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THE COIMBRA JOURNAL FOR LEGAL STUDIES

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Undecidabilities and Law – The Coimbra Journal for Legal Studies (ULCJ)
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In a time highlighted by the quest for the Master Algorithm, several major juridically relevant societal problems resist significantly the predetermination of a unique solution and open a huge spectrum of perspectives and operatories. The title Undecidabilities suggests directly this resistance (as we know, in computation complexity theory, an undecidable problem is the one for which "it is proved to be impossible to construct an algorithm to a correct yes-or-no answer"!), whilst simultaneously considering the permanent renovation of the questions and the plurality of answers which those problems allow, which means considering the instability of cultural and linguistic contexts (justifying a permanent attention to differences, if not différances, as well as to authentic "clauses of nonclausure").

Each volume of our Journal will be dedicated to one of these societal problems and this context of resistance to unique languages and solutions, seriously taken in a reflective horizon that crosses dogmatic and meta-dogmatic legal discourses with the challenges of extra-legal perspectives and approaches.

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Editorial

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In a situation such as ours, involving the paradoxical challenges of both a homogenizing globalization and a self-celebrating plurality, several major juridically relevant societal problems firmly resist the predetermination of a unique solution (i.e. the possibility of an algorithmic *yes-or-no answer or the plausibility of a unity-generating language)* and open up a huge spectrum (if not a whole web) of perspectives, arguments and operatories. The title *Undecidabilities and Law* is a direct allusion to this resistance, as well as to the contextual instability which permanently renews questions and answers.

Our first volume, developed in an exceptionally short period of time, explores one of those problems: the *culture* and/or the *morality* of so-called *political correctness*. Having benefited from a generous and diverse set of contributions, this initial volume privileges a thematic concentration: sufficiently *closed* to guide an always difficult selection, sufficiently *open* however to give the selected sequence the transparency (and the dynamics) of an *"arch*-form" in seven chapters, the extreme panels of which (less focused on the main topic) expand the required contextualisation. The first chapter is by Professor James Boyd White, our sole invited Author, whose participation is certainly a wonderful privilege! Whilst anticipating the plurality of approaches and the perplexing argumentative reversibility which wound the story about Law *and* Political Correctness, the Introduction which follows also clarifies the sequence selected and the choices which build it (*infra*, "Law and the Janus-faced Morality of *Political Correctness:* an Introduction", 3.).

May this be the first step on a long and productive path!

Coimbra, June 2021
The Coordinator
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Thematic core

Law and the Janus-faced Morality of *Political Correctness:*

an Introduction

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ABSTRACT
This introduction explores the relationship between Law and Political Correctness (PC), considering different stages (from *culture wars* on campus to narrative *outsider* jurisprudences), as well as diverse (contextually instable and often contradictory) narrative webs. This reflective path opens three main different problems: the first concerns the way how the sensitivity to political correctness is programmatically (contingently) pursued through statutory law; the second identifies the difficulties which plurality and fragmentation create, when we consider Law's vocation for comparability; the third denounces specific institutionalizing procedures and social effects associable to the *culture* of *political correctness*. Acknowledging that the integrated discussion of these themes, in their juridical systematic implications, is fundamentally *encore à faire*, the last part of the text introduces in detail the seven chapters which follow, highlighting the stimulant plurality of perspectives and approaches which they manifest.

KEYWORDS
political correctness; juridical comparability; free speech; counterstorytelling; Mark Tushnett; Stanley Fish

Concerning the possibility of juridically relevant responses, is the *culture* and/or the *morality* of so-called *political correctness* a significant *societal challenge*? Although an answer in the affirmative seems obvious, the relevance to be taken into account is not, however, as linear as it seems. Almost thirty years after the publication of Mark Tushnets "Political Correctness, the Law, and the Legal Academy" (1992), the story about Law *and* Political Correctness (PC), even though reduced to its contemporary environment, seems in fact very far from being effectively told and systematically clarified. The trouble with this relationship and its narrative web (if not with the plausible *Law &… movement*

it would be expected to generate) concerns not only the *signifier* PC but also the *interlocutors* Law and Legal Thinking — or the role which these interlocutors are (or have been) allowed to play. Whereas the PC formula opens itself up to a spectrum of diverse contexts of signification and performance —condemning a plausible global reconstitution of its thematic field to the incorporation of tensions that cannot be resolved (with a perplexing number of reversibly positive and negative connotations)—, the treatment given to Law and Legal Thinking, when it does not reduce them to an instrumental (silent) position (due to the expectations of a purely functional regulative performance), allows them only a very concentrated role — as if they intervened exclusively under the mask of the *free speech principle* or in the semantic and pragmatic context surrounding the discussion of this principle and its specific *weight* or *limits*.

1. That contextual instability (wounding the *signifier* PC), combined with this reductive concentration (undermining the corresponding juridical relevance), gives us an irresistible opportunity to try out an exercise of *law in literature* — this one revisiting Philipp Roth's brilliant *The Human Stain* (2000) —, as well as to return to Mark Tushnet's exemplary essay; and certainly, and not by chance, since both Roth's novel and Tushnet's essay consider the practices of (and the claims to) PC whilst exploring the same (circumscribed) stage: North American university campuses in the last decade of the twentieth century.

