could be to show the poor how to avoid the legal system rather than seek to change it to better serve their collective interest:

> [I]t appears that the [Office of Economic Opportunity] program may be losing sight of its primary goal, that of providing the poor with an education in preventive law. The increasing caseloads in the local offices have required expending the program's resources to meet the pressing needs of litigation. Additionally, the tendency of the legal aid offices to see themselves as the vehicle for expanding minority rights has further depleted the resources otherwise available for the educational effort. The unfortunate aspect of this situation is that it tends to be retrogressive rather than progressive when the overall long-term goals of the war on poverty are considered. The legal system is simply not adapted to solving the legal problems of the poor. Increasing the poor's dependency on the legal system by providing greater access to it sacrifices the benefits which could be gained by teaching the poor to avoid the legal process.[99]

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[97] For the impact of these early cases and strategies on the later public legal education movement see Gander, "Radical Promise," 20.

[98] Eugene M. Harrington, "Preventive Law for Low Income Groups: The Texas Southern Experience," 21 *Journal of Legal Education* Volume 21, 339 (1968).

[99] Whitler, "Public Legal education," 274-5.

Growing recognition that median income groups also struggled to access the legal system, and had little knowledge of its workings led to a shift in focus from the poorest and most marginalized (that had also involved a community organizing element). Practices less concerned with educative interventions emerged, with more emphasis on casework. This turn away from the most disenfranchised also became increasingly associated with less activist and more orthodox and legalistic responses. According to Gander, "the case-oriented, legalistic perspective and work of [neighbourhood law centres] better supported teaching 'black letter law', providing tips on preventing common legal problems, and generating support for the virtues of the rule of law."[100] The shift in strategies and ensuing compromises also meant that, "the approach implied that neither massive funds nor basic political changes were necessary."[101]

The problems these political compromises involved were visible in one famous experimental service in New Haven, Connecticut. New Haven is the seat of Yale University, had a progressive mayor and was engaged in ambitious urban renewal efforts, and so offered a perfect experimental mix.[102] Edgar Cahn and his wife Jean – both Yale students - sought to try a more progressive approach to community and public interest lawyering. Yet the conflicting interests of the multi-agency settings and funders (in this case, the Ford Foundation) meant lawyers were at times restricted from taking forward controversial litigation.[103] Jean Cahn, herself a young black lawyer, took on the defence of a young black man in the case of the rape of a white woman.[104] The public outcry that followed forced the resignation of Cahn and the closure of the neighbourhood law centre, highlighting the deeply

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[100] Gander, "Radical Promise," 92.

[101] Garth, "*Neighborhood Law Firms*," 1980:24.

[102] Johnson, "*Justice and Reform*," 22.

[103] The Ford Foundation established one of its first experimental legal programs in New Haven, Connecticut in 1963. See Edgar S. Cahn and Jean C. Cahn, "The War on Poverty: A Civilian Perspective," *The Yale Law Journal* Vol. 73, No. 8 (July 1964): 1317-1352.

[104] Cahn's defense of her client was that sex between her black client and the white woman was consensual, a defense subsequently reported in local newspapers. Earl Johnson recounts: "It was not long before irate New Havenites, stung by the accusation that one of their young white girls may have submitted to a negro, shifted their anger from the accused rapist to his defender, Jean Cahn, and her employers, Community Progress Inc." Earl Johnson, *Justice and Reform* (1967), 23.

ingrained racial and political divides undermining attempts at legal activism in poor communities. The Cahns went on to lead a highly influential campaign setting out the model for radically independent and citizen led legal and social reform activities.[105]

The Cahns acknowledged a crisis in the rule of law, the features of which are all too familiar today. The explosion of litigation without sufficient lawyers for the poor, sufficient court time to hear cases, and with an ever-growing number of grievances that did not attract suitable remedies were already pressing in the 1960s. And increasing discretion for officials and government agencies was the stuff of entrenched injustice that the legal system was impotent to address:

> The law provides no immunity from the contumely and arrogance of officials…the continuous insult of being stopped, searched, and humiliatingly interrogated. Nor does the legal system purport to offer remedy for poor garbage collection in slum areas. Lawyers cannot stand by to institute an action every time a child or parent is humiliated by a teacher, every time a taxi refuses to pick up a passenger in the ghetto, every time a chain store offers shoddy merchandise in its slum branches. Yet, it is just such petty grievances which cumulatively have made tinderboxes of every major urban center.[106]

What was needed, according to the Cahns, was a very different approach to legal activism, including new institutions that could better contend with the grievances of the poor, an enlarged legal profession with the requisite skills to work alongside communities, and new methods and forums to enable debate about the permissible and impermissible behaviours that those in power displayed:

> [A] largely unexplored area for the creation of new "legal" institutions is the potential provided by the mass media for informing people of their rights, bringing community disapproval to bear upon particular actions of particular officials, and generating support for norms delimiting the range of permissible behavior in a society where the "legal norms" may have little reality or authority in the community. Cable TV and community owned and operated radio stations in

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[105] Edgar S Cahn and Jean Camper Cahn, "Power to the People or the Profession? The Public Interest in Public Interest Law," *The Yale Law Journal*, Vol. 79, No. 5 (April 1970): 1005-1048

[106] Cahn and Cahn, "Power to the People," 1007.

> particular have substantial potential for creating new, legitimated forums for community debate, norm promulgation and sanctioning - from praise to condemnation.[107]

As the political mood shifted in the 1970s and 80s, the realisation that legal literacy was a tool that had not been adequately deployed came a little too late.[108] For example, critical race and feminist theorists took legal literacy to the centre stage. "Legal literacy was crucial in an age when civil rights discourse was shifting and newer paradigms were developing. They perceived the legal and political orders were in upheaval."[109] Certainly there had been a rights explosion, but this was not evenly distributed and the most able benefited the most from the rise in litigation. The vast increase in claims, in lawyers and in litigation costs were not evenly distributed. Invariably the expansion of claims and access to the courts meant commercial litigants fared better in the new era of rights.[110]

The closure of the New Haven project precipitated a growing demand for law and poverty work. The demand was construed as fundamental to democratic accountability not simply as the struggle for social and economic justice. Edgar Cahn subsequently became speechwriter for Robert Kennedy in Kennedy's role as Attorney General. Cahn's influence is vividly illustrated in Kennedy's speech to the Chicago Student law society on May 1st, 1964: "There is a great need for

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[107] Cahn and Cahn, "Power to the People," 1009.

[108] As Jones describes of this period: "White populism meant the rise of the Republican party and rejection of the Democrats, as the coalition between white ethnic laborers in the Northeast and blacks fell apart. Nixon, Ford, Reagan, and Bush made it into the White House, as compared to only Carter and Clinton. As presidential politics began more and more to determine the nature of judicial policy and politics, the Supreme Court rejected this new trend, as Republican presidents nominated like-minded judges to the bench." Bernie D Jones, "Critical Race Theory: New Strategies for Civil Rights in the New Millennium," *Harvard Black Letter Law Journal*, Volume 18, Issue (2002), 2.

[109] Jones, "Critical Race Theory," 63

[110] Galanter, "In the Winter of Our Discontent," (2006) and Galanter, "Law Abounding," (1992). Teubner also notes that juridification by its very nature entails growth in regulation that contains inherently political and social features." Teubner, "Juridification: Concepts, Aspects, Limits, Solutions" Teubner, Gunther. "Juridification: Concepts, Aspects, Limits, Solutions," (2019).

America to live up to its political promise of civil rights for all its citizens. But there is a parallel need for America to live up to the economic promise of social rights, of social - and thus equal - justice under law."[111] The experience of New Haven led the Cahns to feel the involvement of the Bar was critical, as non-lawyer led organisations were incapable of defending lawyers that took on controversial cases. With the assassination of Robert Kennedy and under mounting economic, social and political pressures, the legal radicalism of the era was relatively short-lived. By 1969 the civil rights movement was in crisis.[112]

Despite the rhetoric of participatory democracy and community involvement, the lack of genuine participation by members of the community was a persistent critique of the Community Action Agencies, and the legal services that were attached to them. Nevertheless, the early lack of independence of legal services (which later would be achieved but did not in itself resolve tensions around different actors' interests)[113] did not completely overshadow the advances that were made – nor did it preclude some early preventive and educational efforts. As Jean Cahn pointed out after her resignation in New Haven: "the potential for extended legal services including representation, education and preventive counselling for the poor is only now coming to be appreciated."[114]

These developments also had significant impact in Canada. The 1960s saw the spread of agencies and legal aid clinics, often student led, incorporating public education activities. These programs, "had as their goal eliminating the root causes of social problems, like poverty and fundamentally altering the way power is

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[111] A Lawyers Responsibility Defined, Robert F. Kennedy's Address to University of Chicago Law School Students on Law Day, May 1, 1964. https://mag.uchicago.edu/law-policy-society/lawyers-responsibility-redefined. [Accessed on 24th February 2019]. Also cited in Gander, "Radical Promise," 1999: 65.

[112] The decade of struggle that brought about the Civil Rights Act of 1964 still had much ground to cover if the rights were to have any traction in poor communities. Legal literacy was considered to be a core element of the struggle by later critical race scholars to make hard won rights concrete in the political and economic orders. Bernie Jones, "Critical Race Theory: New Strategies for Civil Rights in the New Millenium," Harvard *Black Letter Law Journal*, Volume 11 (2000).

[113] For example, by 1969 the heavy involvement of the local Bars, increased lawyer involvement but worked against the Cahns; according to Garth, "local Bars have thwarted attempts to implement the Cahns' suggestions," Garth, *Neighborhood Law Firms*, 26

[114] Cahn and Cahn, "Power to the People," 1964: 1336.

exercised."[115] Here too, a sense of the potential of education in the law for shaping democracy was discernible; participatory democracy was conceived as a means of returning governance to the people, involving legal education at its very core.[116] One influential Canadian development that helped to embed the role of public legal education into the wider legal services landscape can be found in British Columbia. The amalgamation of the Legal Services Commission and the Legal Aid Society in 1979 into the Legal Services Society brought together two distinct strands of work. The Commission was a government led body mandated to develop legal services with a particular focus on the provision of education and information. Its vision included work with schools, libraries, community groups and Aboriginal groups.[117] After an early focus on clinical legal education models,[118] funding from the Federal Department of Health and Welfare proved a catalyst for change, albeit federation meant that some areas were more proactive than others. The model they adopted included law reform, community participation and organizing, paralegals and education initiatives.[119] Yet in Canada too, the shift away from a political mission occurred just as programs expanded and grew to become an embedded aspect of the justice landscape. According to Gander, this is because public legal education failed to adopt a theory of law that does not reproduce the systemic problems that law itself creates: "law has become trapped by the very concept of law it sought to transform" and thereby "suffers a fundamental impediment to accomplishing its goal of democratizing the legal system in the pursuit of justice."[120]

The growth and partial success of North American legal service models were influential elsewhere. In 1968, the U.S. model was described by the English Law Society of Labour Lawyers in their pamphlet 'Justice for All.'[121] By 1970, the

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[115] Gander, "Radical Promise," 6.

[116] Ibid, 9.

[117] Carol McEown and Gayla Reid, *PLE Review: Reflections and Recommendations on Public Legal Education Delivery in BC*, (British Columbia Legal Services Society, 2007), 1. https://lss.bc.ca/assets/aboutUs/reports/PLEI/pleReview_en.pdf [accessed 20th February 2019]

[118] Garth, *Neighborhood Law Firms*, 86

[119] On the Canadian experience more generally see Gander, "Radical Promise," and Garth, *Neighborhood Law Firms*, 85 – 105.

[120] Gander, "Radical Promise," 11 – 12.

[121] Marjorie Mayo, Gerald Keossl, Matthew Scott and Imogen Slater, *Access to Justice for Disadvantaged Communities* (Bristol: University Press, 2014), 25. A number of

first law centre mirroring the model was opened in North Kensington. Although early initiatives for law centres were local, by the end of the 1970s the Law Society concluded that the model offered a complement, rather a threat to private practice.[122] They were not without detractors; the Law Society had initially argued the model would prove divisive and would mean a "loss of independence of the profession and could lead to a totally nationalized legal service."[123] In Australia, community legal centres were similarly founded in response to government and market failures to provide the benefits of the law to the poorest and most marginalized. They can also be located within a history of protest, social change, and civil and legal rights movements that grew out of the radical 1960s.[124] Activists and lawyers came together, initially in disparate local activities, to provide free legal help and establish legal campaigns – for anti-war, anti-death penalty, and youth rights struggles amongst others. They self-identified as 'anti-establishment', seeking to break with elitist legal culture and remove barriers to access. According to one early pioneer of the movement: "[one of the] primary points of distinction of early community legal centres was that they were going to produce information and tell people about the law."[125]

The developing model of neighbourhood based legal services in the U.S., Canada., UK, Australia and New Zealand had in common a preoccupation with closing the gap between law and the communities they served. A wider holistic style of legal service for the poor encompassed advice, information and public legal education practices, in many cases with models of community organizing.[126]

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antecedent services offering legal services to the poor already existed under the 'settlement house' movement of the 19th and 20th Centuries. The same underlying forces were also palpable in the UK as much as the US with regard to new policies directed at poverty reduction, see Garth, *Neighborhood Law Firms*, 53-55.

[122] Mayo *et al*, "Access to Justice," 25.

[123] Garth, *Neighborhood Law Firms*, 55-56.

[124] Jude McCulloch, Megan Blair, and Bridget Harris, "Justice for All: A History of the Victorian Community Legal Centre Movement," (2011). https://www.academia.edu/6688421/Justice_for_All_A_History_of_the_Victorian_Community_Legal_Centre_Movement [Accessed 19th October 2014]

[125] Interview with Mary Anne Noone in McCulloch *et al*., "Justice for All," 2011.

[126] Frederick H Zemans and Aneurin Thomas, "Can community clinics survive? A comparative study of law centres in Australia, Ontario and England," in *The*

Specific targeted campaigns for information involved creative ways of reaching disadvantaged communities with a strong preventive focus, for example, work with women in prisons, homelessness and housing conditions, and racial harassment.[127] However, pressure to limit services to individual advice was apparent from the beginning of the law centre movement in England. The shift toward legal aid casework services consistently appears to have undermined the more proactive elements of the movement, overshadowing community organising and PLE activities.[128] Reflecting on these tensions Byles and Morris comment:

> [A]ny extension of community-oriented work such as housing, immigration, community relations or the enforcement of rights, was interpreted as an area of potential conflict with government, and as such, a threat to the 'nonpolitical' role which it was felt proper for a lawyer to maintain in his professional capacity.[129]

Local law services, the proponents argued, should be akin to that of "the traditional family doctor.'[130] This 'curative' approach to the social ills of poverty rather than critiques of power structures continues to influence public legal education debates in the U.K. today.[131]

The agitation of the 1960s influenced the evolution of legal services elsewhere. In Western Europe, the student movement played a critical role in the development of public legal education activities. Evidence of burgeoning legal activism in Belgium, Norway and the Netherlands can be seen throughout the 1970s. In Tilburg, a group of students created the first 'law shop' (*Rechtswinkel*) with the aim of making their legal skills socially useful.[132] By 1977 there were

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Transformation of Legal Aid Comparative and Historical Studies, eds Francis Regan, Alan Paterson, Tamara Goriely, and Don Fleming (London: Clarendon Press, 1999).

[127] Mayo *et al*, "Access to Justice," footnote 28 at 49.

[128] Garth, *Neighborhood Law Firms*, 60, Mayo *et al*, "Access to Justice," 49.

[129] Anthea Byles and Pauline Morris, *Unmet Need: The Case of the Neighbourhood Law Centre*, (London: Routledge, 1977) 62; cf Garth, *Neighborhood Law Firms*, 60.

[130] Byles and Morris, *Unmet Need*, cf Garth, *Neighborhood Law Firms*, 58.

[131] PLEAS Task Force (2007), 2, The Low Commission Report (2013 Annex 6) http://www.lag.org.uk/media/147429/lcr_annex06.pdf (Accessed 17th October 2014). Wintersteiger and Mulqueen, "Decentering Public Legal Education," 2017.

[132] Garth, *Neighborhood Law Firms*, 119.

approximately 80 law shops with an emphasis on poverty law and decentralised reform focused activities, mirroring neigbourhood law services elsewhere during the same period. Educational activities included radio work and publicity stunts, and in due course their enormous popularity drew attention to the inadequacies of traditional *judicare* services.[133] In order to provide a more adequately funded system, the Dutch Ministry of Justice ultimately replaced the *Rechtswinkel* network with '*bureaus voor rechtshulp*' - legal advice centres.

Recent history of public legal education in comparative contexts highlights the tensions that will shape some of the core arguments of this thesis. Firstly, although they drew inspiration from international political movements, public legal education practices largely grew out of local conditions, often spontaneously emerging from specific experiences of repression and as a counter-tactic against liberal conservatism. Secondly, the pervasive experience of exclusion from legal redress, the unaffordability of legal services, and a culture of elitism surrounding legal knowledge engendered a variety of attempts to break the monopoly of legal knowledge and the protectionism of the legal elites. However, the more this endeavour became led by lawyers themselves, the form of law - its rigidities and hierarchies - came to undermine the radical potential that public legal education held out. Thirdly, despite the relatively widespread establishment of legal education practices, the field remains both under-researched and what research does exist lacks critical orientation. For Gander this is understandable: "[public legal education] providers have tended to engage their inquiry at a practical rather than a theoretical level and to take whatever ground they can gain from time to time. [Public legal education] has also had to take on many faces just to ensure its own survival."[134]

Aside from Gander's fascinating study of the radical promise of public legal education, there is a striking lack of critical scholarship considering relations between the development or curtailment of public legal knowledge and its constitutive role – either in constituting social relations or as an aspect of constituent power from which political legitimacy is derived. Despite the history

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[133] 'Judicare' is defined as a system whereby legal aid is established as a matter of right for all persons eligible under the statutory terms, with the state paying the private lawyer who provides those services. Legal Aid, The First 25 Years, cf. Mauro Cappelletti and Bryant Garth eds. *Access to Justice: A World Survey, Volume 1 Book 1* (Milan: Sijthoff and Noordhoff,1978).

[134] Gander, "Radical Promise," 12.

of political struggle that the early public legal education movement charts, scholarship considering the paradigm of legal knowledge beyond the institutions of courts, academic and professional legal actors is largely limited to empirical legal needs studies.[135] It appears, with some exceptions, legal scholarship has neglected to tackle the linkages between the monopolization of legal knowledge by professional, legal and political elites and the dissemination of legal knowledge to the wider population.[136] This has resulted in a failure to engage with how power relations in and around the juridical field constitute dynamic processes. We will aim to tease out relations of legal knowledge and power that are constitutive of political and social relations throughout the remainder of the chapter.

Legal need studies and access to justice

We have begun to explore the evolution of educational practices that crested in the 1970s, partially due to their initial success in elevating the social, economic and political exclusion of poor and minority groups into public consciousness. In fact, the demand for realisable rights and for meaningful political participation was received in some quarters as nothing short of a crisis in democracy. The Trilateral Commission, founded in 1973 by David Rockefeller, amplified fear of the perceived 'ungovernability of democracies' across the Trilateral axis of the United Sates, Western Europe and Japan. Leading voices of the Trilateral Commission, Michael Crozier, Samuel Huntington and Joji Watanuki, reporting in 1975, lamented the 'excess of democracy' that had emerged in the 1960s. This excess took the shape of "the rise of egalitarian demands and the

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[135] But see Benjamin Fleury-Steiner & Laura Nielsen eds., *The New Civil Rights Research: A Constitutive Approach* (Aldershot/Burlington: Ashgate, 2006). Some of the limitations associated with legal needs scholarship, as Engel points out, fostered the branching off into legal consciousness studies within the paradigm of law and society scholarship. David Engel *How Does Law Matter in the Constitution of Legal Consciousness*? In, Bryant Garth and Austin Sarat eds. *How Does Law Matter*? *Fundamental Issues in Law and Society* (Chicago Ill., Northwestern University Press, 1998), 122.

[136] For a discussion of postmodernism in social theory and law see Roger Cotterrell, *Law in Social Thought and Social Theory in the Study of Law* (2004), 18-21.

desire for active political participation by the poorest, most marginalised classes."[137] What was configured as an excess of democracy was also an excess of government – the art of liberal government had over-reached its internal rules and its longstanding equation of good government with frugality.[138]

Against this 'excess' of distributive justice in the North and West, post-colonial calls for redistribution were also emerging. The founding of the Mont Pèlerin Society in 1947 by Austrian economist Friedrich Hayek and others sought: "to re-found liberalism in opposition to the threat of socialist planning, which, the [Mont Pèlerin Society] argued, had led to the disappearance of 'the essential conditions of human dignity and freedom' from much of the earth."[139] Post-colonial struggles and the demands for restitution, the Society's proponents argued, were conspiracies to keep colonial populations from much needed economic development and freedom. Unsurprisingly, the demand for equality, for redistribution and democratic participation engendered a backlash. But this was not a revival of *laissez-fair* liberalism; rather, it brought about a new version of juridical activism to reassert the independence of the market.[140] The precarious democratic condition of Europe, North America and Japan in the 70s – the Trilateral Commission warned - lay in:

> the conjunction of the policy problems arising from the contextual challenges, the decay in the social base of democracy manifested in the

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[137] Dardot and Laval, *The new way of the world*, 151. Michel Crozier was Professor of Sociology at Paris, Samuel Huntington Professor of Government at Harvard and Joji Watanuki was Professor of Sociology at Sophia (Tokyo).

[138] On the association of Liberalism and frugality, see Michel Foucault, *The Birth of Biopolitics, Lectures at the College de France* 1978-1979. Michel Senellart, ed, trans. Graham Burchell (2008), 37-41. It is of course noteworthy that the oil crisis of 1973-4 contextualized an economic outlook marked by wage stagnation and inflationary pressures.

[139] Jessica Whyte, "Powerless companions or fellow travellers? Human rights and the neoliberal assault on post-colonial economic justice," *Radical Philosophy*, Volume 2, Issue 2 (2018), 17.

[140] Yves Dezelay and Bryant Garth, "Marketing professional Expertise by Reinventing States: Professional Rivalries Between Lawyers and Economists as Hegemonic Strategies in the International Market for the Reproduction of National State Elites," in *Development and Semi-periphery: Post-neoliberal Trajectories in South American and Central Eastern Europe*, Renato Raul Boschi, Carlos Henrique Santana eds, (London/New York: Anthem Press, 2012) 165-181.

> rise of oppositionist intellectuals and privatistic youth, and the imbalances stemming from the actual operations of democracy itself which make the governability of democracy a vital and, indeed, an urgent issue for the Trilateral societies.[141]

The conditions of social and moral decay, intellectual vanguardism and generational agitation were held responsible for a situation in which the growth and coalescence of interest groups were able to make demands on their respective governments. After the Civil Rights Act of 1964, the oil crisis of 1973, and the student revolts of May 1968, the demands overloaded the 'decision-making burdens' on government and were seen as fatal to democracy itself:

> the effective operation of a democratic political system usually requires some measure of apathy and non-involvement on the part of some individuals and groups. In the past, every democratic society has had a marginal population, of greater or lesser size, which has not actively participated in politics. In itself, this marginality on the part of some groups is inherently undemocratic, but it has also been one of the factors which has enabled democracy to function effectively. Marginal social groups, as in the case of the blacks, are now becoming full participants in the political system. Yet the danger of overloading the political system with demands which extend its functions and undermine its authority still remains. Less marginality on the part of some groups thus needs to be replaced by more self-restraint on the part of all groups.[142]

This diagnosis led to a number of crucial responses – some of which we will explore in greater depth in our analysis of the function of legal education and public legal knowledge in the reorientation of the rule of law in modernity. This enables us to trace the origins of a new economic-juridical rationality, one that illustrates a shift in the terrain of political sovereignty.

Before we turn to a political-philosophical account, we will first consider the body of scholarly literature accompanying the period of civil rights agitation and the growth of social and economic rights over the course of the twentieth

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[141] Crozier *et al*, "The Crisis of Democracy," Report of the Trilateral Commission (1975), 9. https://archive.org/stream/TheCrisisOfDemocracy-TrilateralCommission-1975/crisis_of_democracy_djvu.txt [Accessed on 25th February 2019].

[142] Crozier *et al*, "The Crisis of Democracy", 114.

century. These studies offer important insights into the legal epistemological issues that emerge, the different challenges that people encounter in understanding the law, and the complex interactions of attitudes and competencies that have inform and shaped educative interventions in the last half century. While offering crucial insights for public legal education practice and policy, the literature is notable for its shift from early strident political accounts toward increasingly neutral social scientific analyses.

Lack of knowledge about laws and legal systems is pervasive.[143] Despite difficulties in drawing comparisons across jurisdictions, some essential features of legal need are apparent. Legal needs tend to be unevenly distributed across populations and have significant social, health and economic ramifications, as well as being linked to the availability of access to justice.[144] Some groups experience multiple and severe legal problems which they also frequently fail to attempt to

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[143] This statement holds true across a plurality of jurisdictions. However, the difficulties of making effective comparisons in assessing gaps in knowledge across jurisdictions in which legal needs work has been carried out have recently been explored in Pleasence *et al*, "Paths to Justice: Past, present and future roadmap," (Nuffield Foundation, 2013). https://www.nuffieldfoundation.org/sites/default/files/files/PTJ%20Roadmap%20NUFFIELD%20Published.pdf [Accessed February 22nd 2019]. See also Pascoe Pleasence, Nigel Balmer and Rebecca Sandefur, "Apples and Oranges: An International Comparison of the Public's Experience of Justiciable Problems and the Methodological Issues Affecting Comparative Study," *Journal of Empirical Legal Studies,* Volume *13 issue* 1, (2016): 50–93. The institutional focus of much of the early legal need literature meant that less attention was given to the complex interrelationships between subjective knowledge and skills, and quotidian encounters in which law, knowledge, and power are played out. See Rebecca Sandefur, "Access to Civil Justice and Race, Class and Gender Inequality", *Annual Review of Sociology,* Volume 34, Issue 1 (2008): 339-358, Christine Coumarelos, Deborah Macourt, Julie People, Hugh M McDonald, Zhigang Wei, Reiny Iriana, Stephanie Ramsey, "Legal Australia-Wide Survey: Legal Need in Australia". (Sydney: Law and Justice Foundation of New South Wales, 2012).

[144] Pleasence *et al*, "Paths to Justice," 2013. Richard Moorehead and Pascoe Pleasance, "*Access to Justice After Universalism," Journal of Law and Society*, Volume 30, Issue 1 (2003): 1-*10*. Deborah L Rhode, "Access to Justice," *Fordham Law Review*, Volume 9 (2000-2001): 1785. Pascoe Pleasence, Nigel N Balmer, Alexy Buck, Aoife O'Grady, A. and Hazel Genn, "Civil Law Problems and Morbidity," *Journal of Epidemiology and Community Health*, Volume 58, Issue 7, (2004): 552-557.

resolve.[145] Barriers to the resolution of legal problems are interrelated with advice seeking behaviour, problem solving strategies, rights knowledge and problem characterization.[146] The most common legal problems involve consumer issues, problems with neighbours, family, employment problems, issues involving tenure, eviction and property rights, as well as debt problems and personal injury. A final category creating access to justice issues is in relation to government, such as conflicts about social security, migration problems or government permits.[147] Strong correlations exist between vulnerability to legal problems and the presence of disability, single-parenthood, welfare dependency, unemployment and minority ethnic grouping.[148]

The definition of legal need has not remained static, but has shifted and expanded over the years. As a result, what constitutes legal need in the literature has been described as a 'dynamic process'.[149] It has moved away from an original focus on those actively seeking a resolution to a legal problem to consider the ways in which justiciable issues encompass the events that raise legal issues which may

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[145] Coumeralos *et al*., "Legal Need in Australia," 15, Pleasance *et al,* "Causes of Action" 2004a, b, 2006. Balmer *et al* "knowledge, Capability and the Experience of Rights Problems,2010. Buck *et al*., "Do Citizens Know How to Deal with Legal Issues?", 2008. Hugh M McDonald, Zhigang Wei, "Concentrating disadvantage: a working paper on heightened vulnerability to multiple legal problems," (Sydney: Law and Justice Foundation of New South Wales, 2013).

[146] Pascoe Pleasence, Alexy Buck, Nigel N Balmer, Aoife O'Grady, Hazel Genn and Marisol Smith, *Causes of Action: Civil Law and Social Justice* (Norwich, TSO, 2004).

[147] For a comparative perspective of legal aid strategies see Maurits Barendrecht, Laura Kistemaker, Henk Jan Scholten, Ruby Schrader, Marzena Wrzesinska, *Legal Aid in Europe: Nine Different Ways to Guarantee Justice*, (Hiil, Ministerie van Veiligheid en Justitie, 2014*)*. 26 https://www.hiil.org/wp-content/uploads/2018/09/Legal-Aid-in-Europe-Full-Report.pdf . [Accessed March 24th 2019]. Although there is a tendency in the popular imagination to equate justiciable issues with crime, the incidence and frequency of civil legal issues is considerably greater amongst all groups.

[148] Ibid.

[149] The requirement of meeting legal needs has largely dictated institutional and legislative transformations to improve access to justice. Coumerelos *et al*, "Legal Need in Australia", 3. See also Macdonald, R.A., "*Access to justice in Canada today: scope, scale, ambitions*," in Julia Bass, W Bogart & Fredrick H Zemans eds, *Acce*ss to justice for a new century: the way forward, Law Society of Upper Canada, Ontario, (2005): 19–112.

never reach the formal justice system.[150] Finding a lawyer and accessing the courts became one pole of a much wider spectrum of issues concerned with ensuring people could better understand the law, access alternative dispute resolution mechanisms and push for law reform.[151] Nevertheless, the institutional focus of early legal needs studies meant that less attention was given to the complex interrelationships between individuals' knowledge and skills and the quotidian encounters in which law, knowledge, and power are played out.[152] This has contributed to an ongoing law-centric focus in the concept of legal need, even as the concept has expanded.

The earliest empirical research on legal need dates back to the 1930s with a visible expansion of the approach and larger scale studies appearing in the socio-legal scholarship of the 1990s.[153] In 1933, the Dean of Yale School of Law observed:

> [T]here is a large amount of legal business untapped by the legal profession, in the community here studied, there may not be so much of a problem of the "unauthorized practice of law" (since other agencies are not supplying the gap), as a failure of the lawyer to meet the social needs which justify the existence of the profession.[154]

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[150] Hazel Genn, *Paths to Justice,* 1999. The requirement of meeting legal needs has largely dictated institutional and legislative transformations to improve access to justice, see Coumarelos *et al "*Legal Needs in Australia*",* 3.

[151] Macdonald, R.A., '*Access to justice in Canada today: scope, scale, ambitions'*, in Bass *et al*, Access to justice for a new century: the way forward, Law Society of Upper Canada, Ontario, 2005: 19–112.

[152] David Engel, "How Does Law Matter in the Constitution of Legal Consciousness?" in Bryant Garth and Austin Sarat eds, *How Does Law Matter?* (1998), 109–144.

[153] Pleasence *et al*, "Paths to Justice," 2013. Abel places the origins of legal need rhetoric at the door of Reginal Herber Smith's study in 1919, "The conceptualization of legal aid as providing access carries with it the notion of "legal need" and engenders studies designed to show that such need is unfulfilled… I want to argue simply that the concern-indeed, the obsession-with access rests on the value premise that it is desirable that everyone be equally entitled to consult a lawyer or to approach a legal institution directly." Abel, "Law without Politics" 489.

[154] Charles E Clark and Emma Corstvet, The Lawyer and the Public, *The Yale Law Journal* vol. 47 (June 1938):172-1293.

The survey suggested a lack of trust of lawyers by the public, and amongst lawyers, too, there appeared to be anxiety about professional elitism and the implications for the Bar.[155] While there were only very few such surveys until the latter part of the century, and we can note the commercial impetus, the use of survey techniques raised important and unexpected questions for the practice of law in the early part of the twentieth century.[156]

The expansion of social science research in the legal field culminated in the formation of the Law and Society Association in 1964, explicitly endorsing the value of the empirical study of law in the interests of forming social policies.[157] From the very outset of the law and society movement, the intersection of the needs of the poor and the justice system were a primary concern for scholars. The study of law and poverty offered an exemplary site for questioning conventional assumptions about the conditions and consequences of legal administration.[158] How courts and lawyers dealt with the poor came under closer scrutiny. Not only was the character of law itself partially responsible for the failure to accord the poor with the same protections as the rich; one of the many reasons for the failure of the civil justice system to meet their needs was linked to ideas about the capacity of poor people themselves.[159] This included 'legal competence', which described the ability to further and protect interests through active assertion of legal rights. One such example was the exception to conscription laws in place during the Vietnam War, Carlin *et al* observe:

> Poor persons are less likely to have jobs that qualify for deferment on occupational grounds and they are less likely to be students. Moreover, they are less likely to know about the legal status of conscientious objector and to be articulate enough to qualify for that status.[160]

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[155] The survey by Clark and Corstvet was in fact occasioned by a recession at the Bar, see Pascoe Pleasence, Alexy Buck, Tamara Goriely, Jenny Taylor, Helen Perkins and Hannah Quirk, Local Legal Need, London: Legal Services Commission (2001): 9.

[156] Pleasance *et al*, (2001), 10.

[157] Austin Sarat, "Perspectives on the history and significance of law and society research" in *The Blackwell Companion to Law and Society* (Oxford: Blackwell Publishing, 2004), 2-3.

[158] Carlin *et al, Civil Justice and The Poor,* 25-26.

[159] Ibid., 62-63.

[160] Ibid., 24.

The politicisation of the 1960s thereby featured the concomitant growth of public awareness of law and legal education intereventions.[161] This work was also bolstered by renewed efforts by scholars to understand the challenges of access to justice reforms.[162]

The Florence Access to Justice Project, beginning in 1978 and incorporating four volumes of comparative analysis of the modes and limits of access to justice in more than 26 countries, is notable for setting out some of the challenges with which the public legal education movement today continues to grapple with. The three waves of access described by the authors are still relevant to our analysis today. The first wave encompassed recognising the need for legal aid to be extended to the poor; the second noted the importance of new 'diffuse rights', including consumer and tenants' rights – those social and economic domains with most impact on the everyday lives of the poor, and that also implicated groups or classes of interest. The third, dubbed the 'access to justice approach', sought to partially adopt the first two waves while recognising their limitations. These three waves, the authors argue, need to be addressed interdependently and as part of a continuum if headway is to be made. The lack of effectiveness of what was then called *judicare* concerned the problem of small claims (as the amounts at stake often amounted to less than the cost of proceedings), as well as the failure of recognising the class interest of the poor beyond individual claims (and in fact having the effect of individualising what were much more systemic problems). Vitally, *judicare* did not account for the significant disadvantages faced by poor communities which undermined their capacity to even recognise a legal issue, or, when they did, the psychological barriers that prevented them from going to law or persevering with their case.[163]

The extent to which legal services are accessed for those issues that are not ordinarily construed as being 'legal' mean people tend to use legal aid for familiar

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[161] Throughout the 1960s, the expansion of civil rights and attempts to redistribute wealth fostered links between legal and social reform efforts. They encompassed the ideal of the rule of law as a vehicle for formal equality and injected socio-legal scholarship with optimism for equating legal with social justice. Sarat, "History of Law and Society Research", 3-4.

[162] Mauro Cappelletti and Bryant Garth eds. *Access to Justice: A World Survey, Volume 1 Book 1*. (Milan: Sijthoff and Noordhoff, 1978).

[163] Seton Pollock, *Legal Aid the First 25 years,* (London: Oyez Pub 1975), 25.

legal problems such as criminal and divorce matters.[164] Willingness to get a lawyer to buy a house, or obtain a divorce far outstripped preparedness to seek legal advice on areas characterised by power imbalances.[165] Access to the courts as the primary mode of equalising power relations, particularly in the adversarial context, offered limited results. Wider social-theoretical approaches needed to be drawn upon in order to avoid the limitations of law's method of detail and social sciences' narrow empiricism.[166] Knowledge as a barrier to effectively achieving redress came to be considered alongside alienation, and negative perceptions of the justice system. This interplay of subjective consciousness and the structural institutional functions of law were to become the early precursors of theoretically inspired studies into legal consciousness.[167]

Legal need studies and access to justice scholarship also began to register the processes of rapid juridification, identified by Habermas as "the tendency towards an increase in formal (or positive, written) law that can be observed in a modern society."[168] The extensive growth of legal rights and obligations in a number of new fields suggests an economy of legal need and legal expansion that has led to growing gaps in legal knowledge in the public sphere. A broad range of legal

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[164] In a recent survey of the extent to which people characterize their problem as legal, relatively serious problems such as child protection, homelessness, and children's education were characterised as legal by less the half of respondents, with employment, assault by the police, and debt problems characterized as legal by around 60% of respondents. See Pleasance *et al*. "How people understand and interact with law" (The Legal Education Foundation, 2015). https://www.thelegaleducationfoundation.org/wp-content/uploads/2015/12/HPUIL_report.pdf [Accessed 24th February 2019]

[165] 'Lumping' or inaction tends to be concentrated in areas such as complaints against the police. See Genn, *Paths to Justice*, 1999.

[166] Roger Cotterrell, *Law in Social Theory* in Austin Sarat ed. *The Blackwell Companion to Law and Society*, (Oxford: Wiley-Blackwell, 2004) 17. See also Mark Tushnet, "A Critique of Rights: An Essay on Rights" 62 *Texas Law Review,* Volume 62, Issue 8 (1984) 1380

[167] Legal consciousness studies became a branch of the burgeoning law and society scholarship of the 1980s and 90s, addressing the complex of objective and subjective features associated with the problem of legal knowledge see Engel "How Does Law Matter in the Constitution of Legal Consciousness?" (1998), 122. Hertogh, M. "A `European' Conception of Legal Consciousness: Rediscovering Eugen Ehrlich," *Journal of Law and Society*, Volume 31, Number 4, (December 2004): 457-481.

[168] Habermas, Theory of Communicative Action, (1987), 375.

rights, responsibilities and protections have come to apply to areas which have fallen out of the scope of public legal assistance, including housing, employment and welfare benefits.[169] Consequently, for individuals who rely on the state for the provision of basic income and shelter, the law appears as a naturalised fact, while masking its contingent and political nature:

> The growth of legal need alongside the process of juridification suggests that there is an economy between them: the more law there is, the greater legal need will be. However, the concept of legal need obscures this economy: the very idea of 'need' suggests that law is natural or necessary. This inadvertently and subtly reinforces the process of juridification, which is characterised by both the proliferation of laws and a greater penetration of law into everyday life, such that law becomes a 'reified social fact'[170]

The failure to identify the law as contingent and subject to a labour of construction of social reality largely determined by elites is a critical problem with which this thesis argues any progressive education beyond the legal academy must address.[171] Fundamentally, many of the approaches to access to justice explored above fail to address the very terms upon which they rely. This is not only to suggest the need to consider structural effects and relations of law and power on subjects themselves, on the dynamic relations of class, race and gender formed with and by institutional mechanisms, but at root, poses the persistent problem of the relationship between law and its claim to justice.

The proclivity to divorce law from politics in much of the literature on legal aid, legal need and access to justice is, as Abel observes not altogether surprising since advanced capitalism is predicated on the condition of the separation (of liberal legalism) for its expansion. Moreover, "the institution of legal aid itself attempts to fulfil the promises of liberal legalism without first effecting

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[169] In particular the spheres of education, employment, children and families, health, housing, welfare benefits, consumer goods and services, and the environment (Pleasence *et al* 2015, p. 25). See also Teubner, G. ed., *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust, and Social Welfare Law*, (Berlin/New York: De Gruyter, 1989).

[170] Wintersteiger and Mulqueen, "Decentering Law," 2017.

[171] Pierre Bourdieu, The Force of Law: Toward a Sociology of the Juridical Field. *The Hastings Law Journal*, Volume 38, Issue 5 (1987) 833.

any change in fundamental political relationships.[172] The predominant concern is for access to justice, conceived as a problem of epistemological - juridical salience. In this idiom, the studies diagnose the concrete effects of social and economic disadvantage, while largely remaining silent on political diagnoses of legal exclusion. These accounts still offer insights into societal needs, and help us to understand the sorts of interventions that might more effectively meet those needs as we come to consider public legal education strategies in their light. But there is much that escapes this approach. We will need to turn elsewhere to understand more about the relations with which we started – the new rationalities of governance which have as their aim socially adaptive strategies in the context of increasingly ungovernable democracies.[173]

Public legal education policy and the rule of law in the United Kingdom

This final part of the chapter begins to contend with some of the shortcomings we have identified in the preceding discussions. This and the following chapter will turn to a critical reading of the association of legal knowledge in the population with rule of law theories. In contemporary conceptions, legal knowledge is a concrete feature of the way in which the rule of law is brought to life insofar as it concerns the intelligibility and accessibility of citizens' rights and duties.[174] The liberal construction of the rule of law, aspirationally at least, presupposes a constitutive role for public knowledge of law as an aspect of democratic governance and popular sovereignty. This encapsulates the legitimation of limits of authority of the government by virtue of citizens' understanding and participation in the constitution of the legal and political order. These two poles of the constitutive and constituted aspects of legal knowledge

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[172] Richard Abel, "Law Without Politics: Legal Aid under Advanced Capitalism" 32 *UCLA L. Rev*. 474 (1984-1985), 476.

[173] See the discussion on the concerns of theTrilateral Commission at page 49 above.

[174] Tom Bingham, *The Rule of Law*, (London: Penguin. 2011).

incorporate the practices involved in promulgating legal rules and shaping administrative practices, as well as the implicit engagement of citizens in shaping the body politic. The central question that is posed of law and education when seen through this juridical political lens is: What is the nature of the polity that is being produced and reproduced? As the participative and therefore democratic elements are increasingly eclipsed in public policy discourse, we will keep in view what this means for the construction of progressive pedagogical practices that go beyond a mere instrumental redeployment of normative orthodoxies.[175]

Public policy initiatives in the United Kingdom have begun to sharpen the specific links between public legal education discourses and the rule of law. The issues emerging from the United Kingdom have wider implications for rule of law developments in other jurisdictions and bring to the fore some of the contradictions that trouble practices in the field.[176] A recent parliamentary debate on public legal education, led by Conservative Member of Parliament, Ranil Jayawardena, was opened by emphasising the implicit importance of public knowledge of the law for cementing the contract between citizen and state:

> I believe we should start from first principles, for Her Majesty's Government's first duty, above all else, is to keep its citizens and our country safe from harm—safe from those who wish to do us harm,

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[175] Giorgio Agamben points to the problem as follows, "Democracy designates both the form through which power is legitimated and the manner in which it is exercised…it is perfectly plain to everyone that the latter meaning prevails in contemporary political discourse, that the word democracy is used in most cases to refer to a technique of governing." Giorgio Agamben, "*Introductory Note on the Concept of Democracy,"* in *Democracy in What State,* (New York: Columbia University Press, 2012), 2-3. On influential approaches to promulgation see Jeremy Bentham, "Of the Promulgation of the Laws," in *The Works of Jeremy Bentham* (1838); John Austin, *Lectures in Jurisprudence, Or the Philosophy of Positive Law* (London: Law Books Exchange, 2004), Lecture XXV. For an overview of theories of promulgation and concern with the rule of law, see Gilbert Bailey, "The Promulgation of Law," *The American Political Science Review*, Vol. 35, No. 6 (Dec. 1941): 1059-1084.

[176] Not least because of the long history of rule of law developments that emerged from the United Kingdom leaving significant imprints elsewhere in the world. See Zolo, "The Rule of Law: A Critical Appraisal,"3-71. But this claim is also based on the expansion of the role of technology both in the digitization of courts and legal services that are swiftly reshaping thinking about justice systems around the world.

