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MAKING THE CRITICAL MOVES: A TOP TEN IN PROGRESSIVE LEGAL SCHOLARSHIP

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> *Good people say that we must not flee, that to escape is not good, that it isn't effective, and that one must work for reforms. But the revolutionary knows that escape is revolutionary—withdrawal, freaks—provided one sweeps away the social cover on leaving, or causes a piece of the system to get lost in the shuffle.*
>
> – Gilles Deleuze & Felix Guattari (1977)[1]

INTRODUCTION

If comparative law has any one thing to say to legal theory, it is that legal constructs are epistemically *situated* enterprises. Concepts—and critiques—take different meanings depending on their community of reference. No doubt, extensive legal similarities exist throughout the world. There are numerous transplants and borrowings as well as colonial and neo-colonial impositions of law. Yet, beyond surface similarities, effective meanings can vary considerably. Members of a given interpretive community create the conceptual and relational associations that make particular sense *to them*.

Accepting this point means there is no singular path forward for either construction or critique. They both vary according to situational understandings. This observation is not limited to comparisons of very different societies, in which the concept of law itself may vary. It equally stands with respect to historically related legal communities. For example, property relations in a given place may be confined to identifying an individual owner with absolute rights. Yet, elsewhere in the same legal tradition, property law may impose affirmative duties on holders—like requirements to cultivate rural land or build housing on urban lots. Similarly, originalist constitutional interpretation may be quite convincing in some contexts—definitively demonstrating the founders' intended resolution of novel constitutional questions. In other places, with not dissimilar constitutional regimes, originalism may be completely irrelevant or impossible to reconstruct meaningfully in the opinion of mainstream commentators.

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1. GILLES DELEUZE & FELIX GUATTARI, ANTI-OEDIPUS: CAPITALISM AND SCHIZOPHRENIA 277 (Robert Hurley et al. trans., Univ. of Minn. 10th ed. 2000) (1977).

Critiques also metabolize differently across places. They intersect situated understandings and radiate relative effects. A law-and-society critique of legal informality in development debates, for example, may support comprehensive land titling for urban squatters. But it also reinforces the discourse of absolute property rights, in the past synonymous with restrictions on developing-state economic planning and more extensive redistributions of land. An anti-imperialism critique of governance feminism in international law may duly discredit humanitarian military intervention but has the unintended consequence of reinforcing discriminatory gender attitudes on the ground. In sum, not only is the object of critique highly situational but the modes of critique equally present choices of politics and tactics. Selecting one critical move, rather than another, is not an inconsequential matter.

The selection of a particular critique may best be undertaken by focusing on the context. This "context of critique"—that I am highlighting—is not the general law-in-context notion in which law influences and is, in turn, influenced by society. Rather, it refers to the distinct fields (in law and beyond) constituted by more or less shared references and an identifiable political space with consequential stakes. Its boundaries can coincide with national legal communities, but its scale may extend both broader or narrower.[2] Across these contexts, individual critiques have varying degrees of traction depending on the epistemic characteristics and state of play of the situation. Some critiques are, unsurprisingly, more intelligible and penetrating than others. And, they may be more or less attuned to engendering societal receptiveness toward progressive causes. Moreover, critiques in one context may produce quite different effects in another. A locally effective critique may produce overwhelmingly adverse geopolitical effects. Or, conversely, a commonplace critique in a transnational context may undermine some hard-won gains locally.

Over recent decades, progressive legal scholars have conspicuously developed an identifiable repertoire of "moves" or critical strategies. It is not as if these moves were concertedly planned. They are more the product of ongoing dialogue and, in

2. The use of a term like this is not meant to overstate its solidity in the world. It is merely a rhetorical convention—a working concept to try to delimit in succinct terms a phenomenological space.

some cases, sustained collaboration. Some are commonly attributed to certain individuals. Others are widely diffuse within progressive scholarship in general. The types of moves I have in mind are intellectual operations performed on legal texts. For example, pointing out the gaps, conflicts, and ambiguities in legal doctrine: on any given point, doctrine may hold itself out as objective and neutral but is—in fact—filled with political preferences and possibly regressive effects. Or describing the dark sides of generally well-regarded legal regimes and institutions: the dark side of human rights law, for example, may be its reductionism of too many experiences to the stereotype of victims and victimizers. Or a distributional analysis of winners and losers: rules and institutions often distribute resources in opaque ways, projected as neutral or even win-win. Yet, if only the "losers" could see what they are in fact losing, they may be less inclined to support it. And a variety of other such strategies.

This Essay sketches out some of the more common moves. They can be recognized within a wide variety of scholarship. My list is not *by any means* a comprehensive bibliography. Nor is it a search for origins. Rather, I describe some examples with only a smattering of citations. Other observers will likely identify additional moves and provide different illustrations. The exercise has as a first objective simply to lay out the moves. Listing them like this is useful, as a general matter, to more easily identify and track how they are deployed. My more important point, however, is that these critical moves are not interchangeable across different contexts-of-critique. Which ones we choose in particular settings matters. They themselves are part of the intervention—and not just the generic means to unseat an established concept, position, or identity. While all may be useful in producing cogent challenges, some may generate more collateral discursive effects than others. That is, some critical moves may have negative unintended *intertextual* effects that make their use, in a particular setting, less worthwhile overall. Additionally, some may be wasted efforts because they will predictably not get much traction. Others may be outright counterproductive when examined in light of a particular environment.

In the effort here, I draw on the work of early twentieth century Italian political theorist Antonio Gramsci. Faced with growing fascism in his country in the 1920s, Gramsci placed great importance on the work of organic intellectuals. Progressive po-

sitions could prevail only by engaging the consciousness of ordinary people. His *Prison Notebooks* suggest a means to identify the right moves intellectuals can make. He recommends hewing closely to situated understandings. Flashes of "good sense" among society should be identified and turned against the diffuse "common sense" constructed by liberal bourgeois ideology and exploited by fascism, in his day. The discussion below takes Gramsci as our guide, at least part way, in navigating ascendant reactionary hegemony and the counteracting role of progressive critique.

Certainly, there are moments in which liberal legalism's fantasies need to be thoroughly routed—in whatever way possible. Faced with a fascist leader pretending to operate within the rule of law, the mask of liberal legality may need to be completely torn off. Still, there are numerous run-of-the-mill fantasies that liberal legalism harbors in its regular course of operations. In most instances, these are only selectively challenged by progressive scholars—most often to achieve a particular purpose, reform, redirection, rethinking, or imagining of other alternatives.[3] It is at these moments that the means of critique, or the moves chosen, are most relevant to the intervention.

My reflection on this topic also draws inspiration and examples from the discursive domain of Latin American legal studies. That region is no stranger to radical critique—even by mainstream commentators. In fact, radical critique *is* the mainstream. That is, rather than mass producing affirmative legitimation of law, most Latin Americanists widely embrace delegitimating critique about liberal legalism *in Latin America*. This makes for the textually lopsided situation wherein mainstream accounts—from an English-language and global perspective—press searing condemnations of liberal legalism in Latin America while pulling their punches when it comes to the global North. This scenario serves as an example, for purposes here, of the different contexts of critique addressed in more detail below.

3. There is no doubt that determined critics may prefer to bring the entire edifice down wherever liberal legalism may be found, even if totalitarianism is not impending. For them, it may camouflage too many sleights of hand, resulting in an irredeemably unjust legal order. Some other alternative—whether explicitly defined or otherwise—may in all cases seem preferable. Still, the extensive amounts of ideological legitimation, at least in legal communities like the United States, make law's total ideological demise unlikely to happen. At least, that has been the case until recently in this country.

The Essay progresses in two Parts. The first presents a general discussion of the political economy of critique. By this I mean the relative balance of forces between legitimation and critique as well as *the means of critique* in a given legal community. Some contexts may be more heavily weighed down by pervasive critique and open recognition of the practical elusiveness of legal ideals. Other contexts may be buoyed by large doses of legal legitimation, ideology, and hegemony. The guiding thread in this part of the discussion is Gramsci's writings on hegemony and organic intellectuals. In whatever economy of critique, legitimating hegemony or counterhegemonic offensive, the means of critique are singularly contextual and tactical. In turn, the discussion of Latin American legal studies offers an example of a particular economy of critique. It shows a field where pervasive critique is widely prevalent, indeed hegemonic. While the individual objectives of its expositors may be laudable, the overall impact is an undermining of legalism in Latin America which disables the very objectives commentators proclaim. This example demonstrates the need for greater attentiveness to the fuller context-of-critique. The second Part of the Essay lists ten common moves. It lays them out with the objective of more easily assessing their potential traction in a given context-of-critique and their likely capacity to enlist greater progressive consciousness.

I. THE POLITICAL ECONOMY OF CRITIQUE

There is certainly no lack of common traditions, hegemonic global understandings, and textual similarities across legal communities. No doubt, there have been several waves of legal globalization—or international influence—in the past century or so.[4] And, these have produced marked similarities in law across the globe. Legal formalism, to cite just one example, has been documented the world over. Yet, when examined more closely, this phenomenon consists of different understandings, all generically labeled "formalism."

4. *See* Duncan Kennedy, *Three Globalizations of Law and Legal Thought*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19, 19–25 (David M. Trubek & Alvaro Santos eds., 2006) (proposing the thesis of archetypal "langues" as characteristic of three historical globalizations of law from "contexts of production").

Digging deeper, these legal forms take on many different meanings, whether in terms of the actual substance they denote, the background theories they draw on, and the politics of which they are a part.[5] The divergences extend beyond progressive and conservative—left and right—versions of identifiable global paradigms: whether it is classical legal thought in the late nineteenth century, the "social" in the early twentieth century, or post-WWII hodgepodge. They all reveal mismatching and recombining of diverse constructs in all three periods.[6] Moreover, legal constructions and critiques demonstrate a lot of variation across systems.[7] They really only make meaningful sense in relation to specific group understandings—whether the group is a *ronda campesina* in rural Peru or World Trade Organization experts in Geneva. It often appears like we are talking about the same thing when referencing similarly labeled legal concepts and critiques.[8] Yet, they are significantly shaped by the constellations of meaning more proximately surrounding them.

As a result, taking this point seriously, there is no singular direction for either legal construction or critique—much less for a precise agenda of progressive legal moves. It depends on the immediate situation, the political context at hand, and the tactical intervention sought by the critic. Imagining it otherwise makes it appear that there is an inexorable progression of legal knowledge, in which critical analysis is in the vanguard. If any proof were needed that this is not so, some of the most insightful and impactful critical maneuvers still deployed today hail back

5. Jorge L. Esquirol, *The "Three Globalizations" in Latin America*, 3 COMP. L. REV. 1, 7–9 (2012) (commenting on Kennedy, *supra* note 4).

6. *Id.* Even in purported "contexts of production," multiplicity within paradigmatic forms simultaneously abound. *See generally* Lewis A. Grossman, *Langdell Upside-Down: James Coolidge Carter and the Anticlassical Jurisprudence of Anticodification*, 19 YALE J.L. & HUMAN. 149 (2007) (showing the strong anti-formalism presence in the United States at the height of "classical legal thought").

7. *See generally*, DIEGO LÓPEZ MEDINA, TEORÍA IMPURA DEL DERECHO: LA TRANSFORMACIÓN DE LA CULTURA JURÍDICA LATINOAMERICANA (2004) (showing the multiple combinations of legal thought made by Latin Americans crossing different paradigms of globalization); *see also* Jorge L. Esquirol, *The Fictions of Latin American Law (Part I)*, 1997 UTAH L. REV. 425 [hereinafter Esquirol, *Fictions of Latin American Law*] (demonstrating sociological anti-formalism as a defense of traditional positivist hegemony in Latin American rather than its critique).

8. *See, e.g.*, Jorge L. Esquirol, *Can International Law Help: An Analysis of the Colombian Peace Process*, 16 CONN. J. INT'L L. 23, 70–81 (2000) (describing the hegemonic yet locally idiosyncratic version of public international law and humanitarian law prevalent in Colombia during the 1998–2000 peace talks—not all in keeping with the standard understandings of those legal regimes).

to early twentieth century legal realists. Based on these and subsequent developments, a relatively wide range of intellectual tools exist that serve to challenge the overblown pretensions of liberal law.

A. Hegemony and Intellectuals

Gramsci offers a useful perspective from which to consider these questions. He—like us—lived in a period of reactionary populism. As a person of the left, he had to confront a rapidly changing environment. The revolutionary impetus heralded by working class mobilizations in Italy between 1918–1922 was manifestly insufficient to make continued progress. The laws of economic determinism would not, it was obvious to Gramsci, unequivocally lead to success.[9] Indeed, dismissing the utility of action in the realm of politics, culture, and ideology seemed deeply misguided. A new politics and culture would not simply emerge from working class positions. Instead, subjective intervention was necessary to change entrenched beliefs, group narratives, and popular "common sense." Neglecting this dimension of social organization could lead to violent backlash—which Italian fascism ultimately became.

The concept of hegemony as developed by Gramsci goes precisely beyond economic determinism—beyond the rigid division between economic base and ideological superstructure and the priority of the former over the latter.[10] It addresses the realm of the political, cultural, and ideological. Hegemony has been helpfully summarized as

> [A] central system of practices, meanings and values, which we can properly call dominant and effective . . . which is lived at such a depth, which saturates the society to such an extent, and which, as Gramsci put it, even constitutes the limit

9. ANTONIO GRAMSCI, QUADERNI DEL CARCERE, Q. 11, § 12 (18) (Giulio Einaudi ed., 2014). Gramsci, however, understood the appeal of economic determinism particularly from a historically subaltern position: "When one does not have the initiative in a struggle, and when the struggle itself ends by its identification with a series of defeats, mechanical determinism becomes a formidable force of moral resistance, of cohesion, of patient and obstinate perseverance." *Id.* All translations of Italian texts are mine.

10. It goes beyond Lenin's use of the term as simply the superior role of the proletariat over other class allies. *See* JOHN M. CAMMETT, ANTONIO GRAMSCI AND THE ORIGINS OF ITALIAN COMMUNISM 205 (1967).

> of common sense for most people under its sway . . . . [T]his can only be so, in a complex society, if it is something more substantial and more flexible than any abstract imposed ideology.[11]

Gramsci invoked the idea of hegemony in a period when most Italian class activists shunned "subjective" intervention. They believed instead in inescapable material laws to produce working-class victories. They were mostly disdainful of intervening in bourgeois institutions. And the moderates within their ranks simply advocated for social democratic reforms without challenging existing foundations.[12]

However, in a period of organic crisis—such as Gramsci's description of the Italian liberal state in the early 1920s—hegemony breaks down. A "static equilibrium" takes its place in the form of a stalemate between forces. Either a new hegemonic narrative is rapidly assembled or a charismatic leader becomes boss[13]—or both, I would add. The situation has the potential for reactionary backlash. Reacting against working-class gains, fascists were able to exploit existing hegemonic discourses to push them back—justifying recourse to force and authoritarianism.[14] As fascism gained ground in the 1920s, Gramsci tells us:

> [F]ascism has fought against the proletariat and reached power exploiting and organizing the unconsciousness and herd mentality of the petty bourgeoisie drunken with hate against the working class, who with the force of their organization, were succeeding in lessening the blows of the capitalist crisis against them.[15]

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11. Raymond Williams, *Base and Superstructure in Marxist Cultural Theory*, 82 NEW LEFT REV. 3, 8–10 (1973) (explaining and developing Gramsci's conception of hegemony).

12. *See* CAMMETT, *supra* note 10, at 65–71.

13. GRAMSCI, *supra* note 9, at Q. 13, § 23 ("organic crisis" is Gramsci's term for a disintegration of the state's existing hegemonic narrative).

14. The advances were mainly organizational in that workers in the Piedmont area effectively called and maintained strikes. Factory councils were instituted in some sectors. However, they were still far from obtaining a material restructuring of the relations of production. The Italian Socialist party was far from being united or capable of univocally supporting labor organizations at the time. CAMMETT, *supra* note 10, at 74–85.

15. ANTONIO GRAMSCI, LA QUESTIONE MERIDIONALE 93–94 (Aonia ed., 2019) [hereinafter GRAMSCI, LA QUESTIONE MERIDIONALE] (translation by the author).

So much was this the case that Gramsci himself had to endure the remainder of his active life in prison, locked up by the fascist state.[16] His reflections on those surroundings offer us a roadmap—despite the differences between his time and ours—for navigating a period of dizzying discursive dissociations and recombinations.[17]

1. Hegemony

The theoretical point here is not overly complex. It is simply the symbiotic relationship between hegemony[18] and intellectuals.[19] Gramsci developed the concept of civil hegemony as an essential element of obtaining and maintaining political power.[20]

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16. *See* ANTONIO GRAMSCI, LETTERE DAL CARCERE (Paolo Spriano ed., 1971) [hereinafter GRAMSCI, LETTERE DAL CARCERE] (containing Gramsci's correspondence with family and friends, especially his sister-in-law, while in prison).

17. Gramsci's concept of hegemony was greatly developed in English language literature by Subaltern Studies, following the *partial* translation of Gramsci's *Prison Notebooks* in the 1970s. Its quintessential development is ERNESTO LACLAU & CHANTAL MOUFFE, HEGEMONY AND SOCIALIST STRATEGY: TOWARDS A RADICAL DEMOCRATIC POLITICS (2d ed. 2001). Since then, hegemony's utility has been criticized, particularly by some Latin American subaltern scholars. *See, e.g.*, JOHN BEVERLEY, SUBALTERNITY AND REPRESENTATION: ARGUMENTS IN CULTURAL THEORY (1999). *But see* Peter D. Thomas, *After (Post) Hegemony*, CONTEMP. POL. THEORY, (2020) (claiming that these post-hegemony critics are narrowly focusing on Laclau and Mouffe's more limited interpretation of hegemony rather than Gramsci's broader idea, which appeared in the later notebooks that were not translated, and arguing that the full Gramsci already contains the points that post-hegemony critics are attempting to make). My own points here are based on the full Italian version of Gramsci's *Prison Notebooks*. *See generally* GRAMSCI, *supra* note 9.

18. Gramsci attributes the concept to Lenin, but his writings demonstrate a much wider development of the concept. GRAMSCI, *supra* note 9, at Q. 7, § 33. For a wonderful historical and comparative study of the uses of the term, see PERRY ANDERSON, THE H-WORD: THE PERIPETEIA OF HEGEMONY 17–24 (2017) (demonstrating the historical concept meant consent by equals). Gramsci developed "something like a systematic theory of the term" in which hegemony consisted of both consent and force, although his writings are inconsistent and sometimes default to consent alone. *Id.* at 19. Regardless, it was not only conceptualized as a logic of proletariat rule, as in Lenin, but one engaged in by any ruler. Its ultimate sense is the "moral consent of the dominated to their own domination." *Id.* at 21.

19. GRAMSCI, *supra* note 9, at Q. 1, § 43 (27) ("By intellectuals it should be understood not only those classes commonly understood with this denomination, but in general all social masses that exercise this organizing function in latent sense: whether in the field of culture or in the administrative-political camp: they correspond to the sub-officers and subaltern officials in the army . . . .").

20. *See* Perry Anderson, *The Heirs of Gramsci*, 100 NEW LEFT REV. 71, 79 (2016) ("But it was Gramsci who made the real breakthrough, by deepening Lenin's conception in two ways: transforming the idea of hegemony from a merely political to a moral and intellectual form of leadership, and understanding that the subject of a hegemony could not be any socio-economically pre-constituted class, but had to

A reigning hegemony is not subject to immediate reversal through material conquest. That is, simply taking over the means of production by workers, in an insurrection for example, is not enough.[21] An alternative hegemony does not automatically flow from taking control through revolution or discrete material gains.[22] Rather, it requires the more prosaic effort of changing what appears to be normal, what seems like common sense.[23] It requires moral and cultural predominance.[24]

According to Gramsci, hegemony is sustained by two types of "apparatuses": state and civil.[25] State apparatuses are basic institutions like parliament, the judiciary, government, etc.[26] Civil society's apparatuses include journalism, organized religions, education, labor unions, and the like.[27] Nonetheless, the two spheres—the State and civil society[28]—are closely connected but not indistinguishable.[29] It is state force (dominance) aligned with hegemony (direction) that secures power.[30] Allies

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be a politically constructed collective will—a force capable of synthesizing heteroclite demands that had no necessary connexion with each other, and could take sharply different directions, into a national-popular unity."); *see also* LACLAU & MOUFFE, *supra* note 17, at 57.

21. GRAMSCI, *supra* note 9, at Q. 7, § 24 ("The claim (presented as essential postulate of historical materialism) to present and expose every fluctuation of politics and ideology as an immediate expression of structure should be theoretically combatted as an infantile primitivism, or practically should be combatted with the authentic testimony of Marx, writer of concrete political and historical works.").

22. *See* Giuseppe Cospito, *Egemonia/Egemonico nei "Quaderni del Carcere" (e Prima)*, 2 INT'L GRAMSCI J. 49, 86 (2016) (arguing that Gramsci was not trying to go beyond Marx and Lenin, but rather returning the theory to its non-mechanical origins).

23. GRAMSCI, *supra* note 9, at Q. 1, § 65 ("'Common sense' is the folklore of 'philosophy' and is in between 'folklore' really and truly (that is, as understood) and philosophy, science and economy of the scientists.").

24. CAMMETT, *supra* note 10, at 206.

25. *See* GIUSEPPE COSPITO, INTRODUZIONE A GRAMSCI (2015).

26. GRAMSCI, *supra* note 9, at Q. 6, § 81.

27. *Id.* at Q. 12, § 1 (stating that all men are intellectual; it is just that not all men have in society the function of intellectuals); GRAMSCI, LETTERE DAL CARCERE, *supra* note 16, at 481–82.

28. GRAMSCI, *supra* note 9, at Q. 6, § 24 ("One must distinguish the meaning of civil society as understood by Hegel and as often used in these notes (that is, as political and cultural hegemony of one social group over the entire society, as the ethical content of the state) from the sense given to it by Catholics, for whom civil society is instead political society or the state, as opposed to the society of the family and of the Church.").

29. Indeed, scholars debate Gramsci's perspective on their relationship. COSPITO, *supra* note 25, at 77–79.

30. GRAMSCI, *supra* note 9, at Q. 1, § 48.

are, in this way, *directed* by the leading social group.[31] The opposition, in turn, is simply *dominated* by force. To remain in power, however, the leading social group must wield political hegemony.[32] No viable state can ultimately exist without it.[33]

More precisely, the substance of hegemony consists of social consciousness: the mass of undifferentiated ideas and narratives coming from religion, folklore, culture, morality, etc. A preponderant part of that includes the apparatuses and narratives reigning at a particular time. These all exist contemporaneously in social consciousness despite their mutual ambiguities and contradictions.[34] Taken together, nonetheless, they constitute a sort of common sense.

Within this realm of common sense, Gramsci affirms there are elements of "good sense" that can be picked out.[35] In Gramsci's words:

> It can be said that [the common man] has two theoretical consciences (or one contradictory conscience), one implicit in his acts and that really unites him to all his collaborators in the practical transformation of reality and one superficially explicit or verbal that he has inherited from the past and has welcomed without critique.[36]

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31. *Id.* at Q. 8, § 191 ("In the hegemonic system, democracy exists between the directing group and the group directed, to the extent that the development of the economy and thus legislation that expresses such development favors the molecular movement of the directed group to the directing group.").

32. *Contra* Giuseppe Cospito, *Egemonia/Egemonico nei "Quaderni del Carcere" (e prima)*, 2 INT'L GRAMSCI J. 49 (2016) (describing the variation of meaning of hegemony in Gramsci's work: sometimes deriving from "direction" standing apart from "domination," sometimes the synthesis of the two, and sometimes as subordinate or counterpoint of force).

33. *See* GRAMSCI, *supra* note 9, at Q. 8, § 227.

34. *Id.* at Q. 11, § 12, Nota I.

35. Gramsci attributes the distinction between common sense and good sense to famed Italian author Alessandro Manzoni in his major novel, *I promessi sposi*. *Id.* at Q. 11, § 56. He gives, as an example, popular sayings such as "to take things philosophically"—an appeal purportedly to reflection and distance rather than to rash reactions. *Id.* at Q. 11, § 12 Nota IV (13bis). *Contrast* JEAN-FRANÇOIS LYOTARD, THE POSTMODERN EXPLAINED: CORRESPONDENCE 1982-1985, at 20 (1993) ("The people's prose—the real prose, I mean—says one thing and its opposite: 'Like father, like son' and 'To the miserly father, a prodigal son.' Only romanticism imagined this prose to be consistent, to be guided by the task of expressivity, emancipation, or the revelation of wisdom."). But, as a move, it does not much matter that Gramsci's "good sense" is reversible. In fact, we would expect it to be.

36. *Id.* at Q. 11, § 12 (16 bis).

It is up to the organic intellectual to identify these elements of "good sense" and apply them to interpret events.[37] The critical aspect is precisely to draw on good sense to undo reactionary positions.[38] It is this conceptualization of scholarly activity—"moves" in my terminology—that I emphasize here. Identifying the right moves and deciding on their selective deployment parallels Gramsci's focus on *organic* intellectual work. It entails appealing to situated understandings as a source of critical power.

2. Intellectuals

Organic intellectuals are the ones making these moves. Of course, for Gramsci intellectuals are, in addition to those usually referred to that way, anyone who exercises organizational functions in production, culture, and political administration, all the way down to subofficials and subalterns.[39] It is they who principally undertake a long-term "war of positions," as Gramsci describes it. They are the agents of (counter) hegemony. Such "influencers" align with particular social groups, not exclusively their own groups of origin but also their adopted affiliations.[40] Organic intellectuals are distinguishable from traditional intellectuals who identify with universalist thought or other commitments beyond social groups.[41] The latter contribute to hegemony in ways that Gramsci extensively discussed in his *Prison Notebooks*, but that is beyond the scope here.

Notably, organic intellectual work is not the paradigm shift of a "scientific" revolution involving a landmark discovery.[42]

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37. *Id.* at Q. 11, §12, Nota IV (12 bis–13).