> both within and outwith. To that end, just as in Burke's unwritten social contract between the living, those who have been and those who are yet to come, the Government form an unwritten contract with the population as a whole. In that contract, in exchange for their security and safety, the public agree to follow the rule of law.[177]

Public legal education is posited as the mechanism that binds the citizen to the state and that underpins the functioning of parliamentary democracy by improving participation in popular sovereignty. Jayawardena goes further, "PLE increases citizens' knowledge of this mother of all Parliaments, the birthplace of parliamentary democracy, where we make the laws that others implement. It increases political engagement and, I hope, will increase representation."[178] In parliamentary questions, the Solicitor General also underlined the importance of education for the rule of law, "Public Legal Education is a statutory feature of the justice system and part of the Rule of Law."[179] A tentative statutory footing was provided for improving citizens' understanding of their rights and duties under the auspice of the Legal Services Act in 2007. Under the Act, the Legal Services Board (LSB) was created as the new independent body charged with overseeing the regulation of the legal profession, as well as reforming and modernising the legal service market by 'putting the interests of consumers at the heart of the system'.[180] The LSB thereby shoulders the duty to promote the regulatory objectives of the Act. The objectives range from supporting the constitutional principles of the rule of law, improving access to justice, protecting and promoting the interests of consumers and increasing public understanding of citizens' legal rights and duties.

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[177] Ranil Jayawardena MP opening the 2018 parliamentary debate on public legal education, Hansard 15 May 2018, Volume 641. https://hansard.parliament.uk/commons/2018-05-15/debates/C71C9E06-36D0-4EDE-B732-F2645A73BE83/PublicLegalEducation[accessed November 3rd 2018].

[178] Ibid.

[179] Written question 903724 answered by Robert Buckland QC https://www.parliament.uk/written-questions-answers-statements/written-question/commons/2016-02-22/903724 [accessed on 20th November 2018].

[180] Legal Services Board website welcome statement [accessed on 7th November 2018] https://www.legalservicesboard.org.uk/. On the background to the Legal Services Act and the consequences for the profession see John Flood, "Will There Be Fallout from Clementi: The Repercussions for the Legal Profession after the Legal Services Act 2007," *Michigan State Law Review*, Issue 2 (2012): 537.

The Act makes no further mention of how public legal education objectives will be given effect beyond the reserved activities traditionally undertaken by lawyers.[181] In practice, this means that legal education for the public is excluded from the scope of reserved activities, and knowledge acquisition is limited to the advice a client can receive individually from their lawyer. For the Act to attain its objectives in supporting the rule of law and enhancing access to justice, the availability and accessibility of legal services to the public is a prerequisite. Yet shortly after the changes to the regulatory frameworks that aimed to liberalise the legal market, the Government introduced the Legal Aid Sentencing and Punishment of Offenders Act in 2012. Bolstered by the rhetoric of austerity measures, heavy cuts to public legal assistance in family and civil law reduced legal aid expenditure from £2.6bn in 2005-06 to £1.5bn in 2016.[182] The cuts immediately undermined the objectives of improving accessibility of legal services, affecting precisely those who were least likely to have an understanding

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[181] The 'Legal Choices' website established by the regulator would ostensibly provide information alongside wider civil society efforts, according to Oliver Heald, "The regulators have established the Legal Choices website, which provides information to help with decisions on whether and how to seek legal advice and the available services the public might choose." Oliver Heald, written question HC Deb 26 October 2016 48969W. https://www.parliament.uk/written-questions-answers-statements/written-question/commons/2016-10-17/48969. The Legal Choices website subsequently came under fire from the Competition and Markets Authority. Legal Services Market Final Report, Competition and Markets Authority (2016) para. 7131, 252.

[182] Owen Boycott, The Guardian, https://www.theguardian.com/law/2017/oct/13/senior-judge-warns-over-shaming-impact-of-legal-aid-cuts [accessed on November 11th 2018]. The Government's stated objectives in the Act were to discourage unnecessary and adversarial litigation at the public expense, to target legal aid to those who need it most, to make significant savings to the cost of the scheme and to deliver better overall value for money for the taxpayer. The targeting of legal aid to those most in need has been shown to have failed in many instances, for example the safety net provision which was designated under the exceptional funding regimes. Public Law Project, Submission to the Post-Implementation Review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (September 2018) https://publiclawproject.org.uk/wp-content/uploads/2018/09/LASPO-PIR-SUBMISSION-PLP.pdf [Accessed 15th March 2019].

of their rights and duties.[183] While the Legal Services Act was successful in cementing a consumerist and competition oriented paradigm for a liberalised legal market, it failed to lead to improvements in access to justice.[184] What the regulatory change served to do however is to re-orientate the rule of law and public understanding of the law as an expected outcome of market-driven competition.

The statutory footing provided by the regulation of legal services casts public knowledge of the law as both a liberalising economic force and as an outcome of that same thrust. Positing enhanced knowledge of legal rights and duties thereby enables the withdrawal of public finance, which market forces will then provide for once public investment has been withdrawn. The changes are promoted as reinvigorating the rule of law and thereby the relation of state and citizen along economic lines. Rather than abandonment to entirely unfettered legal markets, this suggests a dual movement of liberalisation and reshaping of controls toward a political and social formation. Public understanding of the law is presented as a feature of market success or market failure while being cast as a matter of accountability or legitimacy of governance under the democratic rule of law. To illustrate, an investigation into the operation of the legal services market by the Competition and Markets Authority (CMA) underlines the primary objective of balancing consumer protection and the public interest with a competitive legal market. Other objectives: "currently set out in the Legal Services Act 2007, such as ensuring public legal education or improving access to justice, remain extremely relevant but might be considered to be part of the primary objective."[185] Where rule of law protections fail, or unmet legal need persists, this

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[183] The uneven distribution of legal needs, impacting the less educated, lower income and marginalised population groups, has been repeatedly evidenced by legal needs surveys. For an overview of legal needs surveys see Pascoe Pleasance, Nigel Balmer and Rebecca Sandefur, "Paths to Justice, a Past Present and Future Road Map," (Nuffield Foundation, 2014). http://www.nuffieldfoundation.org/sites/default/files/files/PTJ%20Roadmap%20NUFFIELD%20Published.pdf [accessed on 23rd November].

[184] For example, by creating alternative business structures including non-legal ownership, see Legal Services Market Final Report, Competition and Markets Authority (2016), https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf.

[185] Ibid.,199.

is attributable to informational asymmetries between consumer and provider, or alternatively on a failure to achieve adequate price competition.[186]

Another related dynamic influencing the changing role of public legal knowledge is the rise in litigants in person in the United Kingdom court system.[187] The increasing presence of unrepresented parties to litigation has attracted greater attention, and is linked to the impact of the loss of legal aid. This in turn has reshaped how the rule of law will be given effect in the courts.[188] A major court reform programme aims to digitalise the court system, with over one billion investment garnered in part from the sale of significant parts of the courts estate, and by a substantial reduction in court staff employed by HMCTS.[189] In his final

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[186] Ibid., at 3.9 and 7.13.

[187] The Civil Justice Council reporting in 2011 noted: "Access to justice for all is central to the Rule of Law. The proposed reduction of publicly-funded legal aid, and the current cost of privately-paid legal services, are likely to lead to a substantial increase in those whose access to law is unaided by lawyers. The result will be no access to justice for some, and compromised access to justice for others." Civil Justice Council, "Access to Justice for Litigants in Person (or Self-Represented Litigants)", 2011, https://www.judiciary.uk/wp-content/uploads/2014/05/report-on-access-to-justice-for-litigants-in-person-nov2011.pdf [Accessed 13th December 2018].

[188] At the time of writing, the Ministry of Justice's post-implementation review of Part 1 of the Legal Aid, Sentencing and Punishment Offenders Act (LASPO) 2012 is gathering evidence of the effects of the cuts. For the most part these have been wholly negative from an access to justice perspective. For example, a broad advice sector coalition reporting to the Justice Select Committee notes: "the data shows that there has been a decline in civil legal aid supply, throughput and capacity of 75% since LASPO came into effect, removing advice from 650,000 people against a backdrop of growing unmet legal needs. There has also been a reported rise in the number of Litigants in Person, which has consequences for the court system." Law Centres Network 2018, [accessed on November 3rd 2018] .http://www.lawcentres.org.uk/asset/download/619. See also Jess Mant, "Neoliberalism, family law and the cost of access to justice", *Journal of Social Welfare and Family Law*, (2017) 39:2, 246-258, DOI: 10.1080/09649069.2017.1306356

[189] "HMCTS expects that 2.4 million cases per year will be dealt with outside physical courtrooms, it will employ 5,000 fewer staff. HMCTS expects to save £265 million a year from these changes, which will come from lower administration and judicial costs, fewer physical hearings and running a smaller court estate." Public Accounts Committee, "Transforming Courts and Tribunals", July 2018. The principles of reform are stated as "just, proportionate and accessible with the aim of serving "swift and certain justice."

report on the civil court restructure review preceding the reforms, Michael Briggs L.J., contends that an Online Court for the UK requires an associated strategy for educating court users to ensure its success:

> The provision of the Online Court as a means of increasing access to justice for ordinary people needs to be viewed in the context of the provision made nationally for public legal education, that is, educating would-be court users about the essentials of the service provided by the courts for the vindication of their civil rights, including the basics of navigating court process, alternatives to court proceedings and some of the essentials of both substantive and procedural law.[190]

More broadly, the reforms aim to alter the reliance on representation by lawyers in individual disputes in private and public law arenas, and to refocus the profession towards higher value and complex litigation. Litigants with family, civil or tribunal related matters will be encouraged to resolve disputes outside of the court system through enhanced early settlement stages, and wherever possible to apply or defend claims using swifter digital processes. The vision for enhancing the role of United Kingdom courts in international commercial arbitration situates the justice system as a major contributor to the UK economy.[191] Once again, public knowledge is cast as the strategy to ensure that the rule of law continues to function in an orderly and expedient fashion, while simultaneously influencing and reshaping the roles of the actors in the system toward economic imperatives.

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https://consult.justice.gov.uk/digital-communications/transforming-our-courts-and-tribunals/supporting_documents/consultationpaper.pdf.

[190] Civil Court Restructure Review: Final Report 2016, https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf .[accessed 10th November 2018].

[191] "Today our commercial courts are recognised as pre-eminent. International litigators come here because they know they will be treated fairly, and overseas they prefer our law to be the governing law for commercial contracts. That confidence translated into a £25.7 billion contribution to the UK economy by legal services in 2015." Lord Chancellor, Lord Chief Justice and Senior President of Tribunals, "Transforming Our Justice System – Joint Statement," (Ministry of Justice & Her Majesty's Court Services, September 2016), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf. [accessed December 2nd 2018].

This UK case study demonstrates how discourses linking the rule of law directly with public legal education have sharpened around specific social and economic policies that exhibit inherent tensions from the perspective of the role that public legal education can take. Making savings to the public purse and preparing for a 'digital-by-default' system that is less reliant on lawyers demands a more legally educated public. The deregulatory drive to liberalise the market for legal services ostensibly could plug gaps in rule of law protection, but only from the perspective of market rationality that configures players as winners or losers in a globally competitive justice game. Hence, correctives to the problem of failed access to justice policies focus on informational disparities hindering competition and the smooth functioning of the market.[192]

This would, in classical liberal tradition, serve to frame the economic sphere as that which is left untouched by the meddling of the state. The ensemble of legal and economic rationality directs citizens' knowledge toward the rights and duties intrinsic to economic interactions. The shaping of specifically neoliberal interests therefore comprises a complex relationship in which the liberal rule of law and liberal rationality provides the medium through which the neoliberal economy advances itself and shapes the state itself along economic lines.[193] This new paradigm has crucial consequences for actors and their motivations in the field of public legal education. As legal services invite wider economic players into the fold, the question of who will be responsible for delivering public legal education potentially moves to new players in the market for legal services.[194] And as the

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[192] These tensions are by no means exclusive to the United Kingdom; they are being mirrored elsewhere with attempts to adopt digital dispute resolution systems well underway in European as well as Anglo – American jurisdictions. "Online Dispute Resolution for Low Value Civil Claims," Report of the Civil Justice Council (2015), https://www.judiciary.uk/reviews/online-dispute-resolution/odr-report-february-2015/ [accessed November 16th 2018].

[193] Brown, *Undoing the Demos: Neoliberalism's Stealth revolution,* 151.

[194] Alternative Business Structures brought in via the Legal Services Act 2007 enable non-lawyer ownership and investment in legal services. One of the first players to seek ABS status was U.S. based LegalZoom, whose model includes integrating online information with triage to legal advice, and therefore is a particularly relevant model for the shape of future providers. Not every new ABS is primed toward profit motivations; for example, charities have also sought the status of ABS to enter into areas of law in which legal aid has been removed. Neil Rose, "Legal advice charity becomes first not-for-profit to

citizen becomes tethered to the state by altogether new configurations, this also fundamentally reshapes education in law insofar as the body politic is concerned. In other words, if the rule of law binds the citizen to the state, and the way in which this relationship is formed via legal knowledge becomes subject to the rationality of the free market, the educational implications for democratic or popular sovereignty also undergo a transformation.

The following chapter takes up the turn toward neo-liberal policies and responses through a study of wider links between public legal education and the rule of law. The diffuse mechanisms through which law becomes indistinguishable from administration (through bureaucratic institutions that have delegated functions), is concealed by classical rule of law theories that still hold rhetorical sway.[195] Following this discussion of contemporary theories of the rule of law and their treatment of public legal knowledge, we will consider how earlier rule of law theories addressed this concern, with a focus on Enlightenment approaches. The question of how the public were to be included in the body politic contains explicit as well as implied elements of legal knowledge in the work of a number of leading Enlightenment thinkers. As critiques mount from both right and left of the idea that the rule of law in and of itself can provide a bulwark against either populism or authoritarianism, the question remains what sort of polity legal education for the public ought to be striving toward?

To answer this, we must also ask to what underlying legal theoretical approaches we owe rule of law arguments in the field of public legal education today. Originating from around the mid twentieth century in the Occident the relationship between the rule of law and the advancement of economic rationales

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set up an ABS," (Legal Futures, April 26, 2013): https://www.legalfutures.co.uk/latest-news/exclusive-legal-advice-charity-becomes-first-not-for-profit-set-abs [accessed 1 December 2018].

[195] In his 1977-78 lecture course, Security, Territory, Population, Foucault had already demonstrated that Rousseau posed precisely here the problem of reconciling a juridico-constitutional terminology ("contract," "general will," "sovereignty") with an "art of government." Michel Foucault, Security, Territory, Population Lectures at the College De France, 1977 – 78 (Palgrave Macmillan, Ed. Michael Senellart Trans by Graham Birchell. See also Giorgio Agamben, *The Kingdom and the Glory* (Stanford California: Meridian, 2011) Trans Lorenzo Chiesa.

inaugurates a juridical-economic relation between the citizen and the state.[196] The individual citizen-consumer effectively usurps the juridical - political relation that forms and binds the constitutive ties between the citizen and the state. The epistemological attributes of this new configuration entail a discernible shift from liberal to neoliberal underpinnings. The content of legal knowledge entails diminishing emphasis on the rights and duties of citizens as aspects of their coming together to form political associations and thereby forming the constitutional state.

The amplification of market-based rationales also feature in the law and society scholarship that we have considered above. From the initial agitation and political aspiration of the public legal education movement, accompanied by law and poverty scholarship, its replacement by a dominant economic focus fundamentally throws into question the strategies that socially inspired legal activism have relied upon and continue to rely upon.[197] The law and society scholarship paradigms explored thus far present a difficulty in addressing the extent to which law is used not simply to manage disputes but to establish the terrain upon which the disputes are fought.[198] Even if we take into account leftist arguments pointing to the systemic mechanisms through which law reinforces certain interests over others, be they economic or political (or both),[199] the

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[196] The most pertinent example arises in the re-creation of post-war Weimar Germany in 1948. See Foucault, *The Birth of Biopolitics*, 75 – 95.

[197] This draws on the work of Michel Foucault identifying the overlapping tendencies within liberalism toward a rationality of economic government, alongside an attempt to endow existing economic institutions certain functions of governmental infrastructure. In other words, legally mandated power handed over to private institutions. For a useful discussion of the various texts see Colin Gordon, "Governmental Rationality: An introduction," in *The Foucault Effect: Studies in Governmentality Edited by Graham Burchell, Colin Gordon and Peter*, (Chicago: University of Chicago Press, 1991), 26.

[198] This requires a paradigm beyond that of law as the 'mirror of society' with which the law and society field has traditionally associated itself. See Brian Tamanaha, "Law and Society*",* in Dennis Patterson Ed. *A Companion to Philosophy of Law and Legal Theor*y (Oxford: Wiley Blackwell, 2010), 368- 371.

[199] Tamanaha, Brian. 'Law and Society,' in *A Companion to Philosophy of Law and Legal Theory*, 2nd ed. Brian Patterson ed. Oxford: Wiley Blackwell, 2010

[377] See also the Weberian argument of the extent to which legal rationality is uniquely suited to the demands of capitalism for enhancing certainty and predictability, and the concomitant need for specialized bodies of legal knowledge that operate at a distance from

traditional foci of law and society scholarship are unable to tackle the most difficult questions pertaining to the critique of law: how it forms itself and what mythologemes this gives rise to. This is the territory to which we will turn in examining constitutional arguments and theoretical concerns for the rule of law.

lay understanding. Max Weber, *Economy and Society An Outline of Interpretive Sociology,* Edited by Guenther and Claus Wittich (Oxford: Blackwell Publishing1954), 61-4.

2

Public legal education and the rule of law

"As has been stated by numerous legal scholars, I have the absolute right to PARDON myself."[200]

The question of what people know about the law, and the consequences of legal knowledge within a given population, lies at the heart of the Western legal and political order.[201] This relationship is often treated obliquely, and therefore constructions of legal knowledge remain under-theorised for their political and constitutional valence. As a consequence, implications for the nature of public legal education practices, their objectives, constraints and risks are equally occluded. As we have seen in the previous chapter, recent social policy debates engage arguments for public legal education as a means of reinforcing the rule of law. In this idiom, the certainty and foreseeability of law emphasises social equilibrium and the capacity to secure stable trade. Public knowledge of the law is

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[200] Donald J Trump, quoted in The Conversation, June 5th 2018, **"**Trump may believe in the rule of law, just not the one understood by most American lawyers," http://theconversation.com/trump-may-believe-in-the-rule-of-law-just-not-the-one-understood-by-most-american-lawyers-97757, [Accessed on 16th March 2018].

[201] There is a surprising degree of consensus in rule of law theories with regard to the centrality of public understanding of the law, ranging from the basic requirement of publishing laws to more substantive mechanisms for disseminating and educating the public about the law. For an overview see Andrei Marmor, *The Ideal of the Rule of Law*, in *A Companion to Philosophy of Law and Legal Theory,* ed. Patterson, (Oxford: Wiley-Blackwell: 2010). See also Michael J. Trebilock, Ronald J. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Cheltenham: Edward Elgar Publishing, 2008): 266. For a view that distinguishes between orthodox descriptions of the rule of law and a vision of the legal empowerment as a wider political and economic phenomena, see Stephen Golub, "Beyond the Rule of Law Orthodoxy: The Legal Empowerment Alternative", *Rule of Law Series, Democracy and Rule of Law Project,* Number 41 (2003) [accessed on 18th February 2019] https://carnegieendowment.org/files/wp41.pdf

thereby articulated as the basis for stabilizing and sustaining these normative relations. What initially appears as a matter of marginal concern to jurisprudence and a set of patchy legal services thus emerges in a different historical light.

The preceding chapter charted the development of a burgeoning public legal education movement over the last forty years, wherein the challenge of public awareness and knowledge of the law and legal systems became the focus of a number of access to justice initiatives. Animated by the clarion call for civil rights and by battles to eradicate poverty, the legal education movement emerged in the Anglo-American context from the middle of the twentieth century in the turmoil of war and social upheaval.[202] As the political agitation that galvanised civil rights groups receded and the welfare state expanded, then waned, the contours of public legal education discourse changed. Socio-legal literature throughout this period highlights the persistence and intensification of the epistemological-juridical problem of widespread ignorance of the law. Yet the political detachment of much of the literature masks the shifting political consensus during this period, in particular willingness to invest in legal assistance programmes for the poor, and the extent to which programmes either individualised or collectivised struggle. This occlusion in much of the literature fails to register the significance of public legal education when considered as an aspect of the turn away from classical liberal conceptions of economy and law.

Paying attention to the relationship of what people know about the law in manifold rule of law theories reveals some important tendencies. An idea uniting contemporary and classical conceptions of the rule of law is that the universal binding nature of laws assumes implied or explicit knowledge of law, and that this serves as a legitimation of the rule of law and the sovereign state. The principle of self-determination in which citizens are both authors and subjects of the laws is thus paradigmatic of the legitimacy of the legal order. However, the political philosophies that frame these links and how they themselves relate to the constitution of the body politic vary widely. Classical and neoclassical versions ranging from Aquinas and Hobbes, to Locke and Rousseau express the urge toward political association as a turn toward the constitutive and participative features of

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[202] Influences on the development of the field sprang from the poverty law movement originating in Canada and the United States with a focus on civil rights and the alleviation of poverty. See Louise G Trubeck, "Poverty Lawyering in the New Millennium," *Yale Law and Policy Review,* Volume 17, Issue 1 (1998).

sovereignty through which power is both legitimated and constrained. Yet modernity, as Foucault and others observe, appears to progressively abandon the contours of political imaginary, adopting instead a narrow episteme of economy and administration. Rather than marking a revival in classical liberal thought, or indeed earlier juridical-political constructions of the relation between the ruler and the ruled, the new discourse that we will analyse points to the economic-juridical nexus that is in the ascendency. Contemporary public legal education debates gradually come to light within liberal rule of law doctrines that are in the process of being reshaped by the advance of neoliberalism.[203] The chapter will explore how public understanding of the law is treated through these changing paradigms, and how this awareness can aid us in moving on to consider the ways in which critical public legal education strategies can be shaped in light of these influences.

The chapter begins by situating the problem of knowledge of law in formal and substantive accounts of the rule of law. This aims to consider why resurging rhetoric on the rule of law is manifesting at a time in which scholars and jurists from the left and right bemoan its decline. The diagnoses of its decline range from the reaction to the legacies of totalitarianism, to subsequent post-war welfarism and the growth of administrative courts.[204] Yet the wave of populism engulfing the West

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[203] An account of the broad tenets of neoliberalism are given by Wendy Brown as: "enacting an ensemble of economic policies in accord with its root principle of affirming free markets. These include deregulation of industries and capital flows, radical reduction in welfare state provisions and protections for the vulnerable; privatized and outsourced public good, ranging from education, parks, postal services, roads and social welfare to prisons and militaries; replacement of progressive with regressive tax and tariff schemes, the end of wealth distribution as an economic or social political policy; [and] the conversion of every human need or desire into a profitable enterprise. Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth revolution* (New York: Zone Books, 2015), 28. For an evolution of liberalism to neoliberalism see Michel Foucault, *The Birth of Biopolitics: Lectures at the College de France 1978-1979 (*New York: Palgrave Macmillan, 2008), 101 – 291.

[204] Brian Tamanaha, *On* the *Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 60-72. As early as 1885, the English liberal conservative jurist A.V. Dicey expresses concern about the erosion of the rule of law: "The ancient veneration for the rule of law has in England suffered during the last thirty years a marked decline. The truth of this assertion is proved by actual legislation, by the existence among some classes of a certain distrust of the law and of the judges, and by a marked tendency toward the use of lawless methods of the attainment of social and political ends."

continues to engage volubly with rule of law rhetoric. From threats by President Trump to use executive orders to pardon himself if indicted in criminal proceedings, to a popular referendum contributing to parliamentary paralysis in the United Kingdom, followed by declamations of judges as 'enemies of the people' when parliamentary supremacy is invoked. Elsewhere in Europe, the compromise of judicial independence in Hungary and Poland has attracted sharp criticism.[205] In this febrile populist environment it may be apropos to assume education endeavours would focus on public understanding of the rule of law insofar as it relates to questions of democracy, constitutionalism or the wider constraint of governmental powers. Instead, the role of public legal education in current discourse centres on enhancing competitive liberalised and globalised markets and boosting consumer confidence.[206] In the development setting in particular, a swathe of investment-oriented policies aimed at shaping and bolstering the rule of law are underway.[207]

Both substantive and formalist versions of rule of law theories incorporate legal knowledge as an aspect of their construction, and in differing ways lend support to the economic and consumerist paradigms that are in the ascendency. Couched in the language of efficiencies and competition, the reforms that are underway in the West (both technological and ideological) involve a significant export industry.[208] This globalising thrust is particularly pertinent when considering

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Albert Venn Dicey, *Introduction to the Study of the Laws of the Constitutions*, ed. Roger E. Michener (Indianapolis: Liberty Fund, 1982), 64.

[205] For a recent analysis of the intersections of populism and the rule of law see Nicola Lacey, "Populism and the Rule of Law", Working Paper 28 (London School of Economics, 2019) http://www.lse.ac.uk/International-Inequalities/Assets/Documents/Working-Papers/III-Working-Paper-28-Lacey-Populism-and-the-Rule-of-Law.pdf [Accessed 16th March 2019].

[206] A recent exception is the public legal education campaign developed by Lawyers for Choice and others in the recent Irish referendum for repeal of the 8th Amendment in regard to Irish abortion law, see Kevin Burns, "Lawyers for Choice put forward the legal case for Repeal" Irish Legal News, 27th February 2018 https://www.irishlegal.com/article/lawyers-choice-put-forward-legal-case-repeal [accessed 12th February 2019].

[207] For example, via the activism of the World Bank in the rule of law arena see Deval Desai, "*Power Rules, rule of law reform and the world development report 2017,"* in *Handbook on the Rule of Law* eds. Christopher May and Adam Winchester.

[208] The UK and US together account for 60% of global legal services revenue, half of the Global 100 firms are based in the US and 14% in the UK. Recent years have seen a

how post-war human rights instruments have served as a platform for liberal legal expansion. These instruments emphasise the importance of promoting public awareness of rights as aspects of peace building and democratisation. The proliferation of law and the markers of juridification that we began to consider in the first chapter can therefore be construed as an element of emerging legal rationality seen in its global context. As Bilchner and Molander write:

> Today the question of juridification is actualised through the emergence of new democracies at an unprecedented scale; the proliferation of rights discourses globally, regionally, and nationally; and the growth of international law generally and the use of international courts and war crimes tribunals more specifically. Simply put the twin ideals of the rule of law and legally assured human rights have conquered and continue to conquer new ground worldwide.[209]

This diagnosis of global juridification demands further analysis from the perspective of rights knowledge. While the post-war politics of wealth redistribution and state planned welfare lost political traction in the latter part of the twentieth century, the individual rights frames within which public legal education is embedded have provided a continuing backdrop to development discourses and the expansion of global markets. We will consider the implications of these tensions in which public legal knowledge is given growing prominence as an aspect of the rule of law, while the rule of law as such appears simultaneously to be in declining in the internal configuration of the polities of the West.

The study then aims to situate these tensions and their origins in Enlightenment rule of law theories emerging in the seventeenth and eighteenth centuries. We trace the contours of the rise of sovereign states with a consideration of the way in which legal knowledge provides the legitimation for the force of law as religion begins to wane. The separation of secular and religious worlds ushered in a belief in human progress anchored in reason and science. Divine and natural

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major expansion of US and UK law firms into China, other Asian countries, and sub-Saharan Africa, along with a number of rule of law cooperation programmes. "UK Legal Services in 2015," The CITYUK http://www.thecityuk.com/research/our-work/reports-list/legal-services-2015/). [Accessed 26 July 2015].

[209] Lars Blichner and Anders Molander: What is juridification? Working Paper No.14, March 2005 http://www.arena.uio.no

laws waned as legitimating frameworks of civil governance, to be replaced by the supremacy of positive law embodying scientific values of rationality and temporal legitimacy.

We subsequently move to the evolution of representative democracy in which citizens knowledge binds, constitutes and limits popular sovereignty via ideals of social contract or general will, both of which putatively ascribe general knowledge of laws as prerequisite. With the growing belief in human rationality as the centre of technological and scientific progress, the evolution of the rule of law also charts the expansion of the sovereign state and the rise of capitalism, both of which entailed increasingly rapid legislative activity. With the accelerated expansion of the state after the medieval period came an increase in the volume and scope of legislation.[210] These developments provide the trajectory toward a modernity in which juridification has become the norm, alongside the exponential growth in bureaucratic and administrative arbitration mechanisms, creating challenges which public legal education practices grapple with today.

Despite the vigour and aspirations of Enlightenment rule of law theorists, by the middle of the twentieth century checks and balances that democratic rule of law ideals promised came under increasing attack from a number of quarters. Challenges to rule of law orthodoxy arose from an array of forces, from the rise of National Socialism in Germany, to the growth of state capitalism, as well as the expansion of the post-war welfare state. The literature we will discuss points to the frailty or rather the impossibility of the ideal of the rule of law that nevertheless exhibits a remarkable continuity at the intersection of public knowledge of laws with divergent political theories within this shifting terrain.

Formal and substantive accounts of the rule of law

The essentially contested nature of the rule of law, and its polemical evocation by left and right may well have rendered the idea meaningless. As Judith Shklar contends, the idea is in danger of being consigned to nothing more than

[210] Tamanaha, *Rule of Law*, 27.

'ruling class chatter'.[211] Our purpose here is not to offer a critique of the rule of law as such, but to consider how public knowledge of law can be re-evaluated in the context of wider political and educational theory. Despite the contested nature of the rule of law, public knowledge is a component (either explicitly or implicitly) of the narrowest formal and the widest substantive constructions. At the very least, in its thinnest construction, the requirement that laws should be published or promulgated, and be reasonably intelligible remains intrinsic to otherwise competing formulations.

We began where we left off in the previous chapter, with the origins of neoliberalism during the twentieth century, and its acceleration at the end of the Cold War.[212] Substantive theories of the rule of law aim to recognise the limitations of the strict application of the formal rule of law and to a greater or lesser extent undergird formal requirements with external values. This follows the line of argument that without some other extrinsic values, the rule of law is merely determined by the separation of judiciary, administration and legislature, features that lack any inherently democratic characteristic. As Joseph Raz suggests: "[a] nondemocratic legal system may, in principle, conform to the requirements of the rule of law better than any of the legal systems in our more enlightened Western democracies."[213] Moreover, orthodox liberal accounts of the freedom of the individual when formulated in legal terms are at best fluid and at worst result in a calamitous loss of freedom:

> To say that a citizen is free within the open spaces allowed by the law says nothing about how wide (or narrow) those spaces must be. Legal liberty is not offended by severe restrictions on individuals, for it

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[211] On the differing and often antagonistic constructions of the rule of law see Judith Shklar, "Political theory and the rule of law," in Allan Hutchinson and Patrick Monahan, eds., *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987), 3. For a discussion of contestation and epistemological approaches to the rule of law see Danilo Zolo, "The Rule of Law: a Critical Appraisal", 3-71, in *The Rule of Law: History, Theory, Criticism,* eds., Pietro Costa and Danilo Zolo *(*2007), 5-7.

[212] Brown, *Undoing the Demos*, 9.

[213] Joseph Raz, "The Rule of Law and Its Virtue," in *Liberty and The Rule of law,* eds., Cunningham (College Station: Texas A&M University Press, 1979).

> requires only that government actions be consistent with laws declared in advance, imposing no strictures on the content of laws.[214]

Substantive critiques therefore point to the restrictions of individual freedom and liberty that are by no means antithetical to the rule of law. They convey wider values and social objectives, and public understanding of the law and the capacity to exercise rights (even if rather abstractedly stated) is a central tenet of these accounts.

In contrast, formal versions of the rule of law focus on the negative liberties that the rule of law can provide, aligning more closely with liberal economic orthodoxies. Their approaches tend to be minimalist, with a strong positivist thrust. Similarities can be found in how formal accounts treat explicit links between foreknowledge of the law and the regulative demands upon private individual conduct. Austrian economist Friedrich von Hayek (1899-1992), writing in 1944 notes that government is and should be bound:

> [B]y rules fixed and announced beforehand - rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.[215]

Foreknowledge of the limits of permissible conduct (primarily concerning commerce and criminal conduct) is a key element of freedom ascribed by legal liberty. Legal rationality is fundamental to Hayek's theory of economic rationality. Concomitant with the promulgation of general legal rules is the facilitation and securitisation of economic exchange, since the market requires the predictability of regular exchange market freedom. In Hayek's view, the general rules afforded by the rule of law are necessary to ameliorate human ignorance. Ignorance or, as he later qualifies, substantial margins of uncertainty and doubt in human affairs, require a minimum of intervention in market affairs so that innovation can flourish. Assimilating basic rules enables competitive innovation, which in turn requires a minimum of coordinated planning for the future, since our condition of ignorance

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[214] Ibid., 37.

[215] Friedrich Von Hayek, *The Collected Works of F.A. Hayek, Volume 15. The Market and Other Orders* (University of Chicago Press 2014), 181. See also Friedrich Hayek, *The Constitution of Liberty* (Routledge: London, 2006), 306.

(at all strata of society) precludes attempts at the state planning level to succeed. Since individuals base their plans on the way is which knowledge is communicated, "the crucial problem for any theory explaining the economic process, and the problem of what is the best way of utilizing knowledge initially dispersed among all the people is at least one of the main problems of economic policy."[216]

Shklar interprets Hayek's proposition as follows: "By internalizing these minimal rules and social conduct we become more intelligent. Far from being anarchical, a rule observing 'spontaneous order' can be expected to emerge."[217] The problem with Hayek's account, for Shklar, is an unwarranted belief in the emergence of a better 'spontaneous' order arising from the smooth function of a competitive economy. Disavowing wider political objectives, the rule of law as conceived by Hayek reduces contemporary accounts to economy and the demands of capital on one end of the political spectrum, and welfarist demands on the other. She writes:[218]

> Is there much point in talking about the Rule of Law? Not if it is discussed only as the rules that govern courts or as a football in a game between friends and enemies of free-market liberalism. If it is recognised as an essential element of constitutional government generally and of representative democracy particularly, then it has an obvious part to play in political theory.[219]

Unlike classical rule of law accounts, contemporary interpretations evacuate crucial constituent elements of theories of state as the basis of establishing the nature of a polity (democratic or otherwise). Thinning notions of democratic accountability are limited in order to address asymmetries in consumer power in the legal market. An instrumentalisation and internalisation of juridical-economic rationality thereby increasingly evacuates any conception of political community.

This discussion foregrounds an argument that Michel Foucault develops in lectures delivered at the *College de France* between the 24th January and the 21st February 1979. Following his account, the changing paradigm from classic liberal

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[216] Friedrich Von Hayek, 'The Use of Knowledge in Society" *American Economic Review*, XXXV, No. 4; September, 1945, pp. 519-30.

[217] Shklar, *Political Theory and the Rule of Law*, 7.

[218] Ibid., 7-11.

[219] Ibid., 16.

to neoliberal contours in rule of law theories is heavily indebted to Hayek and his move from Freiburg, to the London School of Economics and eventually to Chicago. Blending social market economics and legal theory with Milton Friedman's economic theories from the 1940s onwards, [220] Friedman and Hayek went on to found the influential Mont Pèlerin Society in 1947.[221] In part, their theories were formulated as a reaction to totalitarianism; their idea of generally applicable formal rules aimed at the avoidance of unwarranted state intervention in the market and individual liberties (the rule of law so conceived is "quite the opposite of a plan").[222] Yet the corollary of market freedom is an increase in legal activism. This is reflected in the need to arbitrate social conflicts that inhibit (and necessarily arise from) a competitive enterprise economy.[223]

> One of the problems of liberalism in the eighteenth century was the maximum reinforcement of a juridical framework in the form of a general system of laws imposed on everyone in the same way. But the idea of the primacy of the law that was so important in eighteenth century thought entailed as a result a reduction of the judicial or jurisprudential, in as much as the judicial institution was in principle confined to the pure and simple application of the law. Now…the judicial, instead of being reduced to the simple function of applying the law, acquires a new autonomy and importance.[224]

What is now required is a judicial interventionism that overlays the role of enterprise by reducing the friction and conflict that competitive enterprises produce. Foucault argues that while competition produces the conditions for economic deregulation: "the social regulation of conflicts, irregularities of behaviour, nuisance caused by some to others, and so forth, requires judicial interventionism which has to operate as arbitration within the framework of the

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[220] Foucault explores the links between the German Ordo-Liberals who reconvened in Freiberg University after the war and the American anarcho-liberals related to the Chicago School in *The Birth of Biopolitics*, 51-184.

[221] The links between Mont Pèlerin and the Trilateral Commission are explored in Chapter One.

[222] Dardot and Laval, *The New Way of the World*, 151.

[223] Foucault, *The Birth of Biopolitics*, 172.

[224] Ibid., 177.

rules of the game."[225] With regard to Hayek's notion of the internalisation of legal and social rules as a basis for reconstruction of liberal orthodoxies, we can see how Foucault arrives at the emphasis on the forms of reason and knowledge that could be deployed and internalised to shape the modern neoliberal subject. Wendy Brown also marks this internalised shift as a significant factor in the process of establishing the hegemony of *homo economicus* at the expense of *homo politicus* that was, at least until the nineteenth century still predominant.[226]

The role of legal knowledge thus becomes a potent medium for an alternative rationality of government and of the shaping of citizen-subjects. Foucault identifies new subjects and subjectivities emerging in the latter part of the twentieth century that are: "only governable insofar as a new ensemble can be defined which will envelop them both as subjects of right and as economic actors…[I]t is this new ensemble that is characteristic of the liberal art of governing."[227] This excursus on the deployment of legal knowledge in the public realm as an aspect of narrow and wide rule of law theories suggests a convergence of economic-juridical rationalities shaping citizens more determinedly as economic actors. The reorientation of the rule of law here marks a turn toward a new relation between citizen and state, and a legal rationality that suffuses or overtakes juridical-political rationales for tempering or legitimising government intervention *tout court*. In the following sections we will consider how this influence is borne out in public legal education developments as the appear in recent global rule of law developments.

Public legal education in global rule of law developments

Before moving to consider the ways in which knowledge of law is treated in the writing of a number of key Enlightenment thinkers, will first take a moment to consider the rubric of post-war peace building and the advance of human rights legislation insofar as they consider legal education for the public. From the

[225] Ibid., 175.

[226] Brown, *Undoing the Demos*, 107-111.

[227] Foucault, *Birth of Biopolitics*, 295.

Universal Declaration of Human Rights to the UN Charter, treaty provisions underline the importance of public understanding of law as a necessary aspect of securing human rights protections and preventing the scourge of war. In September 2012, to reaffirm their commitment to the rule of law originating from the founding Charter of 1948, the UN General Assembly underlined the importance of 'awareness raising concerning legal rights' in order to secure equal access to justice.[228] The Charter of the Fundamental Rights of the European Union (2000) likewise aims at its inception to promote the visibility of the rights it enshrines: "[I]t is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter."[229] In the preamble to the Universal Declaration of Human Rights we can likewise find the education of citizens is an explicitly stated goal of the Declaration:

> Now, Therefore The General Assembly proclaims This Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and

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[228] Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels A/Res/671/1. In order to achieve the goals set out, the General Assembly calls for: "international cooperation and invites donors, regional, sub-regional and other intergovernmental organizations, as well as relevant civil society actors, including non-governmental organizations, to provide, at the request of States, technical assistance and capacity-building, including education and training on rule of law-related issues. https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf [Accessed December 12th 2018].

[229] The preamble continues as follows: "The Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice." Charter of the Fundamental Rights of the European Union 2012/C 326/02. https://eur-lex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:12012P/TXT&from=EN [Accessed on 28.9.2018].

> observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.[230]

While formal rule of law requirements were predicated on social and economic relief measures in the aftermath of the Second World War, commitments to broader welfare and wealth distribution elements substantially waned.[231] Human rights and development programmes with a focus on property, security and contractual autonomy have proved more durable.[232] Agendas that pave conditions for the

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[230] Further, the Secretary General of the United Nation defines the rule of law as: "[A] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards." Secretary General of the United Nations, General Assembly of the United Nations, http://www.un.org/en/universal-declaration-human-rights/.

[231] See Samuel Moyn, *Human Rights in an Unequal World,* (Cambridge, Massachusetts: The Belknap Press of the Harvard University Press, 2018), 41-68. The shift away from wealth equalising measures and welfare is evidenced by broader welfare state retrenchment and declining legal aid budgets in the West, since the International Covenant on Economic, Social and Cultural Rights came into force in 1976, particularly in the wake of the global financial crisis. A recent report assessing the global position of social and economic rights concludes: "The dogma of fiscal austerity imposed worldwide in the wake of the global financial and economic crises has represented a renewed assault on economic and social rights. As [Centre for Social and Economic Rights] has shown, austerity policies in both developing and industrialized countries have contributed to escalating levels of inequality and wealth concentration, affecting the rights of marginalized communities disproportionately." Ignacio Saiz, "Twenty Years of Economic and Social Rights Advocacy Marking the twin anniversaries of CESR and the Vienna Declaration and Program of Action," Centre for Social and Economic Rights (2015), 7. http://www.cesr.org/sites/default/files/downloads/cesr_20years_escr.pdf [accessed December 15th 2018]. For an overview of changes in legal aid eligibility in Europe see Maurits Barendrecht *et al.,* "Legal aid in Europe: Nine different ways to guarantee access to justice?" Hague Institute for the Internationalisation of Law (HIIL) (2014), and for a US perspective see Alan W Houseman, "Civil legal aid in the United States, an update for 2017", March 2018. https://repository.library.georgetown.edu/bitstream/handle/10822/761858/Houseman_Civil_Legal_Aid_US_2017.pdf?sequence=5&isAllowed=y. [accessed November 12th 2018].

[232] Zolo, "The Rule of Law: A Critical Appraisal," 4

smooth functioning of the global market have also fared substantially better than reparative post-colonial demands. In the context of legal empowerment initiatives in which community legal education efforts are prominent, land rights and land registration have been at the heart of development efforts.[233] The World Bank's default position has been in favour of land titling where customary and neo-customary land rights have previously prevailed:

> For the Bank and other advocates market-promoting titling and privatisation, land commodification and enhanced transfer-ability are the goal. Private property in land is envisioned as both a driver and the end-point in an inexorable process of economic and institutional modernisation.[234]

Two critiques arise from these observations. First, the capacity to reorient individual liberties and human rights within rule of law frameworks to the paradigm of economic and consumerist transactions comes at the expense of wider public policies aimed at general social and economic welfare. Danilo Zolo makes the argument as follows:

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[233] The Report of the Commission on the Legal Empowerment of the Poor references the Public Legal Education and Support Task Force in the United Kingdom, which was convened at the same time as the United Nations Commission, with a view to considering the importance of self-help strategies and legal rights information provision (2008, 22-24). The Commission, chaired by Peruvian Economist Hernando De Soto was heavily shaped by the thesis presented in his book *The Mystery of Capital,* which sought to bring 'dead capital' into the market. The book was warmly received by Margaret Thatcher who reviewed the book on its publication as follows: "[T]he single greatest source of failure in the Third World and Ex-Communist countries [is the] lack of rule of law that upholds private property and provides a framework for enterprise." Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails everywhere else,* (London: Black Swan, 2001).

[234] Catherine Boone, "Legal Empowerment of the Poor through Property Rights Reform: Tensions and Trade-offs of Land Registration and Titling in Sub-Saharan Africa." *The Journal of Development Studies*, 55:3, 384-400 (2019), 385, https://www.tandfonline.com/loi/fjds20 [Accessed March 17th 2019]. Boone also notes countervailing tactics employed in user rights initiatives that seek to stave off agribusiness and limit the mortgageability of land, 387.

> [T]o support the rule of law means to advocate the protection of individual rights as the primary aim of political institutions and legal bodies…[N]ot only does such a philosophy relinquish social organism, collective utilitarianism and statism, but it also subordinates the public dimension and the general interest.[235]

Second, economic restructuring facilitated by human rights discourses has served to avoid and undermine attempts to establish postcolonial reparative and wealth distribution demands.[236] As human rights instruments move away from distributive accounts of equality to humanitarian interventions and discourses that actively counter state-led distribution endeavours, these shifts exhibit the influence of the same economists behind restructuring in the global North and West. Jessica Whyte's research traces the confluence of influential British-Hungarian development economist Peter Bauer, friend and associate of Hayek (and subsequently adviser to Margaret Thatcher) in the reframing of human rights toward free-enterprise from the 1970s:

> Humanitarians lent their moral prestige to 'free enterprise ideological counter-attack' on Third Worldism and the [New International Economic Order]. Their impact was on the terrain of political idealism, as they helped long-cherished right-wing themes cross over to the political left and re-signified state distribution as a totalitarian threat to liberty and human rights.[237]

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[235] Zolo, "The Rule of Law: A Critical Appraisal," 4.