38. *See id.* at Q. 11, §§ 12, 15. Catharine Mackinnon claims a similar approach as "feminist method." Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 535–36 (1982) ("Proceeding connotatively and analytically at the same time, consciousness raising is at once common sense expression and critical articulation of concepts.").

39. GRAMSCI, *supra* note 9, at Q. 1, § 43 (27).

40. *See* Peter Thomas, *Intelletuali ed Egemonia: Narrazioni di Nazione-Popolo*, *in* NARRAZIONI EGEMONICHE: GRAMSCI, LETTERATURA E SOCIETÀ CIVILE 71, 82–83 (Mauro Pala ed., 2014).

41. GRAMSCI, *supra* note 9, at Q. 1, § 44; *id.* at Q. 12, § 1.

42. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (Univ. of Chi. Press 1969); *see also* GRAMSCI, *supra* note 9, at Q. 1, § 44 (23 bis) ("Changes in modes of thinking, in beliefs, in opinions do not happen through fast and generalized 'explosions,' they happen for the most part through 'successive combinations' occurring through disparate 'formulas.'").

Lone intellectual genius does not necessarily produce it.[43] It requires sacrifice by some of their advantages for the sake of wider solidarity—what Gramsci described as a "historic bloc." The high theorist—or traditional intellectual—is not in a position to trigger this type of movement.[44] Rather, the effort is much more intimate and crucial. The work needs to begin from the consciousness of existing social groups.[45] In his words:

> [T]he philosophy of praxis does not aim to maintain "the simple people" in their primitive philosophy of common sense, but instead to drive them to a conception of the superior life. Affirmed is the requirement of contact between intellectuals and simple people not in order to limit scientific activity or to maintain the unity of the low level of the masses, but in fact to constitute an intellectual-moral bloc that will make it politically possible to construct mass political progress and not only of a few intellectual groups.[46]

As such, Gramsci's intellectuals do not bring abstract frameworks to people and ask them for a leap of faith.[47] Rather, they begin from what a society already feels and then work through that.[48] In this endeavor, the starting points are the "good sense" insights gleaned from situational common sense, as already noted.[49]

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43. GRAMSCI, *supra* note 9, at Q. 11, § 12, Nota IV ("Creating a new culture does not mean only individually making 'original' discoveries, it means also and especially to disseminate critically truths already discovered, to 'socialize' them so to speak . . . that it is not the findings of a philosophical 'genius' of a truth that remains the patrimony of a small group of intellectuals."). Notably, neither does he exclude the emergence of a "great individual philosopher" among organic intellectuals capable of "elaborating the collective doctrine." *Id.* at Q. 11, § 12 (20 bis).

44. *Id.* at Q. 9, § 68 ("[B]ut in a way that such organization and connection appears an 'inductive' practical, empirical necessity, and not the result of a rationalistic, deductive, abstractionist procedure, that is to say in fact properly of 'pure' intellectuals.").

45. *See id.* at Q. 11, § 12.

46. *Id.*

47. *Id.* ("[It] is not a question of introducing from scratch a scientific form of thought into everyone's individual life, but of renovating and making 'critical' an already existing activity."); *see also id.* at Q. 3, § 48.

48. *Id.* at Q. 4, § 33. Postmodern scholars note the indeterminateness of class or groups and any determinate corresponding ideology. *See id.* at Q. 11, § 67 (describing intellectuals' necessary connection to a people and a period).

49. *See generally* Itay Snir, *"Not Just One Common Sense": Gramsci's Common Sense and Laclau and Mouffe's Radical Democratic Politics*, 23 CONSTELLATIONS 269 (2016) (critiquing Gramsci's definition of the intellectual as the thinker that

Gramsci leaves us with some practical advice as well. He understands that influencing the populace is not simply a matter of the best logical arguments. Popular understandings, according to him, are based primarily on faith.[50] While the common person may not be able to out-argue an articulate opponent, that does not mean they will change their mind either. They remain steadfastly convinced in their beliefs by virtue of a trusted source or a line of argument remembered as strikingly convincing—even if the arguments or rationale are later forgotten. Gramsci exhorts organic intellectuals on two points. First, to never weary of repeating one's own arguments, if in different stylistic forms. Repetition is the best didactic method, according to him.[51] Second, to recruit other organic intellectuals among ever vaster strata of society. This second point, he believes, is what ultimately changes the "ideological panorama."[52]

Contemporary critics fault Gramsci on two main points. First, he is criticized for his class essentialism.[53] For Gramsci, working class politics was foundational to an alternative hegemony—even though it could not be constructed on that basis alone. It required a politically constructed collective will. But, the working class centered the meaning and practice of counter-hegemony. Poststructuralists maintain, in contrary fashion, the purely discursive character of identity and thus counterhegemony's potential formation around *any* subject position—not necessarily the working class.[54] Gramsci's class essentialism was both his weakness and his normative strength. Contrary to poststructuralists, he asserts it as the normative basis—even if ultimately incoherent—for his politics. Second, critics reject his modernist bias on culture. Gramsci was invested in a progress

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can identify "good sense" out of the "common sense" based on a deep understanding of underlying economic relations, and arguing instead, based on a non-essentialist perspective, that "good sense" starting points are contextual to specific political contexts).

50. GRAMSCI, *supra* note 9, at Q. 11, § 12 (19 bis).

51. *Id.* at Q. 1, § 43 (23 bis–24).

52. *Id.* at Q. 11, §§ 12, 20.

53. *See, e.g.*, LACLAU & MOUFFE, *supra* note 17, at 190.

54. Douglas Litowitz, *Gramsci, Hegemony, and the Law*, 2000 BYU L. REV. 515, 539–40 (arguing against the contemporary pluralization of hegemony into "hegemonies" of race, gender, sexual orientation, religion, etc. as unrepresentative of Gramsci's more powerful all-encompassing meaning).

narrative.[55] The South of Italy and peasant formations were to be brought along to proletarian culture.[56] Postmodernists take exception to the privileging—and preordained teleology—of any particular cultural formation.[57]

3. Takeaway from Gramsci

My own takeaway from Gramsci is his skepticism of deracinated philosophy and intellectual vanguardism.[58] These are insufficient to produce sustainable change. Ever more penetrating analyses of the material conditions of society, relations of labor, and the like do not necessarily sway broader audiences. Sharp insight and logical rigor do not simply work truths plain. And merely speaking to fellow experts or philosophers is a missed opportunity, or simply constitutes a different project. In any case, these are patently insufficient in periods of organic crises.

Even addressing the caveats mentioned above, Gramsci's intellectual agenda could still prove challenging. Appeals to good sense—no less than other forms of *rational* discourse—require generally accepted rules of speech and thought over irrationality, prejudice, and double-dealing. The latter may simply be part of the human condition. An overly limited set of intellectual practices—or moves—leads to rigidity, whether performed by individuals in their own heads or in social groups collectively. Fitting all new information about the world dichotomously into precommitted categories without accounting for evident differences

55. *See, e.g.*, Gayatri Spivak, *Can the Subaltern Speak?*, *in* MARXISM AND THE INTERPRETATION OF CULTURE 267, 283 (Cary Nelson & Lawrence Grossberg eds., 1988).

56. GRAMSCI, LA QUESTIONE MERIDIONALE, *supra* note 15, at 147.

57. JAMES MARTIN, GRAMSCI'S POLITICAL ANALYSIS: A CRITICAL INTRODUCTION 165 (1998); *Cf.* Alastair Davidson, *Gramsci, The Peasantry and Popular Culture*, 11 J. PEASANT STUD. 139, 140, 150–51 (1984) (arguing post-1921 Gramsci's evolution away from the centrality of proletarian developmentalism as a result of his realization that the peasantry was growing and could only be won over by appealing to their collective ideology—or common sense).

58. *See, e.g.*, GRAMSCI, *supra* note 9, at Q. 14, § 74 ("[T]hat self-criticism be operative and ruthless, because in that is its major efficacy: that it should be ruthless. It has been found instead that self-criticism can give place to beautiful speeches, and declamations without end and nothing more; self-criticism has become 'parliamentarized.'"). In 1920, he did recognize the role of a proletarian vanguard, presumably relying on the groundwork of organic intellectuals: "[A] revolutionary movement can only be founded on the proletarian vanguard and must be conducted without prior consultation, without the apparatus of representative assemblies." Antonio Gramsci, *Capacità politica*, 10 L'ORDINE NUOVO 169, 170 (1920).

and contradictions leads to ideological thinking.[59] This is not easy to overcome where it is repeatedly reinforced or the product of human cognitive limitations.[60]

Indeed, the social arrangements of advanced capitalism may propel these kinds of cognitive flows and breaks.[61] Capitalism and schizophrenia, it has been advanced, share a similar matrix—characterized by the fluidity not only of form and value but also meaning.[62] Its code is not "formalism" per se.[63] It can consist of sharp critique (possibly with the same moves described below) but only to more axiomatically fixate totality—the direction of fascism.[64] The opposite direction takes the route of escapism—ranging from the revolutionary to the deforming pathological. Surely the antidote is not doubling down on counter-

59. My reference to incorporating "new information" here does not take a position on what the new information is or how it is to be found. That is, it is not limited to any preferential field for its validity, whether empirical like public choice and law-and-society claim or more contemplative, discursive, or co-productionist.

60. JOSEPH GABEL, FALSE CONSCIOUSNESS: AN ESSAY ON REIFICATION 54–55 (Philip Rieff & Bryan R. Wilson eds., Margaret A. Thompson & Kenneth A. Thompson trans., Harper & Row 1975) (1962) (according to Gabel, the mental operations involved are: excessive reification, morbid rationalism, non-dialectical thinking—i.e., non-structuring of new information and non-synthesizing, fixation on preferential categories, spatialization of time, dichotomous black-and-white thinking, open contradictions "resolved by a synthesis of a *magical* nature" and thus the illusion of synthesis (quoting Georges Vedel, *Le Rôle des Croyances Economiques dans la Vie Politique*, 1 REVUE FRANÇAISE DE SCIENCE POLITIQUE 40, 46 (1951)) (emphasis added). Gabel cites GEORG LUKACS, HISTORY OF CLASS CONSCIOUSNESS (1971) as the basis for his views but not the error that Lukacs himself denounced, of not recognizing the necessity of reification (and thus alienation). *Id.* Gabel is careful to speak of over- and under-reification (sub-realism and surrealism) but not its elimination in between. *Id.*

61. *See id.* at 78–95 (distinguishing individual ideologies as *partial* and false consciousness as *totalizing* and comparing false consciousness to the mental pathologies of clinical schizophrenia). Citing and deviating from Gabel, Deleuze and Guattari state that "it is evident that there is never a delirium that does not possess this characteristic [social origins] to a high degree, and that is not originally economic, political and so forth before being crushed in the psychiatric and psychoanalytic treadmill." DELEUZE & GUATTARI, *supra* note 1, at 274.

62. DELEUZE & GUATTARI, *supra* note 1, at 245–50.

63. Indeed, without it, communication is not possible. Gabel describes the symptom of under-reification as surrealism and forms of aphasia—where everything is difference. GABEL, *supra* note 60, at 155–58; *see also* JORGE L. ESQUIROL, RULING THE LAW: LEGITIMACY AND FAILURE IN LATIN AMERICAN LEGAL SYSTEMS 90–97 (2020) (discussing the omni-availability of critiques of formalism, since the "right" degree of non-formalism is an inter-subjective range only knowable in relation to a community of reference).

64. *See* DELEUZE & GUATTARI, *supra* note 1.

ideologies.[65] It calls for situated critique of *fascisant* constructions—whether of fixated identities or deconstructions *en route* to greater homogeneity.[66]

Additionally, I would not discount the value of articulating counter-visions among the repertoire of critical moves. Gramsci may well have underestimated the force of the symbolic: that is, "over-determination" as explained by Louis Althusser and developed by Ernesto Laclau and Chantal Mouffe.[67] Ideas are embraced not only because of their rational inescapability or interest-based appeal. They are also compelling because of the non-rational associations they evoke. The symbolic force of critical moves may need greater attention than Gramsci allowed for.[68] Indeed, fixated consciousness cannot be undone with countervailing facts and ideological critique alone. It must also be addressed at an emotive level. In the end, the various objections to Gramsci can certainly be incorporated without compromising his valuable insights on hegemony.

Dominant understandings—or hegemony—are both more organic and, paradoxically, more contingent than generally recognized.[69] Progressive politics requires attention to the construction of thought, ideology, and the symbolic. The latter are not merely reflexive superstructures automatically generated by material evolution or conjunctural political victories. Nor are they automatically short-circuited by distributional analyses showing the losers (especially them) who "really" wins and who loses. Progressive consciousness must be—quite literally—cognitively fought for. Interventions in this sense require "organic" work capable of reaching beyond any one solidarity—as Gramsci

65. Both Joseph Gabel and Gilles Deleuze/Felix Guattari cited above describe the reverse of non-dialectic thought (Gabel) and *fascisant* (fascisizing, as in making fascist) thought (Deleuze/Guattari). It is surrealism for Gabel—insufficient reification of thought—and escapism for Deleuze/Guattari which could be of a revolutionary type. *See* GABEL, *supra* note 60; DELEUZE & GUATTARI, *supra* note 1. But this remains for another conversation.

66. The term "fascisant" means "fascist-izing," as in making fascist. *See* DELEUZE & GUATTARI, *supra* note 1.

67. LACLAU & MOUFFE, *supra* note 17, at 97–98 (citing Althusser's ideas on overdetermination and its meaning as a symbolic excess of meaning given to articulations).

68. Still, Gramsci did recognize that "new conceptions" are with difficulty assimilated by the public at large and then, if so, in "more or less heteroclite and bizarre" ways. GRAMSCI, *supra* note 9, at Q. 11, §12 (19).

69. Not neglecting structural coercion conditioning consent, see MARTIN, *supra* note 57, at 134 (in Gramsci's work "short-term political and economic developments were circumscribed and came to express long-term determinations").

exhorted.[70] With reference to our times, the "progressive" praxis I would suggest consists of moves that are attentive to their contexts-of-critique—without any pre-commitment to liberal legalism *or* routinized critiques.[71]

Legal scholars may want to take note of Gramsci's *Prison Notebooks*.[72] If nothing else, organic intellectuals are directed to draw consciously on the "good sense" diffuse within social understandings.[73] These insights are particularly poignant coming from a period of unravelling progressive gains and the hegemony of populist nationalism. Gramsci's emphasis on intellectuals and hegemony provides an instructive way of thinking about *progressive scholarly moves* today.

B. Latin American Legal Studies

The academic field of Latin American legal studies, in turn, offers a different kind of example. It illustrates the operation of a "context-of-critique" of the sort referenced above. It is an identifiable terrain of discursive interventions with a range of participants and recognizable stakes. In this specific case, its practitioners include scholars, commentators of law and social sciences, as well as government officials, nongovernmental organizations, and transnational lawyers. It consists essentially of all the English-language, professional writing about law in Latin America. Its content may be considered comparative or foreign law but defies any single disciplinary category. Much of the writ-

70. *Id.* at Q. 6, § 200; Cospito, *supra* note 22, at 66.

71. The point that removing working class centrality removes any normative foundation to progressive politics has been amply debated. Indeed, the postmodern concept of hegemony provides no necessary source for deriving one's politics. I will have to bracket that broader debate here. *See also* LEFT LEGALISM/LEFT CRITIQUE 9 (Wendy Brown & Janet Halley eds., 2002) ("[O]ne reason for the complex and contingent relationship between 'the left' and legalism is that 'the left' situates itself as such in part by engaging and disengaging various legalisms.").

72. His writings on hegemony are in his *Prison Notebooks*. Gramsci's letters are also published but they are written to family members and friends and are of a more personal nature. *See generally* GRAMSCI, LETTERE DAL CARCERE, *supra* note 16. For the writings on hegemony, see *supra* notes 18–38.

73. *See generally* Duncan Kennedy, *Antonio Gramsci and the Legal System*, 6 ALSA F. 32, 35 (1982) (noting that Gramsci wrote next to nothing specifically on the legal system, and the little he did "read like a first year law student grappling with the problem of separation of powers").

ing in this field actually consists of expert witness reports introduced in transnational litigation and international arbitration.[74]

This field is not the same as the community of lawyers, judges, scholars, and the like who engage in exchanges in their own home countries. It is a transnational field of academics and experts with different objectives and interests—although some local actors also take part. Indeed, it is not as if these discursive environments were hermetically sealed off from one another. This transnational field is quite relevant to local legal developments. Foreign assistance from wealthy countries, international programs through USAID, the World Bank, nongovernmental organizations, human rights groups, and others all have a large influence in Latin America. Extensive laws and legal programs are erected under their direction and auspices. And, these are driven by the background understandings produced not insignificantly by the transnational field of Latin American legal studies.

This hegemonic knowledge is also deployed in the context of transnational litigation and international arbitration.[75] Access to U.S. courts in transnational cases, especially for foreign plaintiffs, depends on a judicial determination of the "adequacy"—or inadequacy—of Latin American courts. Only on a showing of failed legal systems in their home jurisdictions can foreign plaintiffs (suing in mass tort cases, for example) stay in U.S. courts. Conversely, the enforcement of foreign judgments rides on U.S. judicial determinations of the impartiality and due process in rendering courts. Judgment debtors may shield their assets in the United States if these guarantees do not exist. All of this requires evidence of systemic dysfunction. On such evidence rides huge sums of money in transnational litigation by mass tort plaintiffs and in international arbitration cases by corporations against Latin American states on claims of "denial of justice." The sources for this type of evidence consist of the visions of Latin American law constructed by the global field I have delineated.

I lay out below some of my own contributions to this field, because it sheds light on the overall approach to "critical moves" discussed in the following section. In this Essay, I do no more

74. *See* ESQUIROL, *supra* note 63, at 154–248.
75. *See id.*

than make passing references to Latin America itself and remit the reader to my other publications for greater explanation. The examples here nonetheless are meant to make more concrete the situational variables surrounding the exercise of critique. It highlights the differences across political economies of legal construction. Looking at the configuration of Latin American legal studies offers some insights by analogy on the position of progressive legal critique generally.

A recognizable hegemony of thought operates in the field of legal Latin Americanism. It consists of an identifiable, and circumscribed, set of intellectual moves. In the aggregate, these generate a radical critique of Latin American law. They consist, in effect, of the main critiques of liberal law (developed mostly in the global North in the past century or so) aggregated and projected onto Latin America as a standing assessment of the quality of its national legal systems. My past scholarly work has been to point out these recurring moves in the field—their limited and repeated nature, their overemphasis in Latin America and minimization in the global North, the inescapability of these critiques in all liberal legal systems, and the profound downsides to their serial deployment.[76]

The fuller story of the "field" is—not surprisingly—a bit more complicated than this. For example, there is also a contending vision—if less currently mainstream—of Latin America as legal offspring of Europe.[77] That vision does have some standing within the field as well.[78] Still, it can just as easily be converted into further support for the dominant vision of legal failure. It can equally signify law's foreignness or maladaptedness to the region: Latin America is not Europe after all. And, it provides an explanation for the extraordinary gap perceived between law and society in the region. The mainstream view in the field consists nonetheless of a subset of common critical moves: specifically, critiques of legal formalism, gaps between law and society, inefficiencies of laws and institutions, as well as critiques of indeterminacy, class and social inequities, and liberal

76. Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75, 84–89 (2008); *see generally* ESQUIROL, *supra* note 63.

77. Esquirol, *Fictions of Latin American Law*, *supra* note 7, at 431–33.

78. While beyond the scope of this Essay, this Europeanizing tradition also relies on a standard set of moves, such as historical presentism (European colonialism), positivist comparative law (transplants and borrowings), surface intellectual histories (outsized influence of Kelsen), and sociologizing (mainstream juristic culture). *See generally id.*

ideology (similar to critical legal studies). This does not register as left-wing critique. It is the mainstream in this field. Certainly, it does not serve legal legitimation in Latin America. Rather, the contrary is true.

To offer an example of how this works, the concept of legal formalism is not simply used to critique a line of judicial decisions; it becomes the way to characterize the whole legal culture.[79] The gap between law and society is not a charge against specific under-enforced laws or a call to update legislation in a particular area—it is the existential condition of the whole of the legal system. Whereas in the global North these critiques have been targeted to specific objects in particular political contexts, for Latin Americanists they have become the hegemonic description of all Latin American legal systems. Of course, this vision is also shared by many actors within Latin America who may equally believe its truth or support the concrete projects (e.g., foreign aid, economic orthodoxy, investor's case against a state) that such a vision empowers. Regardless, this hegemonic discourse undermines national legal systems—no doubt despite the good intentions and otherwise irreproachable objectives of its reproducers.

The typical moves within the field are thus quite important. If they are not justified, or consist of skewed critiques of liberal law, they are worth reconsidering—and possibly even rejecting. My point is not that Latin American law can never or should never be critiqued. That would be nonsensical. Rather, it raises questions about the critical moves deployed and in which contexts. The critiques noted above—in the way they are generally articulated as systemic claims about law in Latin America—are overbroad, unsupportable, and could be made about all liberal legal systems generally. They are therefore not a "reality" that we must ultimately accept, regrettable yet unavoidable. Instead, they are a series of moves—questionable ones at that in certain contexts. As moves, they have been undeniably effective. However, the effects for many sectors of Latin American society, and for the sustainability of law in general in Latin America, are quite corrosive. My exhortation to Latin Americanists, therefore, is to eschew these rote moves. Not that they do not work. They

79. Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41, 57–62 (2003).

do—often to very regressive effects. They might even prove useful to a progressive cause in one-off cases. However, their overall impact on the standing of Latin American law globally and its sustainability internally is counterproductive.

Simply repeating and re-emphasizing with ever more theoretical references that there is—for example—a gap between law and society in Latin America reinforces the global hegemonic view of law's irrelevance in the region. And, that is a damaging overstatement. There are other critical moves that may be available that do not default into the same hegemonic platitude. Some labor protection laws, for example, may be seen as insufficient or ineffective. One way to critique them is to emphasize the gap between the law and employer conduct. But another may be on distributional grounds. In the latter mode, the means provided for enforcement may be revealed as insufficient, and the level of protection may be faulted for its regressive effects on workers overall. The former route, however, hammers back at the self-fulfilling discourse of law's irrelevance in Latin America. The latter might suggest some better rearrangement of the rules and resources. In any case, that is just one example. But, attentive scholars of Latin America should not lose sight of the global political economy of critique. This general perspective is equally applicable here, to the field of contemporary progressive critique discussed below.

C. The Contemporary United States

The question of discursive interventions is especially crucial in our times. This period has witnessed a marked polarization of public discourse. It is accompanied by a deep skepticism among significant parts of the population toward expert thinking and their views. Most of this may be chalked up to episodic anti-intellectualism and summarily dismissed. It may also be thought to be limited to a segment of the population and irrelevant to high theory or thought. Yet, even prominent intellectuals have been recently questioning the value of expertise and decrying the false meritocracy of experts.[80] Rule by experts is on the ropes. At a minimum, this development brings front and center

80. *See generally* MICHAEL SANDEL, THE TYRANNY OF MERIT: WHAT'S BECOME OF THE COMMON GOOD? (2020); *compare* DAVID KENNEDY, WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY (2016).

the perennial question of audience. It makes more conscious the particular public imagined for critical legal thought.

The answer to this question surely varies across individuals.[81] My own view is that much recent critical scholarship has been directed to mainstream experts.[82] The main target of critique is the latter's tendency to narrowly draw from mainstream legal thinking and exaggerate the law's singularity and definiteness. Critical scholars have appealed to these experts—and to whomever else may listen—to challenge their limited perception of legal tools and mechanisms; to think of legal concepts in not narrowly reified ways; and to break out of disciplinary limitations. If anything, critical scholars ask experts and the broader public to listen *to them*. Critical interventions offer a better picture of the fluidity of any given situation and better roadmap of the more extended possibilities available.

Nonetheless, these appeals are based on claims or presumptions of greater insight (on the legal materials), (disciplinary) breadth, and (theoretical) knowledge. Much critical scholarship thus operates at the level of "meta-experts," more worthy of trust.[83] However, when policy officials are increasingly ignored and their outsized influence no longer holds, these critical interventions seem like overkill. And the difference between the expertise of run-of-the-mill experts and the insights vaunted by critical scholars does not seem much different. In fact, it generally comes across as even more elitist and disconnected. Of course, the governmental and international policy machine continues to move forward, and thus there is certainly room for con-

81. *See, e.g.*, ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? (1996) (arguing for an extension of the archetypal U.S. inductive legal reasoning—which draws on existing jurisprudential materials to extrapolate a solution to a new problem—to generate solutions not bound by institutional fetishism: that is, not limited to currently existing institutions).

82. Contrast this with Mark Tushnet's view of CLS in the 1980s. Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1539 (1991) ("[T]he academy has had difficulty understanding how people could be interested in the law without being interested in influencing policymakers. Yet, in light of the substantive political views associated with [CLS], that seems to be the case for [CLS].").

83. *Contra* Duncan Kennedy, *Radical Intellectuals in American Culture and Politics, or My Talk at the Gramsci Institute*, *in* SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY 1, 18–20 (1993) (arguing that U.S. intellectuals are best viewed as a separate identity group distinct from societal class or ethnic groups, rather than the traditional Western European cultural prestige model of leaders of the masses or material interest groups).

tinuing intervention and critique at the level of experts. However, it is hard to continue to ignore the broader, altered landscape—or political economy—of hegemonic constructions and critiques.[84]

My suggestion here is not meant to romanticize other "contexts." That is, it is not meant to privilege action over thought, activism over academics, or politics over critique—to drive scholars out of their ivory tower. It's not that at all. Feminists have shown us that the personal is political, early Crits realized that law school politics is real politics, and engagement of whomever is certainly consequential in specific ways. For his part, Gramsci did advocate *mano-a-mano* mass organizing and direct dialogue with workers.[85] But that was his context, not ours.[86] For progressives, in this conjuncture, our relevant context could mean engagement beyond experts or the like-minded.[87] And the paradoxes of progressive goals—or catch-22's, to use a different metaphor—may exceed the inescapable limitations and negative secondary effects of liberal legalism's formulas.[88] The double

84. Compare this with the rise of Thatcherism, in Gramscian terms. ANDERSON, *supra* note 18, at 67–69 (citing the work of Stuart Hall) ("Gramsci's stock of concepts bore directly on the local experience. While it was true that Thatcher never commanded a numerical majority of the electorate, and her ascendancy was always contested by much of the population, she had welded together a range of social agents, reaching from bankers and professionals to small employers to skilled workers, that formed a historic bloc in his sense. Intuitively, Thatcherism ha[s] understood that social interests are often contradictory, that ideolog[u]es need not be coherent, that identities are seldom stable, and had worked on all three to form new popular subjects embodying its hegemony.").