[236] Attempts to fight for wealth redistribution arose particularly in 1970s development arguments. For example, the aim of the New International Economic Order [NIEO] soon became the *bête noir* of neoliberal economic development theorists including Hayek and more recently Peter Bauer. Writing in 1979 Algerian Jurist and Ambassador to the United Nations, Mohammed Bedjaoui, emphasizes the role of law in securing wealth distribution in post-colonial contexts as follows: "The aim must be to reduce inequality in every area where it is found. To do this therefore we must re-fashion, or 'revolutionize', the laws which lead to the reproduction of the relations of domination and exploitation." *Towards a New International Economic Order* (New York and London: Holmes and Meier, 1969), 255.

[237] Jessica Whyte, "Powerless companions or fellow travellers? Human rights and the neoliberal assault on post-colonial economic justice," *Radical Philosophy*, 2.02 (June 2018). Peter Bauer argued that foreign aid and government intervention in development was tantamount to a reduction in individual freedom by 'politicizing' economic life. This

Within these critiques, our central concern is that the articulations of the rule of law within which public legal education endeavours are embedded provide the backdrop, or at least mediate new configurations, altering the relationship between the public and private, and between citizen and state in ways that subsequently enable new supervening economic rationalities to take hold in global rule of law developments.[238]

As we move toward 'thicker' or more teleological accounts in contemporary juristic and legal scholarship on the rule of law, we can note a growing emphasis on the legitimating function of public understanding of the law, with objectives ranging from the legitimacy of criminal sanctions to the safety net provided by social welfare entitlements.[239] According to Tom Bingham in his definition of the rule of law along eight principles, the first guiding principle is that the law must be "accessible and so far as possible, intelligible, clear and predictable."[240] The reasons he provides are threefold. In the criminal law context, since it is not always plain what constitutes criminal conduct, the role of criminal law in discouraging criminal behaviour can only function properly if it is reasonably clear to everyone what such behaviour consists of. Foreknowledge therefore takes on both a preventative and

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premise would eventually become mainstream development policy: "I see myself and the small group that I brought together as a kind of symptom of the rise of neoliberalism…we thought we were the intellectual vanguard but no…we were just following the rising tendency." Ibid., Whyte, Interview with Rony Brauman at footnote 115.

[238] A large number of legal awareness raising programmes have emerged since the 2008 establishment of the Legal Empowerment Commission. The Commission defined legal empowerment as: "a process of systemic change through which the poor and excluded become able to use the law, the legal system, and legal services to protect and advance their rights as citizens and economic actors." The priorities emphasised property rights, labour rights, and business rights in addition to the foundation of access to justice and the rule of law. See Laura Goodwin and Vivek Maru, "What do we know about legal empowerment, mapping the evidence," *Hague Journal on the Rule of Law* (2017) 9:157–194: 159.

[239] For a taxonomy of rule of law approaches that includes teleological accounts aimed at constraining or rendering power accountable see Lacey, "Populism and the Rule of Law," 2019. On the links between neoliberalism and populism see Michael Sandel, "Populism, Trump and the Future of Democracy," Open Democracy, May 9, 2018, https://www.opendemocracy.net/michael-j-sandel/populism-trump-and-future-of-democracy [retrieved 2nd December 2018].

[240] Bingham, *The Rule of Law*, 1998, 39.

disciplining function.[241] In the civil law context, if there are to be rights and obligations that the civil law confers, the citizen must know what they are. Giving the example of claiming winter fuel allowance, Bingham underlines the need for foreknowledge of the allowance as well as accessible means of claiming it.[242] Finally, his grounds for the need to ensure accessibility and intelligibility of the law centres on growth; the ability to invest and trade relies on reasonably clear expectations of how resulting agreements will be treated.[243]

This wide construction of the purposes of rendering the law intelligible and accessible to the public as a mechanism for sustaining social equilibrium is echoed by a number of other scholars. Maravall and Przeworski maintain that guarantees of intelligible, promulgated rules relate to the wider stabilising effect that the rule of law is ostensibly able to provide, so that people are able to predict the actions of others:

> In sum, laws inform people what to expect of others. Even if it were to deviate from the announced course of action, the state announces what it plans to do, including what it intends to punish. Such announcements provide safety for individuals. At the same time, they facilitate coordination of sanctions against a government that deviates from its own announcements. In this sense, publicly promulgated rules provide an equilibrium manual.[244]

American legal scholar Lon Fuller takes a similarly wide view by organising the principles of the rule of law around eight kinds of 'legal excellence'. Fuller's analysis of promulgation is relatively attentive. He argues general rules must be publicised, prospective, intelligible, consistent, not impossible to obey, relatively permanent, and congruence between their actual implementation and the rules as

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[241] As the boundary between civil and criminal law becomes ever less apparent in complex contemporary forms of control and sanctions, this presumption, as Ashworth argues, is increasingly untenable. See Andrew Ashworth, "Ignorance of the Criminal Law and Duties to avoid it," *Modern Law review*, 74 (1): 1-26.

[242] This kind of equalizing, welfarist intervention is precisely what both Hayek and Dicey feared would undermine the certainty and formality that the rule of law offers.

[243] Tom Bingham, *The Rule of Law*, (London: Penguin, 2011), 39-42.

[244] Jose Maria Maravall and Adam Przeworski eds., *Democracy and the rule of law* (Cambridge University Press: 2003), 5.

promulgated must be guaranteed.[245] He ultimately rejects the possibility of educating people about the laws since: "it would in fact be foolish to try to educate every citizen of the full meaning of every law that might be conceivably applied to him."[246] The need would only arise if the law diverged significantly from the generally held views of right and wrong. Nonetheless merely being cognisant of the law is insufficient; the public ought to be able to scrutinise the values behind the laws to ensure that those tasked with applying them do so within the bounds of the law. Resting his argument problematically on the internal morality of the law, his account then also concerns the stabilizing certainty of the application of the rule of law in its constituted functions.

The contours of the rule of law that we have analysed so far, shaped around either wider liberal models of inalienable rights as well as narrower, formalistic accounts in the preceding discussions suggest that in different ways both create the conditions for the reordering of subjectivities toward a new configuration of state and the administration of society.[247] Even wider substantive accounts of the rule of law demonstrate how political-juridical epistemes give way to a juridical-economic episteme. Wealth production and the effective governability of enterprising subjects appears a new order of global rule. However, the liberal frames that we will encounter below do not necessarily lead to the conditions of our contemporary situation in which market orientated principles shape the priorities for rule of law objectives. These preliminary conclusions provide conceptual tools to analyse classical liberal approaches to the rule of law in the remainder of the chapter with specific attention to how legal knowledge and legal education is anchored by political theorist as the source of legitimation for the structures of sovereignty that they entail.

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[245] Lon Fuller, *The Morality of Law* (Yale University Press, Revised edition,1977), Chap. 2.

[246] Ibid., 49.

[247] For Hayek the rule of law is not intended to produce a set of abstract rules in order to protect rights; while narrowly focused on general rules, this peculiar rationality is however wide in its purview: "it does far more than make the citizen feel secure from the agents of coercive government. It sustains the free-market economy and that 'spontaneous order' is itself the foundation that all other aspects of the society as a whole rest on." Shklar, *Political Theory and the Rule of Law*, 9.

The Enlightenment ideal of the rule of law

So how does our contemporary ensemble of legal and economic rationality relate to its classical liberal antecedents, and can we discern where certain continuities and discontinuities emerge from the perspective of how legal knowledge and rights education is theorized by leading thinkers of the Enlightenment? This final part of the chapter explores this crucial movement of cultural, philosophical and political change that emerged out of late seventeenth- and eighteenth-century Europe.[248] An era marked by revolutions and social upheaval, from this period the supremacy of law as an idea or ideal took on new contours.[249] Under the prevailing influence of earlier conceptions of natural law, the doctrine of human rights and civil rights came to find their most powerful expressions in the French Declaration of the Rights of Man and the Citizen and the American Bill of Rights in 1789.[250] Today, notwithstanding the critiques and diffuse orientations of the rule law we have already encountered, it is taken for granted that the rule of law occupies a pre-eminent position as a constitutional principle.[251] But this was not an inevitable outcome, and the evolution of rule of law concepts reflects the conditions and contingencies that arose in different territories and in response to different philosophical-political outlooks.[252] This final section of the chapter will tackle the wide body of literature emerging from this period where

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[248] We will adopt a broad periodicity that Paul Hazard uses to circumscribe the period between the late 1600s to the late 1800s. Paul Hazard, *The Crisis of the European Mind*, J.F. *The Enlightenment* in *Problems and Perspectives in History* (Longmans Green and Co Ltd.: London, 1967).

[249] A number of writers have explored the Enlightenment from the perspective of crisis and transformation - see more generally Hazard, *The Crisis of the European Mind*, 1967 and Ernst Cassirer, *The Philosophy of the Enlightenment,* trans. Fritz Koelln and James Pettigrove, (Princeton University Press: Princeton, New Jersey, 2009).

[250] Cassirer, *The Philosophy of the Enlightenment*, 248.

[251] A.V. Dicey, *Introduction to the Study of the Law of the Constitution,* 70-79.

[252] For example, what came to be known as the rule of law (*Rechstaat)* in Germany arose as a reaction to the limitations of the police state and *raison d'état*. Foucault reminds us that the reason of state is not an art of government based on divine, natural or even human law. It relies on the capacity or rather the relative strength of the state. Foucault, *Birth of Biopolitics*, 246.

sources provide critical purchase on the problem of legal knowledge. In tracing the roots of rule of law theories in Enlightenment thought, the object is to ask under what conditions these theories emerge and what transformations they augur. In particular, we will turn our attention to how rule of law theories shaped relations between citizen and state as they bring forth new forms of rationality. With the Enlightenment comes an era of reason, progress and increasing secularization of political life, adding impetus to the promulgation of laws to the citizenry. And yet the theological undercurrents of the formation of the body politic, and the epistemological evolution binding human reason to God's providential plan remain potent if obscured aspects of modernity. The domination of juridical-economic rationality today is in no small part indebted to these political theological precursors.[253] Keeping in view the educational questions that are central to this study, the following section will consider how the ensemble of legal, economic and political rationalities evolve during the Enlightenment period to produce novel ideas of the legal subject. From the autonomous, reasoning Kantian individual to the consenting contractarianism of Locke and subsequently the abstract legal subject on which Rousseau bases political right, all rely to greater or lesser degree as we shall see the constitutive bind of legal understanding by the populace.

The influence of natural law arguments on the development of Enlightenment thought emphasises the mediating role of reason and law between the divine and the secular realms. To grasp what is at stake in the genealogy of Enlightenment rule of law concepts, we must first briefly take a step back to the influence of Christian theology in the evolution from natural to positive law. The synthesis of Aristotelian philosophy with Christianity owes much to St. Thomas Aquinas (1225-1274). Aquinas applied the precepts of Canon Law to neutralise the opposition between force or violence and law with the mediation of knowledge. The force of law, he contends, is justified or legitimated by the function of knowledge. If the law is to have the binding force proper to it as law (Aquinas reminds us of the semantic link between *lex* and *ligandum:* to bind), it must be applied to those who are subject to it by some promulgation that brings it to their notice.[254] Promulgation, then, is required if law is to have force.[255] Promulgation,

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[253] Max Weber, *The Protestant Ethic and the Spirit of Capitalism,* trans. Talcott Parsons (New York: Vigeo Press, 2017).

[254] Thomas Aquinas, *Selected Philosophical Writings*, trans. Timothy McDermott (Oxford: Oxford University Press, 1993), 413.

[255] Aquinas, *Selected Philosophical Writings*, 416.

according to Aquinas, links the spheres of eternal law, natural law and human law. In the order of God's Providence, eternal law is promulgated through God's Word and the eternal book of life. Since creatures hearing and reading it are not eternal, natural law functions as the reasoning creature's share in the eternal law. As a result, human reason also shares in the Providential plan but in an imperfect way. The goal of law, Aquinas argues, following Aristotle, is to attain the happiness of the community to which each individual is a part: "for he [Aristotle] says we call those acts just in law that promote and conserve happiness and its components in the city, for it is the city that is the complete self-contained community."[256] Human law lays down particular laws to order human actions according to natural law through the will of the ruler, with the proviso that the ruler's will is in accord with reason and directed toward the common good. This providential aspect of reason appears to carry within it the subsequent presumption of the duty to know with regard to laws in general.[257] Moreover, this duty concerns the express requirement for a law to exist so as to legitimise punishment *per se*.[258] The principle and ancient legal maxim that ignorance of the law is no defence also finds its source in classical understandings of the links between legal knowledge and culpability for crimes, Aristotle thus writes: "We punish those who are ignorant of anything in the laws that they ought to know and that is not too difficult."[259]

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[256] Aquinas, *Selected Philosophical Writings*, 413.

[257] According to the Jurist Gratian, "A law is not really law until it has been made known." Gratian, *Decretum Gratiani*, c. 3, dist. VII cf. Gilbert Bailey, "The Promulgation of Law", *The American Political Science Review*, Vol. 35, No. 6 (Dec., 1941), 1059-1084.

[258] The ancient principal that no punishment will be applied without law (*nulla poena sin lege*) simply requires that relevant laws exist, and that they are not applied retrospectively. The rule was historically linked to establishing limits on the conduct of officials rather than as a mechanism for determining culpability Hall. J. *General Principles of Criminal Law* (1947), 373-4.

[259] Aristotle, "Nicomathean Ethics" in Complete Works of Aristotle, The Revised Oxford Translation, Jonathan Barnes Ed, Volume One (Princeton: Princeton University Press, Bollingen Series 1984), 1758. The continuing application of the maxim in modern doctrinal accounts raises important concerns about how legitimate it is for a presumption of knowledge to be ascribed in the complex contemporary forms of control and regulation of conduct and when the line between legal and moral wrongdoing is often far from clear. The ramifications of ignorance of law, rather than fact, offered up as a defence or mitigation of liability from punishment or other forms of legal liability has come under increasing scrutiny. Particular acts of transgression are related to knowledge of law insofar as the act

With this schematic introduction we will move on to consider how natural law arguments were resituated in Enlightenment thinkers' development of the rule of law, beginning with French jurist and liberal political philosopher, Charles-Louis Montesquieu (1689-1785). Montesquieu regarded the spirit of the law to be what animates the world. While some laws come to be made, some exist without needing to be posited, but since man is: "ignorant and subject to error…[and] he could forget his fellows; legislators have returned him to his duties by political and civil laws."[260] For Montesquieu, where civil laws aim at the general welfare, religion comes to be relegated to the perfection of the individual. The spirit of the laws, according to Montesquieu, can be derived from the nature of things, expressing a form of justice, or relations of justice that exist even before enacted laws come to be asserted. The idea of unalterable, universal norms that precede positive laws' command is exemplary of natural law theories.[261] But what distinguished the eighteenth century from earlier natural law theories is the unshakeable belief that human reason can better shape natural laws into a perfected and unified theory of state. As religious ethics and transcendental justice receded, the state had to become the sole source of moral and social order. For Montesquieu, the rule of law was exemplified by the rule of the criminal law as a means of restricting, through certain institutional limitations, the oppressive interventions of the state. Shklar describes how his ideas on the separation of powers evolved:

> Power was checked by power in such a way that neither the violent urges of kings, nor the arbitrariness of legislatures could impinge directly on the individual in such a way as to frighten her and make her insecure in her daily life…the only task of the judiciary is to condemn the guilty of legally known crimes defined as acts threatening the security of others, and protect the innocent accused of such acts.[262]

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is voluntary. Voluntary acts become unlawful only if they are brought about by the power of the individual to act (insofar as they are not compelled by another) and in the absence of ignorance that can be reasonably mitigated. Ashworth considers whether ignorance of the law is itself to be construed as generally wrong, and the problems of autonomy that are implied in the maxim. Andrew Ashworth, *The Principles of Criminal Law, 7th Edition* (2013) 220.

[260] Montesquieu, *Spirit of the Laws*, (Cambridge: Cambridge University Press:1989), 3.

[261] Ibid., 5.

[262] Shklar, *Political Theory and the Rule of Law*, 5.

Knowledge of law was still largely imputed through the link between natural and human reason, though the sovereign nevertheless provides the tie to human law via the act of promulgation. While these earlier thinkers were attentive to the role of legal knowledge, via reason and promulgation, they delimited this with the fundamental unknowability of Gods providential plan. Hidden within the secular arrangements for the developing political community remained an impasse in which the ground of authority rested on transcendental truths, to which human reason could not attain. This impasse, or aporetic relation of legal knowledge in constituting the sovereign state, as we shall see in the next chapter is a crucial argument that we will follow with Walter Benjamin that points to the falsifications and mystifications surrounding modern arrangement of state legitimacy. For present purposes what marked a crucial turning point for early Enlightenment thinkers that held to the apriority of laws, was a new attitude of thought and rationality that sought to bring the forces of reason and nature together in the interests of reforming the relations between the individual and society, not simply the relation between the individual and nature.

The rule of law and the sovereign state

A distinctive framework for early modern writers is the corollary of rule-based government with the sovereign state.[263] We find a critical juncture for the problem of knowledge and the binding force of law materialising in the person of the sovereign in the political theory of Thomas Hobbes (1588-1679). While his political theories are regarded as antithetical to rule of law as it is understood in modern conceptions, we can nevertheless trace crucial links between natural law theories and later social contract theorists in Hobbes insofar as the problem of legal knowledge is concerned. In Hobbes' sovereign theory of state, law is conceived as

[263] William E Scheuerman, "Review: The Rule of Law at Century's End", *Political Theory,* Vol. 25, No. 5 (Oct. 1997) 743.

the command of the sovereign.[264] Sovereign law expresses the sovereign will backed with the power to punish or reward. This entails political authority unrestrained by law (*potestas legibus soluta*). Law cannot bind the sovereign as such (unless by virtue of willingly submitting himself to any law).[265] For Hobbes, the sovereign is conceived as the embodiment of the commonwealth to which every man consents as the best means of avoiding the state of war and violence with which nature is associated: "law was brought into the world for nothing else but to limit the natural liberty of particular men, in such manner as they might not hurt, but assist one another."[266] Hobbes' absolutist schema pits the violence of nature against the peace and rationality of the commonwealth and thereby justifies the absolute right of the sovereign to use force to secure the obedience of his subjects. The irrational state of nature legitimates the coercive demands of secular laws.[267]

Hobbes' construction is remarkably attentive to the juridical-epistemological role of legal knowledge for the subjects who are so bound. Command entails the legislative function as well as the promulgation of law. In keeping with natural law theories, he suggests that knowledge of ordinary moral

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[264] On the conception of law as command rather than counsel, Hobbes relies on Aquinas: The "law is an ordinance of reason for the common good, made by him who cares for the community and promulgated." And Suarez: "the requirement that law be made by one who cares of the community implies that it is not counsel, but a command." "On laws and on God the Lawgiver," Thomas Hobbes, *Leviathan*: *With Selected Variants from the Latin Edition of 1668,* (Cambridge: Hackett Publishing Company Inc., 1994), footnote 2, 173. He also refers to command as the *terminus ultimus* of the forces of all citizens together. *De Cive,* cited in Jean Hampton, "Democracy and the Rule of Law" in *The Rule of Law Nomos XXXVI*, ed. Ian Shapiro (New York: New York University Press, 1994).

[265] Hobbes argues: "A fourth opinion repugnant to the nature of the commonwealth is this: That he that hath the sovereign power is subject to the civil laws…which error that setteth the laws above the sovereign, setteth also a judge above him, and a power to punish him, which is to make a new sovereign." Hobbes, *Leviathan*, 213.

[266] Hobbes, *Leviathan*, 175.

[267] As Giorgio Agamben, observes we will encounter repeatedly the idea that it is the state of nature which in the modern era is the being-in-potentiality of the law and the basis of the laws' self-proposition. Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life,* trans. Daniel Heller-Roazen (Stanford California: Stanford University Press, 1998) 35 - 36. A transcendental logic ascribes the only authority to which the sovereign is bound to the natural law and thus to the ultimate authority of God. Hobbes, *Leviathan*, 213.

rules and of virtues is promulgated by the natural law and is accessible to all men.[268] However civil law, since it is not made by nature, is linked to consent.[269] The relationship between the covenant of society and the social contract requires total submission of all its members as a logical necessity. It is through this and only through this mechanism that a social or community life is constituted. Consent implies a degree of substantive knowledge of the laws to which subject are bound, and which constitute the political arrangement that Hobbes envisages.[270]

Promulgation of the law provides the nexus of the express sovereign will that binds those who also then benefit from the civil laws: "for the knowledge of particular laws belongeth to them that profess the study of the laws of their several countries; but the knowledge of the civil law in general to any man."[271] The way in which the laws must be brought to the attention of subjects is differentiated. Already in the Hobbesian requirement for the promulgation of laws, we see emerging aspects of what extends later notions of legal supremacy in an administrative-governmental state: "For every man seeth that some laws are addressed to all the subjects in general; some to particular provinces; some to particular vocations; and some to particular men; and are therefore laws to every of those to whom the command is directed, and to none else."[272] The absolute state still demands an administrative state apparatus that can disseminate legal knowledge pertaining to particular groups and professions.

For Hobbes, it is in the very nature of law to be made known: "The law of nature excepted, it belongeth to the essence of all other laws to be made known to everyman that shall be obliged to obey them either by word, or writing or some

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[268] "Civil law is part of the dictates of nature…civil law and natural law are not different kinds, but different parts of law, whereof one part (being written) is called civil, the other (unwritten), natural. But the right of nature, that is the natural liberty of man, may by the civil law be abridged and restrained." Hobbes, *Leviathan*, 175.

[269] "But every subject in a Commonwealth hath covenanted to obey the civil law." Hobbes, Leviathan, 175.

[270] Since it is only the authority of the ruler that ultimately founds political society, the move from natural to civil state means consent is framed by Hobbes as surrender, as a covenant of submission (*pactum subjectionis*). See Cassirer, *The Philosophy of the Enlightenment*, 256.

[271] Hobbes, *Leviathan,* 172 and 178.

[272] Ibid., 173.

other act."[273] The objective requirement to promulgate is combined with the subjective requirement of each individual to be sufficiently informed: "for every man is obliged to do his best to endeavour to inform himself of all written laws that may concern his future actions."[274] The means to take notice of law is not within the grasp of "natural fools, children or madmen"[275] in keeping with the maxim, the: "law made, if not made known, is no law."[276] However, laws' inherent lack of clarity also requires that someone decides in the event of uncertainty, and this fact undergirds the necessity of ensuring the sovereign remains uninhibited by legal constraints.[277]

The rationality that underpins Hobbes' theory of state is also characteristic of Enlightenment belief that the sciences offered a new generative mode of reasoning. This meant an object of enquiry could be best ascertained by genetic and causal reasoning. The object of study, of understanding, was to produce rather than simply abstract, and the task of philosophy was to ascertain the whole through subtraction and addition.[278] This was to be hugely influential in the embodied leviathan of Hobbes' political thought. Ernst Cassirer elucidates:

> For the state too is a "body" (*corpus*), and therefore it can only be understood by analysis of its ultimate components and reconstruction from these…Thus at first Hobbes proceeds by analytically isolating the

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[273] Ibid., 178.

[274] Ibid., 179-80.

[275] Ibid., 177.

[276] He goes on to note the modes of promulgation that were used "in ancient time, before letters were in common use, the laws were many times put into verse, that the rude people taking pleasure in singing or reciting them might the more easily retain them in memory" and citing biblical authority from *Deuteronomy* 11:19, 31:12 and Solomon *Proverbs* 7.3 teaching to children the ten commandments "by discourse both at home and upon the way, at going to bed and rising from bed and to write it upon the posts and doors of their houses and to assemble the people …to hear it read." Ibid.,178.

[277] Hampton provides three rationales elaborated by Hobbes for the insufficiency of laws alone in providing a unified coherent political foundation: that laws can never be rendered completely clear; that they cannot be written so that their application is always obvious; and even if they could self-interest would ensure individuals would seek to interpret them in more advantageous ways for themselves. Hampton, "Democracy and the Rule of law,"17.

[278] Cassirer, *The Philosophy of the Enlightenment*, 254-255.

> elements of his problem; in order to use individual wills as counters in the calculation, he treats them as abstract units without any particular quality. Each will wants the same as every other, and each wants it only for itself.[279]

What Hobbes directs our attention to is how the social covenant can resolve the political problem presented by this divergence of will in nature, and the necessary transition from natural law theories (as revealed by our reason) contrasted with the role of law and state. For Hobbes, there is no state of freedom that pre-exists the state, rather, each individual is pitted against the other and no bonds of community serve to avoid conflict. It is submission to the absolute sovereign that creates the basis for political organisation which in nature cannot subsist due to the natural inclinations of men. While natural rights do exist, they must be abridged, and the individual will must consent to be bound together in the body of the sovereign in order for civil rights to render the best state of affairs in society.[280]

Moral and political philosophy during the Enlightenment would increasingly reject absolutism and come to base ideas of freedom and equality at the heart of theories of state and law. However, the basic generative logic would still find a place in later theories. John Locke is one of the most important Enlightenment thinkers regarding rights to private property and individual liberty. For Locke, unlike Hobbes, the state of nature is not inherently inimical to community, and indeed the ties that bind political associations are contingent on a pre-existing sociability. But the uncertainty of unwritten conventions in this state renders protection of property arbitrary and unsure. The idea of the social contract therefore hinges on the ability of people to know the settled law that was made in common to form the only benchmark for restrictions of individual freedoms and rights.[281] The ruling authority must be guided by promulgated laws since the unwritten law can only be found in "the minds of men" and because: "men being biased of their interest, as well as ignorant for study of it, are apt not to follow it as law binding on them."[282] It is in the state of nature that self-preservation becomes

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[279] Ibid., 255-256.

[280] The idea that civil rights are preceded by original ties as the foundation of all social and political organizations is reshaped by later contractarian theorists.

[281] John Locke, *Two Treatises of Government*, 157.

[282] Ibid., 152.

the over-arching basis for man's conduct and his acquisitive nature in turn means that the protection of private property becomes the priority for any civic Government.[283] The social contract rests on a theory of consent in which inheres some degree of public knowledge of laws since this serves as a constitutive force in undergirding the formation of consent as well limiting legitimate authority.[284] In this construction citizens are themselves the author of the laws providing the nexus that preserves the legitimacy of any coercive effect of law, he writes "every single person became subject equally with other the meanest men, to those laws, which he himself as part of the legislative, had established."[285] Locke thereby links the ends of political society and government with the need for: "an established, settled known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them."[286] Law is thus the only guarantor of the liberty and security of men.

Unlike Hobbes, Locke maintains the voluntary nature of consent rather than submission. Express or tacit consent therefore is an important distinction drawn by Locke insofar as the contract between citizen and state ensures willed consent to be governed: "the difficulty is, what ought to be looked on as a tacit consent, and how far it binds i.e. how far anyone shall be looked on to consent where he has made no expressions of it at all."[287] At this point the constitutive role of epistemology of law which seems to imply some juridical-political thrust is fudged in Locke's schema. He continues:

> And to this I say, that every man that hath any possessions, or enjoyment of any part of the dominions of any government, doth thereby give his tacit consent and is as far forth obliged to obedience of the laws of that government, during such enjoyment, as anyone

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[283] Property for Locke includes property of the person, and although in nature property is held in common, as we begin to labour and cultivate, the acquisition of property and its enhancement leave it prone to becoming insecure, since the state of nature is unsafe and uneasy. Ibid., 53.

[284] Important for Locke's theory is the idea that man is in nature free and therefore according to Locke this means that to consent is to do so willingly. Ibid., 142.

[285] Ibid,. 139.

[286] Ibid., 152.

[287] Ibid., 150.

> under it… it reaches as far as the very being of any one within the territories of that government.[288]

This position places Locke in a quandary – one of which he is perhaps aware as he then attempts to disentangle simply being (in person or possessions) under the remit of a government, and existing, perhaps as denizen from another country, under that same government. His anxious desire to protect property creates an exception in which tacit consent only applies insofar a property ownership is concerned. That aside, he concludes that no one can be considered a member of society without express consent: "Nothing can make a man [a member of society] but his actually entering into it by express consent and positive engagement."[289] As we will see in the idea of the general will in Rousseau, there is a continuing dilemma of how the problem of epistemological-juridical questions of legal knowledge can tie or create the binding force of a juridico-political relationship (at least once natural law and natural reason is no longer applied), without which social contract theories risk falling into hopeless abstraction.

Let us examine how the issue of the will to consent can be conceptualized in the writings of Jean-Jacques Rousseau (1712-1778). Rousseau is both a seminal proponent and shaper of Enlightenment thought, as well as a critic of emerging liberal philosophies of the Enlightenment. Unlike Locke, he situates the institution of private property as a source of inequality and the cause of much of the misery that he rails against. *The Social Contract* seeks remedies for the lack of freedom caused by society's structures and its baleful inequalities.[290] Enslavement exists not as a consequence of the natural state of men but of society; he reminds us in the famous opening sentence of the *Contract*: "Man is born free and everywhere he is in chains."[291] His approach emphasises the importance of the constitutive function of law and the deliberative public processes that give force to the general will. He combines natural law ideas from Grotius with a Hobbesian schema in a radical

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[288] Ibid., 150.

[289] Ibid., 151.

[290] Jean Jacques Rousseau, *The Social Contract and other Later Political Writings,* ed. Victor Gourevitch (Cambridge: Cambridge University Press, 2010).

[291] Ibid., 41.

way.[292] Like Hobbes, he employs the metaphor of the body politic as: "an organized body, alive, and similar to man's. The sovereign power represents the head; the laws and customs are the brain."[293] The body is made up of its citizens or members who animate the body. Unlike Grotius, he denies any doctrine of original social instinct, and contrary to natural law thinkers he considers the state of nature to be a situation in which men are isolated from one another and have as their primary focus their own self-preservation.[294] Despite the seduction of private self-interest, Rousseau's theory does not resort to the necessity of subjection. He does return to Grotius, and counters Hobbes in conceding that a people is only a people that constitutes itself through a free act of will: "that very gift is a civil act, it presupposes a public deliberation…For this act, being necessarily prior [to the election of a King] is the true foundation of society."[295]

This presupposed deliberative freedom sits somewhere between the state of nature and the final act of the constitution of a state. For Rousseau (unlike Hobbes) it is not force that gives rise to right but rather civil liberty is conjoined to moral liberty, which means that the passage from nature to the civil state substitutes desires with reason and moral judgment.[296] Man alienates his freedom and gives it over to the whole community so as: "to find an association that will defend and protect the person and goods of each associate."[297] In Rousseau we see that the social contract is the answer to the problem of imperfect natural freedom. The general will is the basis for all justice and social order since nature cannot provide us with a guideline for the rules that a good society requires:

> Hence for the social compact not to be an empty formula, it tacitly includes the following engagement which alone can give force to the rest, that whoever refuses to obey the general will shall be constrained

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[292] See Cassirer, *The Philosophy of the Enlightenment*, 258 and Rousseau, *Of the Social Contract*, 42-43.

[293] Rousseau, "Political Economy" in *The Social Contract and Other Later Political Writings,* ed. Victor Gourevitch (Cambridge: Cambridge University Press, 2010). 6.

[294] Rousseau, *Social Contract*, 42.

[295] Ibid., 49.

[296] Ibid., 44.

[297] Ibid., 49.

> to do so by the entire body: which means nothing other than he shall be forced to be free.[298]

Moreover, this contract requires the total alienation of all rights of the individual to be given over to the community. What is distinct in Rousseau's formulation of the social contract is the negation of individual rights, which would "destroy its real meaning and content."[299] Rousseau does not jettison the idea of inalienable rights but does not evoke them against the state since inalienable rights that once belonged imperfectly to nature do not inhere in the constitutional state.[300] This absolute alienation is the only way in which genuine equality and freedom can be achieved. From the perspective of knowledge of laws, we can see why the requirement of knowledge for all citizens is an important feature of the deliberative social foundation of the general will, and the equal dissemination of and adherence to the rights and duties that the civil order can provide for.

For political society to come about, the individual effectively gives over their individual right in order to be recognised as a member of a political collective capable of forming a polity ruled by laws. Giorgio Agamben offers an important insight into the dilemma that Rousseau presents us with:

> [T]he important thing is the distinction - basic to Rousseau's political thought – between sovereignty and government and their modes of interaction…[I]n the *Social Contract* the distinction between the general will and legislative capacity, on one hand, and government and executive power, on the other, is restated, but Rousseau now faces the challenge of portraying these two elements as distinct – and yet articulated, knit together, interwoven.[301]

It is in the discussion of political economy that this distinction between executive power and government emerges: public economy (government) and sovereignty must remain distinct, general will is the first principle of public economy and fundamental rule of government.[302] In this conception, the law is the divinely

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[298] Ibid., 53.

[299] Cassirer, *The Philosophy of the Enlightenment*, 262.

[300] Ibid., 264.

[301] Agamben, *Introductory Note on Democracy*, 3.

[302] Rousseau, "Political Economy," 6-8.

inspired arbiter and medium that prevents oppression as opposed to freely given consent:

> this salutary organ of the will of all restores [in the realm of] right the natural equality among men. It is this celestial voice that dictates the precepts of public reason to every citizen, and teaches him to act in conformity with the maxims of his own judgement and not to be in contradiction with himself. It alone is also what the chiefs should cause to speak when they command.[303]

Here an altogether theological paradigm is resituated within the profane political organs of the administrative state. The emanation of government as a distinct but interwoven element of sovereign power is a crucial fulcrum for the tensions and contradictions that we have begun to explore with regard to the binding function of the law epistemology and political sovereignty, and as we will go on to consider via conceptual assemblages developed by Critical Theorists some of the challenges that include much older proto-religious thought. We can observe at this stage how the origins of the turn from classical liberal to neoliberal juridical-economic rationality has a longer and more complex pedigree. Agamben writes:

> In Rousseau, the government or executive power claims to coincide with the sovereignty of law from which it nevertheless distinguishes itself…through these distinctions the entire economic-providential apparatus (with its polarities ordinatio/execution, providence/fate, Kingdom/Government) is passed on as an unquestioned inheritance to modern politics…the most nefarious consequence of this theological apparatus dressed up as a political legitimation is that it has rendered the democratic tradition of thinking government and its economy.[304]

This idea of the shaping of the particular will into the general will in the interest of society governed by laws takes us to a final important construct that owes its evolution to Enlightenment thought: the ideas and ideals associated with autonomy, individual liberty and the distinction between public and private reason that would

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[303] Ibid., 10.

[304] Giorgio Agamben, *The Kingdom and the Glory*: *For a Theological Genealogy of Economy and Government*. Trans. Lorenzo Chiesa with Matteo Mandarini (Stanford California: Stanford University Press, 2011) 275-6.

come to be profoundly influential in political theory in modernity as well as shaping approaches to the promulgation and education of laws in the wider population.

In November 1784, a German periodical *Berlinische Monatsschrift* published a response by Immanuel Kant (1724-1804) to the question: What is enlightenment?[305] He provides the following formula: "Enlightenment is man's emergence from self-incurred immaturity."[306] Enlightenment in his view releases humanity from immaturity such that it will no longer be acceptable to bend to someone else's authority. The immaturity that hinders progress toward enlightenment is self-incurred not for want of understanding or reason but rather as a consequence of the "lack of resolution and courage to use it without another's guidance."[307] Society is not yet enlightened in Kant's estimation, but is in the process of becoming so. By adopting a certain will to progress it could eventually be brought about. What might first appear to the modern mind as a strange idea, the motto '*sapere aude*' 'dare to know', dare to use your own reason, was a bold step. For thinkers of the Enlightenment, this meant placing the capacity to reason for oneself above the authority of church and of absolutist monarchy.[308]

In order to use reason in a mature way, Kant made an important distinction between the public and the private realm. Taking our place in society means exercising our private reason in accordance with what is demanded of us as citizen subjects going about our day-to-day labours and duties.[309] The examples he provides are all professions that nevertheless have a public role – the pastor, the tax collector and so forth.[310] Individual restrictions on freedom that demand obedience by subjects are justified insofar as they do not encroach on the free use of reason in the public realm. The use of reason in the public realm - the universal freedom to

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[305] Immanuel Kant, *What is Enlightenment?* in *Kant Political Writings,* ed. H.S Reiss (Cambridge University Press: Cambridge, 1991), 54 - 60.

[306] Kant, *What is Enlightenment?,* 54.

[307] Ibid., 54.

[308] For the writers and thinkers of the Enlightenment, the greatest sources of their own knowledge, education and authority were the classics and scriptures. They were steeped in the teachings of the church fathers and the classical philosophers. Hazard, *The Crisis of the European Mind*, 29.

[309] Kant, *What is Enlightenment?*, 55.

[310] Ibid., 56-57.

think and reason and share those ideas - is the condition that will eventually augur an enlightened age. According to Kant, Enlightenment is therefore a dynamic process of self-emancipation, from which reason can derive *a priori* rules.[311] These *a priori* rules help us to discern the best constitution and the universal laws that reason can shape toward civic life and provide a fulcrum for societal improvement and peace.

Kant was no political revolutionary, and though he was deeply affected by the events in America, he was also politically conservative and hoped to shape public discourse to avoid the ravages of war. [312] Indeed, the struggle to establish the spirit of law pits law against war.[313] The realms of education and publicity are crucial to the progress of an enlightened, peaceful society. According to Kant: "Popular enlightenment is the public instruction of people upon their rights and duties toward the state to which they belong."[314] However, the task of instruction should not be put in the hands of officials appointed by the state, but into the hands of those whose teaching would be free from restraints. By this Kant means philosophers and writers. In contrast to the private use of reason the public use of reason is a matter of writing and publishing: "by the public use of one's reason I mean that use which anyone may make of it as a man of learning (or scholar) addressing the entire reading public."[315] The 'freedom of the pen' to influence others through teaching and writing is a vital force during the Enlightenment, and as Voltaire suggests is the real: "Palladium of the rights of the people...in general, we

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[311] Kant, *The Metaphysics of Morals,* in *Kant Political Writings*, 174.

[312] He remarks on revolution in the text as follows: "A revolution may well put an end to autocratic despotism and to rapacious power-seeking oppression, but it will never produce a true reform in ways of thinking." Kant, *What is Enlightenment?,* 55.

[313] "For the condition of peace is the only state in which the property of a large number of people living together as neighbours under a single constitution can be guaranteed by laws." Kant, *The Metaphysics of Morals*, in *Kant Political Writings,* ed. H.S Reiss (Cambridge University Press: Cambridge, 1991), 174. To this extent Kant follows along the lines of Montesquieu - limited in scope but wide application assertion of the rule of law, which Shklar describes as follows: "The ultimate spiritual and political struggle is always between law and war. Rome chose war and lost everything. If France were to choose world monarchy and war instead of the English path to liberty and law, it too would be doomed to a deadly despotism." *Political Theory and The Rule of Law*, 5.

[314] Kant, *The contest of Faculties,* in *Kant Political Writings* 186.

[315] Kant, *What is Enlightenment?*, 55.

have a natural right to use both our pen and our tongue at our own risk."[316] From the perspective of law this freedom of thought ought for Kant not only to include freedom of religious thought but also public criticism of laws, even if, as private citizens we must do our duty in respect of the laws. Writing about the Frederick the Great, Kant suggests: "there is no danger even to his legislation if he allows his subjects…to put before the public his thoughts on better ways of drawing up the laws even if this entails a forthright criticism of the current legislation."[317] This was a remarkable suggestion at the time and one that was fairly quickly quashed by new edicts on censorship that followed the death of Frederick I and the accession of Frederick Wilhelm II.

Kant's use of 'the public' also appears at a time when there was a growing concern with freedom of the press. It is worth noting the medium that this interjection takes - as a publication in a periodical journal. Just shortly before Kant wrote his piece, another commentator, Wekhrlin, was published in the same periodical in 1784. He writes:

> What must it have been like in the times before printing presses existed! Tyrants had no bridles, the people no refuge. Vice could grow impudent, without becoming red with shame. Virtue knew no means of sharing its suffering, or gaining the sympathy of society. The laws had no critics, morals had no supervisor, reason was monopolized. Providence spoke: let the human race become free! And publicity appeared.[318]

It is in this milieu that men of letters crafted their ideas and turned them into a potent conduit for public discourse and deliberation. This deliberative and critical public discourse had enormous import for the way in which relations between individual and state, and the organization of constitutional government would be conceived. If Enlightenment was to bring about rational autonomy, one of the implicit demands it makes is to use reason to create one's own laws rather than simply obeying the authority of others. The notion of autonomy as self-imposed law entails a two-fold move: the subjective shaping of the autonomous individual

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[316] Cf Cassirer, Voltaire, *Dictionnaire Philosophique*.

[317] Kant, *What is Enlightenment*?, 59.

[318] Wilhelm Wekhrlin, *das graue Ungeheuer*, (1784-1787), 196. Cited in Kant, *Political Writings*.

via the will to reason, and the constitutive political status of public reason in shaping authority. Modern man, as Foucault's critique of Kant's text opens up, must face the task of producing himself, of constituting himself as a subject.[319]

We come to summarise the ideas emerging through our excursus that link public legal education, and more broadly public knowledge of laws, with the rule of law. We began with an exploration of contemporary discourses linking public legal education to the rule of law. The use of legal knowledge in both narrow or wider readings sustains a shift in the orientation of rule of law doctrines toward competitive liberalised and globalised markets. While ostensibly deploying public knowledge of the law as a legitimising force, the legitimation becomes less a process of constraining the power of government than a veridiction: a means of creating and shaping an altogether new rationality of government. The readings suggest a convergence of rule of law, public awareness of the law with the demands of market-driven values and a certain rationality of economy associated with the neoliberalism of the last thirty years.

Substantive theories agree that there must be more than simply formal construct if the ideal of the rule is to have a meaningful role in the lives of citizens. The hedging about of the ideal of the rule of law with extrinsic values, such as the extent to which the rule of law promotes the worthy goals of dignity or freedom, for example, and the extent to which the jurisprudence of human rights provide a positive, if imputed, standard of constitutional norm for rule of law positions, is one route to solving the problems inherent in liberal constructions.[320] However, the framing of laws around the liberal individual has also served to erode the validity of the collective and public realms. These tendencies, as some critics of development orientated approaches have commented, have also usurped aspirations for the rule of law as a mechanism for peace-building and protection of human rights by providing a medium for global investment capital. Here we noted that teaching of human rights and liberal property regimes together formed the emphasis of global expansionism in the legal realm. This form of teaching

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[319] Foucault, "What is Enlightenment?" in *The Foucault Reader*, ed. Paul Rabinow (New York: Pantheon Books, 1984), 39. As we will consider in the final chapter of the thesis, Kant's ideas would be enormously influential in the development of citizenship education.

[320] See for Raz, *The Rule of Law and Its Virtue*, in The Authority of Law: Essays on Law and Morality (2012).

however, despite serving a rubric of democtractisation have substantively moved away from a critical understanding of how citizens themselves shape and form the body politic. Instead these paradigms focus on the constituted elements fo the executive state functions. Promulgated laws need to be understood to foster cohesion and order.

The inter-war years produced a crisis of capitalism that would have enduring consequences for the re-evaluation of classical liberal doctrine. The coincidence of liberal political and legal thought with the rise of capitalism augured industrialisation and with it all the miseries of long hours, poor conditions and endemic poverty. Even liberalism's most fervent proponents were moved to curb the tendencies of liberal economic policy. According to John Stuart Mill, capitalism seemed to give to the least deserving the greatest reward.[121] Ensuing social welfare initiatives including social security, working hours, pensions and universal education came about as means of ameliorating the effects of poverty, and classical liberalism consequently gave way to the social welfare state. Early constitutional theorists such as Dicey (and later Hayek) warned against these developments as inimical to the rule of law. Specifically, the expansion of administrative actions resulting from the developing welfare state and the loss of overview by the ordinary courts of the bulk of administrative actions threatened the orderly rule of law. As theorists increasingly remark the decline of the rule of law in the face of social welfare and administrative courts, we nevertheless noted the populist rhetoric growing in rule of law debates alongside social policies directed toward enhancing public education about the laws for the purpose of liberalising markets and underpinning price competition.