85. GRAMSCI, LA QUESTIONE MERIDIONALE, *supra* note 15, at 94–100, 106–07. In an attempt to define the essence of Italian fascism, Gramsci states that it does not have an essence. It is a mass organization of the petty bourgeoisie with the structure of a deployed militia throughout the territory drawing on a confused nationalist ideology directed against the enemy (i.e., all non-fascists) in the framework of a civil war. "There is no fascist political party that can turn quantity into quality; that can make a political choice in favor of a class or a sector. There only exists a mechanical aggregate of undifferentiated and undifferentiable intellect and politics that lives only because it has acquired in a civil war a very strong *esprit de corps* – roughly identified with national ideology." *Id.*

86. Gramsci describes the context in Southern Italy in 1926: "Southern society is a big agrarian bloc composed of three social strata: the large amorphous and disaggregated mass of farmers (peasants), the intellectuals of the petty and middle rural bourgeoisie, the large landowners and grand intellectuals." *Id.* at 155.

87. *Cf.* Kennedy, *supra* note 83, at 7. In all fairness, Kennedy recognized in 1987 that "[t]his situation may at first appear to be essentially one of impoverishment and impotence. On second glance, it may be one of privilege, at least in the future." *Id.*

88. *Cf.* LEFT LEGALISM/LEFT CRITIQUE, *supra* note 71, at 25–33. In conversation with the authors, I would say that the value of critique—freed of politics—as

binds also include the negative unintended effects within public discourse, especially in relation to *fascisant* constructions. This expanded focus may not be for everybody, and not everyone may take up the challenge. Still, broader attention to *inter-contextuality* could more greatly inform critical practice—whether in terms of its legal geopolitics, as in my Latin American legal studies example, or public discourse in the form of random Google hits.

II. CRITICAL MOVES

To recall, what I mean by a "move" is a type of intellectual operation or strategy. In most scholarship, the legal materials are not simply described or annotated. They are synthesized and analyzed using a set of intellectual tools. These tools may be attributed to a specific source. Or, they may simply be applied without crediting any authority. Regardless, they constitute the intellectual work of the intervention and the attempted means of persuasion. In a very mainstream example, probably the most tried and true move in U.S. legal scholarship is case crunching. In this type of move, legal analysis consists of examining a set of judicial opinions. Their stated rationales are closely examined to show either mutual consistency or inconsistency. If the latter, the author may then attempt to suggest a way to reconcile them. This may mean an overarching rationalization that unifies them, a proposal for law reform to fix discrepancies, or something else. This is an example of what I mean by a move.

A pattern of "critical moves" is also visible. It may be due to the penetration of more critical scholarship in previously solidly mainstream legal fields. It could be that some legal disciplines, especially in the global North, have until recently been tightly sheltered by unchallenged ideology. Progressive exposure to critical thinking increasingly reveals their unspoken inconsistencies. But, it may also have something to do with the fact that these critical moves have become more generalized. That is, many of them have become rather common in legal scholarship.

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consisting of honesty and the pursuit of intellectual political and cultural pleasure is no less a produced effect—either for others or for oneself—and no better and no worse than anything else from which to derive one's politics. As is the point here, adding more inter-textuality to the critical focus may, in fact, exponentially increase the pleasure of critique.

This Part of the Essay highlights some of the more common critical moves. I lay them out for the didactic purpose of recognizing the substantial work they do. More importantly, though, mastering them in this detached way may better offer a basis to deploy them effectively in multiple contexts-of-critique. Critical practice is at its best when it consists of more than a rote set of moves. It equally needs to attend to the construction of a (counter) hegemony that enables progressive consciousness.

Beginning this list will hopefully call to mind other moves I have not included and, even better, generate more "good sense" moves as Gramsci suggested. The footnotes under each move are a cross reference to my own reading lists. By including them here, I am in no way suggesting that one or another move could have been better as an intervention in any particular text. My point about attentiveness to contexts-of-critique is demonstrated by my example of Latin American legal studies above, not here. The works cited below may in fact deploy the best strategic moves possible in the specific circumstances addressed by their respective authors. This Part of the Essay does not take a position on that point. It does not second-guess the appropriateness of the specific works cited toward the overall goal of more hegemonic progressive consciousness. Such an evaluation would require a much more detailed analysis of individual interventions. I simply begin by listing the moves and referencing some examples. The exhortation to greater attentiveness to contexts-of-critique remains a topic for continued discussion over individual pieces and for prospective work.

A. A Critical Methodology?

Critical legal scholars have long resisted the call to adopt a collective manifesto—or standard set of moves. While not uniformly the position of all critics, still, the reticence to explicitly endorse a particular set of methodologies or techniques is widespread. This may be considered a reluctance to lay out a fully reconstructive vision for law or legal analysis.[89] Indeed, much of the reaction to critical legal studies in the 1980s—the most prominent progressive manifestation in recent legal history—

89. *See, e.g.*, Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1045–46 (1992) ("The manifesto part may also be troublesome. . . . I am against totalizing theory.").

consisted of a denunciation of its nihilistic nature.[90] Crits only tear down—the objection went—but have no programmatic alternatives to offer. However, alternatives of the same kind—the only kind that would satisfy mainstream opponents—would likely be assailed by the very same critiques employed by critical scholars.[91] Most critics have been too wary to fall into that trap.

However, there is another likely source of reticence. Standing alone, any manifesto, methodology, or list of techniques is singularly *underwhelming*. Any particular analytical move, perspective, or approach is, foreseeably enough, checked by a countermove, more righteous perspective, and reversible arguments. And, there would be no easy (non-political) way to defend the superiority—at least in the abstract—of any one of them. As such, critical legal scholars have been correct not to lay their arms bare. The exercise produces the sensation that the emperor—and much more the scribe—has no clothes. Moreover, that is not where the force of critical argument lies. It lies in its contextual deployment—to show that particular legal solutions are not necessarily preordained, the only ones supported by the legal materials, culturally inescapable, or politically or distributionally neutral. This operation is required over and over again in a multitude of contexts. The particular moves which attempt to accomplish this are, admittedly, less interesting than the overall impact of the scholarly intervention.

This is surely true. However, there is some value to laying out the critical moves. For one, it takes the job of demystification seriously. Critical scholars have long described their mission as demystifying the hold of traditional legal thought.[92] Being explicit about critical tools demystifies them as well. Of course, this could be a bad thing if, as some scholars may think, this undermines their effective use. Opponents may more easily see how the argument is put together and may more easily assail the method or deploy countermoves. That is no doubt a possibility. It is outweighed, I believe, by the value of taking stock of the tried-and-true moves routinely deployed and recognizable over a

90. Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984).

91. Mark Tushnet, *Perspectives on Critical Legal Studies*, 52 GEO. WASH. L. REV. 239, 242 (1984).

92. John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, Or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84, 97 (1995) (describing the "mystification thesis").

whole generation of progressive writing. It raises greater awareness about tactical deployments of one move over another, depending on the political arena. And, it may serve as a reminder that some critical moves may be actually counterproductive in certain contexts.

B. Putting on the Moves

As I have been arguing, critical scholars have developed—intentionally or not—an identifiable repertoire of moves. My list below is certainly incomplete and somewhat idiosyncratic. It is culled from my own particular exposure to critical legal scholars. Many of them draw on U.S. legal realism from the early twentieth century. Much has been written about this historical movement in legal thinking, and this is no place to go into it in any detail.[93] Suffice it to say that it is legendarily claimed that all U.S. lawyers—not to mention U.S. legal academics—are legal realists now because of this legacy.[94] If this means any one thing, it would be a critique of "legal science." Realists do not believe that legal concepts at a high level of abstraction can definitively resolve concrete legal questions.[95] In fact, as the general story goes, many legal realists advocated the importance of contextual and political factors in the crafting of judicial decisions. The contemporary critical moves extend well beyond these insights. Although, admittedly, I am in no way doing justice here to the larger dimensions of earlier legal realist contributions. However, I would rather focus here on contemporary critical moves.

1. Gaps, Conflicts, and Ambiguities

This one is a classic. Its operative insight is that legal materials are riddled with gaps, conflicts, and ambiguities. Efforts

93. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 193–208 (1992) (identifying four legal realist main moves or "intellectual strategies" as: (1) challenging the neutrality of the market, (2) transforming differences of kind to differences of degree, (3) anti-conceptualist and anti-analogical rule skepticism, and (4) challenges to the public-private distinction).

94. Richard Michael Fischl, *Some Realism About Critical Legal Studies*, 41 U. MIAMI L. REV. 505, 522–23 (1987).

95. For example, see the famous Justice Holmes quote: "General propositions do not decide concrete cases." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

to fill or resolve them merely reveal the lack of neutrality, naturalness, and determinacy of law. As such, claims to singular and necessary legal outcomes are unfounded. There is much more discretion in legal reasoning than normally admitted. And that discretion often works against society's most disadvantaged.

In the United States, this move has a long pedigree. Legal realists were especially attentive to gaps, conflicts, and ambiguities.[96] They questioned legal science's capacity to resolve them in neutral, natural, or determinate ways. The scientific legal thought—that they were arguing against—elevated conceptualism and analogical thinking as modes of neutral and determinate legal reasoning. Realists showed how logical deduction from abstract concepts to legal outcomes was indeterminate. And, analogical thinking from precedents to new cases was not neutral. Critical legal studies in the 1970s and 1980s took it another step. They applied these same critical moves against the legal process school, policy analysis, and neutral principles—the substitutes proposed by the mainstream legal community to take the place of discredited legal science.[97]

The move also consists of a second step. After showing the legal materials' incoherence, the resulting textual openness often admits regressive views and effects.[98] The application of legal rules, doctrines, policies, and principles are not only contradictory or ambiguous—their indeterminacy often redounds to the disadvantage of particular groups. Something other than the official rationale must explain the outcome: whether that is the historical contradiction between individualism and altruism, class bias, sexist images of cohabitating couples, stereotypes of pregnancy and homosexuality, gender identity incoherence, or other potential stand-ins.[99] In early iterations of critical scholarship, the disadvantaged group highlighted was typically class-

96. Note Morton Horwitz's warning that "[L]egal Realism was neither a coherent intellectual movement nor a consistent or systematic jurisprudence." Still, there is enough distinctiveness to "treat Legal Realism as a distinct intellectual outlook." HORWITZ, *supra* note 93, at 169–70.

97. Fischl, *supra* note 94, at 521–24.

98. *See* Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1009–10 (1985); Dan Danielsen, *Representing Identities: Legal Treatment of Pregnancy and Homosexuality*, 26 NEW ENG. L. REV. 1453, 1456–57 (1992); *see generally* Keith Aoki, *Contradiction and Context in American Copyright Law*, 9 CARDOZO ARTS & ENT. L.J. 303 (1991) (showing the incoherence of copyright law and latent, anachronistic property absolutism).

99. *See generally* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 88 HARV. L. REV. 1685 (1976).

based.[100] However, feminists, race scholars, LGBTQ+, and other identity scholars apply the same move to focus on other groups.[101] An identity approach to legal scholarship could itself be considered a "move." However, identity scholars employ a wide array of intellectual strategies. Thus, I will not focus on an identity move *per se*. Rather, I include references to these works under the respective sections below.

The gaps, conflicts, and ambiguities move also resonates in continental European and civilian law generally.[102] Its punch particularly strikes at the ideology of civil codes. Codes are expected to provide answers to all potential legal questions. A showing of irresolvable gaps, conflicts, or ambiguities in the text reveals the ideological nature of this narrative. It shows that the narrative is not true—even if many continue to say and want to believe that it is despite evidence to the contrary.

Despite the legacy of legal realism and critical legal studies, formalist modes of legal thinking are unavoidable. In fact, they are a necessary dimension of reasoning. It is their abuse or congealment that invites critique. Furthermore, openly defended revivals of *neo-formalism* regularly appear.[103] Legal techniques beyond historical "legal formalism" may lay claim to completeness, coherence, and determinacy. They may insist on the necessary nature of a fixed constellation of legal concepts or a singular system of policy imperatives.[104] Indeed, various types of "formalism" remain quite diffuse. Thus, the gaps, conflicts, and ambiguities move remains relevant.

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100. Karl E. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. RELATIONS L.J. 450, 475 (1981) ("[T]he quality of an employee's contractual entitlements turns on the scope of the union's representational duties; but the scope of the union's representational duties may in turn be measured by our initial evaluation of the quality of the employee's contractual entitlements."); *see generally* Duncan Kennedy, *Critical Labor Law Theory: A Comment*, 4 BERKELEY J. EMP. & LAB. L. 503, 504 (1981) (commenting on Klare, *supra*, and a second article by Staughton Lynd, noting that both authors maintain that "the justifications for the existing rules are false or incoherent or both, and that they are false or incoherent with a bias").

101. *See, e.g.*, Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329 (1999) (focusing on judicial opinions regarding transsexual issues).

102. *See generally* Marie-Claire Belleau, *The "Juristes Inquiets": Legal Classicism and Criticism in Early Twentieth-Century France*, 1997 UTAH L. REV. 379 (describing the French version of legal realism).

103. For an example in commercial law, see David Charny, *The New Formalism in Contract*, 66 UNIV. CHI. L. REV. 842, 846–48 (1999).

104. THE CANON OF AMERICAN LEGAL THOUGHT 209–10 (David Kennedy & William W. Fisher III eds., 2006).

2. Dark Sides, Blind Spots, and Unintended Negative Consequences

This set of moves focuses on what is often excluded from a mainstream account of the workings of law. They are not a frontal assault on a particular legal doctrine or legal institution. Rather, they demonstrate that a widely supported legal right or legal mechanism—which may indeed be laudable in certain respects—can actually be part of the problem.

The "dark side" of human rights law, for example, may be that it heightens the harm it seeks to combat.[105] Human rights law entails widely propagating—and reinforcing—the identity of human rights victims as victims. This may produce an additional harm—participating in the very process of victimization. As another example, the "dark side" of governance feminism may be that it has been unwittingly complicit with the carceral state.[106] Taking domestic violence against women seriously has produced an overzealousness for criminal prosecutions disproportionately affecting families of color. Surely, these points may be debated. Still, these interventions place under scrutiny the very legal institutions presumably meant to address the problem but which may, instead, exacerbate it or generate other issues.

Similarly, the "blind spots" move shows how certain legal institutions completely exclude certain crucial dimensions from their remit.[107] It can be used to show, for example, how transitional justice regimes exclude consideration of issues of redistribution.[108] Transitional justice is an exceptional legal regime typically implemented after a civil war or major political upheaval. It often suspends the rules of criminal law in order to negotiate peace with political actors that engaged in criminal activity. It also promotes the civil and political rights of regular citizens, their right to the truth, and sometimes a measure of compensation. Critical work demonstrates how those mechanisms do

105. *See generally* DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM (2004).

106. *See generally* AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION (2020).

107. David Kennedy, *When Renewal Repeats: Thinking Against the Box*, *in* LEFT LEGALISM/LEFT CRITIQUE, *supra* note 71, at 383 ("My project has been . . . to focus instead on the disciplinary vocabulary as a whole, on its blind spots and biases. . . . [I]n some way the international legal profession has often made less likely the very things it claims to most care about.").

108. *See generally* Zinaida Miller, *Effects of Invisibility: In Search of the 'Economic' in Transitional Justice*, 2 INT'L J. TRANSITIONAL JUST. 266 (2008).

nothing to restructure the economic order and its distributional allocations that likely precipitated the conflict in the first place.[109] Rather it attempts to restore the status quo. This would be an example of transitional justice's immense blind spot.

Another example would be from budding debates on "authoritarian constitutionalism." Scholars engaged in this field show how—despite the appearance of a functioning constitutional state with regular elections—the substance of civil and political rights can be serially eroded or even subtracted.[110] A contribution to this debate is to include the subtraction of *economic rights and policy-making* from democratic reach as equally a form of neo-authoritarianism.[111] The neoliberal model, and extractive mining in Latin America, for example, have been effectively shielded from democratic regulation.[112] The move here is to reveal the blind spot on matters of economic policy in scholarly debates about authoritarian constitutionalism. Seemingly, democratic constitutionalism is also liable to the charge of authoritarianism for subtracting economic policy from democratic reach.

Similar is the move pointing out "unintended negative consequences." This is particularly apt to reveal how a generally supported legal mechanism has unexpected negative effects that may undermine its desirability altogether. For example, titling of squatters in urban areas may have the unintended negative consequence of facilitating their dispossession by the lure of marketable title for developers willing to exert pressure and whatever means to obtain them.[113] Socioeconomically vulnerable residents may then be in a position of less tenure stability than promised by formalization. In another example, required criminal prosecution of domestic abusers promises to protect women and correct for law enforcement bias. However, in a variety of socioeconomic contexts, non-discretionary prosecution

109. *Id.*

110. *See, e.g.*, Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391, 393–95 (2015).

111. *See generally* Helena Alviar Garcia, *Neoliberalism as a Form of Constitutional Authoritarianism*, *in* AUTHORITARIAN CONSTITUTIONALISM 37–56 (Helena Alviar Garcia & Günter Frankenberg eds., 2019) (showing the interpretation of Colombian constitutional provisions that lock in extractive industry prerogatives over indigenous consultation rights and popular referenda).

112. *Id.*

113. Jorge L. Esquirol, *Titling and Untitled Housing in Panama City*, 4 TENN. J.L. & POL'Y 243, 290–92 (2008) [hereinafter Esquirol, *Titling and Untitled Housing*].

may cause as a consequence more familial harm than other possible sanctions.[114]

3. Strategic Essentialism

Strategic essentialism admits the socially constructed nature of a particular concept but then deploys it strategically anyway. It requires the critic to juggle seemingly contrary understandings that, on the one hand, a given legal construct is arbitrary and even harmful, while on the other, that the same construct can still—and often must—be deployed to advance a particular cause.

A critique of rights, for example, may convincingly show that rights claims are indeterminate.[115] They may be no more transcendent than any other advantage acquired through the legal process or no more sacred than any other prevailing political commitment. In fact, rights thinking from a critical perspective may appear overly limiting and incapable of addressing intractable prejudice. Nonetheless, progressive interventions may both understand the constructed and limiting quality of legal concepts and at the same time advocate for them. Recognizing both of these ideas, at the same time, somewhat inoculates the commentator from critique—that they would launch against others and even themselves advocating liberal rights.

Strategic essentialism can also be understood in relation to identity categories.[116] Race can be, on the one hand, recognized as socially constructed and historically contingent but nonetheless used as the basis for group politics: for example, women of

114. Aya Gruber, *A "Neo-Feminist" Assessment of Rape and Domestic Violence Law Reform*, 15 J. GENDER RACE & JUST. 583, 595 (2012).

115. Mark Tushnet, *Essay on Rights*, 62 TEX. L. REV. 1363, 1371–86 (1984).

116. Gayatri Spivak, *Subaltern Studies: Deconstructing Historiography (1985)*, *in* THE SPIVAK READER: SELECTED WORKS OF GAYATRI CHAKRAVORTY SPIVAK 203 (Donna Landry & Gerald MacLean eds., 1995); Elizabeth Gross, *Criticism, Feminism and the Institution: An interview with Gayatri Chakravorty Spivak*, THESIS ELEVEN, Feb. 1985, at 175, 175–89.

color,[117] mixed-race,[118] or "mestizo international law."[119] Surely, these classifications may further entrench the social construction of race.[120] But the strategic essentializer advocates on their behalf nonetheless. In this analysis, the costs of doing so are likely taken into account. That is, deepening the grip of historic races by its continuing reassertion may be understood as repeating the harm the concept has provoked. Its potential for emancipation, reparations, or the like, though, is deemed a more valuable course—at least at particular conjunctures.

4. Intersectionality, Rotating Centers/Shifting Bottoms, and Taking a Break

These three moves have something in common while remaining distinct. "Intersectionality" focuses on the interlocking nature of established identity categories and the particular disadvantages and oppressions at the intersections. "Rotating centers and shifting bottoms" advocates an alternating focus on the fluidity of those at the bottom in particular situations and contexts, as well as the fluid nature of the center. "Taking a break" asks us to break from our historical commitments to a particular cause in order to view the issue from a different angle. However, all three propose a shift in perspective. They are an invitation to carry the brief (or take on the cause) of a different position than our habitual constituencies.

There are some paradigmatic examples of intersectionality. Gender and race come together in particular ways to subject women of color to forms of discrimination not easily addressed by either a gender or a race paradigm acting alone.[121] The kinds

117. Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!*, 28 HARV. C.R.-C.L. L. REV. 395, 403 (1993) ("Without attempting to provide a definitive account of what a woman of color 'really' is, I examine the way that the institutional arrangements constructed through the legal interpretation at the boundaries of Title VII and the NLRA organize the formation of collective political identity and the exercise of institutionalized authority.").

118. *See generally* TANYA KATERI HERNANDEZ, MULTIRACIALS AND CIVIL RIGHTS: MIXED-RACE STORIES OF DISCRIMINATION (2018).

119. *See generally* ARNULF BECKER LORCA, MESTIZO INTERNATIONAL LAW: A GLOBAL INTELLECTUAL HISTORY 1842-1933 (2016).

120. Tanya Kateri Hernandez, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, a United States-Latin America Comparison*, 87 CORNELL L. REV. 1093, 1116 (2002).

121. *See generally* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241

of discrimination toward women of color may not be addressable by looking for disparate treatment or disparate impact at either identity category in isolation. A workplace may employ a large number of women, many of whom are regularly promoted. It may also employ people of color in the regular course, with many willing to testify to their fair treatment. However, women of color—in this example—may still be significantly underrepresented and absent from higher-level positions. Discrimination laws are generally written in a way that the presence and ascendance of other women, on the one hand, and other minorities, on the other, makes it impossible to bring a successful discrimination claim. Charges of discrimination are easily rebutted by the presence in the workforce of the larger defined groups.[122] Intersectionality highlights that void in the law and in our understanding. The move may be applied across a wide range of identity combinations.[123] Another example here may be how poverty and Muslim identity in the United States come together to particularly pernicious effects and consequences.[124]

A not dissimilar move arises from the exhortation to "rotate centers" and "shift bottoms." It is commonly associated with the Latcrit movement.[125] Originally a collection of Latinx legal scholars, the organization grew and continues to exist as a broad coalition of identity-focused scholars. The snazzy mantra has no

(1991) (arguing that the experiences of women of color, specifically with regard to racism and sexism, fail to be considered in the separate contexts of antiracism and feminism).

122. Cyra Choudhury, *In the Shadow of Gaslight: Reflections on Identity, Diversity, and the Distribution of Power in the Academy*, 20 CUNY L. REV. 467, 477 (2017) (discussing helpful concept of "racial shields": "Racial or identity shielding, in other words, uses willing minorities to discipline other minorities and provides a cunning defense against any charge of discrimination").

123. Khaled A. Beydoun, *Between Indigence, Islamophobia, and Erasure: Poor and Muslim in "War on Terror" America*, 104 CAL. L. REV. 1463, 1491 (2016) ("Critical scholars, particularly within the legal academy, have used an 'intersectional analysis' to examine how racism, patriarchy, policing, and law enforcement interacts and intersects with poverty. An intersectional analysis enables investigation of each of the liminal positions held by communities who identify with two (or more) disadvantaged groups, such as the community on which this Essay is focused: indigent Muslim Americans.").

124. *Id.*

125. Tayyab Mahmud, Athena Mutua & Francisco Valdes, *Latcrit Praxis @ XX: Toward Equal Justice in Law, Education and Society*, 90 CHI.-KENT L. REV. 361, 372 (2015); Francisco Valdes, *Under Construction: LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1089, 1108–11 (1997).

doubt served as a coalition-forming strategy.[126] It promises to give everyone within the group their turn. It also recognizes cross-identity subordinations and tensions.[127] However, it is no less an intellectual move within progressive scholarship.[128] It points out the "global South" in the "global North" as well as power in subordination. And, it turns attention to the dynamics of minority identity formations.[129]

Finally, "taking a break" proposes a conscious distancing, or rupture, from one's preexisting and possibly long-standing intellectual commitments or political constituency.[130] Deep down, this proposition could be said to take seriously the postmodern concern with antifoundationalism in identity and politics.[131] It exhorts adopting the subject position of a different political constituency and to intervene from that perspective. Its promise for the scholar—ultimately—is to reveal the limitations of a long-held position, its dark sides and unintended consequences, previously obscured as a result of privileging the former position. For example, traditional feminist positions on sexual politics could be set aside to reveal a very different impact of sexual harassment laws on alternative sexualities and gender constructions. Hyper-regulation through feminist-backed harassment laws may negatively affect sexual minorities and sex positive attitudes in general.[132]

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126. The term "shift bottoms" was coined by Athena Mutua. *See generally* Athena D. Mutua, *Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm*, 53 U. MIAMI L. REV. 1177 (1999).

127. *See* Tayyab Mahmud, *Review Essay: Genealogy of a State-Engineered Model Minority: Not Quite/Not White South Asian Americans*, 78 DENV. U. L. REV. 657, 679–83 (2001).