However, classical liberalism does not inevitably lead to the conditions of our contemporary situation in which market orientated principles shape the priorities for rule of law objectives. Enlightenment thought engaged more directly with political theology so that an undercurrent of political theological ideas held in close proximity the idea of God's providential order, natural law and the links to natural reason. These facets agree on the importance of publicity or promulgation of law as garnering the legitimacy of sovereignty. Classical liberal theories both eschewed *and* internalized political theological accounts of natural reason in their constructions of the sovereign state. John Locke and Jean-Jacques Rousseau (in different ways) grasp the importance of promulgating law as an aspect of the

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[141] Tamanaha, *Rule of Law*, 65.

general will and the formation or constitution of consent to be governed above and beyond what natural law can offer. The reading traces the classical liberal foundations for the rule of law with its adherence to doctrines of liberty and the social contract that provides the basis for the constitution of government by consent. In order to constitute the self as an autonomous subject there are two further movements to consider during this period. One the one hand, the idea or ideal of the creation of laws moves away from a theologically determined one, from the rule of the church and scripture. On the other, we see the disavowal of law which is dictated by an absolutist state, by the will of the ruler alone. What we can discern are some of the continuities and discontinuities from classical versions of liberalism *vis-a-vis* contemporary rule of law ideas.

An element to keep in view when considering these new drivers for public legal education is the distinction between the juridico-political function of legal knowledge *vis a vis* the constitutive form of the state, and the epistemological-juridical function of foreknowledge of laws in relation to the ascription of culpability for crimes or breach of duties. Insofar as the rule of law is applied via the medium of the courts, this emphasises the epistemological-juridical (and broadly administrative) function of public legal education. As the market increasingly informs a rationality of state, we can see how early rule of law theories contained the seed of the tendency to shape the rationality of the subject and of the citizen subject in differing ways in Locke, Rousseau and Kant. Legal knowledge is intrinsic to this shaping of private and public reason toward the constitution of government. But the form of economic rationality that is distinctive of neoliberalism was not fully-fledged in classical thought. This question did not contour the ambition of liberalism either as an economic or political doctrine; the former sought only to free the economic subject, the latter to free the political and civil subject. Neither raised the market itself as a principle of all life or of government.[322] The new paradigms for the rule of law and the way in which public knowledge and discourse on the law is deployed serves rather to instrumentalise them toward entirely new configurations of the arrangements between citizens and the government. In contemporary frames it appears citizens are to be taught about the law to ensure they are effectively able to take up their role as competitive consumers. Under the conditions of rapid juridification, and as distinctions between public and private, criminal and civil spheres collapse, the problem of

[322] Brown, *Undoing the Demos*, 61.

public knowledge has stubbornly persisted. Moreover laws become a potent force in shaping the desires and aspirations of the citizens to whom they are directed. We will move in later chapters to consider how the School of Critical Theory challenged the liberal ideal of the rule of law and served as an inspiration for critical pedagogical philosophies. We will also analyse the fundamental problem of the differentiation between the exercise of power from its legitimation raised by Walter Benjamin's critiques of liberal democracy.[323]

[323] See also *Democracy in What State*? (New Directions in Critical Theory) by Giorgio Agamben, Alain Badiou, Daniel Bensaid and Wendy Brown (London: Verso, 2012).

3

Fated orders: Law, myth and guilt

Judged from the standpoint of fate, every choice is blind and leads headlong into disaster

Walter Benjamin[324]

The chapter begins by introducing the interdisciplinary strands of Critical Theory that emerged from the *Institut*, home to a group of predominantly German Jewish thinkers including Max Horkheimer (1895-1973), Theodor Adorno (1903-1969) and more distantly, Walter Benjamin (1892-1940). The analysis traces the birth of Critical Theory in the Germany of the inter-war years and the vision of interdisciplinary social theory that the *Institut* fostered. It is worth noting the contiguity of the Frankfurt School and the German Ordo Liberals that we encountered in the previous chapter. Each group of thinkers, in their own ways, was attending to what they construed as the irrationalities of capitalist society. As Foucault noted, both schools took up the challenge posed by Max Weber wherein law is implicated in the transformation of capital, "the movement from capital to capitalism, from the logic of contradiction to the division between the rational and the irrational."[325] Moreover, as the century unfolded and Nazism saw many of the members of both schools forced into exile, the contingencies and social and political urgency with which both sought to theorise anew the inheritance of liberal Enlightenment are important to keep in mind.

Critical Theory and the writings emerging from the *Institut* would subsequently come to have a significant impact on educational theory both in Europe and America, a subject that will be explored in the final chapter of the thesis.[326] The publications of the *Institut* were substantial, heterogeneous and

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[324] "Goethe's Elective Affinities," *Selected Writings,* Volume 1, 1913-26, eds. Marcus Bullock and Michael W Jenning (Belknap Press: Harvard University Press, 1996), 309.

[325] Foucault, *The Birth of Biopolitics*, 105-6.

[326] For an introduction to the links between Critical Theory and critical pedagogy see Nigel Blake and Jan Masschelein, "Critical Theory and Critical Pedagogy" in *The*

diffusely received. The chapter will therefore limit the scope of the literature by offering an overview of Critical Theory and its methods as described by its key contributors, followed by a focus on these thinkers' reception of liberal legal theory during the fall of the Weimar Republic. This two-stage circumscription of the literature from the *Institut* aims to offer the most relevance to the legal theoretical considerations of the thesis and helps to elucidate the legal educational concerns that we will subsequently move on to consider.

In preceding chapters, we considered the contested space wherein legal knowledge in the public domain is linked to constituent power, to the constitutive role of the citizen *vis a vis* the law and the modern state.[327] Two primary rationales underpin the contemporary debates on public legal education. The first is the basic constitutional premise that obedience to laws implies that knowledge of laws to which citizens are bound should be accessible to all of the citizens attached to a particular legal order (the constitutive function of public knowledge).[328] The second and related rationale addresses the capacity of individuals to have sufficient specific knowledge of their rights and duties in order to secure legal protection and to assess individual culpability insofar as a lack of knowledge of a legal rule procures a defence or mitigation in a particular case (the constituted function of public knowledge).[329]

Blackwell Guide to the Philosophy of Education, eds., Nigel Blake, Paul Smeyers, Richard Smith and Paul Tandish, (London, Blackwell, 2009), 38-56.

[327] The socio-legal literature in the legal needs tradition is explored in detail in Chapter One; however, to recap, this growing body of evidence links the nature and impact of low levels of legal knowledge with the failure to gain legal redress. This in turn has implications for the rule of law, as developed in Chapters Two and Three.

[328] As a general premise of the rule of law, this proposition simply states that people are entitled to know in advance what, as a matter of law, they are (or are not) empowered to do. See Ian Mcleod, *Legal Method* (London: Palgrave Macmillan, 2013), 62.

[329] For a comparative perspective on the doctrinal consideration, see Douglas N Husak, *Ignorance of Law* (New York: Oxford University Press, 2016). The historical origins of the association of ignorance with law can be found in medieval Aristotelianism as well as in Aristotle, and on the other hand, in Augustine. In Roman and Civil law *ignorantia iuris* is defined as ignorance (lack of knowledge) or error (false knowledge) concerning the existence or meaning of a legal norm. The broad rule establishes that ignorance of fact is excusable, whereas ignorance of law is not. See Samuel Parson Scott, *The Civil Law, including the Twelve Tables, the Institutes of Gaius, the Rules of Ulpian, the Opinions of*

The following study takes up considerations of the rule of law and the associated problem of public understanding of the law developed in the previous two chapters through an alternative theoretical framework, for which we will enlist primarily the work of Walter Benjamin (1892-1940). Benjamin is perhaps one of the most enigmatic cultural critics associated with what became known as the Frankfurt School: the Institute for Social Research (*die Institut für Sozialforschung*) established in Frankfurt am Main in 1923.[330] As the foremost thinker attached to the *Institut* whose theories have been developed with an antinomian and anarchist orientation, the use of Benjamin's critical exploration of law may appear an odd choice.[331] However, Benjamin's oeuvre offers a number of

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Paulus, the Enactments of Justinian, and the Constitutions of Leo. Translated from the original Latin, edited, and compared with all accessible systems of jurisprudence ancient and modern, (Cincinnati: Central Trust Co.,1932), Volume 3, 239. For the contemporary canon law of the Catholic Church see more generally Girard M Sherba, *Canon 1096: Ignorance as a Ground for Nullity,* (Doctoral Dissertation, Saint Paul University, 2001), http://www.bookpump.com/dps/pdf-b/1121342b.pdf.

[330] For a critical overview of the work of the Frankfurt School see the collection of essays in Jay Bernstein ed. *The Frankfurt School: Critical Assessments*, Volumes I-V (London: Routledge, 1994). For a history of the *Institut* see Martin Jay, *The Dialectical Imagination: A History of the Frankfurt School and the Institut of Social Research* 1923-1950 (University of California Press, Berkley, 1973) and Rolf Wiggershaus, *The Frankfurt School*: *Its History*, *Theories*, and *Political Significance*, trans. Michael Robertson (*Cambridge*, *MA*: *MIT Press, 1998)*. For a focus on Theodor Adorno and Walter Benjamin and their association with the Institute see Susan Buck Morss, *The Origin of Negative Dialectics: Theodore W Adorno, Walter Benjamin, and the Frankfurt Institut* (New York: The Free Press, 1979). Hereafter the abbreviated term *Institut* will be used in the text.

[331] On Benjamin's association with antinomianism, see David Kaufmann "Beyond Use, Within Reason: Adorno, Benjamin and the Question of Theology", *New German Critique*, No 83 Special Issue on Walter Benjamin (Spring - Summer 2001): 151-173. In his fragmentary exposition on the right to use force written just before the *Critique* in 1920, Benjamin describes the denial of the right of the state and the individual to use force as 'ethical anarchism' which he considers to be fraught with contradictions as a political programme, but retains significance as moral action. Walter Benjamin, "The Right to Use Force", in *Selected Writings,* Volume 1, 231-234. See also James R Martel, "Anarchist All the Way Down: Walter Benjamin's Subversion of Authority in Text, Thought and Action", *Parrhesia Journal,* Number 21 (2014): 3-12 https://www.parrhesiajournal.org/parrhesia21/parrhesia21_martel.pdf [Accessed 9th March 2018]. On the wider group of Jewish writers with whom Benjamin was associated tending

crucial insights into some of the most troubling and sustained tensions that arise in the context of public legal education, both in its theoretical and practical forms.

A review of Critical Theory associated with the *Institut* is followed by a close reading of Walter Benjamin's 1921 essay, *Critique of Violence*.[332] The essay has received substantial attention for its provocative and often obscure reading of law and violence. Of particular interest for the purposes of a critical evaluation of public legal education is Benjamin's suggestion that ignorance of laws (*Unkenntnis* in the German) and guilt are operative preconditions or requirements of legal ordering.[333] The *Critique of Violence* brings myth and guilt to the fore, asserting how law's foundations are secured.[334]The alignment of law with fate serves to show how mythic violence and legal violence coincide in establishing uncontrolled rule over life.[335] This uncontrolled rule is mediated by a juridified world in which law has come to colonise all aspects of life.[336] Benjamin emphasises the ambiguity of laws and the maxim that ignorance offers no defence in both ancient and modern

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toward anarchism see Michael Loewy, *Redemption and Utopia, Jewish Libertarian Thought in Central Europe: A Study in Elective Affinity* (Stanford: Stanford University Press, 1992).

[332] Benjamin, "Critique of Violence", 236-252.

[333] Ibid., 249.

[334] Myth is a core motif in Benjamin's philosophy that he uses to expose quotidian reality through archaic forms of thought that have been marginalized from philosophical-historical enquiry. On the concept of myth in Walter Benjamin's work see Winfried Menninghaus, "Walter Benjamin's Theory of Myth", in *On Walter Benjamin, Critical Essays, and Recollections*, ed., Gary Smith, (Cambridge, Massachusetts: The MIT Press, 1988).

[335] Insofar as it is impossible to locate a precise time at which juridification becomes the norm, as Zartaloudis points out, this is a feature of late modernity, and can be compared to an earlier posited law in which human actions were separable from legal actions – or as events that could provide the basis for a legal evaluation within a specific jurisdiction as 'actiones'. See Zartaloudis, 'Violence without law', 170-1.

[336] As Teubner suggests, this condition of law is not simply a matter of the proliferation of laws but of the "bureaucratization of the world". See "Juridification, Concepts, Aspects, Limits, Solutions" in Juridification of Social Spheres: A Comparative Analysis in the Area of Labor, Corporate, Antitrust and Social Welfare, ed. Gunter Teubner (New York: Walter de Gruyter, 1987), 3-48. Teubner traces the first use of the term juridification (*Verrechtlichung*) to Otto Kirchheimer, a member of the *Institut*; the term was used to criticise the use of labour law to quell political class conflict. Ibid., 9.

legal systems. This illuminates how law in modernity has its origins in the construction of boundaries between the secular and profane, between life and death, and whose deliberate and necessary ambiguity ensures infringement of these respective spheres as conditions of their continued operativity. The analysis ultimately points to a precondition of law in which guilt is the cipher for the capture of life in law.[337] Shifting the centre of law's legitimation away from the presumption of the intelligibility of law as required by rule of law doctrine toward an extortive force that exists as a consequence of law's ambiguity and away from innocence as a presumptive principle of legal operativity radically alters the educational locus we have so far considered.

In order to grasp what is at stake, we will need to proceed keeping two distinct registers in mind. One is of the socio-legal constructions of legal knowledge and navigation of the legal system as already explored in empirical legal needs studies. These studies point to the absence of public knowledge of the law and linked access to justice issues in securing substantive and procedural protection. The other register concerns a historico-philosophical development of guilt and ignorance, which brings together a constellation of concepts including fate and mythic violence. Together these two registers illuminate overlapping or interwoven difficulties for theoretical analysis that will serve to underpin the educational concerns that follow, and as we will go on to show in the final chapter of the thesis, sustain very different educative orientations.

These readings provide a very different perspective on the problems we have encountered of juridification, or proliferation of law and of the possibility for a progressive liberal reading of the rule of law. By unearthing a framework of violence, myth and the suffocation of alternatives modes of ethical and social relation, Benjamin ask us to reassess our understanding of legal modernity and to consider abandoning its application as a means of achieving either the peaceful resolution of disputes or of establishing the basis of democratic governance. The expectation of orderly, peaceful and equitable modern law is thereby fundamentally brought into question. Rather than the promise of freedom,

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[337] Giorgio Agamben describes this as follows: "The cipher of this capture of life in law is not sanction (which is not at all an exclusive characteristic of the juridical rule) but guilt…in the original sense that indicates a being-in-debt – *in culpa esse*." Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Palo Alto: Stanford University Press, 1998), 26.

autonomy and progress with which Enlightenment thought and Enlightenment legality is associated, what Benjamin and his collaborators at the *Institut* point to is the increasing oppression and loss of freedom that legal modernity augurs for all but the very few.

Critical Theory and the Frankfurt School

We begin by considering the problems presented by what the *Institut's* thinkers construed as 'traditional theory' as opposed to Critical Theory. The need for an alternative theoretical model centres on their accusation that traditional theory is not only impotent in the face of social and economic injustice, but is in fact complicit in its perpetuation. Their diagnosis profoundly implicates a liberal account of law. Law belongs to a wider shift in which the rationalities it constitutes, of equality, rights, freedom and so forth produce antinomies that subvert or eviscerate the lived experiences of alienation, marginalisation and oppression brought about by the economic-juridical order of law. The stark separation of fact and value, description and prescription performed by legal reasoning attempts to erase its own self-constituting arrangements and the constitutive role that it has in producing the categories and the subjectivities that it then deploys. Yet this operation must at all cost remain hidden if the law is to maintain the appearance of deriving its authority from some other (more legitimate) source than brute force of superior power. In a secular world, the necessity of producing false sovereigns is crucial to the continuation of law's hegemony and involves a process of smoothing over contradictions and discontinuities that also radically limit the ability to imagine different ways of being, living and relating. This undermines the pursuit of justice insofar as it belongs to a rationality that has lost any wider value beyond self-preservation and the pursuit of technological and economic progress. Their scathing attack on positivism as such and legal positivism as its corollary provides a lens with which to reconsider the assumptions we have encountered about the progressive and emancipatory potential of public legal education. We will look in greater depth at the problem that positivist or instrumental rationality poses for education via the

writings emerging from the *Institut* in the next chapter. The present discussion focuses on critiques of liberal legal theories and their implications in the political context of the Weimar Republic. For the purposes of the argument at this stage, the critique of the positivist and putatively progressive ideas of the liberal rule of law offer the opportunity to re-evaluate the stabilising and pacifying force attributed to the rule of law in contemporary society. Instead, a technocratic and economist-centric rendition of law becomes the handmaid of Enlightenment logic. The substitution of meaning, substance and suffering with utilitarian value, quantification and the primacy of universal rule relegate all unscientific thought to the margins of philosophy, and with it the pursuit of social justice.

For Critical Theory's proponents, its transformative potential lies in its fundamentally negative orientation rather than offering a positive theory of improvement for elements of the structure of society. Unlike traditional method, critical method fosters a stance that "is suspicious of the very categories of better, useful, appropriate, productive, and valuable, as these are understood in the present order, and refuses to take them as non-scientific presuppositions about which one can do nothing."[338] Negation thus seeks to insist on the non-identity of the actual and rational, and therefore to challenge the given social order. As a result of this negative orientation, Critical Theory lays no claim to neutrality but situates its only evaluative criterion as the overcoming of social injustice with a deep antipathy to accepting the rules of conduct with which society furnishes its members. For Horkheimer, the inspiration for this negative drive would derive from a tradition of philosophical pessimism, following a decisive shift away from Marx. Moreover, for Horkheimer, Adorno, and Benjamin this would also entail an exposition of negative theology closely associated with a strand of Jewish messianism in which the end of suffering and a redeemed world anticipates a radical break with an orthodox understanding of historical progress:

> [Horkheimer's] messianism, as that of Benjamin is not a positive and simplistic one; Horkheimer's historical pessimism ruins the optimistic conception of culture, and dissolves the foundation for any positive utopian position. If in principle thought and culture are mainly interpreted as man's oppression of nature (and of nature within man), then there is no room for progress towards the utopian stage. Like Benjamin, the later Horkheimer has showed that action in the name of and for the sake of progress instead led necessarily to the abolishment

[338] Max Horkheimer, "Traditional and Critical Theory" in *Critical Theory: Selected Essays,* trans. Matthew J Connel (New York: Continuum, 2002), 206-207.

> of the free subject and to the oppression of man by the system of culture.[339]

This orientation is also a crucial fulcrum for the argument pursued in the thesis, both in terms of a critique of law and of education. What emerges from a critical theoretical perspective is a negative or even destructive process, clearing the conceptual ground so that alternative framings of law and education can flourish. Negative critical enquiry eschews the presumption that teaching law to people who have been excluded or marginalised is a valuable and productive tool for inclusion into the social and economic order. Once this presumption is set aside, an urgent task for public legal education theorists and practitioners is to reflect on the fundamental purpose of public legal education and how these goals are instrumentalised in teaching practices. Moreover, this also begins to elucidate how the law constitutes and shapes teachers and students that, in turn, come to be constitutive subjects of the legal order. This critical awareness is a prerequisite for opening a space for transformative legal education.

The Frankfurt School of Social Research was established as an adjunct to the University of Frankfurt in the 1920s. Responding to the limitations of orthodox Marxism at a time of political turmoil and the subsequent rise of National Socialism, the *Institut*, led by Max Horkheimer,[340] set out to foster a particular paradigm of Critical Theory. Their theoretical endeavours had to be adequate to what they saw as the most urgent task of social enquiry, which was to break with the prevailing conditions of authoritarian closure and domination in social

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[339] Ilan Gur-Ze'ev "Walter Benjamin and Max Horkheimer: From Utopia to Redemption" *The Journal of Jewish Thought and Philosophy* Volume 8, Issue 1 (1998, Volume 8: Issue 1): 6. Ze'ev further describes these influences as follows: "In the second stage of the development of their work, both thinkers offer a counter-educational praxis whose religiosity is fertilized by the alarming recognition of the impossible realization of the imperative of human advance toward God, absolute Spirit, or Reason; toward the progressing true knowledge of genuine human interests and realization of their potentials." In Illan Gur Ze'ev, *Critical Theory, Critical Pedagogy and the Possibility of Counter-Education*, (Sense Publishers Rotterdam, The Netherlands, 2010), 28.

[340] The first director, Carl Gruenberg, an Austrian Marxist, initially pursued a much more orthodox Marxist study programme but was replaced by Max Horkheimer following a stroke in 1928. Howard Eiland and Michael W. Jennings, *Walter Benjamin: A Critical Life* (London: The Belknap Press of Harvard University Press, 2014), 426.

relations.[341] Scholars from a number of disciplines, including Herbert Marcuse, Max Horkheimer, Friedrich Pollock, Theodor Adorno and Walter Benjamin,[342] sought to contribute to this interdisciplinary social analysis and to a Western European Marxist philosophical tradition that could resist the social and economic order of capitalism and, more fundamentally, challenge what they considered to be the most pernicious elements of Enlightenment rationality. Their critique of Enlightenment rationality sought to show how modern technocratic and economic rationality subverts rather than serves the Enlightenment's claim to free the world from religious and metaphysical dogma.[343] Their pessimism about the cultural and societal conditions centred on multiple forms of injustice, and responded to the exigencies of their time. This group of writers, predominantly Jewish, developed their ideas in the light of failed revolution, the collapse of the Weimar Republic the rise of National Socialism, and the spectre of Holocaust. The task of Critical Theory was therefore an urgent one. It aimed to break with the closures both in thought and in the related concrete material conditions of oppression that arose in a period of extreme political and social upheaval.

Horkheimer describes a form of theory that can provide a critical analysis of the prevailing social, economic and psychological conditions in his 1937 essay "Traditional and Critical Theory," published in the *Zeitschrift für Sozialforschung*.[344] In answer to the question 'what is theory?' Horkheimer contrasts 'traditional' with Critical Theory. He contends that traditional theory is "stored-up knowledge, put in a form that makes it useful for the closest possible description of facts" and aims at embracing all objects within a universal systematic science.[345]

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[341] Max Horkheimer, "Traditional and Critical Theory" in *Critical Theory*. For the development and correction of Marxist thought by Frankfurt *Institut* theorists, see Jay, *The Dialectical Imagination*, 41-85.

[342] It should be noted that Benjamin, while immensely influential to the research programme established by Horkheimer, contributed more loosely to the work of the *Institut*, nevertheless becoming a primary contributor to the journal *zeitschrift fur sozialforschung* when Horkheimer took over the directorship of the *Institut* in 1931. Eiland and Jennings, *A Critical Life*, 333 and 427.

[343] Theodor W Adorno and Max Horkheimer, *Dialectic of Enlightenment,* trans. Edmund Jephcott (New York: Verso, 1979) 3-9.

[344] Horkheimer, "Traditional and Critical Theory," 188-9.

[345] Critical theory insists on the continuing importance and validity of empirical research. However empirical research requires the theoretical framework which only a

The requirements of a traditional theoretical system, according to Horkheimer, serve a functional unity that subsumes rather than extricates the universal and particular so that "all parts should intermesh thoroughly and without friction. Harmony, which includes lack of contradictions, and the absence of the superfluous," are its conditions.[346] The subsumption of verifiable facts or perceptions within conceptual structures of knowledge give traditional theory its validity, but in doing so erases the contradictions within which concrete conditions of oppression are experienced.[347] In contrast to traditional theory, the task of a truly critical theory is the negation of rationalist instrumentalism's tendencies. Those tendencies arise out of the historical development of societies dominated by industrial production techniques that in turn produce theoretical formulations that are intractably caught up in the self-same modes of production and economic rationality. Moreover, these forms of rationality render the urgent task of the critique of social problems impotent. Social critique should offer an alternative paradigm to scientism by analysing the tensions and contradictions it encounters. In the face of the total process of production, social critique, according to Horkheimer, had failed in its critical task.[348]

Horkheimer maintains that science need not necessarily serve progressive ends and can just as readily be placed at the service of the most regressive tendencies. Indeed, science "can be used to serve the most diabolical social forces,

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critique that has society as its object can offer; Horkheimer "Critical Theory", 188- 206. For an overview of the empirical work of the *Institut* see Jay, *The Dialectical Imagination,* 219-252.

[346] Ibid., 212.

[347] The critique of scientism and the erasure of contradictions and antagonisms that are inherent to Traditional theory closely follows the method of materialist dialectic as set out by Georg Lukács in his 1923 book, *History and Class Consciousness: Studies in Marxist Dialectics*, (Berlin and Neuwied: The Merlin Press), 3-11. Lukács was one of the attendees at the *Erste Marxistische Arbeitswoche* (First Marxist Work Week) that was organised in Thuringia by Felix Weil. This informal gathering of intellectuals, also attended by Friedrich Pollock, predated the establishment of the more permanent *Institut*. The reception of Lukács was to be decisive for both Adorno and Benjamin in their subsequent development of a theory of reified logic and the necessity for the cognitive method of dialectical materialism, see Buck-Morss, *The Origin of Negative Dialects*, 25- 28.

[348] Horkheimer, "Traditional and Critical Theory", 213 and Adorno and Horkheimer, *Dialectic of Enlightenment*, xii.

and scientism is no less narrow-minded than militant religion."[349] Science and its positivistic logic frame the social, historical and economic horizons within traditional theory, creating reified ideological categories in which rational cause and effect, action and reaction, become entirely unreflexive of their own constitutive role in the creation of the present social reality. Rather than a construction of history and reality through contingency and antagonism, traditional theory posits necessity and mechanistic progress as the historical conditions of the present. Horkheimer and Adorno would go even further to suggest that this predicament not only forecloses any attempt to bring about change, but quite contrary to Enlightenment theorists' belief in rational human ingenuity as the inevitable source of progress, Enlightenment rationality had instead taken on an increasingly irrational character.[350]

Critical Theory applies a mode of immanent critique that places theory and practice, subject and object, past and present into active and dynamic relation in creating meaning and producing reason. Christodoulidis provides a succinct account of what Critical Theory seeks to achieve:

> On the one hand, theory equips practice with its coordinates; on the other, practice situates and re-situates theory within new coordinates that will inform its possibilities anew. A dialectic develops between theory and practice in a dynamic process, that is caught up in history and in the making of history. The distinction theory/practice installs a border between the two terms, across which the dialectic operates. The boundary is, so to say, that which gives traction. Theory measures itself against its ability to rationalise practice, and practice emerges as meaningful with the help of theory. The dialectic keeps them combined and in tension. Any asymmetry that installs itself between theory and practice can work both ways. A deficit on the pole of practice leaves theory as mere contemplation of, and apology for, the

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[349] Max Horkheimer, *The Eclipse of Reason*, (New York: Continuum, 2004), 49.

[350] The distortion of the role of reason in securing the collective interests of society occurs as a consequence of the alienation of labour and takes on a fatalistic and irrational form, according to Horkheimer: "The collaboration of men in society is the mode of existence which reason urges upon them, and so they do apply their powers and thus confirm their own rationality. But at the same time their work and its results are alienated from them, and the whole process with all its waste and work-power and human life, and with its wars and all the senseless wretchedness, seems to be an unchangeable force of nature, a fate beyond man's control." Horkheimer, "Critical Theory", 204.

> status quo; a deficit on the side of theory leaves practice under-determined.[351]

One of the most striking examples of Critical Theoretical method is employed by the *Institut's* two leading theorists in their co-authored *Dialectic of Enlightenment* in 1944, just after their flight into exile.[352] As Gillian Rose notes, the book exemplifies Critical Theoretical method by employing a dialectical strategy through exaggerated conceptual pairings that are then analysed by the authors, with the aim of drawing out the problems they present and to release the potential for both reflection and action.[353] The *Dialectic* offers a radical diagnosis of the conditions and origins of social and economic oppression. The authors claim that the increasing irrationality of modern capitalism exhibits the influence of forms of thought that stem from much earlier societies, in which myths created and framed normative principles. Their analysis of the origins of law and the intensification of oppression provide alternative ways to conceive of law's evolution and its ties to the positive construction of humanity's progress through history. "Domination, in becoming reified as law and organization, first when humans formed settlements and later in the commodity economy, has had to limit itself. The instrument is becoming autonomous: independently of the will of the rulers, the mediating agency of mind moderates the immediacy of economic injustice."[354] This critique of the function of legal reasoning both in archaic and modern contexts points to its capacity to be shaped by and in turn to shape the world at a remove from wider objective values or collectively determined goals. Governance begins to emerge from this analysis as a mere afterthought of rationality, aimed at economic

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[351] Emilios Christodoulides, "Critical Theory and the Law: Reflections on origins, trajectories and conjunctures", forthcoming in *Research Handbook on Critical legal Theory,* Christodoulidis, Dukes, Goldoni (eds.) Edward Elgar publishing, 2019), 7.

[352] Gillian Rose suggests that the chapter "The Concept of Enlightenment" is primarily attributable to Horkheimer although Adorno may have contributed, while the "Excursus I: Odysseus or Myth and Enlightenment" and "The Culture Industry: Enlightenment and Mass Deception" are attributable to Adorno. *Judaism & Modernity: Philosophical Essays* (Oxford: Blackwell, 1993), 59 fn18.

[353] Rose, *Judaism and Modernity*, 59. Buck-Morss also points to Adorno's technique of setting out extremes to illuminate the contradictory feature of truth rather than to eliminate contradictions as untrue. *The Origin of Negative Dialects*, 100.

[354] Adorno and Horkheimer, *Dialectic of Enlightenment*, 29

dominance. These critiques bear on the way in which it becomes apparent that increasing understanding of law alone is ultimately an insufficient basis for transformative action. This places a renewed emphasis on developing strategies for legal education in which theory and practice are dynamically engaged and in which the capacity to act differently in the world undergirds the intervention. The urgent demands of critique point to the challenge of transformative reason that shapes alternative imaginaries, as well as active interventions in the past and future, in the legal and political and in the secular and theological construction of the present social order.

This awareness weighs in the dialectic of myth and enlightenment that Adorno and Horkheimer deploy. Ancient myths narrate the ways in which earlier societies understood themselves and the world around them, as well as revealing the bonds and relations between the profane and the sacred.[355] Crucially, as Levi-Strauss maintains, the world of myth served societies in which the need to form a total understanding of the world enabled individual phenomena to become intelligible, and this drive to universalism begins from the earliest human cultures.[356] For Adorno and Horkheimer, this much earlier tendency toward universalism suggests that, while Enlightenment rationality had aimed at releasing humanity from a world ruled by both religion and myths, it remained inexorably identified and intertwined with mythology. The dialectic reveals both the primeval history of the modern subject and the subject's relation to the world. The effect of this entanglement, they contend, is critical and ethical impotence, as well the legitimisation of an intolerable status quo.

The continuing symbolic power of myth in modern forms of thought illuminates the process through which man seeks to release himself from the bonds of nature and the arbitrary rule of fate, and in so doing objectifies the world. All things are treated as objects and the world is thereby presented as a positivist, empirically calculable reality (that which simply *is*). In Excursus I of the *Dialectic,* the dialectical rise and fall of myth and Enlightenment is analysed through a reading of Homer's *Odyssey*. The authors argue the ancient myths narrated by Homer sought to make man's position *vis a vis* nature intelligible, and indeed to

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[355] On the connection between myths and the symbolism of defilement, sin and guilt see Paul Ricoeur, *The Symbolism of Evil* (Boston: Beacon Press, 1967).

[356] Claude Levi-Strauss, *Myth and Meaning: Cracking the Code of Culture* (New York: Schocken Books, 1995), 17.

overcome it. Their reading suggests that Odysseus provides an archetype of modern man. The story is a composite of epic poetry and myths retrieved from different historical epochs. Odysseus is the intrepid and heroic seafarer who nevertheless marks the shift from nomadic existence to a new social order in which property is central. As a landowner and employer in this early depiction of societal organisation, mastery and labour are divided:

> the hero of the adventures shows himself to be a prototype of the bourgeois individual…the epic is the historico-philosophic counterpart to a novel, and eventually displays features approximating those characteristics of the novel. The venerable cosmos of the meaningful Homeric world is shown to be the achievement of regulative reason, which destroys myth by virtue of the same rational order which reflects it.[357]

Their dialectical exposition of the Homeric world illuminates Enlightenment in its older order. Both epic and myth show that they have domination and exploitation in common. Odysseus already displays all the traits of liberalism, bourgeois spirit and reason. He must, above all, survive the dangers of the natural world, barter for his life and sacrifice his nature in return for exercising his cunning. In other words, he must attain self-mastery simultaneously with world-mastery. The myth shows how knowledge of the world equates to power over the world, and in the metamorphosis of the world into manipulable things - objects to be utilised - human beings reproduce themselves as objects that can either be dominated or utilised, or both. While Enlightenment rationality sought to juxtapose reason against myth and religion, these supressed or partially erased forms of mythical thought nevertheless reveal themselves as the formative undercurrents of modernity. What emerges from their critique is an Enlightenment that simply isn't enlightened enough to avoid falling back into oppression and domination: "Myth turns into Enlightenment, and nature into mere objectivity. Men pay for the increase of their power with alienation from that over which they exercise their power."[358] In their diagnosis, man and nature repeatedly succumb to necessary

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[357] Adorno and Horkheimer, *The Dialectic of Enlightenment,* 14 and 42

[358] Adorno and Horkheimer, *The Dialectic of Enlightenment*, 9. While acknowledging the humanistic tendencies and faith in human reason that marks out Enlightenment thought

relations of power and command (and thereby domination), a relation that was already established in earlier Classical civilization, exemplified in the myths of the Greek gods.

Rather than liberating man and disenchanting the world from all that would prevent the establishment of a truly human sovereignty, the fully enlightened world that is presented through their reading instead "radiates disaster triumphant."[359] Just as man objectified nature, in the inheritance of Enlightenment thought, man becomes object, but this time objectified in relation to others. Therein, Adorno and Horkheimer argue, lie the conditions for the domination inscribed in social and economic relations. Progress and growth require unswerving and tenacious domination of both man and nature. To learn from nature and ultimately to use it for wealth generation through the application of technology and labour, means that neither the enslavement of men nor the destruction of nature can serve as obstacles to economic growth. Reaching a new force in the shift from monopoly to state capitalism, the "authoritarian state of the present," is described as the total integration or totally administered society in the latter stages of state managed capitalism.[360] Contemporary social problems reveal the tendency toward social and cultural forms of oppression that are not the creations of a self-conscious unified will, but rather the world of capital extending beyond the control of man insofar as he is himself dominated by it.

The subjective and manipulative function of reason, instrumentalised through technological domination, had also led reason itself to be vacated of any critical content.[361] As myth becomes secularised, man becomes the focus and source of his own self-preservation and reason becomes the new foundation and *telos* in a world evacuated of its gods. The shift toward instrumental subjective reason comes at a price. As Martin Jay observes, for Horkheimer and Adorno, instrumental subjective reason marks a loss of objective reason and values: "all interaction was eventually reduced to power relationships. In their view, the disenchantment of the

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which is, for them, inseparable from social freedom, it is precisely in this unreflexive belief that the seeds of destruction are planted. *Dialectic of Enlightenment*, xiii.

[359] Adorno and Horkheimer, *Dialectic*, 3.

[360] Max Horkheimer, "The Authoritarian State" in *The Essential Frankfurt School Reader*, eds. Andrew Arato and Eike Gebhardt (New York: Continuum, 1985), 97.

[361] On the distinction between objective and subjective reason and the relation of means and ends see Horkheimer, *The Eclipse of Reason*, 3-40.

world had gone too far, and reason itself had been gutted of its original content."[362] As the critique of the Enlightenment demonstrates, Critical Theoretical method aimed at exposing the contradictions that appear in the analysis of political, juridical and historical events. In risking the loss of their own normative grounds for exposing these contradictions (since Critical Theory could itself be implicated by the same social, economic and psychological conditions), the aim was nevertheless to develop a method of critical thought that is cognisant of the dangers of instrumental reasoning but that also makes no claim to absolute objectivity since no theory, according to Adorno, truly escapes the marketplace.[363]

Critical Theory and the liberal rule of law

With this initial discussion of Critical Theorists' concern about the complicity of the liberal rule of law with social and economic injustice, we can begin to reflect on how this critique might be fruitfully adopted in the context of popular teaching practices. Teaching students who experience disadvantage to focus on the tensions and contradictions in liberal legal theories can help to reveal the histories and subjectivities that have been supressed in order for legal progression to appear as a smooth and pacifying force, and to understand how law works to perpetuate social and economic disadvantage. A fundamental aspect of counter-hegemonic education seeks to unmask some of law's core suppositions. In their analysis of law, the inner circle of the Frankfurt School questioned whether positive law could extract itself from the totalising effects of ideology and technological rationality. Not only is law constructed on a model of rationality that serves to mask its ideological attributes and power relations. Its modern liberal secular form also masks how these relations are implicated in the distribution of legal knowledge and the regulation of actions by the individual or the collective. As we have noted in the contemporary context, this awareness brings urgent attention to the reorientation of legal knowledge to economic-juridical governance that is now decisively underway.

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[362] Jay, *The Dialectical Imagination,* 271-272.

[363] Theodor W Adorno, *Negative Dialectics* (New York: Continuum Publishing, 2007), 4.

Perhaps one of the most penetrating critiques of law posited by the Frankfurt School is that modern reason and modern law emerged together, and therefore law is a primal phenomenon of irrational rationality. The thinking that at once aimed to break with myth is also breaks with meaning and supplants formula, rule and probability for concepts, cause and motive.[364] In the stark view of Adorno, "in law the formal principle of equivalence becomes the norm; everyone is treated alike. An equality in which differences perish secretly serves to promote inequality."[365] In other words, the liberal ideal of equality before the law masks the fact that law is a direct attribute of power (and violence) and under the guise of equality it thereby also obscures the powerlessness of those who would have recourse to it. Unsettling or decentring the premise of rationality, universality and equivalence are therefore aspects of educational focus meriting further consideration.

The principle of equivalence, according to Critical Theorists, also serves the deceptions fostered by modern liberal legal rationality that are directly tied to the process of secularisation and rationalisation. In this view, human subjectivity (and ostensibly freedom) emerges simultaneously with the acquiescence to the regulatory demands of the state. Law appears less as the system concerned with the freedom of the rational autonomous legal subject, but rather as a subjection to the heteronomous demands of secular powers to achieve an order based on predictability and regularity. Thornhill provides a lucid summary of what is at stake:

> Underlying the broad critique of modern rationality in early Critical Theory is a quite specific claim about modern law and about the relation between law and reason. This claim is, namely, that the emergence of modern reason is inextricable from the emergence of modern law; that rationality acts as a means of maintaining temporally and locally overarching sequences of predictability, calculability and organisation – that is of securing conditions of legal regularity through society.[366]

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[364] *Dialectic of Enlightenment*, 4

[365] Adorno, *Negative Dialectics*, 309.

[366] Chris Thornhill, "Law and Religion in Early Critical Theory", in *The Early Frankfurt School and Religion*, eds. Margaret Kohlenbach and Raymond Geuss, (London: Palgrave MacMillan, 2005), 103-127.

The rationalist inheritance of the Enlightenment in the development of modern law based on a principle of equivalence also illuminates what Adorno and Horkheimer argue is an inherited form of mythic thought. They contend that this mythic quality of thought serves to solidify an ontology of debt (or guilt) and retribution that replicates the already existent order.

The principle of fatal necessity is received and embedded in Enlightenment logic as the principle of indebtedness and equivalence. This circular logic renders all actions as reactions rather than capable of breaking with that which already exists. What concerned Adorno and Horkheimer is the loss of a basis for human action originating in freedom when retribution and indebtedness underscore the ordering principles of a society.[367] They perceive modernity organised according to the demands of much older societal structures, in which a closed circle of fate and retribution requires that all things must atone for simply having happened: "Greek myths know no exits, and are eternally the same, every birth is paid for with death, every fortune with misfortune…Hence for mythic and enlightened justice, guilt and atonement, happiness and unhappiness, were sides of equations."[368] It is within this closed circle that law is designated as the arch principle of equivalence and *ratio* that in contemporary societies reappears as a secularised version of older proto-religious societies wherein justice is subsumed in law:

> The step from chaos to civilization, in which natural conditions exert their power no longer directly but through the medium of the human consciousness, has not changed the principle of equivalence. Indeed, men paid for this very step by worshipping what they were once in a thrall to only in the same way as all other creatures. Now equivalence itself has become a fetish. The blindfold over Justitia's eyes does not

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[367] The distinction in fact of what is necessary and what contingent lies at the heart of the task that critical theory sees itself as addressing, sometimes described as 'anti-necessitarian' thinking. The idea is to resist the temptation to describe the realm of freedom from the vantage point of (supposed) necessity; to resist the argument, typically, that given human nature, such are the options available for the exercise of freedom. see Christodoulidis, *Research Handbook of Critical Theory*, page 37 and 13.

[368] Adorno and Horkheimer, *Dialectic of Enlightenment*, 16-17.

> only mean that there should be no assault upon justice, but that justice does not originate in freedom.[369]

Kant's attempt to ground mutual respect in the form of law, once religion wanes, and once morality and rationality cannot be equated, renders a basis for society devoid of meaning: "the citizen who would forgo profit only on the Kantian motive of respect for the mere form of law would not be enlightened, but superstitious – a fool."[370] Their philosophical-historical analysis traces a process through which the emergence of rational consciousness from ancient to modern societies has the result of subsuming every claim to human freedom or justice to the calculus of an economically rationalised society. This calculus of justice as equivalence not only results in irrationality, but is also far removed from any ethical or moral basis for action and responsibility.

In keeping with the negative orientation of Critical Theory, a secular theory of justice for Horkheimer makes an entirely different demand than that suggested by the economic rationality inherent to law. Justice "epitomises the demands of the suppressed at any given moment and is therefore as changeable as those demands themselves."[371] The transience and changeability of concrete experiences of oppression militate against the rational science of law that seeks to contain the particular in the universal. The Enlightenment claim that the yoke of religious heteronomy has been removed in the pursuit of human progress has merely served to subsume the individual and their experience of suffering in a concept of history and of human subjectivity that is a secularised form of salvation history.[372] In other words, law serves to erase individual suffering with a universal

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[369] Ibid., 17.

[370] Ibid., 85

[371] Max Horkheimer, "Power, Right, Justice" in *Dawn and Decline Notes* 1926 – 31 & 1950 – 1969 (New York: The Seabury Press, 1978)

[372] Benjamin concerns himself with this problem in his exploration of the rule of law as will be discussed in more detail below. As Annika Thiem notes, Benjamin criticizes Kant for excluding the theological aspects of epistemology that ground profane experience while underpinning history with a Christian salvation theology. Hence, "Kant's treatment of history [that] excludes demise and dissolves suffering into the idea of progress." Annika Thiem, "Benjamin's Messianic Metaphysics of Transience" in *Walter Benjamin and*

deferral of justice to come, without grounds for evaluating the historically contingent and singular ethical moment in which suffering occurs. The singularity of justice as an immanent demand in the face of suffering is a theme that is also pursued by Benjamin, as we shall see in due course. The conclusion that the theorists arrive at with regard to law and justice therefore presents a radical challenge to any attempt to construct any alternative normative paradigm, leaving many more questions than answers in the wake of their critique of law.

It is this difficulty that attracts much subsequent criticism of the Frankfurt School's intellectual stance. Their analysis has been criticised for their overly determined ascription of ideology and law and the utterly pessimistic outlook on any possibility for transformation it appears to entail. Habermas, for example, suggests that Adorno and Horkheimer's extension of Lukács' and Weber's thesis of rationalisation and reification in instrumental reason to a category of world historical process (to the very primeval beginnings of 'hominization'), and the identification of knowledge with power in their theory results in the loss of any normative foundation for Critical Theory. He argues:

> From the beginning, critical theory labored over the problem of giving an account of its own normative foundations; since Horkheimer and Adorno made their turn to the critique of instrumental reason early in the 1940s, this problem has become drastically apparent […] they submitted subjective reason to an unrelenting critique from the ironically distanced perspective of an objective reason that had fallen irreparably into ruin.[373]

Nevertheless, Adorno and Horkheimer's assertions fundamentally centred on the unstable and oppressive ground of law and sovereignty, and the propensity of instrumental and ideological capture of the rule of law by powerful actors alongside the oppressive expansion of bureaucracy in modernity. The re-emergence of right-wing populism in the West and the ever more ubiquitous use of emergency law in Western democracies may have reinvigorated rule of law

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Theology Perspectives in Continental Philosophy, eds. Colby Dickinson and Stephane Symons (New York: Fordham University Press, 2016), 24.