128. *See* EVE KOSOFSKY SEDGWICK, THE EPISTEMOLOGY OF THE CLOSET 33 (1990) ("*[N]ot* that all oppressions are congruent, but that they are *differently* structured and so must intersect in complex embodiments that was the first great heuristic breakthrough of socialist-feminist thought and of the thought of women of color." (emphasis in original)).

129. Choudhury, *supra* note 122, at 471 (pointing out that "we must also recognize the role of some minorities in doing the work of subordination").

130. The phrase "taking a break" was inspired by the title of Janet Halley's celebrated book, JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM (2006).

131. See, for example, a contemporary version of this in LACLAU & MOUFFE, *supra* note 17.

132. HALLEY, *supra* note 130, at 283–303.

5. Flipping

"Flipping" is the practice of turning an opponent's argument on its head. It mirrors the argument back but with an opposite conclusion. When convincingly done, it draws on the same premises and reveals an equally or more compelling contrary result.[133] The objective is to use the same materials and not a different basis for rebuttal. This reversal can be done as a matter of alternative logical reasoning or shift in the framing or balancing of policy, arriving at an opposite conclusion. Indeed, flipping is probably the most prominent late twentieth century move drawing on realist and critical insights. Not only can rule deductions be flipped, but policy balancing can also be tipped.[134] An oppositely matched pair of policy rationales are generally always available to support a contrary conclusion.

As an example, Title VII employment-discrimination decisions generally hold that personal animosity is not illegal bias. Only the latter is actionable discrimination. Title VII courts have over time been shifting from a presumption of illegal bias to one of personal animosity after the employer's proffered nondiscriminatory reason is shown to be false.[135] However, as the authors of the article cited maintain, "[p]ersonal animosity, rather than being the antithesis of discrimination, could be considered evidence of discrimination."[136] This flip is based on the very premises of Title VII. For protected classes, the law exceptionally suspends employment-at-will, for which personal animosity prerogatives are at its historical core. The practical indistinguishability of these prerogatives from illegal discrimination was well known to the legislation's authors and more broadly, so the authors show.[137] As such, one would expect that the legislation equally suspend personal-animosity-based employment ac-

133. See Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1083 (2002) ("'[F]lipping'—the deliberate alteration of context to produce different perspectives on legal issues and conclusions.").

134. *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIECLE) 112–13, 147–52 (1997). Generally speaking, rule reasoning is conducted through deduction, and policy reasoning is conducted through balancing. But, both—with enough intellectual work—can be flipped around.

135. *See* Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to No Cause Employment*, 81 TEX. L. REV. 1177, 1179 (2003).

136. *Id.* at 1245.

137. *See id.* at 1242–45.

tions for protected classes or, at least, that they serve as evidence of illegal discrimination—but never provide a presumptive defense.

Another example comes from the field of international law. The UN Charter promotes peace, not war. To that end, it outlaws military intervention in the affairs of other states. In 1993, the Security Council, in the name of non-intervention, maintained an arms embargo on Bosnia, then under attack by Serbia. The embargo proactively consisted of collective state action, military force to implement it, delivery of humanitarian supplies, a no-fly zone, and patrol of safe areas.[138] This appears an awful lot like intervention. In fact, this purported "non-intervention" can itself be said to constitute unlawful intervention under the UN Charter.[139] The flip consists of recognizing that "the traditional doctrine . . . is inadequate to describe justifications of current policy."[140] The doctrine instead "oscillates" to its opposite: international intervention in the name of non-intervention and a newly-developed humanitarian justification—at the same time denying arms to Bosnia to defend itself.

6. Disaggregating Multiple Meanings

Probably the classic example cited for this move is Wesley Hohfeld's 1913 article on rights.[141] Progressive scholars frequently cite him. His point was that both legal scholars and judges are often guilty of sloppy thinking when using legal terms.[142] The term "rights," for example, is often employed without regard to the fact that its authors may mean different things by it. It is sometimes used in probably its most intuitive sense:

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138. *See* Nathaniel Berman, *Between Alliance and Localization: Nationalism and the New Oscillationism*, 26 N.Y.U. J. INT'L L. & POL. 449, 474 (1994); *see also id.* at 490 ("[T]he so-called 'non-intervention' stance, developed in Spain and carried forward with the arms embargo and humanitarian aid in Bosnia, is an intervention requiring Chapter VII authorization.").

139. *See id.* at 490–91.

140. *Id.* at 475.

141. *See generally* Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

142. For a contemporary Hohfeldian opus applied to "legal doctrine," see PIERRE SCHLAG & AMY J. GRIFFIN, HOW TO DO THINGS WITH LEGAL DOCTRINE 8, 30 (2020) ("We would very much like to help nudge the state of the art in judicial opinions beyond its present condition. . . . We collect the various terms to show the import of these major distinctions.").

that its holder has a legal entitlement to something that is mirrored by the duty of others to respect that. This is, however, only one of its possible meanings. Sometimes the term is inaccurately used to mean a privilege or a power or an immunity. These all signify different types of legal relations among parties with different degrees of entitlements and burdens. Separating the meanings out is not only an act of analytical clarity but also an intervention that may shift or distribute the legal allocations of discretion and resources.

This approach is a model for many similar interventions. The move can be used with respect to almost any concept in any particular institutional setting. It can be used to enumerate the various meanings of things like legal doctrine, sovereignty, the provocation defense, rule of law, informality, and others.[143] Its most effective use shows the different meanings deployed within a single text or institution or across a whole field of thought. The use of multiple meanings may demonstrate the text or reasoning is ambiguous, contradictory, misleading, or all of these. It reveals how reasoning may be cobbled together in a way that does not hold up to greater scrutiny. In other words, this move is a tool of textual deconstruction.

The concept of "legal informality" is a good example. What we mean by the term may include a broad range of things from housing to employment to social relations. It takes a somewhat different meaning in each case. For example, labor informality may mean working without a formal work contract, getting remunerated below legal limits, working independently without a license or permit, doing illegal work or child labor, or variations on these conditions.[144] In contrast, housing informality may

143. *See, e.g.*, Matthew Craven & Rose S. Parfitt, *Statehood, Self-Determination, and Recognition*, *in* INTERNATIONAL LAW 177, 189–95 (Malcom Evans ed., Oxford Univ. Press 5th ed., 2018) (shifting the meaning of "states" in international law: "The key observation here, however, is not simply to note the pervasiveness of a set of contradictory undercurrents that underpin the legal formation of statehood in international law, but to note that many of these contradictions were to appear for a particular reason—that this was the means by which European statehood could be globalized and made the universal mode of political organization and emancipation."); Aya Gruber, *A Provocative Defense*, 103 CAL. L. REV. 273, 278–92 (2015) (dissecting multiple states of mind underlying provocation defense in criminal law); SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010) (distinguishing the modern foundational basis for human rights thinking from conceptually different historical groundings).

144. *See, e.g.*, Yugank Goyal, *Responsibilization Through Regulatory Intermediaries in Informal Markets: Examining the Governance of Prostitution in India*, REG. & GOVERNANCE 1–16 (2020), https://doi.org/10.1111/rego.12298

mean not complying with building or housing codes, squatting on another's private property or state land, living in substandard housing, or other such meanings.[145]

More importantly, "informality" may also mean quite different things conceptually. In the legal field, it can stand as a euphemism for illegality; a grey area when it occurs on state land or adverse possession context; administrative violations of building and housing codes; occupant or state discretion in patrolling rights to use; and a variety of other things. For example, the act of squatting, in a given jurisdiction, may be both informal and illegal. Or, it can possibly be something short of criminal but nonetheless inconsistent with existing laws. Moreover, the concept of informality may simply reference discretion within the law by government officials or private actors—as in, not formally prescribed one way or another within the law. This sense of informality can mean, for example, the wide margin of discretion extended to public prosecutors or the police. The law allows wide zones of discretion for these individuals, and many other such interstices exist for all sorts of public officials. All of this may be legitimately labeled "informality," and these different meanings may even be contemporaneously used and confused in a single text.

Referring to one of its meanings in one place and a different one in others in the text obfuscates the true point. It may even make a position or text sound coherent when it is not. For example, the drive against informality of all sorts sponsored by some economic-development writing often fails to see the wide amounts of informality-as-discretion existing in formal law. A scholarly intervention employing the "disaggregating multiple meanings" move could map these different meanings out, and possibly demonstrate that the war against informality everywhere is misplaced. Rather, the better questions would be where, and to whom, "informality" should be assigned.

Another good example is the expression "rule of law." Its multiple meanings may be serially deployed, in shifting ways, to

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[https://perma.cc/U487-6EZN]; Laura Porras, *The Limits of State Labour Law: Its Inability to Protect the Working Poor in Bogotá*, 20 REVISTA DE ANTROPOLOGÍA Y SOCIOLOGÍA 29–30 (2018) (Colom.) ("[T]he inapplicability of State labour law is definitely compensated by the increase of local regulation. . . . The assumption that both lawyers and economists make when arguing that the informal labour market is unregulated because State labour law is either inexistent or unenforceable is empirically indefensible.").

145. *See* Esquirol, *Titling and Untitled Housing*, *supra* note 113, at 255–62.

dodge critiques associated with any one of its meanings.[146] For example, the World Bank amply supports "rule of law" projects in target countries. However, under its founding documents, the Bank is barred from interfering in internal political matters.[147] The projects defended by the Bank and its various departments shift into and out of the various meanings of "rule of law"—as either institutional framework or substantive rules, instrumental devices, or intrinsic values.[148] When a particular project is critiqued on substantive grounds, for example, its supporters may claim it is merely institutional. When the project is critiqued as biased toward certain values, it can be defended as merely instrumental to development or democracy. Using ambiguous concepts in this way presents a shell-game response to potential critics. Disaggregating the multiple meanings of "rule of law" behind these responses is a good move in order to make this evident. It demonstrates how organizations—or commentators—are able to maintain positions and programs that, upon greater scrutiny, are internally inconsistent if not incoherent. They are using words in (intentionally) sloppy ways that cover up conceptual confusion or political objective.

7. Style and Sensibility

The operationalization of this move consists in characterizing the aesthetics of a defined legal debate or entire discipline, or field. For example, whether it is international lawyers in the interwar period, feminist human rights experts, comparative legal scholars, drafters of UCC Article 9, or liberal legalists, they

146. For further discussion on Alvaro Santos's multiple meanings of "rule of law" in World Bank bureaucracy, see Alvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise in Economic Development*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 253 (David M. Trubek & Alvaro Santos eds., 2006) (exposing various meanings of rule of law, their intellectual history, and their alternating deployment within the World Bank).

147. *See* Int'l Bank for Reconstruction & Development, *Articles of Agreement* arts. III § 5(b), IV § 10, V § 5(c) (June 27, 2012), https://www.worldbank.org/en/about/articles-of-agreement/ibrd-articles-of-agreement [https://perma.cc/HJ7B-HLPH]; Ibrahim Shihata, *The World Bank and "Governance" Issues in its Borrowing Members*, *in* IBRAHIM F. I. SHIHATA, 1 THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS 53, 65–67 (Franziska Tschofen & Atonio R. Parra eds., 1991).

148. *See* Santos, *supra* note 146, at 258–59.

may each, in their respective ambits, reveal a shared sensibility.[149] Demonstrating what this sensibility is offers an alternative way of understanding the problems that come within the radar of these particular fields and the range of solutions typically pursued by their practitioners.[150]

This move takes a position, in effect, on the philosophical question of causation of social events. Phenomena in the world, including legal phenomena, may be understood as connected to each other in varying degrees of relation. They may be perceived as the consequence of stages of evolution, dialectical clash among conflicting ideals or material relations, logical determination from first principles, cause and effect, dynamic influence of multiple factors, or potentially something else. Style and sensibility eschews all of these explanations and takes an even less determinate stance. Other, more mechanical theories of explanation are either explicitly or implicitly rejected. In this respect, in any particular thought community not one but multiple logics

149. *See generally* Karen Engle, *International Human Rights and Feminism: When Discourses Meet*, 13 MICH. J. INT'L L. 517 (1992) (describing three feminist approaches—or styles—to human rights law and their unexpressed assumptions); Nathaniel Berman, *"But the Alternative Is Despair": European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792, 1806 (1993) ("The new international law would therefore constitute a paradoxical 'alliance' of the 'experimental' and the 'primitive' against the construct that formerly constituted international law's foundation"); David Kennedy, *Receiving the International*, 10 CONN. J. INT'L L. 1 (1994) (describing a "cosmopolitan" and a "metropolitan" sensibility in international law); MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960 (2001) (describing a liberal sensibility in late nineteenth-century international law); Schlag, *supra* note 133, at 1050 ("[T]he aesthetic pertains to the forms, images, tropes, perceptions, and sensibilities"); Heather Hughes, *Aesthetics of Commercial Law—Domestic and International Implications*, 67 LA. L. REV. 689, 736–37, 748–49 (2007) (arguing that commercial law's aesthetics—in Schlag's terms—discourages progressive reform of UCC Article 9); JUSTIN DESAUTELS-STEIN, THE JURISPRUDENCE OF STYLE: A STRUCTURALIST HISTORY OF AMERICAN PRAGMATISM AND LIBERAL LEGAL THOUGHT 16 (2018) ("As I will argue, this naturalizing sensibility is critical in understanding the structure of liberal legalism . . . .").