[373] Jürgen Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society*, trans. Thomas McCarthy (Cambridge: Polity Press), 376-77.

debates, as we explored in the previous chapter, but they affirm the prognosis and urgency of Adorno and Horkheimer's fundamental mistrust of rule of law arguments that aim to serve as a bulwark against authoritarianism and to stave off excesses of power.[374] More importantly, the argument that public legal education in itself can serve to underpin and legitimise a more stable and inclusive rule of law requires fundamental reassessment.

The readings in the previous chapters, both empirical and theoretical, attest to an increasingly juridified world and a divestment of public funding as part of a wider project of global neoliberal economic-juridical rationality. As we saw, this has had significantly deleterious effects on the ability to secure the rights and entitlements that provide equal protection under the law.[375] These conditions not only substantially reduce routes to access to justice, but also militate against a predictable ordering of quotidian life from the perspective of citizens. Legal knowledge acquisition, or legal education, as a means of either including the legally excluded subject to make more effective claims to the justice system or as binding citizen and state in a relation of accountability and legitimacy, appear equally illusory. As ever greater resort to claims of identity and belonging coalesce around courts and legal processes - which are at the same time ever further from reach for those without significant resources - we encounter a need for alternative strategies in the contemporary predicaments of public legal education.[376] As we move on to explore the paradigm of unpredictability, ambiguity and power that the members of the *Institut* argued exhibits law in its most archaic light, what at first blush appears to be an impossible impasse, is one of the most potent contributions and insights that early Critical Theory can offer for the present condition of law, and particularly so from a perspective of education.

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[374] On the increasing use of emergency laws see Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago: The University of Chicago Press, 2015).

[375] Gillian Hadfield and Jamie Heine, "Life in the Law-Thick World: The Legal Resource Landscape for Ordinary Americans" in *Beyond Elite Law: Access to Civil Justice in America* eds. S Estreicher and J Radice (Cambridge University Press, 2016). See also Gunther Teubner, *Juridification of Social Spheres: A Comparative Analysis in the Area of Labor, Corporate, Antitrust and Social Welfare*, (New York: Walter de Gruyter, 1987).

[376] Ronald Niezen, *Public Justice and the Anthropology of Law* (Cambridge: Cambridge University Press, 2010), 217-30.

The preceding discussion about the method of Critical Theory offers a point of departure for a different conception of law and legal education. Rather than pursuing a positive utopian spirit or programme, as we have argued above, for Adorno and Horkheimer all positive constructions of progress in fact carry with them the seed of oppression. What results is a profound mistrust of an emancipatory utopian vision – either of a revolutionary political project or indeed as a task for educative resolve.[377] The nature of the utopian impulse that emerges in this milieu is best understood as a negative dialectical engagement between the present and the past, in which hope is a remnant rather than an object or goal to be pursued. For Adorno, this means that history "promises no salvation and offers the possibility of hope only to the concept whose movements follow history's path to the very extreme."[378] Emancipation as utopian impetus is clouded in illusion since it is hidden under the signs of autonomy and law. The problem of historical transformation that this view leads to is also one of Walter Benjamin's most important contributions to the thinkers around him. The ideals of social democracy are bound up for Benjamin with fundamental problems that exist for him under the sign of historical progress and thus demand a critical examination of the concept of progress itself:

> Social democratic theory, and still more the praxis, was determined by a concept of progress which did not hold to reality, but had a dogmatic claim. Progress, as it was painted in the minds of the social democrats, was once upon a time the progress of humanity itself (not only that of its abilities and knowledges). It was, secondly, something unending (something corresponding to an endless perfectibility of humanity). It counted, thirdly, as something essentially unstoppable (as something self-activating, pursuing a straight or spiral path). Each of these predicates is controversial, and critique could be applied to each of them. This latter must, however, when push comes to shove, go behind all these predicates and direct itself at what they all have in common. The concept of the progress of the human race in history is not to be separated from the concept of its progression through a homogenous and empty time.[379]

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[377] Ilan Gur-Ze'ev "Conflicting Trends in Critical Theory" in *The Possibility/Impossibility of a New Critical Language in Education*, ed Ilan Gur-Ze'ev (Rotterdam: Sense Publishers, 2010), 62-5.

[378] Adorno, *Critical Models: Interventions and Catchwords* in Ilan Gur-Ze'ev, 'Diasporic Philosophy and Counter Education', 65.

[379] Walter Benjamin, Thesis On the Concept of History, Selected Writings, Volume 4: 138-1940 Eds. Howard Eiland and Michael Jennings, Harvard: Belknap Press

This challenge to the concept of progress fundamentally unsettles the claims of legal positivism and the evolution of law. Under the sign of progress, suffering and historical domination is subsumed and erased. Education and law are both implicated in this catastrophe.

The central influence of Benjamin's ideas is apparent despite the fact that his work with the *Institut* was sporadic and ultimately disappointing at a time of significant personal crisis in his life.[380] In order to subvert modernity's (and specifically legal modernity's) claim to advances, the political and religious motifs within his writings serve to highlight a perpetual disenchantment with the world as it appears in its immediacy. The present in its entire immediate phantasmagoria only obfuscates and obscures.[381] The next section of this chapter moves to consider some core elements of Benjamin's historico-philosophical writings through his acclaimed critical essay on violence, which provides us with preliminary access to his reading of law. The problem of historical transformation is a subject around which he circles again and again with his work on the relation between violence and law, and in his analysis of classical and German baroque drama.[382] For the purposes of a reconsideration of rule of law through his reading, and the

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[380] His reliance on the commissions of the *Zeitschrift für Sozialforschung*, came to a head in 1938 on the submission of the manuscript for the second part of his book on Baudelaire. Adorno wrote, refusing to send the piece to press. This was shortly followed by the news that the *Institut* was ending his stipend - his sole subsistence since 1934. At this time Benjamin writes: "What kept me plugging along in the early years was the hope of someday getting a position at the Institut under halfway dignified conditions. What I mean by halfway dignified is my minimal subsistence of 2,400 francs. To sink below this level again would be hard for me to bear *a la longue*. For this, the charms exerted on me by this world are too weak to make it worthwhile, and the rewards of posterity too uncertain." *The Correspondence of Walter Benjamin and Gerschom Scholem* 1932-1940 Ed. by Gershom Scholem Trans by Andre Lefevere (Harvard: Harvard University Press, 1992), 248-249.

[381] See Sigfried Kracauer, "On the Writing of Walter Benjamin" in *Walter Benjamin: Critical Evaluations in Cultural Theory*, Volume 2 ed, Peter Osborne (London: Routledge, 2004). See also Peter Szondi "Hope in the Past: On Walter Benjamin" *Critical Inquiry*, Vol. 4, No. 3 Harvey Mendelsohn trans (Spring, 1978), 491-506.

[382] Benjamin, "Critique of Violence," 238. On a wider exploration of the problem of history in Benjamin's work see also Stephane Moses, *The Angel of History: Rosenzweig, Benjamin, Scholem,* trans. Barbara Harshav (Stanford: Stanford University Press). For his readings on classical and Baroque tragic drama see "*Trauerspiel* and Tragedy", Selected Writings, Volume I, 1913-1926, 55-57, *On the Origins of German Tragic Drama.*

implications for a more critical approach to public legal education theory and practice, the suggestion that guilt or indebtedness exists in order for law to come about will be the focus of the next stage of the chapter. The central claims that we will analyse concern the role of knowledge of law in the designation of culpability and more broadly in the constitutive ambiguities that arise through Benjamin's reading. The challenge posed for education demands a critical understanding of the structural function of knowledge of law in legitimation, and the specific strategies of sovereignty that undermine rather than foster the intelligibility of law.

Mythic violence and the origins of law

In the preceding section we encountered the critique of instrumental rationalisation and of the liberal legal order that, according to Critical Theorists, have shared origins in Enlightenment rationality that are also interwoven with archaic forms of thought. For the exponents of Critical Theory this instrumental reason is a medium through which historical oppression repeats and intensifies. Their analysis was to some extent an elaboration inspired by the earlier writing of their friend and contributor to the *Institut*, Walter Benjamin.[383] We will explore the consequences for legal epistemology and legal pedagogy in light of the 1921 essay *Critique of Violence* in which Benjamin's schema of law-making violence (violence that historically institutes a given order) and law-preserving violence (the systems, including police and courts, that preserve the existing order) also aligns the concepts of fate and guilt (guilt in German carries the dual meaning of guilt and debt) with the legal order.[384] Rather than describing a notion of fault or moral

[383] Adorno and Horkheimer, *The Dialectic of Enlightenment*, 16-17.

[384] Benjamin, "Critique of Violence," 242 – 252. Judith Butler offers the following explanation of the distinction between law-preserving and law-making violence: "Law-preserving violence is exercised by the courts and, indeed by the police and represents the repeated and institutionalized efforts to make sure law continues to be binding on the population it governs…Law-instating violence is different. Law is posited as something that is done when a polity comes into being and law is made." "Critique, Coercion and

failure, this framework of indebtedness or guilt reflects a condition of human life that produces the normative force of law – both modern and archaic. It is a condition that for him is abject and distorted.[385] The world Benjamin presents in the readings (very similar to that which we will encounter in our subsequent reading of Kafka) is a world which is simultaneously suffocated by law and shamefully lawless. In holding a constellation of an archaic world of myth in close analogy to capitalist modernity, he dismantles a series of putative 'truths' that law and sovereign states erect for themselves. Rather than producing Enlightenment rule and distributing power according to the demands of constitutionalism, law masks the operation of dominant historical forces. As we traverse these contentions, we will remain attentive to the concerns of legal knowledge as operative aspects of both modern and archaic constructions.

Written in the context of the crisis of parliamentary politics in the Weimar Republic which was formed following the first world war and internally riven by violent revolutions, his essay exposes the problem of both political and ethical action.[386] The essay tackled one aspect of what was to form part of a larger project

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Sacred Life in Benjamin's 'Critique of Violence'" in *Parting Ways: Jewishness and the Critique of Zionism*, (Columbia University Press: 2013), 71.

[385] Law is already myth in Benjamin's view and adopts the ordering of life's potency or power toward an oppressive and coercive formula, one that is fundamentally corrupted. As David Kaufmann perceives, it is in the very assumption of progress as redemptive, or that the law originates in freedom and autonomy that the need to depose law as myth is located: "between primeval guilt and future expiation…the greatest form of distortion inheres in the fact that, for the fallen, the emancipatory by nature disguises itself as atonement – freedom appears under the sign of law, autonomy under the aegis of heteronomy." David Kaufmann, "Beyond Use, Within Reason", 159.

[386] Beatrice Hanssen notes the frequent contact with Ernst Bloch and Hugo Ball in 1919 during Benjamin's studies in Bern, and the urgency of the question of political activity in the wake of the Bolshevik revolution and the short-lived Munich Soviet Republic. Beatrice Hanssen, *Critique of Violence: Between Post-structuralism and Critical Theory*, (New York: Routledge, 2000), 16. For a treatment of political theology reflecting on the influence of Max Weber see Howard Caygill "Non-Messianic Political Theology in Benjamin's 'On the Concept of History'" in Andrew Benjamin Ed. *Walter Benjamin and History* (London: Continuum, 2004) 215-226. On the influence of Benjamin's close friend and correspondent, Gershom Scholem, See Eric Jacobson, *A Metaphysics of the Profane: The political theology of Walter Benjamin and Gershom Scholem*, (Columbia: Columbia University Press, 2003).

that he generally described as his 'politics.'[387] The other texts, written around 1920, were lost, but the fragments that remain illustrate Benjamin's concern with the deeply antagonistic relation between life and law. Rather than protecting the life and liberty of those living within the constitutional state, the constitutional state in his view is inimical to peaceable existence and freedom. For Benjamin, the struggle for existence thus becomes a struggle against law and a "striving toward" justice.[388] The first critical thrust of the essay of interest here is the fundamental instability he attributes to the rule of law in modern liberal orders. From his perspective, parliaments display their inherent instability precisely when the spectre of legal violence is no longer visible: "when the consciousness of the latent presence of violence in a legal institution disappears, the institution falls into decay."[389] Contrary to our reading of stable, foreseeable relations under the democratic rule of law, Benjamin paints a picture of instability and perpetual violence (whether as punitive enforcement of contract or in the spectre of the police and armed forces).

The second and associated critical contribution that Benjamin offers is a striking conclusion about the temporal order of guilt and retribution in the working of law, a conclusion that establishes very different grounds for the hyper-juridification we have encountered via our previous readings of Foucault, Adorno and Horkheimer. He reverses the temporal assumption of the claim that law makes for itself - that it seeks out guilt for a transgressive act and offers up punishment once this has been determined. Law, he suggests, can only become operative if guilt is already in existence. In order to decide conclusively whether punishment should be meted out, law must first be able to bring all of life within its purview

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[387] Essays entitled "Life and Violence" and "The True Politician", were planned, with the second to contain chapters on "Dismantling Violence" and "Teleology Without End". Peter Fenves, *The Messianic Reduction, Walter Benjamin and the Shape of Time*, (Palo Alto: Stanford University Press, 2011), 208.

[388] In a short fragment written in 1920 he remarks, "It is quite wrong to assert that, in a constitutional state, the struggle for existence becomes the struggle for law. On the contrary, experience shows conclusively that the opposite is the case. And this is necessarily so since the law's concern with justice is only apparent, whereas in truth, the law is concerned with self-preservation." Walter Benjamin, 'The Right to Use Force', *Selected Writings* I, (1920), 232.

[389] Benjamin, "Critique of Violence," 244. This problem is also developed in his theory of Baroque sovereignty.

and scrutiny. This means that guilt is co-extensive with law, or rather it constitutes the law and this inaugural moment of the rule of law reveals its fateful and mythic origins. As we shall see, Benjamin goes a step further. It is not as a consequence of transgression that the force of law is felt, but when viewed in the light of archaic mythical construction which haunts modern legal orders, it is because mortals are fated to the laws of nature and to creaturely life whose centre of gravity is death.[390] The modern juridical order, he argues, mirrors this formulation by placing life as the foundation of the legal and political order. In this view, life itself is juridified and condemned to be decided upon by law.[391] Benjamin's critique of juridified life means that nothing remains outside of the colonisation of the life-world, which is a feature of law that also deeply impoverishes the ethical plane of existence since all assessment of value is subsumed within law's purview.

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[390] Fate, as Benjamin writes in "*Trauerspiel* and Tragedy", "leads to death. Death is not punishment but atonement, an expression of the subjection of guilty life to the law of natural life. That guilt which has often been the focal point of the theory of the tragic has its home in fate and the drama of fate." *The Origin of German Tragic Drama*, 131. The proximity of Benjamin's work on drama to understanding his philosophico-historical critique is vital to understanding his attempt to overturn scientism as it is deployed in historiography as well as grasping his analysis of political theology. See for example *Calderon's El Mayor Monstruo, Los Celos and Hebbel's Herodes und Mariamne: Comments on the Problem of Historical Drama*, in *Selected Writings*, Volume I, 363. Equally, the importance of the theoretical frame for his ambitions in constructing the concept of character and the prospect of freedom of action appear already in the earlier essay "Fate and Character" in *Selected Writings,* Volume 1, 202-205.

[391] For an elaboration of Benjamin's biopolitical reading see Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, 5-29. The analysis of life's indebtedness to the juridical sphere was derived in part from the historical investigations of Swiss jurist and anthropologist Johann Bachofen into matriarchy, myth and law. "Death is the supreme natural law, the *fatum* of material life…The law of material life becomes a juridical concept, death is seen as a *debitum naturae* (our debt to nature)." Johann Bachofen, *Myth, Religion, and Mother Right*, trans. Ralph Manheim (New York: Princeton University Press, 1967), 188. Benjamin in fact intended to write an essay on Bachofen, commending him on his ability to present the 'Tableaux of Prehistory' in which the "ancient necropolis attested to the silent force of the prelinguistic image (*eidos*)." His influence appears with great force in the subsequent essay on Kafka. See Beatrice Hanssen, *Walter Benjamin's Other History: Of Stones, Animals, Human Beings and Angels*, (California: University of California Press, 2000), 93.

The third and final conclusion concerns an educative undercurrent which informs a logic of misapprehension about the law. Following his schema, guilt is necessarily accompanied by lack of knowledge (*Unkenntniss*) of the law. Unknown or incomprehensible laws render the unfortunate and unsuspecting victim prone to the full force of the law, and thus offer no relief from punishment.[392] We have considered in previous chapters the putative role of public knowledge of laws as both legitimating and binding the rule of law to the citizen of a given state. If, as Benjamin contends, incomprehension and guilt are necessary preconditions for law, then the legal educative consequences for his formulation require an entirely different orientation than we have heretofore assumed. Rather than describing a reinvigorated sovereign form that evolves from juridico-theological and juridico-political theories binding the citizen to the sovereign state, Benjamin's claim produces an *aporia* in the modern liberal construction insofar as its core principles of foreseeability, predictability and calculability are concerned. Theological references serve to illuminate the secular implications of laws attempt to emulate transcendental justice and thus to decouple law from its claim to justice. Law and justice fundamentally belong to different orders, but in order to conceal its groundlessness in a Godless world. For this reason law is always already myth for Benjamin. Dismantling the array of false projections of state sovereignty and its attendant violence does not preclude Benjamin from imagining the possibility of secular justice. Justice is a threshold that, we shall see, permits of profane action even if, in the last analysis, it cannot be sought in judgement (since this is the domain of God).[393] The secular threshold of revolutionary action, and of educative force, as we will see, delineates the urgent task of reanimating political and ethical modes of human interaction that could fundamentally break with false sovereigns (and false idols), along with their heteronomy and oppression.[394] In other words,

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[392] "*Von diesem Geiste des Rechts legt noch der moderne Grundsatz, dass Unkenntnis des Gesetzes nicht vor Strafe schützt*." Benjamin, "Critique of Violence", 249. Benjamin's concern is not epistemological, but rather is internal to the sphere, to the rule, of the *Gesetz*. I am grateful to Anton Schutz for clarifying this important point.

[393] One such rupture of the link between life and law is the proletarian general strike in which the demand for limited concessions of legal rights to workers by the state is substituted by a "root and branch" attack on the legal system and the state itself.

[394] Martel reads this as a subversion rather than a break with sovereignty, the "cleansing of mythological superimpositions…has both a human and non-human aspect to it...by displacing sovereignty in the face of a divine competitor, Benjamin de-centers it from its

the practice of critique of the cultural reproductive and constitutive forces unleashed in law and education at each moment repose the problem of injustice and oppression as the basis of the continual work of dismantling sovereignty and the repetition of historical violence.

Benjamin's essay begins by showing how legal theories elide the self-positing of law by establishing a transcendent foundation or metaphysical criterion for law. He points to the impossibility of a categorical imperative or a universal principle that circumscribes the use of violence in the pursuit of justice.[395] Natural law posits justice as the natural end of law (via natural reason), and positive law identifies justice with its means (as founded on the norms sponsored by the State). Whereas natural law sanctions violence as means to just ends (but provides no basis for a criterion for justice), positive law resorts to distinguishing the historically acknowledged conditions of the application of violence: "positive law demands of all violence a proof of its historical origin."[396]

> The function of law-making in violence is twofold, in the sense that law-making pursues as its end, with violence as its means, *what* is to be established as law, but at that moment of instatement does not dismiss violence; rather, at this very moment of law-making, it specifically establishes as law not an end unalloyed by violence but one necessarily and intimately bound to it under the title of power.[397]

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stranglehold on human agency without actually getting rid of it. James Martel, *Divine Violence: Walter Benjamin and the Eschatology of Sovereignty* (New York: Routledge, 2012), 60-62.

[395] Peter Fenves offers an insightful account of the proximity and divergence of Benjamin's "Critique of Violence" with Kant's use of *potestas* and *violentia* in the *Doctrine of Right*. The attempt to find a postulate through which the sphere of right can extend seeks to provide a metaphysical category that "makes might right whenever it is minimally rational." Kant's attempt fails precisely because there is no universally valid principle that can be deduced from the axiom of right without recourse to original force in order to "extend the juridical body." Kant ultimately obviates the problem through his writings on history wherein any original injustice will be gradually alleviated by means of ever-increasing conformity of enforceable law to the idea of right. See chapter 7. 'The Political Counterpart to Pure Practical Reason: from Kant's Doctrine of Right to Benjamin's Category of Justice', in *The Messianic Reduction*, 187-227.

[20] Benjamin, "Critique of Violence," 238.

[397] Ibid., 248.

Violence, Benjamin concludes, posited as an end or as a means to an end either makes law or preserves law. In turn, claims to law and right are ultimately the arbitrary assumption of power as the immediate or indirect (i.e. as the threat underpinning the law of obligations) manifestation of violence.[398]

Benjamin's suggestion that law perpetuates a mythical order is most distinctive in his construction of law-founding violence. Since the basis of any state, in his reading is historical violence, the signifier of the arbitrary assumption of power effectively precludes law from serving either secular or divine justice. Benjamin exploits the tension between the contingency and necessity of historical violence by anchoring mythic (and legal) violence to the concept of fate. He readily concedes that the concept of fate, which finds its origins in the archaic world of myth, is not readily grasped by the contemporary mind as a notion of predetermination or destiny.[399] While the concept of fate was partially adopted into Christian theology, he is at pains to point out that it is not a religious category but rather a principle and ground of power corresponding to the emergence of legality and of legal subjectivity in pagan cults.[400] By establishing boundaries between the ineffable rules that regulate the cycles of the world, as predestined or predetermined allotments of life and death, fate becomes the basis for the human rules that can be adopted into the profane life of the political community.[401]

The concept of fate (*moira)* abounds in Greek lyric and epic poetry, and reflects the sense of patterns of order and apportionment of events, of time and space, as well as the cycles of nature.[402] The Homeric allusion to destiny and

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[398] Thus law-making (*Rechtsetzung*) is revealed as pernicious power-making (*Machtsetzung*). Ibid., 248 and 249.

[399] Benjamin, "Fate and character" *Selected Writing*s Vol 1, 201.

[400] The fact that fate is not a religious category is discerned through its lack of correspondence to either innocence or indeed happiness i.e. its lack of redemptive counterpart. Benjamin, 'Fate and Character', 201-2.

[401] An important feature of Benjamin's understanding of the constellations he offers between different historical epochs is that he does not conceive of a chain of linear time. He weaves a spatiotemporal tapestry that brings event and meaning into analogical tension across epochs.

[402] The idea that a traditional plot coincides with the Will of Zeus and thus accords with destiny is discussed by Gregory Nagy, *The Best of the Achaeans: Concepts of the Hero in Archaic Greek Poetry* (John Hopkins University Press, 1999), 40, 82. Fate and destiny in

tradition illuminates other, perhaps older, concepts associated with *moira,* concerning customary sacrifice that ensure boundaries between the human and divine, the sacred and profane were maintained.[403] The word *moira* meaning alternatively portion, fate or destiny is often associated with offerings at the sacrificial table, in particular the sacrificial custom at Delphi.[404] Later classical interpretations of the word are most commonly associated with a fixed allotment of life in expectation of death, "one's share is above all else death; as such *moira* may be either a fact of nature, as special destiny, an outcome of divine anger or of divine decree, or of all of these put together."[405] *Moira* both fixes decline and death and regulates the order of life and nature – in fixing and regulating this order within nascent forms of religious thought, fate takes the character of divine predeterminism, emphasising misfortune and destruction rather than the cyclical laws of nature from which it originated.[406] Henceforth, fate brings down the anger of the gods for hubris (acts that transgress the limits of human freedom, as in the myth of Niobe whose sacrifice also coincided with her being turned into stone.)[407]

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this sense help to construct a predictable and calculable narrative in which meaning is secured; perhaps we see here a cultural strategy for making contingency and the vicissitudes of life in the trajectory toward death explicable.

[403] See Zartaloudis, *Birth of Nomos*, 3-34. For an alternative reading of sacrificial rituals as engendering religion, and as precursor to myth see Rene Girard, "The Origins of Myth and Ritual" in *Violence and the Sacred,* trans. Patrick Gregory (London: the Athlone Press, 1988).

[404] "When someone goes in for the purpose of initiating sacrifice to the god, the Delphians stand around the altar carrying concealed *makhairai* (sacrificial knives). And after the priest has slaughtered and flayed the sacrificial victim and after he has apportioned the innards, those who have been standing around cut off whatever *moira* of meat each of them is able to cut off and then depart, with the result that the one who initiated the sacrifice oftentimes departs without having a *moira* himself." Gregory Nagy, *The Best of The Achaeans*, 125. The word *dais* (feast) is derived from the word *daimoai* (divide, apportion allot). Nagy, *The Best of The Achaeans*, 128.

[405] Jack Newton Lawson*, The concept of Fate in Ancient Mesopotamia,* (1994), 7.

[406] Lawson, *The concept of Fate in Ancient Mesopotamia*, 6.

[407] In myth, pride or arrogance brought the consequence of divine retribution. Benjamin deploys the myth of Niobe, in which her pride at being a more fertile mother than Leto led to the death of her sons and daughters. See "Critique of Violence", 248 and on eternal recurrence see Susan Buck-Morss, *The Dialectics of Seeing: Walter Benjamin and the*

When mortals provoke the anger of the gods, unwittingly or through hubris, the gods' retribution is not expiatory; guilt appears as a constant force that drives the fate of each man, a fate that is already determined and may not be altered even by the gods themselves.[408] Following Zartaloudis' analysis of Homeric *moira*, the depiction of the gods as being equally subjected to the necessity of order established by the potency of *moira* is decisive: "order needs to be maintained; *moira* cannot be undone or unbound by divine intervention. *Moira* is a fact of the cosmos."[409]

Mythic violence which polices the boundaries of the profane and divine realms, Benjamin argues, "is in its archetypal form a mere manifestation of the gods."[410] Law mirrors this operation by seeking to originate the source of its right to monopolise force within the logic of sovereignty, but since all sovereigns are false insofar as they attempt to usurp God, his account unmasks the fact that laws force is wielded without justification or end.[411] A preeminent example Benjamin points to appears in the Greek myth of Niobe. Niobe is depicted in the *Iliad* as the mortal daughter of Tantalus, who, having borne six sons and six daughters boasts to Leto of her fertility. Niobe's boastful pride (hubris) at her superior fecundity offends the gods, leading to the vengeful murder of all of her progeny by Artemis and Apollo. The tale depicts her as being turned to stone, forever sorrowing for her slain children. The cautionary tale speaks of overstepping the boundary between the mortal and divine realms. Rather than having broken any law, it is her arrogance

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Arcades Project, (Boston: MIT Press, 1991), 103. Niobe was also struck mute in this myth, and in the lost play by Aeschylus, she remains silent throughout. Her silent mourning is a striking feature of Greek tragedy. See Karl Kerenyi, *Goddess of Sun and Moon: Circe, Aphrodite, Medea, Niobe,* (New York: Spring Publications, 1976).

[408] In the Homeric world, the order of fate, or *moira* has the sense of a wider plan that lies behind the gods as a 'shadowy reality', as a fixed order rather than a power, which concerns the apportionment of prerogatives between mortals and immortals. As regards the question of the extent to which the gods themselves are subject to fate see Greene, *Moira,* 14-17 and Zartaloudis, *Birth of Nomos*, 50-51.

[409] Zartaloudis, *Birth of Nomos*, 57.

[410] Benjamin, "Critique of Violence," 248

[411] Judith Butler, "Critique, Coercion and Sacred Life in Benjamin's 'Critique of Violence'" 71.

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that calls fate down upon her because she challenges the mere existence of gods.[412] The myth underscores the economy of fate and debt/guilt that Benjamin suggests is also perpetuated in the economy of guilt and law. Mortal life, or human life is always already construed as corrupt and damaged for its mortality. The myth depicts Niobe as the mute bearer of guilt and the act of mythic violence serves to reaffirm her pre-existing guilt:

> Violence therefore bursts on Niobe from the uncertain, ambiguous sphere of fate […] although it brings death to her children, it stops short of claiming the life of their mother, whom it leaves behind, more guilty than before through the death of her children, both as an eternally mute bearer of guilt and as a boundary stone on the frontier between men and gods.[413]

This manifestation of mythic violence also reveals the hidden object of power. Power is the principle that is guaranteed by law-making so as to circumscribe boundaries over life and death, and as the power to exercise violence over life.[414] The idea of fate – or *moira* in Homeric accounts according to Zartaloudis relates to the forces ordering both life and death. "*Moira* indicates an abyss between the mortal and immortal planes…what mortals suffer is down to their own power and *moira*. *Moira* is not an overpowering force but rather is a life subject to the ordering of the cosmos."[415] What is revealed through Homeric drama, a feature which Benjamin alludes to, is that fate is not a transcendental power as such, but rather relates to the all too human appropriation of divine power, with all its attendant dangers.

To demonstrate mythic violence and its potential interruption, Benjamin brings the Greek myth of Niobe in contrast with the story of the Korah rebellion in

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[412] Benjamin, Critique of Violence, 248.

[413] Ibid., 248.

[414] As Ricoeur helps to illuminate through his much later study of mythic themes in Greek tragedy, the fault "if it can be described as such", of some god "laying violent hands on a human act" is a seizure that is not a punishment but rather is the origin of the fault, it demarcates the threat which the act posed to the operation of power. Ricoeur, *The Symbolism of Evil*, 215.

[415] Thanos Zartaloudis, *The Birth of Nomos* (Edinburgh: Edinburgh University Press, 2019), 63.

the Book of Numbers, the fourth book of the Hebrew Bible. In the tale of Korah, God's punishment for transgression is considered an example of divine violence that carries educative power (or educative force) wherein violence strikes without bloodshed.[416] Benjamin recounts the story, in which the rebellious Levites are bloodlessly annihilated (they are swallowed up by the earth but they remain miraculously alive according to most Jewish commentators).[417] God's judgement strikes privileged Levites without warning and without threat, but does not stop short of annihilation. Divine violence in this account "is pure power over life for the sake of the living."[418] According to Benjamin, in punishing Korah's transgression for failing to follow God's word, the Biblical account serves as an example of divine violence in its educative frame. A guideline or yardstick (*Richtschnur*) is introduced in this reading, which does not preclude all violence but circumscribes violence as a power or "gift" that must not be subject to wider authority, and that appears to bind only to itself.[419] What this violence against violence seems to suggest is that it does not strike at a living subject but rather at the legal subject, or the subject petrified by law.[420]

In contrast to divine violence, mythic violence teaches by example but without expiatory potential. Rather than being construed as a protective force, the law according to Benjamin merely threatens (although where it will strike is unclear), and since it requires no justification for its coercion, it potentially places all human action at the mercy of its determinations.[421] Not only does the law

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[416] Benjamin, *Critique of Violence*, 250.

[417] "If these men die as all men die and the fate of all men will be visited upon them, then the Lord has not sent me. But if the Lord creates a creation, and the earth opens its mouth and swallows them and all that is theirs, and they descend alive into the grave, you will know that these men have provoked the Lord." Book of Numbers 16:28.

[418] The careful distinction from an over-arching moral order is clear. Command "consists not as a criterion for judgement but as a guideline for action." Benjamin, "Critique of Violence," 250.

[419] Agamben, *State of Exception*, 88.

[420] This is exemplified as Niobe in the myth is turned into stone. Judith Butler's analysis helps to clarify the point: "Divine violence does not strike at the body or the organic life of the individual, but at the subject who is formed by law. It purifies the guilty, not of guilt, but of its immersion in law and thus it dissolves the bonds of accountability that follow from the rule of law itself." Butler, "Critique, Coercion and Sacred Life," 211.

[421] Benjamin, "Critique of Violence", 242

threaten rather than protect, but also by its nature in circumscribing the boundaries of life, law threatens to juridify the world. The colonisation of life by law and the juridification of the world have the effect of arbitrarily interring all human acts. Birnbaum elaborates what Benjamin has in mind as follows:

> [H]e proposes to show that this violence of the power inherent in law ineluctably pursues a colonising expansion, which encloses more and more acts and facts within the system of guilt…the monopoly of violence proper to the law does suppress natural violence only to the extent that it extends legal violence, and this at the expense of all other non-violent means of agreement or conflict. The law tends to colonise all other possible means of referring to the acts of life, even those that appeared at first alien to the order of guilt.[422]

The expansionist proclivity of law interprets human actions as always already corrupted and guilty and thereby required to be determined by law. Law's concern with justice in his reading is interpreted as a foil for its own guilt. As Zartaloudis describes, "the juridical description of the world is a life falsification, an impoverishment," to hide or cover this embarrassing lack of ground and yet maintain mastery in a world that has lost its gods: "the law must presuppose a masterless plane of normativity, in the name of its self-imposed necessity of mastering."[423] Law then maintains a relation of guilt "towards the world as such, at the same time as it places all events and all human actions as subject to law's suspicion."[424] It is worth emphasising again that the reversed temporality of action and responsibility that we might expect in the casuistry of law in Benjamin's reading is crucial. From the perspective of ethics, this means there is no room for conceiving of human actions and human responsibility other than as always already culpable, and leads to what Thiem describes as an 'arrested' form of

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[422] Antonia Birnbaum, "Variations of Fate" in *Towards the Critique of Violence,* eds. Brendan Moran and Carlo Salzani (London: Bloomsbury, 2017), 94-95.

[423] Thanos Zartaloudis, "Violence without law?" in *Towards a Critique of Violence*, 171.

[424] Ibid., 171.

responsibility.[425] Human life that is juridified (according to the temporal determination Benjamin sets out to show) also precludes meaningful freedom of political and ethical action.

A further problem is the element of ambiguity that Benjamin ascribes to law. As we have discussed, the rationale for education about the law is to ensure the predictable ordering of legal events in the lives of citizens. Moreover, public legal education in its positivist frame proposes to enable citizens to understand how to conduct themselves within the limits of the law and in the event of transgression what can be anticipated by legal judgement. Benjamin's reading points to a radical legal ambiguity, most pressingly where it concerns the unfolding of the question of guilt with regard to knowledge (or lack of knowledge) of law. Benjamin suggests that rather than condemning a transgressive act, law must first condemn life to law in order to make or legitimise any particular legal judgment. This reversal in temporality leads to an inability to predict the course of events from the position of a legal subject, while nevertheless suggesting events are predetermined. Events are predetermined (fated in this sense) insofar as the guilt of the subject precedes the determination of the law and insofar as the law will make a determination on any given action. The ambiguity of legal decisions lies in the fact that the subsequent determination or judgement (of legal guilt or innocence over a particular act) is not yet certain, since it is possible to be judged as innocent. Benjamin here debunks the premise of liberal legal theories basing the legitimacy of the use of legal violence on the predictability and certainty that legal ordering promises, and the degree of certain knowledge of which acts the law will come to sanction: "a deterrent in the exact sense would require a certainty that contradicts the nature of a threat and is not attained by any law, since there is always hope of eluding its arm."[426] In other words, the threatening or extortive violence of law (or legal violence) can't be deployed as a convincing deterrent due to the inherent uncertainty of when sanctions may actually be deployed.[427]

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[425] Annika Thiem, *Fate, Guilt and Messianic Interruptions*, Doctoral Thesis (Berkeley: University of California 2004), 21.

[426] Benjamin, "Critique of Violence", 242.

[427] In Cornellia Vismann's reading the extortive violence of the law "nestles in the zone of indeterminacy"… "Benjamin begins with the constitutive paradox of law and violence in order to lay bare the constructive ambiguities of law" Cornellia Vismann, "Two Critics of Law: Benjamin and Kraus", *Cardozo Law review*, 26 (2005), 1165

Benjamin reminds us that mythical law-making that has power as its principle and takes as its object the determination over life, is circumscribed by unwritten laws: "Laws and circumscribed borders remain at least in primeval times, unwritten laws." [428] Bringing this notion to bear on the present emphasises the necessary unknowability of boundaries for law to maintain its own being in force. For our purposes we can take the central argument that de-coupling knowledge of law with the legitimation of modern law alters our understanding of the constitutive relationship of sovereign states derived from its citizens. Far from being regular, universal and predictable, Benjamin diagnoses the unpredictability and instability of the constituting moment as well as illuminating the groundless and self-preserving nature of law.

Law in the archaic worldview to which Benjamin alludes is not only the means by which relations amongst people are decided, but the instantiation of legal statutes also concerns relations between people and their gods.[429] Ancient Greece began to record its customary laws in written form following the Bronze Age. A feature of the early Greek written law is their central purpose of making knowledge of laws available to the wider community, rather than as a technical resolution tool for a professional classes of lawyers.[430] A feature of the archaic period is an explicitly educative perspective, wherein law-making was construed as teaching. Dating back to the sixth century BCE, to the emergence of Greek direct democracy under the archonship of Solon and subsequently reiterated by Aristotle, we encounter a juridico-political order that was contingent on citizens learning the laws as the mechanism through which divine retribution for injustice could be avoided and order brought to the Athenian city-state.[431] The establishment of laws is construed as an educative act, which aims to dispel ignorance in the *polis*.

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[428] Ibid., 249.

[429] For an evolution of the idea of law and the terms and concepts associated with it from pre to post Homeric Greece see Zartaloudis, *The Birth of Nomos,* 2019.

[430] See more generally Michael Gagarin, *Writing Greek Law* (Cambridge: Cambridge University Press, 2011). Early written law characteristically focused on procedure, such as terms of office for magistrates, aspects of ordering in the life of a city that depended on knowing and administering the governing customs. See Kevin Robb, *Literacy and Paideia in Ancient Greece* (Oxford: Oxford University Press, 1994), 86.

[431] Aristotle emphasised the role of legislators in forming good habits in citizens, and this effect distinguished the good constitution from the bad, "Nicomachean Ethics" in *The Complete Works of Aristotle*, Volume Two, ed. J. Barns, (Princeton: Princeton University

Interesting to note is the shift in concepts of guilt in this archaic milieu, which entailed breaking away from the transcendental order of mythic law, toward the beginnings of a written corpus of law. Greek tragedy provides one of the most fertile literary resources to consider how fate was juxtaposed with law, and in which the problem of knowledge of human law and the laws of fate are played out in the emerging Greek city-state. [432] The coincidence of Greek tragic drama and rule by law in the West also encompassed a wider notion of cultural education described as *paideia* (the ideal of cultural and educational rearing in the context of the members the polis).[433] Tragedy was thus an art form as much as it was a social institution bringing together aspects of religious cult with features of juridical thought.[434]

Press, 1984), 1743. Pedagogical aspects of law in archaic Greece are developed as a notion of *paideia,* drawn primarily from the three-volume work by Werner Jaeger, *Paideia: the ideals of Greek culture,* (1967: trans., by whom from 2nd Ger. Ed. Gilbert Highet). *Paideia* broadly translates as 'education' but means not only the rearing and education of children (*pais* is the simple Greek for child) but, by extension, "mental culture, civilization," and then "objectively, the literature and accomplishments of an age or people." See Clara Claibourne Park, "*A Reconsideration: Werner Jaeger's Paideia*", Modern Age; Vol. 28 Issue 2/3, (Spring/Summer 1984): 152. For a discussion of the educational role of Greek drama see Peter Arnott, "Greek Drama as Education," *Educational Theatre Journal*, Vol. 22, No. 1 (March 1970), 35-42.

[432] Apart from the use of technical legal terminology used by tragic writers, the frequent reference to crimes of bloodshed, and form of plays as judgment is a characteristic feature of Greek tragic drama. Jean-Pierre Vernant and Pierre Vidal-Naquet, *Myth and Tragedy in Ancient Greece*, (New York: Zone Books, 1990) 31-32

[433] The concept of *paideia* is drawn primarily from the three-volume work by Werner Jaeger, *Paideia: the ideals of Greek culture,* (pb?1967: trans. from 2nd Ger. Ed. Gilbert Highet.) See Clara Claibourne Park, "A Reconsideration: Werner Jaeger's *Paideia*", Modern Age; Vol. 28 Issue 2/3 (Spring/Summer1984): 152.

[434] As a general principle the *agon* was connected with the cult of heroes, for example, in Homeric epic only the funeral of a hero was occasion for an athletic contest. See Nagy, *The Best of the Achaeans*, 112. On the concept of *agon* in relation to early juridical thought see Michel Foucault, *Lecture on the Will to Know; Lectures at the College de France 1970-1971,* Trans Graham Burchell (Paris: Picador, 2014) 75. On the development of *agon* in the context of Greek tragic drama, see Florens Christian Rang, *Historische Psychologie des Karnevals* (Berlin: Brinkman and Bose, 1983), 51.

Benjamin alludes to the fact that these constellations of ideas maintain themselves in the modern law, but these traits remain buried and lead to a false understanding of the grounds of law's force and effect. For him, law's threatening character serves as a lesson, since it educates by example. In order to enfold the material world, the constant threat of law looms over the individual whose ignorance and potential to overstep the boundaries of legality is a feature of law's continuation. Rather than the certainty and foreseeability of rules, Benjamin conceives of the relation between life and law as a problem of ambiguity, guilt and indebtedness. In a juridified modernity, nothing is left outside of the law, but when and where the law will strike is never quite clear. Unknown laws render the unfortunate and unsuspecting victim prone to the full force of the law. Legal learning teaches the precarity of life through an adaptive mode of learning by employing the culprit: "as a mere occasion to 'teach a lesson' and thereby to increase [law's] own credibility, to replenish its own ever-threatened stability."[435] Modernity thereby perpetuates an ancient economy of guilt and law, yet one that has adaptive and educative features.

In the inaugurating moment of law in a polity, we observe that this historical event marks the decision over the circumscription of borders, or the task of establishing frontiers. The problem we already encountered with Adorno and Horkheimer is that the principle of equivalence instituted with the founding of law and the reasoning subject can find no basis in ascriptions of law to justice, nor, for that matter, for a basis for justice in freedom. The falsification of the world that lends credence to law's promise of justice thereby becomes apparent, as do the contours of the historical catastrophe to which Benjamin points. The frontiers or borders that law inaugurates grant to the victor power to guarantee the 'rights' of the loser. Laws appear in their demonic and mythic force with a pretence of equality that merely instantiates in the face of absolute defeat.[436] This elucidation of law-founding violence challenges the idealisation of history and human progress and it brings to light the fundamental ambiguity of the origin of law in instances of

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[435] Anton Schütz, "Thinking the Law With and Against Luhmann, Legendre, Agamben," *Law and Critique*, Volume 11: 107 (2000), 123.

[436] Benjamin goes on to write: "When frontiers are decided the adversary is not merely annihilated; indeed, he is accorded rights even when the victor's superiority in power is complete. And these are, in a demonically ambiguous way, "equal rights": for both parties to the treaty, it is the same line that may not be crossed." *Critique of Violence*, 249.

historical violence.[437] As the final arbiter of the right to life, law holds over life a form of arbitrary power that has its corollary in the rule of fate in myth.[438] The constellation of concepts that Benjamin deploys aims to dispel the myth that law (and modern parliamentary democracy) are the consequence of peaceable conclusions of historical conflict, and in so doing emphasises their inherent instability.

We also encountered the claim that law-founding and law-preserving violence results in the colonisation of all aspects of life by the law, something that we are witness to in the contemporary phenomena of hyper-juridification. We have previously considered the challenge that juridification presents to the task of legal educators and to the legitimacy of the rule of law in providing regularity of legal relations and the opportunity for all citizens to access the protection that the law putatively affords. This awareness can serve as a critical resource for producing alternative strategies in encounters with law. Educative interventions require these tools of analysis in order to begin to reconceive the object and value of legal knowledge. This necessarily disavows pedagogy that merely replicates assumptions about the necessity of order or progress as defined within a capitalist horizon. The reproduction of the dominant cultural and societal forces brought about by orthodox legal education belongs to the armoury of law's coercive function, even as it aims to offer routes to emancipation and social justice.

The preceding chapter deployed some of the insights and methods of Critical Theory in order to reassess the claims of the liberal rule of law to provide a stabilising and pacifying force, within which the intelligibility of law bridges the constitutive relationship between citizen and state. Whereas liberal democracies

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[437] Giorgio Agamben, following the trajectories of both Foucault and Benjamin, contends that what is at stake is the inclusion of life in the juridico-political order through a form of abandonment or subjection to death. Rather than conceiving of the originary social tie as a form of contract that provides the basis of participation in political life, what is suggested is an untying such that mere life is exposed to a subjection to death. *Homo Sacer*, (1995), 90.

[438] Ibid., 243. In the context of fate, the demonic sphere is characterized by ambiguity and its conceptual origins lie in pre-historical societies. See Giorgio Agamben, "Walter Benjamin and the Demonic: Happiness and Historical Redemption" in *Potentialities: Collected Essays in Philosophy*, (Palo Alto: Stanford University Press, 1999), 138.

present public legal knowledge as a cornerstone of the way in which the rule of law sustains and legitimates the binding of citizen to state, proponents of Critical Theory suggest that this device occludes the oppressive and politically stultifying force of law. The philosophico-historical critique developed with Benjamin reveals the aporetic relation of knowledge and the rule of law, in which ambiguity and transitive guilt serve as operative forces in legal ordering. What emerges from a Critical Theoretical perspective is that notions of positive progress attributed to law and to history serve to perpetuate a cycle of violence and social injustice.

The readings we have considered lend themselves to a negative or even destructive process that clears the conceptual ground. It is within this space that the juridico-political realm can be re-evaluated. The subject of law as formed in and through a dynamic interpretation of past and present, illuminating the challenges with which public legal education grapples. We encountered the claim that the increasing alignment of law in modernity with the demands of technological and economic progress results in ever more irrational and oppressive social arrangements. Rather than tied to emancipatory or liberatory progress we are confronted by law's most coercive aspects. The demands of competitive economic-juridical rationality depend on the juridification of life itself, which in turn demands and produces sacrifice, which operates through the bodies of its subjects. This realization is a pivotal moment in reshaping and reimagining alternative political communities. The negative orientation of theory persistently reveals the difficulty of adopting an educative stance toward law when constructed within a liberal or neoliberal horizon. For example, the persistence of the maxim that ignorance of the law fails to offer relief from punishment; legal guilt in this sense is coeval with unhappy misfortune rather than foresight, as both the condition and consequence of judgement. Benjamin's analysis of law and violence reveal the mounting historical catastrophe that piles up in the name of law and the arrested form of responsibility it entails. Unintended transgression is the necessary condition of bringing law into being, not as a consequence of religious offence, nor as an inauguration of a purer sphere (the justice to which law is mistakenly ascribed), but as a specific historical function of the threatening order of mythic law.[439]

As we have seen, the spheres of religion and myth, according to Benjamin, have become entangled, and this entanglement secretly maintains itself in law.

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[439] Benjamin, *Critique of Violence*, 249.

Thus, for the function of law in modernity, notions of transgression, responsibility and punishment are not only morally ambiguous, but serve to obfuscate the world as it is. When law is aligned with myth, what results is a world falsification. Rather than any striving toward justice as our best and most human task, we are precisely prevented from perceiving the world in its falsification. These ideas serve to illuminate the difficulties encountered for public legal education if it is to avoid reinscribing normative violence and if it seeks subvert the reinstitution of law's colonisation of the world at the expense of alternative ways of ordering and relating in the world.

We encountered the ancient idea that human beings are marked by fate.[440] The rule of fate entails the unravelling of an individual life in the net of a previously woven destiny. As myth becomes entangled with religion, human life is construed as irredeemably fallen; destined to misfortune and unhappiness. The concept of fate comes to be assigned to law and religion precisely through the nexus of guilt. The field in which guilt exerts its power over life is distinguished by fate, such that fate is the "entelechy of events within the field of guilt."[441] In disentangling the spheres of law, religion and myth and bringing to light the origins of mythic guilt, Benjamin presents the problem of responsibility and culpability in view of the individual and his progression in the view of law.

This creates the urgent demand of identifying and undoing (as the foremost task of critique) falsifications in which the myth holds sway over law.[442] It also foregrounds an approach to education which carries a negative utopian charge, one that provides an altogether different orientation for an educative endeavour in law. In applying a negative utopian outlook, we cleave to an idea of a dialectic in which

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[440] See Anthony Winterbourne, *When the Norns Have Spoken: Time and Fate in Germanic Paganism*, (Madison, Fairleigh Dickinson University Press, 2004), 14. See also Jack Newton Lawson, *The Concept of Fate in Ancient Mesopotamia of the First Millennium*: Toward an Understanding of Šīmtu (Wiesbaden: Herrassowitz Verlag, 1994), 7.

[441] "The isolation of the field within which the latter exerts its power is what distinguishes fate; for here everything intentional or accidental is so intensified that the complexities – of honour for instance – betray, by their paradoxical vehemence, that the action of the play has been inspired by fate." Benjamin, *The Origin of German Tragic Drama*, 129-30.

[442] The 'bastardization' of law with myth precisely postulates a nobility of law, of *Recht,* before its entanglement with myth. I'm grateful to Anton Schutz for this insight.

utopian thought conceives of and works for a transformation in society through a critique of what it is not. For our purposes, transformation entails disassembling the myths of liberal law in and through its origins.

The structural theoretical problems that Benjamin offers need not necessarily lead to paralysis or result in defeatism. In seeking ways to interrupt the operation of law and reinvigorate a political and ethical stance toward human action and accountability, Benjamin poses potent questions about other ways of conceiving of sociality and political action, and how those alternatives are being subsumed or supressed by law. What is vital to take from this stage of the exploration is this: the critical philosophical-historical study of law reveals that law can be unmasked in its own self-assertion, along with an awareness of the fact that the violence that founds and preserves law is maintained precisely through the oscillation between founding and preserving.

4

Critical theory, critical pedagogy: Hope in the past

The image of the teacher repeats, no matter how dimly, the extremely affect-laden image of the executioner.[443]

The institutions of law and of education mask the political and historically contingent forces that attend them.[444] An enquiry into the educational theories underpinning public legal education practices thus involves keeping in close view the correspondence of education with its wider social and political formations. Previous chapters emphasised the nexus of public understanding of law with the legitimation of very different historically situated forms of political and social organisation – from early formations of *paideia* in rearing Greek citizens for their participation in nascent democracy from the transformations from absolutism to

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[443] Theodor Adorno, *Critical Models, Interventions and Catchwords,* trans Henry W Pickford (New York: Columbia University Press,1998), 183.

[444] Education and law share common traits when construed as the historical process through which the cultural and social reproduction of any given society is secured by substituting physical with symbolic violence. Hence, pedagogic action is described as follows "objectively, symbolic violence insofar as it is the imposition of a cultural arbitrary by an arbitrary power," including all diffuse education by family members, social groups or institutional educational settings. Moreover, this symbolic violence usurps the imposition of meanings and "imposes them as legitimate by concealing the power relations which are the basis of its force." Pierre Bourdieu and Jean Claude Passeron, *Reproduction in Education, Society and Culture* (Los Angeles: Sage publishers, 2000). For Adorno, the latent violence in the educational system is linked to its genealogical roots in the ritual of execution; alternatively, Foucault situates the rise of mass education in parallel to military training. Tyson Lewis, "From Aesthetics to Pedagogy and Back: Rethinking the Works of Theodor Adorno," *InterActions: UCLA Journal of Education and Information Studies* 2, no. 1 (2006) https://escholarship.org/uc/item/6sc710z2 accessed 3 April 2018.

parliamentary sovereignty.[445] The central question we have continually posed of law and education is: What is the nature of the polity that is being produced and reproduced?

The chapter begins with a consideration of educational theories elaborated (either fully or partially) within the rubric of public legal education. The limitations of the available literature prove challenging for providing a full account through an educational lens. Public legal education literature focused on educational philosophies is scant; some exists under the aegis of associated disciplines of citizenship education, development literature and popular education literature, frequently as isolated case-studies or discontinuous programmes.[446] The absence of an analysis of educational theories in most studies also points to the political and value neutral exposition of liberal legality. An uncritical stance on the role and function of law (and public education in law) in society results in attempts to recuperate law as a protective or progressive agent for change, impervious to the structural conditions driving the juridical field in which educational practices are delivered.

In this idiom, public legal education risks co-opting participants or learners into a mythology of rights that reinforces heteronomy and portrays those who suffer most from the absence of legal assistance in the wake of state retrenchment as responsible for their own failed status as right bearers.[447] Education is

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[445] For a discussion on the association of paideia and the formation of political constitutions see Cornelius Castoriadis, *Philosophy, Politics, Autonomy: Essays in Political Philosophy* (Oxford: Odeon, 1991), 149 and 161-62.

[446] See Lisa Wintersteiger, "Legal Need, Legal Capability and the Role of Public Legal Education," (Law for Life, 2015) accessed 25 January 2018. http://www.lawforlife.org.uk/wp-content/uploads/Legal-needs-Legal-capability-and-the-role-of-Public-Legal-Education.pdf. Lisa Wintersteiger and Tara Mulqueen, "Decentering Law Through Public Legal Education," *Oñati Socio-Legal Series* 7, No. 7 (2017) 1557-1880. Available at SSRN: https://ssrn.com/abstract=3058991

. Don Rowe, "Law-Related Education: An Overview," in *Cultural Diversity and the Schools: Human Rights Education and Global Responsibilities* eds. James Lynch, Celia Modgil and Sohan Modgil (London: Routledge, 2014). Amy S Tsanga, *Taking Law to the People: Gender; Law Reform and Community Legal Education in Zimbabwe* (Harare: Women's Law Centre, Weaver Press, 1999).

[447] On rights and hegemony see Alan Hunt, "Rights and Social Movements: Counter-Hegemonic Strategies," *Journal of Law and Society* 17, No. 3 (1990): 309-203. For a

increasingly articulated as the requirement or responsibility of citizens to advance social cohesion and integration, rather than a right that the citizen claims from the state in the interest of equality or freedom. This paradigm places the duty and responsibility of social cohesion and integration on individuals.[448]

The chapter moves on to trace the intersections of Critical Theory emerging from the Institute for Social Research and the later critical pedagogy movement. The different phases of development of Critical Theory by the *Institut* have influenced the theory, practice and philosophy of education more generally.[449] The analysis here aims to the draw out the complex intersections of political and cultural forces impacting on the experiences of both students and educators working in public legal education practices. What emerges from the emancipatory political project that attracted critical pedagogical thinkers to the earlier work of the *Institut* is the difficulty of dislodging ideological and instrumental approaches to educational practices. The continuing importance of Critical Theory helps us to address the puzzles presented in educational practices, "[that] are not necessarily procedural kinks or pedagogical tangles of our own making,"[450] and in rooting out the politically sculpted situations and contradictions stemming from the capitalist system in which educators work.[451] Critical pedagogical approaches need to disrupt the logic of adaptation and socialization that education in law entails, in part because the question of law, (its historical-philosophical conditions) as such, is foreclosed. This poses the question of the political theologies that tie the subject to a juridico-economic order founded on an eschatology of progress.[452] Moreover it asks how this set of rationalities is instrumentalised in public legal education theories. The dilemma that emancipatory education poses is what it means to be or become a free, autonomous, democratic subject and whether such a subject can in

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reading of public legal education and responsibility, Wintersteiger and Mulqueen, "Decentering Law"

[448] The transactional educational paradigm also suggests a shifting paradigm in the politics of learning see Biesta, "Against Learning," 58.

[449] Nigel Balke and Jan Masschelein, "Critical Theory and Critical Pedagogy" in *The Blackwell Guide to Philosophy of Education*, eds. by Nigel Blake, Paul Smeyers, Richard D. Smith, Paul Standish (Oxford: Blackwell Publishing, 2008), 38-57.

[450] Ibid., 6.

[451] Brookfield, *Power of Critical Theor*y, 6. Full citation needed

[452] The objectives of cohesion and adaptation says nothing about what kind of polity are shaped. See Biesta, *The Beautiful Risk of Education*, 68.

fact be a product of education. In these pressing questions, early proponents of Critical Theory have a continuing contribution to make.

The interdisciplinary approach to philosophical-historical enquiry developed by Critical Theorists alongside their negative utopian orientation provides a potent source of inspiration for public legal education practices engaging in a counter-educational exchange with the law. Unlike their predecessors later proponents of critical pedagogy would cleave to a form of utopianism that are explicitly not 'Messianic' but rather 'anticipatory', aimed at helping students to expand their capacity as agents of social change and teachers to become engaged 'oppositional intellectuals' supporting students to address authority and govern themselves rather than simply be governed.[453] Rather than adopting this positive utopian emancipatory vocation of critical pedagogies developed in the wake of the Frankfurt School, the destructive political referent for grounding critique and the possibility of social transformation is reimaged in this final chapter.[454]

The final part of the chapter explores the pedagogical insights that can be drawn from Walter Benjamin's contributions to Critical Theory.[455] The idea of educative force (*erzieherische Gewalt*) that appears in the Critique of Violence will be developed as taking on a negative utopian hue.[456] Its destructive and creative potential, following a Messianic reading, combine to depict a threshold, or gateway. A couple of preliminary points bear making. The problem of utopianism, linked in Benjamin's thinking to the dialectic of human emancipation and the idea of messianic redemption, has no direct relation to the prevailing conditions; it is

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[453] Giroux, *Theory and Resistance*, xxii.

[454] Henry Giroux, *Theory and Resistance in Education: Towards a Pedagogy of the Opposition* (Santa Barbara: Praeger Publishers, 2001), xxi.

[455] On the relationship of Benjamin with the Frankfurt Institute generally, see Martin Jay, *The Dialectical Imagination: A History of the Frankfurt School and the Institute of Social research 1923-1950* (Berkeley: The University of California Press, 1996). On Benjamin's influence on Adorno, see Susan Buck-Morss, *The Origin of Negative Dialectics: Theodore W Adorno, Walter Benjamin, and the Frankfurt Institute* (New York: The Free Press, 1979), 20-23, 136-184.

[456] The concept of negative utopianism is distinguished from dystopian or anti-utopian thought. For a broader engagement with utopian literature, see Fatima Vieira, "*The Concept of Utopia"* in *The Cambridge Companion to Utopian Literature*, ed. Gregory Claeyes, (Cambridge: Cambridge University Press, 2010), 3-128. For a discussion of negative utopianism as pessimistic utopianism, see Balke and Masschelein, "Critical Theory," 39.

glimpsed in flashes of the past. It can be manifested as an educative force, but only insofar as it forgoes the necessity of law's self-grounding myths and the mirage of progress, both of which foreclose alternative imaginaries of justice and social solidarities. The analysis will develop a concept of study with a particular focus on Benjamin's writing on Kafka and a reading of law as doctrine, or a body of teaching.[457]

Philosophies of education: From early civics to socially transformative accounts of public legal education

The tensions pervading public legal education practices today have been read in light of a changing paradigm, from a juridical-political relation between the state and the citizen, toward an economic relationship in which the state becomes the provider of goods and services consumed by individual citizens. This development is an aspect of the emergence of a concept of learning in which the consumer of educational goods has needs that are fulfilled by the educator and the content of education becomes the product or commodity to be provided.[458] While the historical trajectory we have charted in the evolution of the public legal education movement demonstrates its vulnerability to co-option, de-politicisation

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[457] The distinction between law and doctrine points to the etymological roots of doctrine as a body of teaching, *Chambers Dictionary of Etymology*, ed. Robert K Barnhart (Edinburgh: Chambers, 2008), 293. In the Benjaminian reading, we are also oriented to the Jewish connotations of doctrine. Gillian Rose writes, "Since the Epistles of Paul and the Gospels, Judaism has born the opprobrium of the evangelical opposition of Christian love to Pharisaical law. In the modern period, the further connotations of 'positive' or 'human' law (without the Christian criterion of natural law) can accrue to Torah if it is translated as *law* when it would be more accurately translated as teaching or instruction." Rose, "Walter Benjamin: Out of the Sources of Modern Judaism," in *Judaism and Modernity* (Oxford: Blackwell 1993), 187.

[458] Biesta, *Beyond Learning*, 13-24.

and the neutralizing of economic and social struggle, these are not inevitable outcomes.

The following discussion of educational theories of public legal education is a schematic account that would benefit from much wider field work. The modest aim here is to reveal some of the principle challenges and opportunities inherent in existing educational configurations for future practitioners to develop transformative educational spaces in which law can be exposed in its potency and with all its attendant risks. Three strands will consider the civics or law-related education activities focused over the last several decades on young people, development-oriented accounts, and the framework of legal capability. Some of the literature reveals progressive or transformative practices, conceiving legal education as a strategy of resistance to economic and social oppression, particularly when situated in its historical, socially and culturally contingent effects within the lived experience and reality of learners' lives. This potential is explored as a consciousness-raising tool, and as a mechanism for galvanising collective and social action. The case studies offer important evaluative critiques of the political and moral constructions of law-making and citizen participation. Nonetheless, law (albeit better law) is consistently posited as the mechanism through which marginalised groups will be able to resist systemic inequality and oppression. While reformist in spirit, this largely adopts a settled account of the application of law as the medium of or instigator in progressive change.

This fundamentally throws into question strategies that fail to address the extent to which law is used, not simply to manage disputes but to establish the terrain upon which disputes are fought.[459] An educational paradigm which primarily addresses itself to applying law in and through its existing institutional structures inhibits wider political space for resistance and co-opts struggle to the confines of the regulatory state. Law is also thereby naturalised as the means for oppressed or marginalised group to organise resistance, re-establishing the rule of law as the primary means to secure recognition for social and political legitimacy and as the only alternative for advancing freedom. This obscures the fact that novel demands

[459] This requires a paradigm beyond that of law as the 'mirror of society' with which the law and society field has traditionally associated itself. See Brian Tamabaha, *Law and Society,* 368- 371.

for rights operate by integrating and subsuming power relations into the body of law.

The difficulty of situating public legal education within broader socio-political constructs and enabling a critical and transformative learning praxis emerges under the aegis of law-related education. Focused predominantly on school aged children, education programmes in this field combine knowledge of political and legal institutions with the skills necessary for active citizenship. U.S. law-related education evolved in three phases from the early 1960s.[460] The 1960s saw a collaboration between universities and civil liberties organisations form the first teaching institutes which brought interdisciplinary perspectives on the Bill of Rights and the Declaration of Independence together to devise teaching programmes for students.[461]

One of the earliest radical proponents of the movement, Isidore Starr, recalls how case study teaching methods were brought to the fore in order to encourage a more critical attitude among the students:

> What amazed me at the time was the effect of law-related discussions on the interest and quality of student thinking. In time, I began to find the uses of law in social studies an important means of breaking through superficial textbook commentary to case study confrontations of value conflicts, the nature of decision making, and the quest for a hierarchy of values in our society.[462]

The adoption of case study methods injected legal learning with a realism that became a precursor to a period of political turbulence. The second period of law-related education is demarcated by civil unrest between 1968 and 1979. The assassinations of John F Kennedy, his brother Robert, and of Martin Luther King, student activism and the Vietnam war attested to a lack of faith in government structures, as well as perceptions of rising crime.[463] As well as a growth in street law

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[460] Sherry Weinstein and Robert W Wood, "History of Law-Related Education" (Eric Clearinghouse, 1995) Accessed 31 January 2018 https://files.eric.ed.gov/fulltext/ED401163.pdf.

[461] Ibid, 8.

[462] Isidore Starr, "The Law Studies Movement: A Memoir," *Peabody Journal of Education* 55, no. 1, (1977): 6-11.

[463] Weinstein and Wood, "History of Law-Related Education," 14.

and community-based programmes focused on everyday legal issues, these factors influenced a shift toward 'delinquency prevention'. Writing in 1971, American Bar Association president Leon Jaworski emphasised the goal of law-related education aimed "to teach the child at a receptive age why any free society must rely upon law and its institutions and the nature of the duties that a free society imposes upon its members."[464] By 1977, this emphasis became formalised and the law was amended to specifically provide for "prevention, control and reduction of juvenile delinquency."[465] Although ostensibly aimed at ameliorating the failure of political and civics education, curricula maintained a relatively narrow focus on government and law-making. This meant the social realities of students were largely ignored by curricula, which in turn fundamentally failed to achieve their appointed task of securing active participation in democratic life.[466] Law-related education subsequently addressed the failure of civics education to achieve relevance by offering a 'citizen-centred' learning focus, drawing its themes from political science and contextualising concepts such as power and democracy through the application of rights and duties applicable to day-to-day life. The fundamental difference between the black-letter professional training of lawyers and the school curriculum lies in how the latter focused on students' capacity to adapt to the adult world. The goal was thereby to adapt students to become workers and make a smooth transition into adult life.[467]

An important outgrowth of the law-related education movement in 1972 was the Street Law programme at Georgetown University, with the first clinics teaching law students how to teach practical law classes in schools and to the wider community.[468] These programmes have since been developed in a number of jurisdictions and represent one of the most wide-ranging manifestations of public

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[464] L Jaworski, President's Page. *American Bar Association Journal* 57 (1971) 829 cf. Weinstein and Wood, "The History of Law-Related Education," 1995, 15. https://eric.ed.gov/?id=ED401163

[465] Juvenile Justice Amendments 1977 amended the Juvenile Justice and Delinquency Prevention Act of 1974 to provide the term "juvenile delinquency program", Weinstein and Wood, "The History of Law-Related Education," p?.

[466] Rowe, "Law-Related Education," 72.

[467] Ibid, 53.

[468] Margret E Fischer, "So What is Street Law Anyway? A U.S. Perspective," *International Journal of Public Legal Education* 11, no. 1 (2007).

legal education practices globally.[469] Their relative success has been attributed to a focus on the law-related issues that are commonly faced by students, as well as their participatory teaching and experiential learning methodologies.[470]

> Learner-centered education is often contrasted with the more traditional top-down, teacher-centered approach known as instructionism that views students as empty vessels to be filled and teachers as the imparters and transmitters of everything students need to know. With learner-centered education, students' prior knowledge is valued and the teacher's role is to help students build bridges between their current understandings and the new subject matter.[471]

The programmes approached community building and teacher education aiming to foster a sense of collective and creative problem-solving. However, they rarely carry these educational models outside of the student or school environment.[472] Relatively few evaluations focus on delivery to the wider community and funding

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[469] Street Law now exists in 50 U.S law schools and many other international law schools. Weinstein and Wood, "History of Law-Related Education."

[470] Seán Arthurs, Melinda Cooperman, Jessica Gallagher, Dr Freda Grealy, John Lunney, Rob Marrs and Richard Roe, "Is it possible to go from Zero to 60? An Evaluation of One Effort to Build Belief, Capacity, and Community in Street Law Instructors in One Weekend," *International Journal of Public Legal Education* 1, no. 1 (2017): 19-81

[471] Ibid, 27. Street Law adopts a Bloom taxonomy of learning which encompasses knowledge, comprehension, application, analysis, synthesis and evaluation. The higher level of thinking encouraged by this taxonomy "is reflected through the short essays based on hypotheticals, judgments, on mock trials or real legislation using learned knowledge of law, or other responses that display complex analysis." See also Kamina A. Pinder, "Street Law: Twenty-Five Years and Counting," *Journal of Law and Education* 27 Nno. 1 (1998): 219.

[472] A number of evaluations focus on elements of resilience and confidence building in the context of juvenile crime see Bonnie Benard, "Fostering Resilience in Children: Protective Factors in Family, School, and Community," (Portland: Northwest Regional Educational Laboratory, 1995), and Caliber Associates, "The Promise of Law-Related Education as Delinquency Prevention," *ABA Technical Assistance Bulletin (*Washington, DC: American Bar Association, 2002), 19.

seems to have been hard to sustain.[473] The focus has predominantly been on school aged students and on the citizen building aspects of public legal education with a view to socialisation and law and order compliance:

> PLE provides an opportunity for students to develop their practical skills (such as communication and problem solving skills) whilst involved in authentic experiences. The primary objective of PLE is however to educate the public in order to "empower" individuals to achieve solutions and promote "compliance" with obligations- in three words this is designed to encourage active citizenship.[474]

Even the more narrowly construed field of public legal education in the civics context appears to have been vulnerable to shifting political agendas aimed at reproducing the normative and adaptive demands of citizenship.

This is also apparent in the cognitive behavioural development theories adapted for the secondary curriculum that created educational models designed to naturalise moral development and normative judgments as aspects of maturation. Indebted to a liberal and humanist tradition following Kant, these ideas continue to hold significant sway in education theory and practice. They encompass three models: 'legal competence;' the 'developmental model' following the work of Piaget and Kohlberg; and a 'compliance model.'[475] In Kohlberg's theory, a further six moral stages are grouped into three major levels. In the preconventional, notions of 'good' and 'bad' are translated via physical consequences of punishment or reward. The second stage is the conventional, characterised by active support for authority figures and the internalisation of rules toward conformity with wider

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[473] Other more recent attempts to reach a wider public are still in evidence, for example, Michael Urban, "Why is There a Need for Street Law?" *International Journal of Public Legal Education*, Vol 2, No 1, (2018)101-102.

[474] Sarah Morse, "Design, Development and Value" *International Journal of Public Legal Educatio*n Vol 2, no. 1 (2017): 106.

[475] Legal competence focuses on critical enquiry into history and the values and application of law. The cognitive developmental approach to moral development draws from Dewey's genetic, experiential and purposive reasoning. June L Tapp and Lawrence Kohlberg, "Developing Senses of Law and Legal Justice," *Journal of Social Issues* 27, no. 2 (1971): 76-84.

social groups. Finally, the postconventional stage incorporates autonomous judgement with what Kohlberg calls 'constitutional' overtones and individual rights focus that nevertheless encompass ethical and abstract frameworks for judgment and the critique of law.[476]

It is worth revisiting liberal Enlightenment ideas insofar as they have shaped the educational theories we are discussing. Following Kant, the defining aim of the Enlightenment is to release man from his condition of tutelage and subordination, to deploy reasoned reflection and gain independence at a remove from heteronomy.[477] Heteronomy directs the individual's actions from the outside, whereas for Kant the mature, responsible and reasoning individual is capable of independent thought and therefore ultimately free.[478] The role of education in this endeavour is essential (both for the individual and society) in order to provide the necessary direction and moral instruction to achieve maturity and rational autonomy, elements which provide the conditions of an enlightened civilization. Education can foster reason, 'the touchstone of truth' by shaping young minds. Society had yet to achieve this maturity but by raising enlightened individuals, the whole of society would eventually assume a democratic character.[479]

Education conceived in this light was later tied to citizenship and significantly influenced trends in democratic education.[480] Enlightenment thinkers

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[476] All models exhibit a staged or structured evolution of learning competencies, engaging young people from the basic rule-oriented to more advanced critical stages. Lawrence Kohlberg, "Moral Stages and Moralization: Cognitive-Developmental Approach," in Lawrence Kohlberg, *Essays on Moral Development Volume II The Psychology of Moral Development: The Nature and Validity of Moral Stages* (San Francisco: Harper Publishing, 1984) 170 – 206.

[477] Immanuel Kant, "What is Enlightenment?" in *Kant: Political Writings* ed. H S Reiss, Cambridge Texts in Political Thought (Cambridge: Cambridge University Press, 1991), 56. For the engagement of Adorno with Kant on the problem of maturity, see Robert French and Jem Thomas, "Maturity and Education, Citizenship and Enlightenment: An Introduction to Theodor Adorno and Hellmut Becker, 'Education for maturity and responsibility'," *History of Human Sciences*12, no. 3 (1999): 4-10

[478] Kant, "What is Enlightenment?", 56

[479] Although he readily admits there are other obstacles to education aimed at "enlightening an era." Kant "What is Orientation in Thinking" in Political Writings, 249.

[480] The notable emphasis in Kant is of the individualistic conception of democratic person, Biesta, *Beyond Learning*, 127.

raised the question of the kind of subject that would be best suited to a democratic society. "For Kant, the democratic person is the one who can think for himself, who can make his own judgements without direction from another: The Kantian subject is therefore the rational subject and an autonomous subject."[481] In subsequent theories of education, the construction of the moral and rational individual was taken up in models developed by Piaget and Kohlberg; learning about the law as an aspect of citizenship education would also serve to foster moral judgement, moving from the egocentric and naïve orientation of the young child toward "orientation not only to actually ordained social rules but to principles of choice involving appeal to logical university and consistency."[482]

While the phases described in the cognitive behavioural models above assume progression between heteronomy at one pole and autonomy at another, most students, according to Kohlberg, fall into the first and second stages with very few ever attaining the third.[483] This raises important concerns about the limitations of educational capacity to shape autonomous learners, while highlighting the tensions inherent in citizenship education instrumentalised on one hand toward independence and on the other toward crime prevention and social cohesion. Programmes that establish socialisation, adaptation and the pursuit of law and order as the primary model sought to help students become better decision makers, thereby "creating good citizens."[484] Public legal education in this construction can be understood as an aspect of the technology or technique of citizenship, which Rose describes as

> practices for civilizing human subjects by turning them into responsible citizens. Such projects for inculcating responsibility divide subjects into actual citizens, potential citizens, failed citizens, anti-citizens on the basis of their presumed or demonstrated capacity – or

[481] Ibid., 127.

[482] Kohlberg "Moral Stages," 171-172.

[483] Ibid., 172.

[484] Although Weinstein and Wood argue that citizenship approaches were less focused on delinquency in the 1980s, the literature folds in these various aspects such that they become matters of degree rather than kind. Weinstein and Wood, "History of Law-Related Education," 31

> lack of capacity – to exercise responsibility; or their wilful refusal of the demands to become responsible.[485]

Not only is it the responsibility of each to be become reasoning individuals as an aspect of socialisation and inculcation into the normative demands of society, but the burden of any failure to have achieved requisite status is eschewed by the state. It falls on the individual to 'do better' at handling their legal issues and acquiring rights, thereby also assuming their role as fully socialised citizen-subjects.

Turning our attention to development focused practices, education programmes have expanded in response to global rule of law advances since the latter part of the twentieth century. While framed in the European liberal tradition, they exhibit important critical approaches aiming to surface the way in which liberal legalism operates in post-colonial settings. Amy Tsanga provides a detailed account of Zimbabwean legal services programmes, in particular legal literacy for Zimbabwean women. Contrasting traditional legal services with alternative methods grounded in critical enquiry and transformative action, she writes "it is too simplistic to centre strategy entirely on rights to legal aid and knowledge of law" because that approach "ignores the powerful social, cultural, psychological and political constraints that hinder the enjoyment of rights."[486] Transformative community legal education engages in a process of co-producing knowledge through dialogue, participation in the learning process and contextualisation within the lived realities of the women involved. This involves de-individualising struggle so as to enable resistance through community organising and the capacity to "amass power and to ultimately effect change."[487] Empowerment is defined as "the process of acquiring social and psychological capacities needed to bring about change."[488] The curriculum necessitates situating legal questions arising in

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[485] Nikolas Rose and Filippa Lentzos, "Making Us Resilient: Responsible Citizens for Uncertain Times," in *Competing Responsibilities: The Ethics and Politics of Responsibility in Contemporary Life,* eds. Susanna Trnka and Catherine Trundle (Durham, NC: Duke University Press, 2017), 27–48.

[486] Amy Tsanga, "Taking Law to the People: Gender, Law Reform and Community Legal Education in Zimbabwe, (Zimbabwe: Weaver Press, 2003), 17.

[487] Ibid, 20.

[488] Margaret Schuler, Legal Literacy, A Tool for Women's Empowerment Edited by Sakuntala Kadirgamar-Rasaingham, (Michigan. OH: OEF International 1992), quoted in Tsanga, "Taking Law to the People", 40.

educational approaches in historical terms, through a critical reading of colonial history and gender identity: "one of the greatest challenges facing organizations that seek to take the law to the people is to address the tensions posed by people's history and sense of identity as well as the gendered dimensions of power that are posed by culture."[489]

Another fruitful study in women's rights brings together a number of education theories in community legal education for low-income single mothers in Chile.[490] The programme enabled women to critically evaluate the legal response to their situations, and to reflect on power imbalances between various actors (including lawyers and teachers). However, failure to link collective awareness with mobilisation ultimately left them unable to challenge the power structures involved in ineffective alimony and support laws. The link between learning and action was not made, and ultimately the prevailing political will dictated the capacity of the programme to galvanise a political response.[491] The programme drew from the critical education theories of Brazilian popular educationalist Paolo Freire, who contributed a substantial body of work on critical pedagogical methods working in the slums of Rio. His dialogic and participative methods were influential in the social and political context of the period of democratic agitation in Brazil. However, this popular education drive in Chile fundamentally altered the educational locus as it related to law:

> Freire's literacy campaigns in Brazil occurred within the context of revolutionary social change. The opportunities for collective action were antecedent to learning: elections were to take place, land redistribution was underway, and technical and financial support was

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[489] Tsanga, "Taking Law to the People," 70.

[490] Susan McDonald, "Popular education in downtown Santiago," *Convergence* 31, no. 1-2 (1998): 147-55. A prerequisite was to take part in a session examining the history of working-class women in Chilean society. Methods developed in sessions with women included codification exercises that brought women's experience of the various actors in their lives – including police, the fathers of their children, and judges – together with exploration of feelings of powerlessness and guilt in the context of their circumstances. Ordering exercises, looking at the stages of abstract legal process with the support of a lawyer to bring clarity to the legal steps required for a claim of alimony, alongside the reality of the efficacy of those steps (for example, the burden of tracking down the father fell on the women).

[491] Ibid., 147.

> available for economic development. In contrast this programme [in Santiago] was implemented in 1993. The elections of 1989 had returned democracy to the country. This program for single mothers was one example of the Government's work to promote (and effectively contain) social protest.[492]

Taking up the themes of dominance and ideology in educational discourse, Paolo Freire's work in poverty stricken north-eastern Brazil in the 1960s aimed to resolve the contradiction of the teacher-student hierarchy (which for him maintains the character of authoritarian logic). Problem-posing education sets out to demythologize the world through a dialogue of equals between teacher and student.[493] Freire's contention was that education should release the oppressed from the fatalism that prescribes their condition as the inevitable outcome of their social and intellectual subordinacy.[494] Freire's syncretic formulae brought together aspects of Critical Theory with a form of liberation theology.[495] The belief in revolutionary praxis took the shape of a positive utopian belief within a religious, redemptive horizon of the not-yet fully actualised class struggle. The emancipatory *telos* and confidence in the emergence of a critical class consciousness was enormously influential in the critiques subsequently developed in the fields of postcolonial theory, gender studies, cultural studies and critical adult education.[496]

Legal empowerment practices incorporating elements of Freirean inheritance have burgeoned in recent years. Goodwin and Maru describe practices focused not only on knowledge building but associated activities that build agency and a sense of group empowerment in order to foster change and reform when the rule of law fails to protect people's needs: "Changes in legal knowledge may be a

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[492] Ibid., 149.

[493] Arguably, this dialogic alternative overcomes the monologic difficulty posed by a Marxist reading of ideology. The problem of how to wrest a liberated consciousness from the workings of power, if the position from which this awareness can be derived is necessarily from the outside, from someone else who is somehow situated outside the working of power, remains unresolved. Biesta, *The Beautiful Risk of Education,* 70-71.

[494] Paulo Freire, *The Pedagogy of the Oppressed*, (St Ives: Clays Ltd., 1996).

[495] Peter McLaren, and Joe L. Kincheloe, *Critical Pedagogy: Where Are We Now?* (New York: Peter Lang, 2007).

[496] Henry Giroux, *Border Crossings: Cultural Workers and the Politics of Education* (Oxford: Routledge, 2005).

foundation for other impacts over time, including willingness to take action in pursuit of remedies or other entitlements."[497] However, change within legal empowerment paradigms relies on the willingness of political actors to relinquish power, a factor that profoundly curtails their efficacy. Educational efforts sit within a continuum of legal advocacy, and studies struggle to differentiate the impact of legal education as distinct from legal advocacy or community organising.

Conceptual components of public legal education have been analysed in the last decade in the UK, with the development of an evaluation framework for assessing the spectrum of competencies - from individual rights knowledge, skills and attitudinal changes to collective community organising.[498] Curricula incorporate wider contextualised understanding of the institutional and historical aspects of legal systems and extend to influence and critical engagement in the wider legal and political system.[499] Exercises and pedagogical tools involve a shift from law-centred to contextualised critical reflections on the law:

> By foregrounding the experience of those we teach and focusing on legal capability, our approach does not simply reproduce narratives of law's effectiveness or neutrality, but rather tries to use law in strategic relation to other domains and perspectives. Our goal is that when confronted with a law-related issue, those we teach should be able to identify it and from there have the resources and tools they need to make a decision about how best to proceed, whether by using the law or not.[500]

Alongside the need to help individuals recognise and 'see' the law in its multiple dimensions, reform efforts tie juridico-political dimensions to the conceptual

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[497] Laura Goodwin and Vivek Maru, "What Do We Know about Legal Empowerment? Mapping the Evidence," *Hague Journal on the Rule of Law* 9, no 1 (2017): 25. Advocacy, casework and education are largely undifferentiated in the social and economic evaluations. This leaves open the question of how to attribute methodologically different interventions that might build legal knowledge and skills, and the nature and extent of the combination of knowledge and sense of agency that led to community activism.

[498] Sharon Collard, Chris Deeming, Lisa Wintersteiger, Martin Jones and John Seargeant, "Legal Capability Evaluation Framework," (London: Plenet, 2010). See also Wintersteiger and Mulqueen, "Decentering the Law," 2017.

[499] Wintersteiger and Mulqueen, "Decentering the Law," 13.

[500] Ibid., 13.

framework. Yet mobilising collective and progressive approaches are often hampered in practice. The pressure to address legal need as the basis for educational interventions means practices are constrained by the logic and field of influence of juridification. The growth of law, particularly in the newly won areas of social and economic rights, provides for a constantly growing (and changing) body of law that must be 'acquired' in order for the need to be met.

Critical analysis of law's social constructedness, how law is both shaped by and constitutes social relations, is therefore one of the crucial difficulties identified for education:

> [T]he framework of legal need obscures the fact that law is a socially constructed form of relation; that the need for law is only a correlate of the presence of law itself, which is neither necessary nor natural. It is important to remember that law is at once constitutive and constituted: it actively creates the categories it deploys, but it is also itself the product of social relations.[501]

The contingent and contested power relations subsumed by law underpin legal innovation as well as legal stability.[502] To the extent that law (and education in law) provides pre-eminent modes of producing and reproducing hegemonic relations, the urgent task for counter-hegemonic pedagogy is for this process to be unmasked.[503] It is in the very nature of law to claim new territory in order to ascribe and preserve its own legitimacy; critical awareness of this function of law and therefore toward law as a potential tool of resistance is the unique contribution that a critical educational exchange with law can open. Revealing the contradictions of progress and ideology in liberal legal regimes was a core focus of some of the leading thinkers of the Frankfurt School. Having considered some of the tensions that public legal education practitioners encounter, we will turn to develop the key strands of educational philosophy originating from the *Institut*.

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[501] Ibid, 13.

[502] Bourdieu, "Force of Law," 1987.

[503] For a reading of Gramsci and counter-hegemony and legal rights, see Alan Hunt, "Rights and Social Movements: Counter-Hegemonic Strategies," *Journal of Law and Society* 17, no 3, (1990): 309-203.

Critical Pedagogy and Critical Theory

What is needed is a radical reconsideration of the knowing individual as such.[504]

The work emerging from the *Institut* exerted considerable influence on the development of critical pedagogical writing in the years following the school's move to Geneva, and subsequently to Colombia.[505] The following discussion aims to explore the continuities and important discontinuities between early proponents of Critical Theory and later contributions aimed specifically at the development of critical pedagogical approaches. A central concern will be the evolution of the emancipatory and utopian thinking associated with critical pedagogies. Rather than adopting the utopian emancipatory vocation of critical pedagogies developed in the wake of the Frankfurt School, this enquiry will retrieve a destructive or negative political referent for grounding critique that emerged from the early years of Critical Theory.

Negative utopianism conceives of educational encounters that retain a possibility of social transformation while disavowing the tendencies of utopian 'progress'. In contrast to the negative utopian orientation of the early proponents, the form of radical education adopted in later versions, as critical pedagogy theorist Henry Giroux describes it, is 'anticipatory.'[506] Pedagogy is conceived as helping students to expand their capacity as agents of social change with a view to their role as democratic citizens.[507] While questions of authority, autonomy and subject formation are central critiques within Critical Theory, by seeking recourse to the

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[504] Horkheimer, "Traditional and Critical Theory," 199.

[505] Writers in the field include Pierre Bourdieu, Paolo Freire and Henry Giroux. Scholars more broadly associated with the school include thinkers as diverse as Michel Foucault, Louis Althusser, Cornel West and Bell Hooks. On the shift toward the second phase of the Critical Theory see Ilan Gur-Ze'ev, "Walter Benjamin and Max Horkheimer from Utopia to Redemption," *The Journal of Jewish Thought and Philosophy* 8, (1998): 119-155. An alternative three stage analysis of the *Institut*'s development is offered by Balke and Misscheleien, "Critical Theory," 40-42.

[506] Giroux, *Theory and Resistance in Education*, xxi

[507] Ibid.

positive and anticipatory features of utopian emancipatory thought, later generations fail to engage with precisely the very same tendency of law, as it reaches for a redemptive horizon while producing and reproducing political communities sustained by heteronomy and oppression.

A core premise of critical pedagogy is that educational institutions provide the machinery for de-subjectification, insisting on a world of economic necessity and foreclosing learners from the world of meaningful actions. Rather than allowing human agency and autonomy to flourish, education in the modern technological era aims at the production of goods, not persons. Teachers and students are subjected to commodity-driven grading and professional advancement in an education market exhibiting the same rationale as the stock market.[508] Educational theory operates much like social theory, having become "socialized semi-education, an ever present alienated mind."[509] The insights offered by critical pedagogy point to the correspondence of classroom and educational practices with the demands of the workplace, and the social embeddedness of education within a wider global economy with all its attendant inequalities.[510]

Work spearheaded in Germany by Jurgen Habermas (a student of Horkheimer and Adorno) aimed to salvage the primacy of reason from the early Critical Theoretical writers. His over-arching social theory confirmed the broad diagnosis that education as a reflection of dominant political and economic imperatives fails to serve any higher purpose of self-realisation or emancipation. But the spread of democratisation, women's and minority rights, shifting subjectivities and identities within groups, and the often-competing claims for identity also entailed a re-reading of Critical Theory. Emancipation, according to Habermas, requires a discourse ethic that could break with the pessimism of the *Institut's* founders and prepare the ground for a new language of educational

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[508] Bourdieu, 1995b cf. Critical theories in education, *Critical Theories in Education*, eds. Thomas S Popkewitz and Lynn Fendler (New York: Routledge, 1999), 129.

[509] Theodore W Adorno, "Theorie der Halbbildung" (Theory of Partial Education) in Adorno *Soziologische Schriften* 1 (Frankfurt am Main: Surkamp,1972), 93.

[510] Russell F Farnen, "Politics, Education and Paradigmatic Reconceptualisaton" in *The Politics, Sociology and Economics of Education: Interdisciplinary and Comparative Perspectives*, eds. Russell F Farnen and Heinz Jünker (London: Macmillan Press, 2001), 30-31.

freedom and self-determination as the general aim of education.[511] His turn to communicative intersubjectivity sought to foster "forms of living together in which autonomy and dependency can truly enter into a non-agonistic relation." Rather than looking to a community situated in the past, this relation to others aims at "experiences of undisturbed intersubjectivity."[512] In turn, this intersubjectivity depends on a system of communicative action predicated on mutual understanding and consensus. Instrumentalisation and objectification are thereby presented as distortions to a system of communication, to language as such, which underscores the drive toward mutual understanding.[513]

Habermas' riposte to his predecessors' pessimism warrants a brief re-evaluation in light of Horkheimer's critique of the role of language in the degeneration of reason in modernity. This views language as a pre-eminent mechanism through which oppression is spread, having succumbed to the same technical rationalism that infects every system and institution of modernity. Language for Horkheimer has become no more than a tool "in the gigantic apparatus of production in modern society. Every sentence that is not equivalent to an operation in that apparatus appears to the layman just as meaningless …meaning is supplanted by function or effect in the world of things and events."[514] The non-agonistic communicative intersubjectivity envisaged by Habermas leaves undisturbed the loss of meaning entailed by the dominance of subjective or instrumentalised reason. Rationality, overwhelmingly concerned with self-preservation, becomes attached exclusively to the subjective concerns of atomized individuals with no greater end or purpose in view.[515]

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[511] Masschelein, "Critical Theory," 41. See also *Habermas, Critical Theory and Education*, eds. Mark Murphy and Ted Fleming (New York: Routledge, 2010).