150. *See* Nathaniel Berman, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, 4 YALE J.L. & HUMAN. 351, 352 (1992) ("This juxtaposition of forms of law with other forms of culture should not be viewed as a claim of a direct correlation or 'influence,' but, rather, as indicating an overlapping series of responses to a common cultural situation."); Kennedy, *supra* note 107, at 337, 345 ("I present international law as a series of professional performances rather than as an edifice of ideas, doctrines, and institutions, recasting the discipline's intellectual tools as a lexicon for argument about reform and disciplinary renewal, as well as for professional affiliation and disaffiliation. . . . [Internationalists] use available bits of expertise and argument, and express, sometimes directly and sometimes indirectly, what we can interpret as a continuous disciplinary character or style.").

of derivation are simultaneously at play. That is the case because analytical explanations based on "logic" are often easily falsifiable—by contrasting examples, exceptions, outliers, and the like. For example, it is not solely legal formalism that informs most U.S. appellate court decisions today. Judgements also rely on policy reasoning and consequentialist thinking. Appellate decisions may thus suggest a dynamic at play between formalist thinking and policy analysis. In this respect, an identifiable "dynamic" of factors may be said to offer a more fitting explanation. But a dynamic suggests two or more poles from which outcomes emanate. Even that may leave out too many variables to serve as a convincing explanation. It may still be too reductive.

For those employing this move, the image of style or sensibility better captures the commonalities at work. It demonstrates how patterns may still be produced when logics, dynamics, and dialectics do not appear to offer a convincing explanation. The move to sensibility offers a more general variable *with still some explanatory traction.* It is not so general as to signify nothing. In other words, it is not a nonexplanation because of the particularity of every situation and set of factors that defies all generalization. Rather, it points to professional self-perception and identity and a range of other aesthetics not easily included within more narrowly defined causal chains. Breaking out of this sensibility may be the explicit, or implicit, point of scholarly interventions that employ this move. The range of available options are imaginatively constrained by a reigning style or sensibility.

8. The Politics of Private Law

This move focuses on private law rules. It is not as if progressive legal scholars neglected the realm of private law in the past. In fact, much of critical legal studies focused on the indeterminacy of first-year doctrinal subjects. Still, politically liberal interventions are understood to occur primarily through public law. Social welfare programs, antidiscrimination laws, and constitutional rights all appear to be the fulcrum for the protection of disadvantaged groups. It is thus the predominant legal focus—or seemingly so—for reformist politics.

Highlighting the "politics" of private law reveals the political premises behind private law rules. A good example is property law. An absolutist conception of property creates a different distributional regime, for example, than would property rights vested with social obligations.[151] In the latter, owners may have to fulfill certain obligations for the continuing right to ownership. Or, adverse possession periods may be shortened in order to accommodate the needs of the landless—or lengthened in the case of incursions into environmentally protected areas.[152] Another example comes from contract law. Modifying contractual doctrines may equally alter power relations.[153] Limiting unconscionability and coercion doctrines impacts more vulnerable parties, as do legislated "cooling off" periods permitting rescission by buyers or implied "good faith" requirements running in favor of the more vulnerable party in any contractual arrangement. Focusing on the transnational supply contracts, and not exclusively on national regulation, may better advance corporate social responsibility and development.[154] Elevating contractual rights to the status of property equally shifts the balance of power among parties—from governments to private parties, from sellers to purchasers.

Private law rules are thus just as regulatory and governmental. Indeed, this move to reveal the politics of private law highlights the limits of public law progressivism. It focuses on changing the basic rules of the game. The micro-doctrines of private law rules thus come to the fore. For example, by amending

151. *See generally* Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009) (arguing the existent yet minimalized "social obligation" in U.S. property rights law); Colin Crawford, *The Social Function of Property and the Human Capacity to Flourish*, 80 FORDHAM L. REV. 1089 (2011) (examining the operation of "social function" property obligations in Latin America and Caribbean).

152. *See generally* Tomaso Ferrando, Land and Territory in Global Production: A Critical Legal Chain Analysis (Oct. 23, 2015) (unpublished Ph.D. dissertation, Institut d'Études Politiques (Fra.)) (on file with author) (demonstrating how land confiscation claims by Cambodian peasants against British sugar company depend on the features of English private law).

153. *See generally* JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY (2000) (debating the rearrangement of "entitlements" typically recognized by property doctrines).

154. *See generally* Dan Danielsen, *Beyond Corporate Governance: Why a New Approach to the Study of Corporate Law is Needed to Address Global Inequality and Economic Development*, *in* RESEARCH HANDBOOKS ON GLOBALISATION AND THE LAW 195 (Ugo Mattei & John D. Haskell eds., 2015) (arguing for a shift in focus of traditional corporate governance to the "firm" that constitutes an international supply chain).

nuisance laws, adverse possession periods, property categories, and the like, significant structural changes may result. Indeed, the "market" itself may be reconstituted—and not just in the image of financial capital and natural resources extractivism. Quite alternative markets and economies can be constructed. Private law rules are its basic building blocks.

9. Background Rules

This move highlights the surrounding legal rules which may equally, if not more significantly, bear on the contours of a given problem. Normally, any given legal issue is rather automatically associated to a corresponding field of law. Issues of housing are assigned to property law. Criminal activity to criminal law. Workplace issues to employment law. And so forth. However, the insight here is that other not obviously labeled legal fields may be as, if not more, pertinent in addressing certain issues.[155]

This move responds to the often-felt frustration over the inefficacy of legal reforms. Discrimination seems intractable and unresponsive to mere antidiscrimination laws. Exploitation is rather impervious to protective contract law doctrines or consumer protection laws. The act of "expanding the aperture" on the problem brings in an array of other legal rules that may be contributing to the intractability of certain arrangements. They may be fueled not only by social and informal norms but actually by the legal system itself, if in only some more secreted-away part of the architecture.

For example, on questions of gender and sexual orientation injustice, the normal tendency would be to reference the field of antidiscrimination law. This field may certainly be important. However, a whole other complex of legal rules may equally have significant bearing. These may extend to fields unsurprisingly related such as family law and employment law. Yet, they may involve other not so easily perceived dimensions. For example, antidiscrimination laws—and an approach focused solely on them—would be a grossly insufficient way of addressing the issues of LGBTQ youth experiencing homelessness.[156] Their

155. For the commonly cited piece supporting this insight, see Robert Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 POL. SCI. Q. 470 (1923).

156. *See generally* LIBBY ADLER, GAY PRIORI: A QUEER CRITICAL LEGAL STUDIES APPROACH TO LAW REFORM ch. 5, 175–211 (2018).

plight is affected by a host of background rules which heighten their disadvantage. Equally pertinent are legal rules on the range of permissible parenting, child welfare department vetting of foster parents, as well as contractual rules on incapacity of minors, child labor laws, minor emancipation rules, funding for shelters, and prostitution laws.[157]

As such, this move decenters the expected legal rules and legal institutions normally the focus of action. It instead embeds social questions within a broader net of legal relations. This move is not so distinct from a law-and-society approach, at least at a general structural level. Legal sociologists highlight the contextual social norms and institutions that impact legal relations. Background-rules thinking extends, or displaces the attention, to less obvious legal relations and rules that may be—rather covertly—constructing the situation.

10. Distributional Analysis

Distributional analysis is a demystifying move *par excellence*. It takes down legal analysis to a calculation of winners and losers.[158] It need not be purely economic gains that are calculated. Law is not only distributive of economic rents and material resources. It can also distribute dignity, sexual fulfillment, human rights, and just about any other thing—including degradation and discrimination. Anything allocated among society may be considered in distributional fashion. Law's direct regulation or indirect contribution to how these "goods" are assigned among people can thus be subjected to a distributional analysis.

This move can serve more than one purpose. It may consist of an individual heuristic. That is, a particular commentator could use it as a quick calculus to figure out which side they are on. Considering the legal regime, a proposed change, or rejection of law all together—which allocation of rents, pleasure, or the like would one defend? This is no doubt an instructive metric, as a logic of self-discovery—an, "OK, now I know what to fight for." But the distributional calculus could also be a discursive move,

157. *See id.* at 204–06.

158. For a great "how to" description of this move, see JANET HALLEY ET AL., GOVERNANCE FEMINISM: AN INTRODUCTION 253–67 (2018).

properly speaking. In other words, it could be the argument itself.[159] I can demystify a legal debate, articulated primarily in the language of human rights, constitutional law, or other legal concepts, and reveal who would be the winners and losers with or without an anticipated rule change. The intervention would then make obvious to all, especially to the expected losers, what they stand to lose. It may encourage them to more clearly see the stakes and take action in some way. And, it may turn other heads. The expected winners may change their minds and regret, in a more systematic way, what will ultimately be lost.[160]

This approach has all the key characteristics of a critical move. It demystifies philosophical and ideological narratives of law. Rights discourse, originalism, policy science—all dissolve away. Instead, the dividing lines between winners and losers are more clearly traced. Still, the move requires a range of assumptions, or even unknowns, on the part of the analyst. For example, who will win, who will lose, and by how much are not always reliably knowable. In many rule changes, how it will all work out is a matter of an educated guess, at best. Additionally, the losing group could actually prefer the rule change that the scholar predicts will make them losers. For example, titling shantytown squatters with full property rights—instead of some other form of property category that will protect them from market depredation—may very well result in many individuals with less tenure security rather than more. However, full property titling is very popular—anything short of that appears like second class citizenship. Thus, a move that simply projects future dispossession (and who stands to lose) may not be enough or even the right one.

Indeed, any attempt at a distributional analysis can be met by calls for more and deeper information: "I need to know more," one may hear skeptics say. What other variables need to be taken into account before we can call the losers? Are there also

159. *See, e.g.*, Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CAL. L. REV. 107 (2013) (critiquing the "politics of private law" move of the progressive property movement based on a distributional analysis, which highlights the acquisition and distribution inequities that remain unaddressed for indigenous and racial minorities).

160. DUNCAN KENNEDY, *Sexual Abuse, Sexy Dressing and Erotization of Domination*, *in* SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY 126 (1995) (arguing laxity in sexual harassment regulation in the case of harassing men redounds to the detriment of all men).

administrative regulations that come into play? Are there differences between neighborhoods or ethnicities? Do the people one is advocating for really want this? Maybe they would rather be dispossessed in the end? Will they really be worse off if this happens? Nonetheless, as Janet Halley says, at some point you have to end the analysis and make some executive decisions.[161] There will be plenty of assumptions and projections that must unavoidably be made.

However, these are not the only issues. It may turn out that doing distributional analysis is not always the best move to make. Revealing who are the winners and losers may make the winners see what they really stand to lose if they do not prevail on a particular question. They may dig their heels in more deeply. Additionally, arguing for a particular distribution is programmed to ideological beliefs regarding the "correct" distribution. Supply siders want wealth channeled to the job producers and engines of the economy. Progressives want wealth directed downward. A distributional analysis does not move you beyond the routinized policy arguments of the entrenched ideological divide.

Indeed, demystifying all the other moves in law—including human rights discourse, constitutional discourse, and all the rest—may actually worsen the position of one's constituents. Distributional analysis reframes everything as a political calculus with a zero-sum game. This may be what we truly believe deep down, but it is not always the most tactical intervention. As such, I posit, it may not always be the best course. However, as a logic of discovery for the individual scholar—and not necessarily the means of critique—it is *de rigueur*. A distributional analysis of distributional analysis is always in order. That is, just like my point about any other move, this choice of move should also be subject to considerations of context.

CONCLUSION

Just as legal constructs experience a dispersion of meaning when metabolized by different legal communities, so does critique. The latter's deployments are equally situational. For organic intellectuals, as progressive legal scholars are bound to be, the context of critique is always simultaneously the proximate

161. *See* HALLEY ET AL., *supra* note 158, at 253–67.

civil society. And, as we increasingly realize in the United States and elsewhere, the projected audience may need to extend beyond experts. Progressive positions are increasingly at risk of being overwhelmed by reactionary symbolism and thinking. In light of the Latin America example offered, scholarly interventions are situated in cross-cutting contexts: in that example the relevant intersection was the geopolitics of law. Along these lines, the selection of critical moves must thus attend to the inter-contextual effects of an intervention in multiple planes. This is not to hamstring scholars in overly complex machinations in a multitiered chess game. However, it is to say that these broader political and cultural dynamics are simultaneously at play whether or not we attend to them.

A progressive intellectual practice cannot but consider the strength of certain moves over others. Legal scholars have fortunately already elaborated a wide array of moves, which this Essay only partly lists and which it itself deploys. Most of these are commonly incorporated in legal scholarship without any solemn theoretical baggage. Rather, they are often quite common-sensibly articulated. In a way, they function somewhat like Gramsci's "good sense." At the same time, it cannot be avoided that not all bits of good sense are productive, interchangeably, to all situations. Conscious attention to their likely political and cultural effects is thus needed. And, certainly, so is the utility of developing other moves—whether inspired by folkish common sense, attuned introspection, or otherwise—in order to engage potential allies and expand progressive aims.