[512] Jürgen Habermas interview, Dews 1986, 125, quoted in Siebren Miedema and Willem L Wardekker, "Emergent Identity: Possibilities for a Postmodern Repoliticisation of Critical Pedagogy" in Popkewitz Fendler, *Critical Theories*, 71.

[513] Ibid, 71. Popkewitz, *Critical Theories in Education,* 149. Which does the ibid refer to?

[514] Max Horkheimer, *The Eclipse of Reason* (New York: Oxford University Press, 1947), 21-22.

[515] This involves the decline of reason tied to ends that earlier religious or metaphysical philosophical systems retained (obtaining to the pursuit of justice, equality, happiness and so forth), *Eclipse of Reason*, 22.

The critique sought to locate something of a spirit of objective reason that had been lost and to consider what that loss incurred. The centrality of subjective concerns represents a distorted and one sided historico-philosophical development of the idea of autonomy as intrinsic to human progress. This contrasts with a form of autonomy that envisages the pursuit of freedom of the individual *for* and *within* society:

> The absolutely isolated individual has always been an illusion. The most esteemed personal qualities, such as independence, will to freedom, sympathy and the sense of justice, are social as well as individual virtues. The fully developed individual is the consummation of a fully developed society. The emancipation of the individual is not an emancipation from society, but the deliverance of the society from atomization, and atomization that may reach its peak in periods of collectivization and mass culture.[516]

Underlying this argument is a critique of an abstract transcendental principle of person, essence or subject formation inherited from Enlightenment thought. Just as emancipation and individuation are only conceivable as aspects of socialisation, individuals are not immune to the repressive forces within a society and are necessarily prone to forces immanent in history and culture (for good or ill). The predominance of the abstract universal subjectivity of the Enlightenment project means that the particular, unique individual becomes inserted into the economic order of advanced capitalism at the expense of the disintegration or loss of self and identity.

The changing face of global capital and geopolitical formations, as well as the need for a more nuanced understanding of socio-political construction of the individual posed new and pressing problems on the mechanisms available to critical pedagogy to forge new directions.[517] The *Institut's* theorists themselves, having moved to establish a base in the United States in exile from National

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[516] Ibid, 137.

[517] Joe L Kinchloe, "Critical Pedagogy in the 21st Century: Evolution for Survival" in *Critical Pedagogy: Where are we now?* eds. Peter Mclaren and Joe L Kinchloe (New York: Peter Lang, 2007), 10-42.

Socialism, disavowed the capacity of revolutionary praxis to afford a means of escape, and of the existence of a universal revolutionary subject-in-waiting to achieve a shift in consciousness that can be lifted *en masse* to transgress a totalising reality.[518] The challenge to later critical educators reappears as one of resurrecting a critique that both acknowledges the advances of more progressive elements of modernism, and that seeks more sophisticated considerations of the subjectivities and identities of those identified as the proletariat in Marxist, and subsequently Freirean discourse.[519]

Both German and U.S. branches of critical pedagogy sought to exploit some of the impasses presented in earlier theories, as with the resort to a 'new language' (following Habermas) in communicative action. American theorists also sought a radical reconception of citizenship, attempting to exploit discontinuities in the cultural societal nexus in which resistance could be located. The stakes, according to Giroux, are not simply over "a new language to rethink the modernist tradition" but also "the reconstruction of the political, cultural and social preconditions for developing a radical conception of citizenship and pedagogy."[520] As with the more radical reform oriented law-related educational strategies explored above, Giroux contends that a radical pedagogy needs to combine the insights of critical pedagogy with theories of social action to move beyond the reproductive rationality and over determinism of correspondence theories, toward a transcendent and reconstructive education system.[521]

A core critique levelled at earlier proponents of critical pedagogy thus centred on challenging a theory of strict correspondence between the sites of cultural production (such as school and the workplace). Rather, theorists like Giroux and Apple argue that schools offered sites of resistance and contestation between the formal education system and workplace settings.[522] Postmodern

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[518] Buck-Morss, *The Origin of Negative Dialectics*, 28-32. See also Ilan Gur-Ze'ev, "Walter Benjamin and Max Horkheimer from Utopia to Redemption," 16-18.

[519] For some critical theorists, this entails a shift in thinking away from notions of identity toward a question of subjectivity which asks "how can we be or become a subject of action and responsibility?" Biesta, *The Beautiful Risk of Education*, 142.

[520] Giroux, *Border Crossings*, 32.

[521] Giroux, *Border Crossings*, 37

[522] Michael M Apple, *Education and Power* (London: Routledge & Kegan Paul, 1979).

feminist discourses point to new directions that could be adapted to the challenge of a totalising discourse (of history and reason), arguing the subject seen through this lens necessarily becomes plural rather than the singular universal figure of the worker. Feminist educators counter the abstractions of critical pedagogy by refocusing the personal as political, and bringing concrete experiences to the fore that nevertheless arise from shifting subjectivities and identities.[523] These tactics can, Giroux argues, reinvigorate social and political struggle.[524]

Nonetheless, questions linger as to whether critical pedagogy can provide an effective vehicle for emancipatory practices. The difficulties encountered in the field of public legal education earlier are telling. In an educational market driven by competition, how do education programmes break with economic rationality so as to have practical effect in reaching communities most prone to experiencing oppression? This requires strategies to reach beyond the classroom and bring subjugated knowledge of and by those groups who are traditionally excluded from the academy or school to bear.[525] A continuing stumbling block in the field of emancipatory education has also centred on the problem of authority in the classroom, specifically the authority of the teacher. Ostensibly, the students' immersion in repressive or coercive forces requires an educator to lift them from their condition: "Because it is assumed that power also operates on peoples' understandings of the situations they are in."[526] In the legal context, this can play out with some force when legal professionals predominate as teachers in community settings, working with groups already contending with disadvantage. Avoiding the reproduction of educational models built on a relation of dependency rather than autonomy is crucial for developing counter-hegemonic public legal education practices.

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[523] Elizabeth Ellsworth, "Why Doesn't this Feel Empowering?" in *Education Feminism: Classic and Contemporary Readings*, eds. Barbara J Thayer-Bacon, Lynda Stone and Katharine M Sprecher (New York: SUNY Press, 2013).

[524] Giroux, *Border Crossing*, 39-66.

[525] Critical pedagogical practices are accused of failing to achieve anything beyond marginal recognition in debates on education in the institutions of power, often restricted to privileged academic discourse. McLaren and Kincheloe, *Critical Pedagogy*, 11, see also Eric Weiner "Critical Pedagogy and the Crisis of the Imagination, in McLaren and Kincheloe, *Critical Pedagogy*, 59.

[526] Biesta, *The Beautiful Risk of Education*, 78.

Insofar as education and autonomy or emancipation can be meaningfully linked, the problem of identity and subject persists for critical pedagogy. If the anonymous machinery of societal formations "does away with the individual," how (if at all) can a less destructive individuation in keeping with notions of social solidarity be fostered via critical education theory and practice?[527] Adorno's critique takes up the line of thought pursued by Kant to show precisely how the opposite has occurred in modern educational contexts. Through a range of techniques aimed at generating conformity to the demands of industrial technological progress, education trains people for social adaptation into societal systems oriented to repression. The modern individual is thereby moulded by processes and structures that remain heteronomous:

> [T]hrough a vast number of different structures and processes, in such a way that, living within this heteronomous framework, they swallow and accept everything, without its truer nature even being available to the individual consciousness […] The real problem of maturity today is whether and how one can work against this - and who this 'one' is, is a major question in its own right too.[528]

From the perspective of socialisation to legal norms, and citizen's education in law, the problem of self-determination becomes even more acute. The contradictions inherent in the universal rational subject of law and the rights bearing individual of modernity are shaped by adaptive demands to the normative requirements of society. Legal socialization, whether through formal education or in the process of culturally appropriated norms and rules serves as a means of inserting 'newcomers' (through birth or arrival) so that they can participate in the normative order as rational individuals.[529] The singular individual must precisely lose their unique singularity to adapt and to participate. The formal and universal Kantian subject, for Adorno, implies the ultimate interchangeability and exchangeability of every

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[527] Theodore W Adorno, *Prisms,* trans. Samuel and Sherry Weber (Cambridge, MA: The MIT Press, 1967), 37.

[528] Adorno and Becker, "Education for Maturity and Responsibility", 30.

[529] Gert J.J. Biesta, *Good Education in an Age of Measurement*, (Boulder, CO: Paradigm Publishers, 2010).

subject that is integrated into the demands of a technocratic society, rather than a unique and critically self-reflective individual: "Kant's universality seeks to be one for all, that is to say for all rational beings; and the rational are a priori socialized."[530] The problem of universality (and legal universality for our present concerns) is posed not only as a problem of desubjectification more generally, but also as a problem at the heart of education. What is important about Adorno's claim is that desubjectification results in the impotence of the individual to act with meaningful autonomy. The universal categories of humanity, subject and so forth undermine the capacity of singular individuals to reflect on their own dialectical formation within historical and societal forces in a critical way, since "to imagine a transcendental subject without society, without the individuals whom it integrates for good or ill is just impossible."[531]

Rather than advocating for a radically atomised subjectivity capable of achieving rational understanding as a pre-given, pre-socialised subject following Kant, Adorno describes the conditions for subject formation dialectically, as a process that occurs by and in the social and cultural environment. This subject is not free, according to Adorno, insofar as the institution of the normative order is tied to the universal and abstract rational subject; reason is always itself a product of historico-political conditions. From an educational perspective, the individual must therefore be able to grasp the limits of the conditions of their socialisation, and necessarily the limits to individual freedom, as an aspect of their capacity for critical self-reflection (what education must ultimately aim at according to Adorno). In the tensions and contradictions exposed by the dialectic of subject/object, individual/society through a critical self-reflective endeavour, there lies some hope for a newly conceived objective reason. "[O]nly a definition of the objective goals of society that includes the purpose of self-preservation of the

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[530] Theodor W Adorno, *Negative Dialectics* (New York: Continuum, 2007), 200.

[531] Ibid., 200. The dialogical exchange between teacher and student is thrown into doubt as the vehicle for unveiling or reshaping the forces at work. Biesta pursues a similar argument through humanist educational theory. Every determination of the essence of humanity – and humanity as goal - must first pose the central question of 'what is man?' In this framing the 'what' as opposed to the 'who' lies the failure to recognise the singular and unique individual. This problem of the 'who' – who can become present in the transformative undertaking of education - must be taken up as a central task of education, Biesta, *Beyond Learning,* 42-43.

subject, the respect for individual life, deserves to be called objective."[532] In other words, the objective goals of society must include self-preservation but only by preserving the ties of social solidarity aimed at collective survival. "It is in the realisation of the impotence of subjective reason toward its goal that…these metaphysical systems express in partly mythological form the insight that self-preservation can be achieved only in a supra-individual order that is to say, through social solidarity."[533]

For critical approaches to public legal education, this central critical questioning of law, as formed by and with society, as a questioning necessary to understanding the political contingency of law – and as only one version of a supra-individual order. Both its repressive and progressive tendencies must be repeatedly questioned in a continuing critical engagement with the present. While Critical Theory holds that a capacity for critical self-reflection is crucial, this does not afford an effortless move to a programme of education. Reflecting on the problems of autonomy and education after the horrors of Auschwitz, Adorno writes:

> The pressure exerted by the prevailing universal upon everything particular, upon the individual people and the individual institutions, has a tendency to destroy the particular and the individual together with their power of resistance. With the loss of their identity and power of resistance, people also forfeit those qualities by virtue of which they are able to pit themselves against what at some moment might lure them again to commit atrocity.[534]

While education carries the potential of bringing to light the dangers that harbour in the consciousness of an atomised and administered society, this is no easy task since the "loss of identity and power to resist are also threatened."[535]

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[532] Horkheimer, *Eclipse of Reason,* 176.

[533] Ibid., 176

[534] Adorno, "Education after Auschwitz" in *Critical Models: Interventions and Catchwords*, 193.

[535] Horkheimer and Adorno, *Dialectic of Enlightenment,* 86.

One critical possibility unearthed in historico-philosphical enquiry is in the evolution of the concept of *Bildung* (translating roughly as education and formation, or self-cultivation). *Bildung,* containing both political and educational dimensions, emerged from the educational ideal in Greek society, one aiming to enquire into the constitutive features of an educated or cultivated human being:

> [T]he answer was not given in terms of discipline or socialization, that is in terms of adaptation to the existing external order. *Bildung* rather referred to the cultivation of the inner life, the cultivation of the human mind or soul.… the modern conception of *bildung* was mainly coined in the Enlightenment when self-*bildung* became defined in terms of rational autonomy.[536]

Where the tradition of *Bildung* had previously sought to shape and preserve "man's natural existence" and was concerned with the inner cultivation of the individual, modern education has lost its two-sided aspect of both adapting (and taming) people to one another while providing "opposition to the pressure of the decrepit, man-made order."[537] A one-sided process of education has resulted, with a predominant concern for adaptation and insertion into the normative order.[538] Two important aspects to this critique merit consideration in approaching legal education models. The first relates to the institution of legal systems more generally and the role of the legal subject within them, and the second concerns the orientation to the future (that might be described as a negative utopian critique), aiming at transformation of the present through historico-philosophical analysis.

Turning first to the problem of modern legal subjectivity and legal systems, a critique of legal rationality (and implicitly educational rationality) entails a consideration of how Enlightenment thinkers sought to foster individual freedom following the collapse of older forms of authority (religious, monarchical and so forth). Just as ideas of autonomy shift the terrain of authority, legal expansionism and a process of juridification mean that ever more norms and rules

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[536] Biesta, *Beyond Learning*, 100-102.

[537] Theodor W Adorno, "Theorie der Halbbildung." 1959, 171 In Theodor W Adorno, *Gesammelte Schriften*, *Band 8*, 93-121. (Darmstadt: Wissenschaftliche Buchgesellschaft, 1998).

[538] Ibid, 171.

are tied to the modern legal subject. Legal education described in the studies above exhibit two polarities - either the positivist tendency aiming to adapt the subject as atomised liberal subject into the existing normative order, or, in its communitarian orientation, as consciousness raising of the subject of an excluded class or oppressed group. The subject of legal education is caught in this polarity, either appearing in the guise of the liberal subject of rights and entitlements that can be armed with knowledge of their rights enabling the pursuit of legal claims, or conversely the communitarian embedded subject of shared meanings and social norms, emphasising identity politics and empowerment of disadvantaged groups needing to assert their collective interest (as minority rights and so forth). As Gillian Rose observes, neither of these two polarities escape a common totalizing archetype:

> These two apparently warring engagements have a lot in common…By maligning all putative universality as 'totalitarian' and seeking to liberate the 'individual' or the 'plurality' from domination, both the libertarian and the communitarian disqualify themselves from any understanding of actualities of structure and authority, intrinsic to any conceivable social and political constitution and which their opposing stances leave intact.[539]

Communitarian constructions of identitarian claims are increasingly impossible to sustain in post-colonial fragmentation of modern, plural societies. Efforts to empower local or particular group interests paradoxically involves competition for interests and risk turning the oppressed into oppressor. For example, narratives that have sought a "pedagogical encounter to foist off the tyranny of authoritarianism and oppression and bring about an all embracing and diverse fellowship of global citizens profoundly endowed with a fully claimed humanity," while espousing laudable goals consistently run up against the constitutive and constituting force of law.[540] The subject of political or legal liberatory and reform movements continually threatens to be engulfed by forces of cultural and historical formations: "'Empowerment' itself, as it is often imagined in education, may

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[539] Gillian Rose, *Mourning Becomes the Law*, (Cambridge: Cambridge University Press, 1996), 4.

[540] Peter Mclaren, "Reflections on the Present State of Empire and Pedagogy" in McLaren and Kincheloe, *Critical Pedagogy,* 300.

assume the same universal and unified subject that elite accounts of national development emphasise with regard to politics."[541]

A critical legal education can begin to show how law's progression is implicated by these forces. Its political contingency and the problem of autonomy are thereby intimately linked to the instituting and institutions of law (what Benjamin might otherwise describe as law-making and law-preserving aspects). The concept of autonomy, as it pertains to society and the formation of the political space in which individuals become part of the body politic, must first be able to grasp that to be autonomous means to posit one's own laws. Following Cornelius Castoriadis, this can only occur when the individuals within a society recognise themselves as the source of their own norms – there can be no "law of law" and autonomy as an individual or collective enterprise is no end in itself.[542] Rather, the institution of the political space is a continuous creative act, in which the autonomous individual emerges and is formed both by seeking their own laws and acting so as to self-limit in the interests of the Other.[543] The questions of which laws to be governed by, what is good and just law, is the perpetual task of autonomous societies and the creative endeavour to which classical understanding of education – as *paideia* or *Bildung*– were alert. In this wider understanding of the political and cultural space of education, Adorno also finds the possibility that beyond individual institutional boundaries, education can be conceived as an endeavour aimed at 'knocking down' the deceptions by which people are kept in their condition of subordination:

> [T]he only concrete form of maturity would consist of a few people who are of a mind to do so working with all their energies towards making education an education for protest and resistance…so that to begin with, all we try to do is simply to open people's minds to the fact that they are constantly being deceived, because the mechanism of

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[541] Noah De Lissovoy, Frantz Fanon and a Materialist Critical Pedagogy in McLaren and Kincheloe, *Critical Pedagogy*, 365.

[542] Cornelius Castoriadis, "The Greek Polis and the Creation of Democracy" in *Philosophy, Politics and Autonomy: Essays in Political Philosophy* (New York: Oxford University Press, 1991), 81-123.

[543] Adorno, "Education for Maturity", 31

> tutelage has been raised to the status of a universal mundus vult decipi: the world wants to be deceived.[544]

The unfortunate slide into an elite intellectual assumption that this task must be undertaken by "a few people who are of a mind," aside, cultivating education for protest and resistance must be established, "everywhere…in every aspect of our lives."[545] This is a labour of negative critique, one that takes the present and its demystification (or demythification) seriously.

The negative utopian aspect of earlier Critical Theory considers the impossibility of simply directing education toward a positive utopian *telos* as a moment of reconciliation of what exists with what can or should be. The coincidence of utopian thought and education is by no means incidental, as Lewis observes, "education and utopia necessarily imply one another."[546] Education strives to shape the emergence of alternative possibilities. For this reason, the nature of that relation is contingent on the nature of the utopian drive that lies at the heart of education. For Siegfried Krakauer, the utopianism that Adorno conceives of is a "regulative concept",[547] it is "a concept which could never be, and was never really intended to be realized but rather to act as a perennial corrective against any claim that a natural or equitable social order has been achieved."[548] According to Adorno, the failure of all positive utopias takes on the character of vanity – the vision of the future which asserts that "things have developed differently and will continue to do so."[549] A narrative of the historical progress of mankind occludes the social injustice of the present. Thus, all positive utopias repeat the idealism which forgets that nature and history, and therefore individual and society, are mutually implicated but non-identical. The remnants that this non-identity throw into critical relief is the task of a negative dialectic.

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[544] Ibid, 31.

[545] Ibid, 31.

[546] Tyson Lewis, "Utopia and Education in Critical Theory," *Policy Futures in Education* 4, no. 1 (2006).

[547] Quoted in Simon Jarvis, *Adorno: A Critical Introduction* (Cambridge: Polity Press, 2007), 218.

[548] Ibid., 218.

[549] Adorno, *Prisms*, 115.

> "It [utopia], the consciousness of possibility, clings to whatever has not been disfigured. The way to utopia is barred by the possible, never the immediate reality; this is why it always appears abstract in the midst of existing reality. It is served by thought, a piece of existence that, negative as always, reaches out to that which is not.[550]

Positive utopian thought erases that which has been disfigured in its search for new possibilities. Instead, Adorno as well as Benjamin sought to point to precisely what was intolerable in the present conditions of society, what was most disfigured. Emancipatory hope lies in the development of critical self-consciousness and the resurrection of what has either been lost or forgotten. By focusing on the gaps and discontinuities in the present which could be illuminated through a secret relation to the past, "Adorno saw hope for the future. But never its guarantee."[551] Redemptive figures of the past appear repeatedly in Benjamin's work, with more theological connotations than for Adorno.[552] The *Institut'*s thinkers did not rule out the prospect of change – or the prospect of changing the course of history in the interest of social justice – in the face of suffering. This constellation of memory, lived experience, and the discontinuities that appear in the light of a negative critical enterprise offer powerful educative ideas in our contemporary critical educational endeavours.

In summary, we have traced continuities and departures between early proponents of Critical Theory and later critical pedagogical developments. The potential for critical pedagogy to achieve its self-declared emancipatory ends is countered by the bleak assessment of the possibilities for praxis and prognosis of society, and the concomitant struggle for an anti-hegemonic educational form that can already be found in Adorno's writing.[553] At the heart of a critique of the inter-related issues of the formation of the free, democratic subject and the positive

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[550] Theodor W Adorno, *Lectures on Negative Dialectics*, Fragments of a Lecture Course 1965/1966 ed. Rolf Tiedemnan (Cambridge: Polity, 2008), 182.

[551] Buck-Morss, *The Origin of Negative Dialectics*, 47.

[552] David Kaufman, "Beyond Use, Within Reason: Adorno, Benjamin and the Question of Theology," *Journal of New German Critique* No. 83 (2001):151-173

[553] Miedema and Wardekker, "Emergent Identity Versus Consistent Identity: Possibilities for a postmodern Repoliticization of Critical Pedagogy" in *Critical Theories in Education* Popkewitz and Fendler, 68.

utopian *telos* of educational goals is a continuing resort to the instrumentalisation of education as the means to achieve predetermined ends.

In order to tease out the arguments with specific relevance to public legal education, we have focused on the limitations of the critical pedagogy movement in its positive utopian orientation. This entails a turn to the possibilities of reinvigorating aspects of early Critical Theoretical inspirations via a critical appraisal of the tension associated with the modern liberal legal subject and its attendant institutions. In modern educational theory, de-subjectification occurs through a one-sided process of adapting and socialising the individual, with little scope for education enabling the individual to resist that process (which Adorno claims to have been inherent in the duality of earlier modes of *Bildung*).[554] What we can detect in the tensions already visible in variously dogmatic or emancipatory forms of education in public legal education models, is the polarity of arguments still reflecting the liberal normative ideal, and its opposition to communitarian social ideal; each with competing claims to freedom and progress. The final part of the chapter will pursue this line of thought with an argument encompassing the concept of study arising from Walter Benjamin's literary criticism of Franz Kafka and numerous exchanges and correspondences around his essays with Gershom Scholem and Theodor Adorno.[555]

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[554] For example, Heydorn's exploration of the concept of *Bildung* in Greek antiquity points to two features: "social orientation corresponding to the bonded task of knowledge-production aiming at improving human talents, and a quality within education itself, turning these social relations round. Freedom is won from determination." Heinz Jünker, "Heydorn's *Bildung*: Theory and Content as Social Analysis," in Farnen and Jünker, *Politics, Sociology and Economics*, 122.

[555] See Walter Benjamin, The Complete Correspondences 1928-1940 Theodor W. Adorno Eds., Henri Lonitz Trans Nicholas Walker (Cambridge: Polity Press, 1999), The Correspondence of Walter Benjamin and Gershom Scholem 1932-1940, Edited by Gershom Scholem Trans Gary Smith and Andre Lefever (Cambrideg, MA: Harvard University Press, 1992) and The Correspondence of Walter Benjamin 1910-1940 Eds Gershom Scholem and Theodor W. Adorno, Trans Manfred R Jacobson and Evelyn M Jacobson (Chicao and London: University of Chicago Press, 1994).

On study: Kafka and Benjamin's gateway to justice

The law which is studied but no longer practiced is the gate to justice.[556]

In the work of both Benjamin and Kafka, the underlying violence and inhumanity inherent in modern legal and bureaucratic systems is revealed. Each illuminates the demonic ambiguity attending legal processes, with secret laws and unknown transgressions reminiscent of much older theologico-historical forces. Neither share faith in progress or the advance of human civilization and its modern institutions of justice, since every document of civilization, Benjamin reminds us, "is at the same time a document of barbarism."[557] Both Kafka and Benjamin refuse a historicism of law as a chain of cause and effect but rather aim to read the present through flashes of what has passed so as to "brush history against its grain."[558] Hence, we encounter a reading of the problem of law through the lens of the violent founding (and preservation) of political community.

Their critique unveils a corrupt world in which both law and history mark the passing of time in unending cycles of judgment and guilt. Their orientation to a utopian impulse is radically negative.[559] Yet both perceive in the misshapen, tired and malformed aspects of the world the whisperings of redemption. For the purposes of this final discussion, we will trace the educative elements that emerge from an 'archaic modern' perception in its studious and attentive inclination toward things past.[560]

Benjamin sought not only to critique the legitimation of the use of force and concealment of the arbitrary workings of power/violence in the normative (and apparently peaceful) order of law. He sought to decouple life from its fateful entanglement with law altogether. In his early work in the 1920s, he had already identified law as the means by which the struggle for power is usurped and

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[556] Benjamin, "Franz Kafka: On the Tenth Anniversary of His Death" in *Selected Writings*, 815.

[557] Walter Benjamin, "Theses on the Philosophy of History," in *Illuminations,* trans. Harry Zorn, (London: Pimlico, 1999) 248.

[558] Ibid., 248.

[559] See Michael Loewy *Redemption and Utopia: Jewish Libertarian Thought in Central Europe A Study in Elective Affinity* (Palo Alto: Stanford University Press, 1992).

[560] Kaufmann, "Beyond Use, With Reason," 157.

contained. Nevertheless, Benjamin's essay *Critique of Violence* gestures towards a 'bloodless' form of power or force that would not repeat and reinstitute the violence of law. Somewhat later in the essay he refers, (as we introduced in the previous chapter), to one such manifestation as an educational force (*erzieherische Gewalt*), that he describes as (bloodless yet annihilating) 'divine violence', serving to undo the mythic function of violence and law: "This divine violence is not only attested by religious tradition but is also found in present-day life in at least one sanctioned manifestation. The educative power which in its perfected form stands outside the law."[561] We will cleave closely to the idea that this force teaches without incurring the extortive violence that attends law but that somehow holds a sense of the nobility of law in view. This obscure reference to educative force nevertheless begs the question of how this force is to be given effect, since as Martel observes the ascription of divine violence to human actions goes against the wider thrust of the essay.[562]

To gain insight into what might inform a pedagogic reading, it is helpful to cast back to Benjamin's early student life, which exposed him to a range of influences, including teaching by the neo-Kantian Heinrich Rickert, whose critique of positivism and vitalism (the philosophical focus on life itself) would prove deeply influential on his thinking in relation to education.[563] His *Life of Students* lambasted the delineation of academic study from the experience of life: "for the vast majority of students, academic study is nothing more than vocational training. Because 'academic study has no bearing on life.'"[564] Building on educational readings by Fichte and Nietzsche, this instrumentalised version of study as opposed to what he evokes as a "community of learning" serves not simply the production

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[561] Benjamin, "Critique of Violence," 250. Revolutionary violence is another such manifestation.

[562] Creating a dialectical space for human agency to act pedagogically, in full view of the dangers of adopting fetishistic modes that repose (rather than depose) the normative force of law is one possible interpretation. J A Martel, "Divine Pedagogy? Benjamin's 'Educative Power' and the Subversion of Myth and Authority," *Boundary 2 International Journal of literature and culture* 45, no. 2 (2018): 171-186.

[563] Howard Eiland and Michael W Jennings, *Walter Benjamin, a Critical Life* (Cambridge, MA: The Bellknap Press, 2014), 33.

[564] Benjamin, "The Life of Students" in *Selected Writings* Volume 1, 38.

of the professions, but places them firmly within the adaptive (and heteronomous) demands of the state:

> For the sign of true decadence is not the collusion of the university and the state…but the theory and guarantee of academic freedom, when in reality people assume with brutal simplicity that the aim of study is to steer its disciples to a socially conceived individuality and service to the state.[565]

During his time at Wickersdorf, he joined a progressive educational community led by Gustav Wyneken, and collaboration with other, mainly Jewish, students led to a shift in Benjamin's own sense of belonging to a Jewish milieu.[566] This community championed academic and cultural reform and a model of an anti-authoritarian free school community on which Wickersdorf was conceived.[567]

Education provides the vehicle for the transmission and reproduction of culture and society, and both produces and is produced by historically dominant forces. Benjamin's early writing critiques these forces. Opening the essay *On the Life of Students* he writes: "There is a view of history that puts faith in the infinite extent of time and thus concerns itself only with speed, or the lack of it, with which people and epochs advance along the path to progress."[568] Rather than contributing to the mirage of progress, the task of education is precisely to transform the prevailing dominant culture and society and thus the conditions for a revolutionary present. This entails a reappraisal of the tradition of the oppressed that demands,

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[565] Ibid., 38. The reliance on readings by Fichte and Nietzsche is discussed in Eiland and Jennings, *A Critical Life*, 64-65.

[566] This is highlighted by his correspondence with Strauss. *Walter Benjamin, Correspondence 1918-40,* eds. Theodor Adorno and Gershom Scholem (Chicago: Chicago University Press, 1994). See also H Eiland, "Walter Benjamin's Jewishness," in *Walter Benjamin and Theology,* eds. Colby Dickinson and Stephane Symons (New York: Fordham University Press, 2016), 114-115.

[567] Eiland and Jennings, *A Critical Life*, 36.

[568] Benjamin, "The Life of Students," 37.

not only apprehension of the past, but seeks a lived connection with it.[569] Hence, only the image of enslaved ancestors rather than the falsifying images of social democracy that depict an "ideal of liberated descendants" could be adequate to such an apprehension.[570]

Faith in progress is for Benjamin entirely misplaced; the historical task is the excavation of the present.[571] His work is charged with an insistence that penetrates appearance so as to gain access to the phantasmagoria he encountered "to break the bonds of a logic that covers over the particular with the universal."[572] This insistence grew partly out of a response to his own cultural milieu. Hannah Arendt would describe the sense of unreality pervading the Jewish community of Benjamin's upbringing in its relationship to Imperial Germany and the 'Jewish problem', and how deeply it affected the Jewish intelligentsia to which Benjamin, Kafka and Adorno belonged.[573] Benjamin distinguishes his own sense of Jewishness as cultural Zionism; displaying an ambivalence to Zionism and Marxism that allowed both paths to remain open and available to him in his work. The attitudes that shaped his literary production over the years thus exhibited from the very

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[569] This connection profoundly pertains to the cultural and spiritual task of commentary in the tradition of Kafka, Proust and Kraus, some of the most powerful essayistic writings produced by Benjamin. See Robert Alter, *Necessary Angels: Tradition and Modernity in Kafka, Benjamin and Scholem* (Cambridge, MA: Harvard University Press, 1991), 81-82.

[570] Benjamin "On the Concept of History" *Selected Writings*, Volume 4 Eds. Howard Eiland and Michael W. Jennings Volume 4, 1938-1940 Trans by Edmund Jephcott and Others (Cambridge, MA: The Belnap Press of Harvard University Press, 2003) 394. He was later to reflect on his period of student activism with some regret that despite the political orientation of the student movement, they failed to achieve this transformation Since an attempt to "change the attitudes of people without changing their circumstance." Was bound to fail. Eiland and Jennings, *A Critical Life*, 44.

[571] This excavation can only be grasped in its metaphysical structure through an act of cognition. The Messianic domain and the French Revolution are both potential sources for such a metaphysical structure. Hannah Arendt, "Introduction, Walter Benjamin: 1892-1940" in *Illuminations*, 37-38.

[572] Adorno, *Prisms,* 230.

[573] Arendt, *Illuminations,* 33-42. The assimilated Jewish bourgeoisie was in denial of the anti-Semitism lurking behind their apparent acceptance. "[T]he decisive factor in all this was the loss of reality, aided and abetted by the wealth of these classes." Ibid., 37.

outset the complexity with which he viewed the question of tradition and of the past.[574]

The transmissibility of tradition and handing down the authority of the past are central to both Kafka and Benjamin as writers. According to Benjamin, tradition is the mystical experience which forms one pole of the ellipse of all of Kafka's work. Tradition is here properly understood in light of the literal translation of *Kabbalah* (tradition, transmission), a terminological awareness that Benjamin was alert to.[575] This literature forms part of the esoteric world of Talmudic sages and their secret teachings, which were largely not recorded until the Middle Ages.[576] The other pole of Kafka's work and world is the experience of the modern city dweller; Benjamin perceives in Kafka "the modern citizen who knows he is at the mercy of vast bureaucratic machinery, whose functioning is steered by authorities who remain nebulous even to the executive organs themselves, let alone the people they deal with."[577] Elsewhere, Benjamin's image of Kafka's works is of a bow drawn taught "on one side [with] the political and on the other the mystical."[578] Thus, in the nature of Kafka's parabolic writings, the light reflecting on the profoundly alienating experience of the modern citizen advances from the pole whose orientation is mystical experience.

This mystical experience does not make itself apparent as an optic but can be best perceived through the sense of hearing. Examples of this appear as whisperings (of the messenger, Barnabas in *The Castle)* or in the laughter of Odradek (the animated spool-like creature appearing in *The Cares of a Family Man*) that sounds like the rustling of fallen leaves.[579] In song or music too, tokens of hope or escape might be available, and so to strain the ear was a way of

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[574] Arendt notes tradition necessarily gives rise to the problem of authority. "Insofar as the past has been transmitted as tradition, it possesses authority; insofar as authority presents itself historically it becomes tradition. This awareness may also have influenced his choice to undertake a study on the German Baroque." Arendt, *Illuminations*, 43.

[575] Benjamin, footnote 4 letter 299 to Gershom Scholem, *The Correspondence of Walter Benjamin*, 563-564.

[576] Adin Steinsaltz, *The Essential Talmud*, (Cambridge, MA: Basic Books, 2006) 247-249.

[577] Ibid., 564.

[578] Benjamin, Letter 244 to Gershom Scholem, *The Correspondence*, 458

[579] Franz Kafka, *The Castle*, trans. Willa and Edwin Muir, (London: Vintage, 2008), 655.

experiencing the redemptive remnants of tradition: "Kafka lived in a complementary world…his experience was based solely on the tradition to which Kafka surrendered. There was no far-sightedness or 'prophetic vision.' Kafka eavesdropped on tradition, and he who listens hard does not see."[580] Kafka's brilliance, according to Benjamin, lies in his portrayal of the fact that tradition no longer transmits the wisdom that properly belongs to it, a realisation which leads him to hold, in the last instance, to transmissibility as such. For Kafka, wisdom is attributed to "truth in its haggadic consistency", a feature that no longer obtains in tradition and that has lost its authority.

Kafka's work, Benjamin maintains, "represents tradition becoming ill."[581] How can we understand this diagnosis insofar as the question of law is concerned? To explore how law and tradition can be related in this constellation, it is worth clarifying that Jewish law (Torah) is composed of Oral (*aggadah*) and Written (*halachah*) Law, each reflecting a different aspect of the truth of the Law.[582] For Judaism, revelation is not the salvationary principle of the redeeming Christ.[583] Revelation and tradition are, Scholem writes

> [T]wo poles around which Judaism has grouped itself during two millennia. In the view that prevailed of Talmudic Judaism, revelation and tradition were both manifestations of Torah, of "teaching" on the shaping of human life. Revelation here comes to be regarded as the

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[580] Benjamin, *Correspondence*, 224.

[581] Benjamin, "Franz Kafka", 565.

[582] The Talmud (Hebrew for to study, to learn) contains thousands of years of Jewish wisdom and oral law. It is composed of the Mishnah, a book of *halachah* (written law) and the commentary on the Mishnah. Aggadah is usually defined negatively as everything that is not either *halachah* or discussion of *halachah*. It includes interpretations of biblical verses, homiletic and ethical teaching, as well as anecdotes about sages, folk sayings and proverbs. It also contains the theological or religious problems that could not be accommodated by the written law, including relations between man and God and the coming of the Messiah. Adin Steinsalz, *The Essential Talmud*, 285. On the relationship between *halachah* and *aggadah* see also Haim Nahman Bialik, *Revealment and Concealment: 5 Essays* (Cologne: Ibis, 2002).

[583] In Judaism, revelation is not the redeeming death of Christ. The Messianic fixation in Judaism for Benjamin concerns "the disgrace or disorder in the relation to revelation." Gillian Rose, "Walter Benjamin Out of the Sources of Judaism," in *Judaism and Modernity: Philosophical Essays* (Oxford, Blackwell, 1993), 181.

> "Written Torah", which is represented, and as the Tradition, which as "Oral Torah" serves as its ongoing interpretation.[584]

In a mystical Kabbalistic reading, revelation takes on increasingly anarchic elements brought about by a crisis of tradition.[585] What Benjamin expresses in his reading of Kafka is the disgrace of revelation that no longer transmits wisdom. Kafka's world is a world of revelation that can only be read in the products of its decay.[586] His world and work are typified by lawlessness. However, if what Benjamin proposes and insists on in Kafka's *haggadic* orientation is correct, then what we encounter in Kafka's world is the distortion of the pedagogic aspect of law in its doctrinal aspect – of law properly regarded as a body of teaching.[587] For this reason, in his letter to Werner Kraft, Benjamin opposes the concept of laws to the concept of doctrine. Interpretation fails precisely on this point of law in Kafka and can only be attempted indirectly, hence, "in case it [law] were to have a function in his work: in spite of everything – whether it does is something I want to leave open – an interpretation that takes images as its point of departure, like mine does, is sure to lead to it in the end."[588] Any alternative insistence on law in Kafka's work is, for Benjamin, predominantly illusory and a 'sham'.[589]

With this constellation in mind as tools for reading Kafka with Benjamin, let us move on to consider a notion of study elaborated by Benjamin in the anniversary essay on Kafka written in 1934. It brings together some of the literary representations of law in Kafka's work with the thought-figure of study.[590] Kafka's novels repeatedly contain themes of the tortuous and labyrinthine workings of law and the ambiguous and arbitrary forms of guilt and punishment that attach to their

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[584] Gershom Scholem, *The Messianic Idea in Judaism And Other Essays on Jewish Spirituality* (New York: Schocken Books, 1995), 50.

[585] Ibid., 58-67. This concerns the antinomian impulse of Sabbatian movements, among others, that point to the inapplicability of the written Torah conceived as the Torah of the Tree of Knowledge (and as model of one of the two possible forms of life in the light of revelation). Ibid., 70.

[586] Benjamin, C*orrespondence*, 225.

[587] Peter Fitzpatrick, "Necessary Deceptions: Kafka and the Mystery of Law," In *Crime, Fiction and the Law,* eds. Maria Aristodemou, Fiona MacMillan and Patricia Tuitt, (Abingdon: Birkbeck Law Press, 2017), 3.

[588] Benjamin, Letter 241 to Gerhard Scholem, *The Correspondence 1910-1940*, 454.

[589] Benjamin, Letter 246 to Werner Kraft, *The Correspondence 1910-1940*, 463.

[590] Benjamin, "Franz Kafka," 794-816.

characters, often by what appears as some force of necessity. So much so, that we find that it is guilt that draws the accused to the attention of the courts rather than any obvious transgression.[591] At the very beginning of *The Trial*, the principle protagonist, Joseph K, is arrested and warned by police sent to his home: "Our authorities as far as I know, and I only know the lowest grades, don't go out looking for guilt among the public; it's the guilt that draws them out, like it says in the law, and they have to send us police officers out. That's the law."[592] The law itself seems to stipulate that guilt pervades; guilt is to be regarded as an inevitability that demands proceedings be instigated.[593]

The nature of the law or regulations, however, is not known, there are books of law but they are secret or can't be read, a fact that serves as an indication of the guilt that also pervades the court: "those books must be law books" Joseph K declares, "and that's how this court does things, not only to try people who are innocent but even to try them without letting them know what's going on."[594] Protestations of innocence are treated as proof of guilt, and ignorance of the law is met with gleeful vindication of the justice of the proceeding: "look at this Willem, he admits he doesn't know the law and at the same time insists he is innocent!"[595] So too the regulations in the village at the foot of the castle; although secretaries appear to know more than the "legal gentry," the paths to the law remain secret, and competence to handle a case is by no means assured.[596]

The hierarchies of officials, servants, secretaries and assistants are readily subverted. It is not clear who is in charge, "servants seem to be the real masters in the castle," and with these oscillations, it is no surprise to find that "castle regulations are not fully binding on them in the village."[597] Accusers and accused in the process easily trade places. In the short story, *The Penal Colony*, no sooner is the condemned man freed from the apparatus of torture (administered for the

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[591] Benjamin, "The Trial," 149.

[592] Ibid.

[593] In the short story, "The Penal Colony," the condemned man is summarily convicted and knows nothing of the process or the sentence, but: "Guilt is always beyond a doubt." "The Penal Colony," in *Kafka, Metamorphosis and Other Stories*, 157.

[594] Ibid, 187-8.

[595] The statement is made by the arresting officer, Franz, in "The Trial," 150.

[596] Kafka, "The Castle", 694-5.

[597] Ibid, 650.

supposed crime of insubordination), in the name of a law he knows nothing of, not even the sentence, then the official tasked with ensuring the sentence is issued and carried out promptly takes his place for the sentence to be executed in the soldiers place.[598] Similarly, in *The Trial*, Joseph K (already accused of his unknown crime) is surprised to discover the police officers, Franz and Willem, in the junk room attached to his offices being submitted to the whip. This punishment is endured, it seems, endlessly, although the finding of fault has yet to be established, since Joseph K made no complaint about them. As Benjamin contends, the process or trial itself appears to be the punishment.[599]

The problem of knowledge in Kafka illuminates the decay of the transmissibility of law and tradition. In *The Penal Colony,* we discover that the procedure no longer garners any support, the source of authority is doubtful: "This process and examination, which you now have the opportunity to admire, have no more open supporters in our colony. I am its only defender, just as I am the single advocate for the legacy of the Commandant."[600] In due course it becomes clear that the Commandant's source of authority has been erased and even his followers are no longer permitted to be named.[601] The past, no longer properly transmissible has lost its authority and in turn authority that no longer presents itself historically cannot become tradition. It thereby takes on the mythic function of prophecy. Mythic law knows no route to redemption and so the sentences are still being carried out even after the Commandant has died. The apparatus of the law is decoupled from any foundation; the authority of the redemptive aspects of law either cannot be fulfilled or the laws that are written as script cannot be deciphered (the machine's design comes with its own instructions which can't be read).[602]

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[598] In the penal colony, one only finds out the law once it is inscribed on the body by torture. Kafka, "The Penal Colony," 98-101 and 116.

[599] Benjamin, "*Franz Kafka",* 128

[600] Ibid, 105.

[601] Discovering the Commandant's gravestone under the tables of the "poor oppressed people", the foreign traveler summoned to the colony to witness the execution reads: "Here rests the old Commandant. His followers who are now not permitted to have a name buried him in this grave and erected this stone. There exists a prophecy that the Commandant will rise again after a certain number of years and from this house will lead his followers to a re-conquest of the colony. We have faith and wait!" Kafka, "The Penal Colony," 120.

[602] Ibid., 173. Whether law in Kafka's world is absent or ultimately unfulfillable is a point of critical disagreement between Benjamin and Scholem. Revelation in Kafka is, for

Despite all that is incomprehensible, the "machine still works and operates on its own."[603]

Guilt and attraction to the law are thus inevitable, without foundation and boundless. It is here that law takes on the quality of fate, driven by guilt itself since fate simply advances the necessity of order. This order harks back to a 'prehistoric world' one which forecloses expiation.[604]

> Laws and definite norms remain unwritten in the prehistoric world. A man can transgress them without suspecting it and then must strive for atonement. But no matter how hard it may hit the unsuspecting, the transgression in the sense of the law is not accidental but fated, a destiny which appears here in all its ambiguity.[605]

The nature of this order, as described in the parable, *The Great Wall of China,* is that everything is "completed piecemeal" since the design in its entirety would be incomprehensible, "neither book learning nor our common sense would have sufficed for the humble task which we performed in the great whole."[606] Similarly, as we also find in both *The Trial* and *The Castle*, everyone has their place in the order of things; every toil and labour has a role in a wider purpose, and everyone is connected to the 'great organism,'[607] to the workings of the court, or the castle on the hill. But no one appears able to grasp what the purpose of the organisation is – someone else is sure to know. Public and private realms collapse; proceedings are carried out very often at night, or on Sundays, in attics, bedrooms and

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Scholem, "returned to its own nothingness…the nonfullfillability of what has been revealed…coincides most perfectly with that which offers the key to Kafka's work." Scholem, *Correspondence*, 127.

[603] Kafka, "The Penal Colony," 107.

[604] Benjamin, "Kafka: On the Anniversary of His Death," 803.

[605] Ibid., 797.

[606] Kafka, "The Great Wall of China and Other Stories Trans Malcolm Paisley (London: Penguin, 2007). Moreover, Benjamin notes, "this organisation resembles fate." *Selected Writings*, 803.

[607] Kafka, "The Trial", 249.

guesthouses.[608] Of private matters "everyone already knows,"[609] but the verdict of the court will never be made public.[610] The collapse of the public and private space in Kafka's novels creates a further sense of the sheer inevitability and inescapability of law as the immanent mechanism through which life is ordered - whether the law of the father, the family or of the courts.[611] Power and violence are immanent in Kafka's world,[612] but what is at stake is the profane order of the living, "in every case it is a question of how life and work are organised in human society."[613] In all of this, we see clear parallels to the world of capital and the faceless, machine-like bureaucracies surrounding the modern city dweller.

Perhaps this is why the characters are so tired; overwhelming fatigue accompanies the protagonists. Organisations take on the quality of a living organism, but only by virtue of the actors who take part: "[W]e meet these holders of power in constant, slow movement, rising or falling, who are always on the move."[614] This movement appears to oppose the decay and inertia of the institutions of the court. The institutions themselves seem to be in suspense, the outward appearance of regularity and order of proceedings soon collapses into increasing decrepitude: files go missing, officials are unkempt and slovenly, rooms are dusty and without air.[615] Failure to pay attention and excessive tiredness in the airless antechambers and passages might well account for the mien of the guilty man,

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[608] Titorelli, the painter, confirms to Joseph K "there are court offices in almost every attic." Kafka, *The Trial*, 287. Moreover, secretaries in the *Herrenhof* guestrooms and cellars conduct interrogations over dinner and sometimes in the middle of the night, because interrogations by day are too ugly for the officials' sensitivities. Kafka, *The Castle*, 670.

[609] Ibid., 262.

[610] Ibid., 279.

[611] Benjamin contends that the world of court officials and father is the same but no respect for authority can be found. "The similarity does not redound to this world's credit; it consists of dullness, decay and filth." Benjamin, *"Franz Kafka"*, 796.

[612] According to Agamben, life is exposed at every turn to pure anomic violence, which is simply a manifestation of power: "Kafka's most proper gesture consists (not as Scholem believes) in having maintained a law that no longer has any meaning, but in having shown that it ceases to be law and blurs at all points with life." Agamben, *State of Exception,* 63.

[613] Benjamin, "*Franz Kafka,"* 803.

[614] Ibid.

[615] Kafka, *The Trial*, 249.

more so than ignorance. Despite his ignorance, the Land Surveyor, K (the unfortunate protagonist of *The Castle)* conjectures "all this had only happened because he was excessively tired."[616] Indeed, he is so absent-minded that attentiveness is key to unravelling some of the vertiginous effects ascribed to the proceedings.[617] Joseph K is also often dizzy and tired. He diagnoses his own guilt insofar as lack of attentiveness is "the basic rule that he was continually violating."[618] Reflecting on the price of inattention can but lead to the conclusion "that one of the most basic rules governing how a defendant should behave was always to be prepared, never allow surprises."[619]

Not everyone is tired however. Students, Benjamin remarks of a category of characters in Kafka's novels, are awake while they study.[620] The figure of the student and the question of study appear in numerous short stories and novels by Kafka.[621] Students, Benjamin contends, appear at first unimportant, but eventually take on more influential forms: "[A]mong Kafka's creations there is a clan which reckons with the brevity of life in a peculiar way…the students who appear in the strangest places in Kafka's works are the spokesmen for and the leaders of this clan."[622] They are members of a clan of assistants and helpers that appear repeatedly, and not only as human figures. The students can also take the shape of creatures, for example in the case of the parable *The New Advocate*, a horse (*Bucephalus* is the horse of Alexander the Great) or the ape *Rotpeter* from *A Report to an Academy*. In fact, animals in Kafka's universe are exemplary students, "no human teacher" declares *Rotpeter* in a Report to an Academy, "has ever found

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[616] Kafka, *The Castle*, 715. The chambermaids too are always tired. Ibid., 723.

[617] Ibid., 731.

[618] Kafka, *The Trial*, 287.

[619] Ibid., 288.

[620] Benjamin, "Franz Kafka," 813.

[621] The major novels include, *Amerika*, *The Trial* and *The Castle*, as well as numerous short stories including, "A Report to an Academy," in *Collected Works* (Norderstedt: Books on Demand, 2015) and "The New Advocate," in *Metamorphosis and Other Stories*, trans Michael Hoffman (London: Penguin, 2015).

[622] Benjamin, "Franz Kafka," 813. Moreover, in *The Trial* it is apparent that the student is powerful, although it is not clear from where this power originates, Kafka, *The Trial*, 118.

in the entire world such a student of human beings."[623] What unites the figures is the apparent uselessness of the study to which they turn their attention. In the novel *Amerika*, the most searing critique in all of Kafka's novels of the advance of capitalism, we encounter the student Joseph Mendel. Joseph mysteriously explains that he studies "merely for the sake of consistency," and we are left none the wiser about what the object of his study might be when he says, "I get very little satisfaction out of it, and even less hope for the future."[624] No progress is apparent in his endeavour. Nevertheless, their studies keep the students awake. Not only does this account for their reckoning with the brevity of life, it is, according to Benjamin, perhaps what is best about study, as being kept awake serves to remind them of the forgetfulness of sleep. The tireless students that appear in the city in the South are spokesmen; they never sleep, just as Joseph Mendel declares "I'll get some sleep when I'm finished with my studies."[625]

The law to which Kafka's students turn also seems to hold their attention without pause. *Bucephalus* is absorbed in law books. We discover that he has been admitted to the Bar but he has not stopped reading the law.[626] Ceaseless study mirrors the never-ending operation of the trial and the endurance of guilt.[627] The price of being accused in a trial is perpetual motion and for the accused it is better to be moving rather than still. In the *Trial,* the lawyer Dr. Huld advises Joseph K "if you are still you can be weighed in the pan of the scales without knowing it and be weighed along with your sins."[628] The students are also on the move, "the scribes, the students are out of breath, they're fairly racing along. Often the official dictates

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[623] Kafka, "Report to an Academy," 86. Both creatures escape their animalistic existence and take up new roles in the upper echelons of human society.

[624] Kafka, *Amerika*, 415.

[625] "[F]orgetting always involves the best. For it involves the possibility of redemption." Benjamin, "Franz Kafka," 813.

[626] Kafka, "The New Advocate*," Collected Works*.

[627] Three forms of acquittal are discussed by the painter Titorelli in *The Trial*. Absolute acquittal is impossible. Apparent acquittal can only gain temporary freedom, in which the indictment is withdrawn but the charge continues to hang over the accused. Finally, deferment consists in keeping proceedings in their early stages, which apparently requires less effort but "more attention" and the accused must "never let the trial out of their sight". Kafka, *The Trial*, 282-288.

[628] Kafka, *The Trial*, 312.

in such a low voice that the scribe cannot even hear it sitting down; he has to jump up, catch the dictated words, quickly sit again and write them down."[629]

The never-ending process of accuser and accused occurs in the abysmal and unclean world of the officials and functionaries of law and judgement seems never to arrive. Their dirty uniforms and shabby appearance, we are told, speak not of economic conditions but of their parasitic nature and the "forces of reason and humanity from which this clan makes a living."[630] Quite unlike the students, this clan is concerned with the application of law and the finding of guilt. The victory scored in this inherited adduction of guilt is that of the past over the future. The endless prescription of the prehistoric (or hetaeric) world,[631] both for Kafka and for Benjamin, exerts its ruthless force over the present, and the form this force takes is that of judgement.[632] The nature of the judgement however is unclear, and in this narrative device Benjamin offers a glimmer of hope, if not of redemption, then of postponement: "in the stories which Kafka left us, narrative art regains the significance it had in the mouth of Scheherazade: its ability to postpone the future. In *Der Prozess (The Trial)* postponement is the hope of the accused man only if the proceedings do not gradually turn into the judgement."[633] This recalls the tales told by Scheherazade to postpone her execution each night by "telling of the rulers and annals of long ago" that she had learned about in her studies.[634]

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[629] Benjamin, "Franz Kafka", 814.

[630] Ibid., 796. The forces of reason are much like those in the relation of father to son which "gnaw on the son's right to exist". Here we encounter what Kafka defines as original sin. The "old injustice committed by man, consists in the complaint unceasingly made by man that he is the victim of an injustice, the victim of original sin." Kafka, Er?, quoted in Benjamin, ibid., 796.

[631] As Kaufman points out, for Benjamin, "Kafka's work depicts the supposedly demystified modern world not as enlightened, but as prehistoric; that is pre-animistic. Modernity has not been cleansed of mythology as its defenders might claim. In fact it has not even achieved the state of myth. Kaufman, "Beyond Use, Within Reason" 155.

[632] Benjamin, "Franz Kafka," 807.

[633] Ibid., 807.

[634] A.S. Byatt, *The Arabian Nights, Tales from a Thousand and One Nights*, trans. Richard F Burton (New York: The Modern Library, 2009)

We can construe studying less as an exercise in acquisition but rather as an ascetic experience which necessarily involves remembering.[635] Thus, Karl Rossman's encounter with that student in *Amerika* leads to the recollection of his studying in his own home as a child. Benjamin points out that what is at stake in memory is lived experience itself, since experiences, he writes elsewhere, are lived similarities.[636] It need not amount to much, after all, "but that are very close to that nothing which alone makes it possible for a something to be useful."[637] The ultimate experience of alienation and therefore impetus to rediscover the situation of the subject is, for Kafka, the experience which directs him to learning, where he may encounter fragments of his own existence: "He might understand himself, but what an enormous effort is required! It is a tempest that blows from the land of oblivion, and learning is a cavalry attack against it."[638] Experience gives the present a source of access to the oblivion of the past. For Benjamin, there are no other tools at hand than the object or phenomenon, the appearance of which can begin to open the world to a configuration of ideas, a conceptually mediated constellation that is always being remade. The passing away of things negates any possessive character to this process of analysis, often invaded by the involuntary memory that experience gives rise to, yet momentarily illuminating possibilities.

In his use of allegory and parable, Kafka approaches the experience of alienation of the modern city dweller (his own lived sense of alienation) and the tortured machinations of law through the mystical tradition associated with Judaism. Kafka's stories do not belong entirely to the Western canon, as they are more akin to religious teaching. But even these teachings lie in ruins; his characters and gestures are "relics to the teachings, although we could just as well regard

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[635] Benjamin suggest that "the crowning achievement of asceticism is study." "Franz Kafka," 813.

[636] In a fragment written in 1931 or 1932, Benjamin writes "There is no greater error than the attempt to construe experience – in the sense of life experience – according to the model on which the exact natural sciences are based. What is decisive here is not the causal connections established over the course of time, but the similarities that have been lived." "Experience," *Selected Writings*, volume 2 part 2, 553.

[637] Benjamin, "Franz Kafka," 813.

[638] Ibid., 814.

them as precursors preparing the teachings."[639] The half-buried, incomplete and barely remembered remnants of a tradition of study which accords, in Benjamin's view, with the haggadic elements of truth is the mode through which the modern citizen in their contact with law's impossible demands is conveyed. This indirect or indistinct mode of access to the past is itself neither "knowledge that one can preserve" nor "doctrine that one can absorb."[640] Although ostensible study has no end, and amounts to nothing, we have seen this lack of object almost amounts to a use.[641] The attributes of study which Benjamin points to with Kafka is akin to Aggadah as fragmentary theology, lore, legend, sayings, prayer and praise.[642] What remains are remnants which correspond, according to Agamben, to the unmasking of mythico-juridical violence: "there is still, therefore a possible figure of law after its nexus with violence and power has been deposed, but it is a law that no longer has force or application."[643] What has been forgotten of law is its absolute absence of ground. No longer attached to the promise of justice or redemption, law operates with all its demonic violence in the modern era. It cannot be law that is invoked against myth, as Benjamin observes: Bucephalus "as a legal scholar remains true to his origins, except that he does not seem to be practicing the law."[644]

Rather than abandoning law altogether, law transformed via the labour of study offers hope, but only through a path of reversal, via hope in the past. Rather than a theologically determined, or indeed political-ideological recuperation of Kafka, Benjamin points to what remains undone in Kafka. In correspondence with Gershom Scholem over the essay prior to publication, Benjamin responds to the accusation by Scholem that in the matter of law, "the existence of secret law foils your interpretation: it should not exist in a pre-mythical world of chimeric confusion, to say nothing of the very special way it announces its existence. There

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[639] Here again, Benjamin describes Kafka's writing as taking the form of *aggadah* as it relates to halkhah, the teaching itself does not exist, "here and there we have an allusion to it." *Selected Writings*, 803.

[640] Ibid., 141.

[641] Ibid., 814.

[642] Elman Yaakov, "Classical rabbinical interpretation," in *The Jewish Study Bible*, 1847. (Oxford: Oxford University Press, 2004)

[643] Agamben, *State of Exception*, 63.

[644] Benjamin, *Selected Writings*, 815.

you went much too far with your elimination of theology."[645] In response, Benjamin reiterates that the pupils (students) do not belong to this pre-mythical world. Unlike the accused for whom everything is hopeless, they belong to the clan who are messengers, "the unfinished and hapless" for whom there is always hope.[646]

Here Benjamin locates a trace of redemptive hope in Kafka's diagnosis. It is "the source of his radiant serenity;"[647] for Kafka posed the problem of law as one of precisely this chimerical confusion. In his short prose piece *On the Problem of Our Laws,* the laws are not entrusted to the people, as they have not been worthy of them. They are secret and not generally known, yet people are convinced they are "unscrupulously administered."[648] They are so much a secret, that their very existence can only be presumed. The task of studying laws must be relentless for their fulfilment: "when the tradition and our research into it will jointly reach their conclusion, and as it were gain a breathing space, when everything will have become clear, the law itself will belong to the people, and the nobility will vanish. "The people are called to the collective endeavour of enquiry, As Fitzpatrick observes of the parable, the laws are demotically generated, "for the demotic majority these laws have ever to be "more formally enquired into."[649] Benjamin gives this task a more determined shape – one that seeks to lift law (as doctrine) out of the swamp of the primordial past in which redemption has no place. This specific reading of memory is derived from the Jewish tradition. Quoting Willy Hass, Benjamin argues: "Memory plays a very mysterious role as piousness. It is not an ordinary quality…The most sacred act of the ritual is the erasing of sins from the book of memory."[650] This collective task is reoriented away from law that is in force. The demand for the application of law to attain justice is severed and, as ever with Kafka, we are afforded little comfort in the present. The present is described as life on this 'razor's edge' since the "sole visible and indubitable law

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[645] Gershom Scholem letter July 9th, 1934 in *The Correspondence of Walter Benjamin and Gershom Scholem,* 122-123.

[646] Benjamin, *Selected Writings*, 798-9.

[647] Letter 299 to Gerhard Scholem, *Correspondence*, 565- 566.

[648] Franz Kafka, "The Problem of Our Laws," in *The Great Wall of China,* 125

[649] Fitzpatrick, *Necessary Deceptions*, 19.

[650] Benjamin, "Franz Kafka," 809.

that is imposed upon us is the nobility"[651]? and while there is hope, the hope is not for us.

Study, educative force, in this reading takes on a negative utopian hue. It is depicted as a threshold, a gateway. It has no *telos* and cannot be instrumentalised since it no longer demands the practicing of the law, the violent application of which serves ultimately as an act of severance of law from justice. The educative orientation lies with a negative utopian impetus whose direction faces toward a redeemed past rather than an emancipated future. Later scholars would disavow this element of Critical Theory as either pessimism or cynicism. We find for example Giroux calls for 'concrete utopianism' which can serve as the basis for "an ethical basis for challenging the excessive cynicism regarding social change and a political referent for grounding critique and the possibility of social transformation.[652]

Alternatively, Freire aspires to a realisable pedagogic utopia which is a dynamic engagement with the future, one that employs creativity and is alert to the dangers. Freire, for example, urges: "rather than repetition of the present…to values that are lived rather than myths that are imposed."[653] That utopian call for education has been adapted and implemented in many places around the world, and cannot be ignored as a potent source of inspiration for critical educators and critical educational projects up to the present time, it remains caught in a logic of instrumentality.[654] This warns of the dangers of reinstituting a relation that produces the problems attendant to laws' heteronomy and violent institutions.

We move to an alternative reading of the pedagogical possibilities in Benjamin's critique of law and sovereignty. Potential lapses into re-establishing normative frameworks and the associated violent manifestations of authority are ever-present dangers and the possibility articulating educative power through a programmatic approach to education seems to be rejected by Benjamin. Educative power or force therefore sustains a decisively negative association to the

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[651] Fitzpatrick, *Necessary Deceptions*, 438.

[652] Giroux, Theory and Resistance, xxi

[653] Paolo Freire, cited in Henry Giroux and Peter Mclaren, "Paolo Freire, Postmodernism, and the Utopian Imagination: A Blochian Reading," in J O Daniel and T Moylan eds., *Not Yet, Reconsidering Ernst Bloch* (London: Verso, 1997), 150.

[654] Gustavo E Fischman and Luis A Gandin, "Escola Cidada and Critical Discourse of Educational Hope," in Mclaren and Kincheloe, *Critical Pedagogy*, 218.

constitutive power of law.[655] In a further move in his essay on violence, Benjamin points to the "power to annihilate through the destruction of all law-making." This destructive rather than positive utopian call nonetheless has the potential to render the world other than it is by breaking with the fateful logic that results in the immanence of life and law (that also determines that all things must be as they are). Equally, it is a force that seeks to avoid at all costs the reinstitution of a new order formulated along the lines of the old. Much like the example of instituting a general strike as distinct from individual adjustments to labour relations, the danger of capture within new forms of oppression means this force must stand outside the law in all its manifestations. Some key features of educative force then appear as the withdrawal of intention understood as education aimed at a predetermined or programmatic approach invested in and by the logic of the state or of the socialisation of the individual. The "aim of study is not to steer its disciples", but it must however have a "bearing to life"[656]

[655] Martel, "A Divine Pedagogy?"

[656] Benjamin, "The Life of Students" in *Selected Writings* Volume 1, 38.

5
Conclusion

The thesis began with an exploration of the substantive (and limited) literature available on public legal education as a field, given the predominantly oral and often radical practices that have defied traditions of historicism and recording in the legal academy. The material traces the contours of a public education movement or 'discipline' as it is increasingly recognised in contemporary understanding. The historical antecedents of public legal education were traced through the War on Poverty in the United States and the post-war consensus in the West. 'Poverty law', out of which public legal education grew in the twentieth century, was itself an outgrowth of the civil rights movement; it was conceived as a direct challenge to the systemic inequalities that the law had come to entrench in the legal order.[657] Community education and community organising flourished as a way of improving knowledge of legal rights and as an aspect of poverty prevention delivered via neighbourhood legal services. The more proactive and reform-oriented strategies were most commonly attributable to community based legal education championed by civil rights groups.

Some examples encountered above promised a radical and community led strategy with the potential to resist social and legal hegemony.[658] However, alongside these activist and reformist efforts came a rise in state spending for legal assistance programmes, soon followed by a concern with the overburdening of these services: "the overwhelming need and pressure on services was brought into sharp focus…. Burdens on caseloads served to detract attention from legal

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[657] For a concise overview of the various programmes that emerged in the U.S. in the context of the 'War on Poverty', and poverty research in the era of civil rights see Frank Munger, "Rights in the Shadow of Class: Poverty, Welfare, and the Law" in The Blackwell Companion to Law and Society, ed. Austin Sarat (Oxford, UK: Blackwell Publishing Ltd.)

[658] Lois Gander, "The Radical Promise of Public Legal Education in Canada", (masters thesis, University of Alberta, 1999). Bryant Garth, *Neighborhood Law Firms for the Poor: A Comparative Study of Recent Developments in Legal Aid and in the Legal Profession*, (Dortrecht, Netherlands: Springer, 1980).

education and legal campaigns by communities themselves."[659] In order to meet the pressing legal needs of the communities they served, neighbourhood law centres moved away from public legal education, toward a focus on one-to-one casework and advice.[660] This resulted in the role of public legal education narrowing significantly. As Gander writes: "the job of PLE became making sure that the poor knew the rules that applied in their situations. Confining PLE to primary rules and colluding in promoting the passive role of the public in the legal system."[661] Public legal education has therefore occupied an ambiguous position in relation to the historical role of the legal profession and legal services, and to the growth of new rights in the 1960s and 70s, as well as in the evolution of rule of law ideals in which the state is entrusted with the task of informing the public about its rights and duties. Even at its most politically radical, public legal education was marked by contradictions and tensions in its proximity to and support (directly or indirectly) of the promulgatory function of law-making, with all its attendant adaptive and coercive demands.[662]

The review of subsequent legal needs and access to justice studies that incorporate a concern with legal knowledge and public education portrayed the vexed space within which contemporary practices operate. While the discourse of rule of law and access to justice construed as 'legal need' added a different dimension to formal public promulgation of the law, these new discourses also entailed the growth and proliferation of law becomes a "reified social fact."[663]

Moreover, the legal construction of demands for individual rights at the expense of collective political demands simultaneously embeds wider structural inequality within the normative order. Alongside social welfare law, one of the exemplary fields of legal expansion has been in the field of industrial relations, suggesting that the subsumption of antagonistic social and political relations is a common feature

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[659] Lisa Wintersteiger, "Legal Exclusion in a Post-LASPO Era," In In Defence of Welfare 2, Eds Liam Fox, Anne Brunton, Chris Deeming Journal of Social Policy, (Bristol: Policy Press, 2015) 68-71.

[660] Garth, "Neighbourhood Law Firms," 145.

[661] Gander, "Radical Promise", 15.

[662] See Wintersteiger and Mulqueen, "Decentering Law" 2017.

[663] Douglas J Goodman, D., and Susan S Silbey, Defending Liberal Education from the Law. In: Austin Sarat, ed., *Law in the Liberal Arts*. (New York: Ithica, Cornell University, 2005). 17-40, 21 cited from Wintersteiger and Mulqueen, "Decentering the Law," 17.

of juridification. The creation of these new areas of law, according to Bourdieu, therefore "legitimiz[e] victories over the dominated, which are thereby converted into accepted facts."[664] Legal need naturalises law in such a way that it masks a dialectical process in which the expansion of rights accompanies and obscures social antagonism.[665]

The initial agitation and political aspiration of the public legal education movement, accompanied by a growth in scholarship concerned with the interrelatedness of law and poverty, soon came to be suppressed. With fear of further outbreaks of unrest following the assassinations of Martin Luther King and John F Kennedy, and the associated fear that civil unrest might stymie global capital. With the retrenchment of welfarism which reduced willingness to fund legal assistance, there came an ever more dominant juridico-economic focus with which legal services also became associated. The casework oriented focus for law had to navigate a faltering market; poor law struggled to meet the rising demand for legal help. These shifts fundamentally throw into question the strategies that socially inspired legal activism have relied upon and continue to rely upon. The successful citizen becomes the putative consumer of educational and legal services, who requires sufficient knowledge and skills to level the playing field, overcoming informational asymmetries and becoming an empowered actor in the legal market. The role of education is considered to be adaptive in purpose: to bring the legal consumer into the legal market. The first chapter consequently considered how rule of law discourses have reoriented public legal education toward neoliberal exigencies for the rule of law. These constructions fundamentally altered the relationship between citizen and state, with an economic-juridical rationality at the expense of a juridical-political understanding of the binding force of law that is both shaped by and shapes the nature of a polity.

An emphasis on the associations of public legal education with a variety of theories of state is a core feature of the subsequent historical-philosophical reading of public legal education and of the evolution of the concept of the rule of law. Chapter Two traced the shift from classical liberal discourse to the responses of

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[664] Pierre *Bourdieu*, "The *Force of Law*: Toward a Sociology of the Juridical Field", 38 *Hastings Law Journal*, Volume 38, Issue 5 (1987), 817

[665] Bourdieu, "The Force of Law", 817 quoted in Wintersteiger and Mulqueen, "Decentering Law," 24.

both the German Ordo Liberals and the Chicago school. The inter-war years produced a crisis of capitalism that would have enduring consequences for the re-evaluation of classical liberal doctrine. Their reorientation of classical liberalism responds to the ungovernability that, for neoliberal theorists, attends a perceived 'excess of democracy' and a belief that some degree of marginalisation is a natural feature of competitive markets.

For influential theorists such as Friedrich Von Hayek, legal knowledge is core to their economic and political programme. Rather than approaching economic growth through the doctrine of *laissez faire*, we find that legal activism is core to their strategy. Fearful of the growth of authoritarianism as much as of the demand for reparations and debt relief for the global South, this new breed of liberalism also recognizes the role of ignorance and the concomitant necessity of some information realignment. This means deploying knowledge (including legal) only so far as to help serve basic entrepreneurial innovation. The core rules encompass the general rule pertaining to contract and exchange of property, and rules intrinsic to serving the free flow of investment capital. This aimed to foster, in Shklar's words, "a rule observing 'spontaneous order' [which] can be expected to emerge."[666] In a slightly different but connected vein, Foucault contends that: "The rule of law and *l'etat de droit* formalize the action of government, a provider of rules for an economic game in which the only players…must be individuals…or enterprises."[667] For our present purposes, public legal education strategies are deeply implicated in this instrumentalisation, in which subjects are shaped through and through to adapt, conform and compete in this new global order. Not only are alternative political imaginaries suppressed, this new economisation of government and state, facilitated in part through legal knowledge dissemination, is a far cry from the various guises in which public legal education appears in earlier classical accounts.

The thesis traversed Enlightenment thought with its aspirations for progress and self-determination. Already in the syncretic thought of St Thomas Aquinas, we noted the role that legal knowledge has (manifesting as promulgation of laws) to neutralise the opposition between force or violence and law with the mediation of knowledge. The force of law, he contends, is justified or legitimated by the function of knowledge. We find a shifting yet persistent valence of the legitimation of the force of law and the function of sovereignty in thinkers from Hobbes to

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[666] Shklar, *Political Theory and the Rule of Law*, 7.

[667] Foucault, *The Birth of Biopolitics*.

Locke, and Kant to Rousseau. Common to the formulations of the Enlightenments most prominent political thinkers, was the importance of legal promulgation in forming the bond between citizen and state. For Locke and Rousseau this extended to an awareness of the deliberative and participative precursors to the construction of the putative social contract.

Yet even this possibility becomes subject to suspicion as we move to construe the evolution of Enlightenment through a one-sided and adaptive process of cultural education. This critique appears forcefully in the work of Horkheimer and Adorno. Law belongs to a wider shift in which the rationalities it constitutes, of equality, rights, freedom and so forth produce antinomies that subvert or eviscerate the lived experiences of alienation, marginalisation and oppression brought about by the economic-juridical order of law itself. The dialectic of myth and enlightenment in their thought illuminates how the archetype of bourgeois individualism traverses epochs and unleashes the most destructive forces of history in the name of self-preservation and the mastery of nature through economic and technocratic expansionism. In this light the ideals of a modernity attendant with a progressive and positivist science of law with any emancipatory *telos* dissolves.

These features of Critical Theory, we have argued reorient theories underpinning public legal education in a number of ways. The negative utopian strands of Adorno and Benjamin's thought in particular are highlighted, and their association with memory, the rejection of idealised notions of progress offer a corrective to passive acceptance of the inequalities of present social conditions. As a set of practices existing at the very margins of institutionalised legal education and informal community education, public legal education holds the promise of disrupting or interrupting the orthodoxies of liberal legal rationality.[668] In their indirect relation to the application of law, or as practices of critically 'decentring law', these practices are afforded a force that has the potential to disrupt the instrumental link between law and its application, and for constructed alternative political spaces in which the resolution of human conflict and violence can be re-evaluated and reimagined.[669]

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[668] Legal orthodoxy in this sense is distinct from legal doxa: the fundamental and unquestioned self-evidence of law as a system beyond question as opposed to what Bourdieu describes as the socially legitimized requirement to which everyone must conform, see Force of law, 1987.

[669] Wintersteiger and Mulqueen, "Decentering Law," 2017

To this end, we consider Benjamin's central text on the association of law and violence (or force). While broadly antinomian in his stance in the *Critique of Violence,* Benjamin alludes to a curious sense of *Recht* (Right) which is both more and less than the normative order of law; it neither embodies executive law-making violence, nor the law-preserving violence of an administrative nature. Rather than subsuming every event and action, as is the case with law, as we noted above in the Benjaminian sense, justice must suit each singular event.[670] What we retrieve is a pedagogical force that insists on both a radical singularity that is pervaded by a theological spirit that somehow lies beneath the desiccated bureaucracies of modernity that administer life with all their technocratic and murderous effect. Rather than replicating the myth of a sacred life this places an emphasis on the shared fragility of an all too human existence. This, then, is a secular theology that appears to offer nothing more than glimmers of hope through a redeemed past that fundamentally breaks with our understandings of the ends law with its false promise of justice: "redemption manifests itself in an odd way, for it seems to entail a complete apocalyptically destructive break."[671] In this view, every epoch holds the possibility of redeeming the previous. The destructive labour of philosophico-historical critique undertaken by Benjamin excavates the present from all its obfuscations and mystifications.

Fate and guilt become core conceptual apparatus in this endeavour of releasing profane life from the grips of myth and mythic violence. The readings illuminate two different but related variations of fate in Benjamin's wider work that serve our purposes. The first register of fate we encountered refers to the simple fatality of life in its apportionment, or distribution among mortals, which also serves as the basis of the normative order. This order demands that ambiguity and unknowability function so ensure transgression in order to promote law's self-perpetuation. Following a mythic schematic, this demonic variation of fate means that human life is delivered over to the inscrutable realm of the gods and unending cycles of mythic violence as a consequence of mortality. We also encountered in a second register of fate the realm of historical ruin, describing a profane history no longer tied to the promise of redemption. This is history evacuated of the promise of salvation, an idea that became a crucial nexus of Enlightenment metaphysics of

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[670] Walter Benjamin '*On Language as Such*', *Selected Writings* Volume I, 62.

[671] Kaufmann, 'Adorno, Benjamin and the Question of Theology,' 156

reason and progress. In a secular world, human progress and perfectibility take on the task that religious ideals of salvation and redemption previously provided.[672] The description of these two registers of fate helps us to grasp what is at stake in the boundaries established and guarded by law. In this view, an uncritical stance toward the educative locus of law as a preeminent site of the reproduction of historical violence remains hidden, as do the attempts to resurrect idols and false sovereigns in a world that has lost its gods.

Moreover, in depicting a corrupt and abject world, Benjamin ask us to re-evaluate the operative function of guilt (or indebtedness in the German rendering) in the structure of law. We explored how his analysis produces an aporetic relation between knowledge and law, one that has its roots in the implication of law and life in a bond quite opposite to the constitutive political force we consider in earlier chapters. This entails an exploration of the instantiation of law as the historical rupture of constituent political power, one that binds and constitutes a community which always already lies under a pall of guilt, a relation that disavows our assumptions of law's intelligibility as bridging and binding constitutive power. Knowledge of law in this view assuages none of the guilt attached to the legal subject preceding any act of transgression in the readings that Benjamin offers. Guilt appears to be concretised in a state of ignorance.[673] In the diagnosis of modern law and its ancient counterparts, law must sustain ambiguity so as to fulfil itself. This necessity for transgression for the fulfilment of law points to fact that law must first create the conditions for its prohibitions to have reference to life, and to make that reference regular (to establish its rule).

> Since the rule both stabilizes and presupposes the conditions of this reference, the originary structure of the rule is always of this kind: "If (a real case in point, e.g.: *si membrum rupsist),* then (juridical consequence, e.g.: *talio esto)"* in which a fact is

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[672] Birnbaum, "Variations of Fate" in *Towards the Critique of Violence*, 94-95.

[673] "Even the modern principle that ignorance is no protection against punishment testifies to this spirit of law." Benjamin, *Critique of Violence*, 249. Moreover "the struggle over written law in the early period of the ancient Greek communities should be understood as a rebellion against the spirit of mythic statutes". Ibid., 249.

> included in the juridical order through its exclusion, and transgression seems to precede and determine the lawful case.[674]

This retributive characteristic, "if" – "then", means that the juridical order does not sanction a transgressive act, as is commonly understood, but rather "constitutes itself through the repetition of the same act without any sanction, that is, as an exceptional case."[675] It is a law of vengeance that operates so as to render all acts first guilty and subsequently subject to legal punishment. Knowledge of the rule is not exculpatory since guilt must simply refer to something, some act which will come about. In this impossibility of deciding if it is guilt that grounds the rule, or the rule that posits guilt, what comes to light is the indistinction between inside and outside, and between life and law.[676]

Since law appears to place the subject in an interminable undecidability, in which predicting the outcome of a case appears ever more arbitrary and subject to coercion, with this analysis Benjamin also enjoins us to consider what, in the absence of the false sovereigns we labour under, we can begin to draw from for a secular basis of human relations. Since the only 'real' sovereign can be God, what knowledge, what reason can provide the basis for truly human relationships?

> For Benjamin, the reason that states are violent (both in the usual and Benjamin's particular understanding of that word) is precisely because, as agents of mythic violence, they have no true authentic basis. State sovereignty is based, as thinkers from Schmitt to Hobbes to Kantorowicz have noted, on a secularization of a theological basis for monarchy… If God is king of the universe, that kingship becomes actualized, in the secular model, as a human form of rule. States thus claim the mantle of God as a basis for legal and political authority (although eventually that connection is meant to be obscured without ceasing to be critical). Yet, as Benjamin shows, this claim is false. God for Benjamin is utterly unknowable except as that force which opposes its own mythologization.[677]

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[674] Agamben, *Homo Sacer*, 26. *Lex talionis* is a feature of the retributive function of Mosaic law, "eye for eye, tooth for tooth" in Exodus 21:23–25.

[675] Ibid., 26.

[676] Ibid., 27.

[677] James Martel "Why does the state keep coming back? Neoliberalism, the state and the Archeon." *Law and Critique* 29 (3):359-375 (2018), 369

In his relentless critique of law lies the promise of claims to law, to *Recht* (perhaps in this sense better captured as 'Right') and what is at stake in that promise, which the English translation of law fails to adequately capture. That law continues law, and preserves itself through interring violence, is a basic premise of legal theory. However, *Recht* refers also to the aspirational but inapplicable claim against the law by the legal subject, which must nevertheless also contend with violence.[678] In order to break the continuum of violence, the problem of locating an immanent mode of existence that does not seek justification from outside is one that he would continue to grapple with, in particular in relation to the notion of law as study.

The final chapter returns to Critical Theory from the specific perspective of educational theory, and considers public legal education models within the broader critical pedagogy movement that grew out of the Frankfurt School. Law in modernity, since it pertains to instrumentalised rather than objective reason, for Horkheimer, only serves as an instrument of power and simply sustains the status quo.[679] The critique of reason and the loss of a meaningful basis for the normative order also suggests the protections afforded to the liberal subject are as contingent as they are aligned to the powers that govern them. The problem of subjectivity and identity haunts critical education generally, but specifically critical legal pedagogical approaches with their claims to emancipation. Rather than being brushed aside as a fundamental pessimism, earlier critical theorists' claims pose serious challenges for later emancipatory strands of critical pedagogy and about the extent to which emancipatory claims can be made for educational practices that are available out of the self-same assemblages of subject and society.

Critical pedagogy thus appears to fall into the very trap that it set out to avoid. Both European and American strands of critical pedagogy exhibit the failure to free the concept of educational praxis from functional and instrumental demands, albeit for the laudable attainment of liberation or emancipation from oppression.[680] This logic of a technological project underlying the educational praxis

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[678] Walter Benjamin, "The Right to Use Force," Selected Writings, Volume 1, 232.

[679] Horkheimer, *Eclipse of Reason*, 33

[680] A number of different approaches to emancipation appear in critical pedagogical writings, these include 'edification': as a process of social development of the species following Habermas; as self-reliance and self and co-determination following Klafki; and

means critical pedagogy "remains itself subject to the same instrumental logic that it deplores at the heart of the capitalist system."[681] The fundamental problem of conflating means and ends, where ends are construed as either the formation of the autonomous subject or the recipient of emancipatory interventions, fails to disrupt the logic of emancipation with its relations of dependency and inequality.

Emancipation assumes the need by the oppressed minority of an intervention from the outside that will lead the subject to a future position of equality and freedom. As a consequence, modern emancipation,

> is not only based on dependency – it is also based on fundamental inequality between the emancipator and the one to be emancipated. According to the modern logic of emancipation, the emancipator is the one who knows better and best and who can perform the act of demystification that is needed to expose the working of power.[682]

Wider critiques of critical pedagogy include the failure to produce an effective paradigm of education that bridges theory and practice, in particular when placed in an institutionalised education environment, and therefore risks simply offering a critical approach producing nothing other than critique. After all, the *Institut's* own thinkers are thinking from within institutional educational contexts. Adorno certainly was not unaware of this; "the heart of Adorno's dilemma is that he wants educationalists to possess enough authority to pull authority down – or at least render it transparent."[683] To take any position of critique necessitates a position within advanced capitalism and therefore a space in which critique itself is commodified; "education for critique can turn in to the new orthodoxy."[684]

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setting people free from the compulsion of material power and ideologies through critique following Adorno. Misschelein, "Critical Theory", 74

[681] Ibid, 50.

[682] Gert J.J. Biesta, *The Beautiful Risk of Education* (London: Paradigm Publishers, 2013), 83.

[683] Adorno and Becker "Maturity and Education" 9.

[684] Adorno and Becker, "Education for Maturity", 6

Critical pedagogic analysis of cultural and social reproduction made important contributions to understanding the nexus between inequalities in education and inequality in wider society, although these too have met with criticisms.[685] Some critical pedagogical insights are visible in the literature on public legal education theories, but little considers the nature of education as a site of social or cultural reproduction and thereby the particular ways in which legal education may be a vehicle for the transmission of wider power relations, either in terms of classroom practices or in wider cultural and social relations.[686]

A different, perhaps indirect, method takes a counter-hegemonic approach to public legal education, turning to the constellation, formed by the thinking between Benjamin and Kafka. It rejects a positive utopian drive, but seeks urgent and ceaseless attention to the present, to what is disfigured and hidden in the present. It traces the lines of utopian negativity as a regulative principle only insofar as "a concept which could never be, and was never really intended to be, realized but rather to act as a perennial corrective against any claim that a natural or equitable social order has been achieved."[687] Benjamin's oeuvre, and to some extent Critical Theory more widely, thus provides nothing more than glimpses of utopia by providing an account of negative utopia, or a negation of utopia understood as a historical progress, law ascribing justice or a range of other formulations that emulate and rely on the mystification of the present.

What we traced with Benjamin and Kafka is a pedagogy of inoperativity and uselessness, but nevertheless a determined praxis of learning. Agamben describes the contours of what remains of law following Benjamin and Kafka:

> What is found after law is not a more proper use and original use that precedes law, but a new use that is born only after it. And use that has

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[685] We will discuss these concerns in more detail below, however one such criticism is attributed to Giroux who point to the limitations of theories of social reproduction in education, which are rooted in over-determination. He argues that they fail to adequately understand the function of agency by the various actors in schools and engages a reductionist view where struggle and conflict are entirely overcome through a one-sided process of cultural domination. Henry Giroux, *A Theory and Resistance in Education: Toward a Pedagogy for the Opposition*, 87-111.

[686] Bourdieu and Passeron. *Reproduction in Education, Society and Culture Theory,* 2000.

[687] Adorno, *Critical Models: Interventions and Catchwords*, 218.

> been contaminated by law, must also be freed from its own value. This liberation is the task of study.[688]

In this, Rose suggests, Benjamin's reading comes near to the idea of Talmud Torah when he contrasts the commandment as a guideline (not a criterion) along with its educative potential.[689]

Benjamin's philosophical approach not only deploys theological categories but also brings human experience to the fore in the dialectical arrangement with the representative of ideas, an element that also provides educational potential. Rather than relying on the intuitive concept produced from the understanding or from abstract universal concepts, all philosophical truth for Benjamin arises from the central concern with concrete phenomena of experience: "For Benjamin everything habitually excluded by the norms of experience ought to become part of experience to the extent that it adheres to its own concreteness instead of dissipating this, its immortal aspect, to the schema of the abstract universal."[690] In the task of representing ideas, the subject has a conceptualising agency, acting as mediator arranging phenomenal elements so that they can become visible, for the idea to be formed. Crucially, rather than submerging phenomena or objects in concepts, Benjamin's approach aims to allow the phenomena to shine forth as ideas, as their objective interpretation and their virtual arrangement: "Ideas are related to phenomena as constellations are to the stars."[691] Meticulous attention to the minute was a hallmark of Benjamin's work, and reflected his suspicion of the sterility of traditional philosophical method and mistrust of the universal abstraction that authorised what he referred to as inductive method that led nowhere.[692]

This suggestion gestures toward a very different pedagogical insight and approach to questions of law than the orthodox methods associated either with theoretical postulates to be analysed according to specific applications, or indeed the empirical framing of legal cases into a broader jurisprudence offered in positivist frames. Placed within a praxis of education, this sheds new light on

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[688] Agamben, *State of Exception*, 64.

[689] Rose, *Walter Benjamin, Out of the Sources of Judaism*, 189.

[690] Adorno. T.W Introduction to Benjamin's *Schriften* in Walter Benjamin Critical Essay and Recollections Gary Smith ed., 4

[691] Benjamin *The Origin of the German Trauerspiel*, 34.

[692] Ibid, 39.

learners' capacity to bring their concrete experience of law to a re-examination of the grounds of law, its paradoxical appearance as both totalising: "the law is all over"[693], and the absence of knowledge of law in everyday life.[694] The nexus for the interrogation is of the specific content of legal knowledge, verifiable facts and cases, and the constellation of ideas that surround law deriving from the rich multidisciplinary sources that we have encountered. For the purposes of bringing the idea of law to bear in the educative field, the starting point remains the concrete, lived experience of conflict or dispute in social interactions.

Rather than merely entering the experience as a subjective 're-living', the tools to draw out and rearrange the various elements of the concrete phenomena can be activated. These necessarily involve the dialogical and discursive method of critique in community settings that often reflect the misery and alienation that marginalised communities express in their encounters with the law. But they also concern a withdrawal, a movement away from immediate experience toward specific historical associations and locations that permeate experience. In addition, identifiable lived moments serve not only to illuminate " the causal connections lived over time, but the similarities that have been lived"[695], that can shed light on the example or phenomena at hand. These are rich, creative and recreative resources, originating from participants themselves, that open a wide array of perspectives to the task of learning about the law and how it operates in and forms lived experience in and through time.

While public legal education is frequently instrumentalised or indeed reified as a signifier of belonging to or constituting sovereign constitutionality, we can begin to reimagine political community. This fundamentally rejects the idea and intention of returning the excluded subject, the individual without access to law, to the interior of knowledge and thereby to be the individual possessor of rights and the holder of the mechanism to apply rights toward formal remedy. The approach to non-application via a negative dialectical enquiry carries with it a resort to patient and ceaseless study; study of law as means but not an end to grasping new configurations of living in community.

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[693] Austin Sarat (1990). ""The Law is All Over" Power, Resistance and the legal consciousness of the welfare poor" *Yale Journal of Law and Humanities* Vol. 2: Issue. 2, 6.

[694] Wintersteiger, Legal Need, Legal Capability, 2015.

[695] Benjamin, Experience, *Selected Writings Volume* 1, 553.

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