As far as this novel is concerned, a very brief note will suffice now, just in order to recall how the experience of ambiguity or ambivalence affecting political correctness is here for once recreated as an intrinsic component of a singular life path and as such (circularly) inscribed in a specific practical-existential condition. This path concerns the protagonist, Coleman Silk, an African-American university professor of Classics, who builds his nuclear family, and his successful career, as an academic and as dean (at a certain Athena College), while choosing to pass as white and thus hiding his origins (assuming the mantle of a Jewish white identity and drastically reinventing his personal history). The painful irony is that this career will end abruptly (with devastating consequences also for his personal life, involving his wife's death) when, in a class, Coleman uses a seemingly harmless and semantically plausible expression ("spooks") to address two systematically absent students ("Does anyone know these people? Do they exist or are they spooks?"), an expression that comes to prove *politically incorrect* (and that will thus feed

a relentless accusation of white racism) when it is clarified that the students in question are two young black women (Roth 2000, 16)!

The return to Tushnet's diagnosis, an integral part of the so-called *war of language on campus*[1], is certainly indispensable for other reasons. As the stage is basically the same (circumscribed) one, the specifications which affect the debate are also those we should expect, defining PC as the "enforcement, in some sense, of politically-derived standards of scholarship" (Tushnet 1992, 128) and "teaching" (Brest 1992, 381), and turning *freedom of speech* into institutional and/or individual "academic freedom", more or less strictly identified with First Amendment protection of the professor's rights [Tushnet 1992, 144-153 ("Questions of Academic Freedom")]. This concentration on located normative grids and specific institutional situations does not however contribute to simplifying the dynamic of the interactions to be diagnosed and overcoming the ambiguity of the references which lead to them. Tushnet certainly assumes some dominant representations, the most significant of all being probably the one which, from the very beginning of the essay, associates the "campaign" against PC with an ideologically conservative appropriation[2]. It is in fact this presupposition which gives the text the coherence of an exercise in deconstruction, the goal of which is to show precisely "how overblown or distorted" the "conservative characterization" (Tushnet 1992, 127-8) of the so-called *culture wars*[3] has been. Following this purpose means for Tushnet giving due weight to the abundant practices of "coercion" (to conservative "orthodoxy") inflicted on "progressive professors" (most of them classed as "critical legal scholars")[4], as well as offering the resources to reject the immediate qualification of specific events (which are in fact cases of bad or unhappy pedagogy) as exempla of PC enforcement (this time victimizing right-wing

[1] "The spring squall of 1991 about political correctness on campus has passed, leaving behind a muddy residue in the nation's political rhetoric." (Tushnet 1992, 127)

[2] "Although the squall initially may have seemed to develop from a detached interest in campus developments, it rapidly became clear that the campaign against 'political correctness' was this year's version of conservative concern about liberalism in the universities..." (Tushnet 1992, 127)

[3] Used to identify in general the nineties American academic debate concerning political correctness, this formulation has certainly more directly to do with a part of this debate: the one which, mainly in literary studies, opposes the canon and multiculturalism. See Hughes (2010, 70 ff.), but also the broader contextualization reconstituted by Andrew Hartman (Hartman 2015).

[4] "In the law schools, Richard Abel offers an 'incomplete list' of twelve people associated with critical legal studies who 'suffered adverse personnel decisions–denials of tenure, contract terminations, and reversals of lateral appointments voted by faculty.' A full consideration of the problem of political correctness ought to take these incidents, and other similar ones, into account..."(Tushnet 1992, 129).

or moderate scholars)[5]. Anyhow, as the agents of coercion, according to these narratives, are almost exclusively university administrators — so much more vulnerable to ideologues and lobbies that are ignorant of the *School's mission*[6] —, these dominant representations do not exclude outright the possibility of a rhetoric about PC defending political progressive standards or imposing a relativistic approach. And this is evidently enough to ensure that the tangle of arguments and counter-arguments emerging from these institutional situations becomes perplexingly intricate ("what is at issue in the PC discussion is much more complicated than most participants are willing to admit") [Tushnet 1992, 152] indeed so intricate that the only possible *way out* contemplated by Tushnet —in his evident "aversion to ambiguity" (Brest 1992, 381)— seems to be the defense of an alternative, drawing a distinction between two kinds of universities… as well as demanding that these differences (and their gradation) are transparently assumed as strategic (political) decisions[7]. The polarized radicalization of this basic alternative in fact distinguishes as models or types the universities which aim to take "an extremely active role in moral formation" and those "which treat their campuses as free fire free speech zones": this means acknowledging that both of them provoke unavoidable conflicts between "institutional" and "individual" freedom, but also admitting (as a congruent but not less perplexing implication) that the former are allowed to adopt "stringent 'hate speech' codes" (Tushnet 1992, 162-163)[8].[9]

Isn't this a frustrating conclusion, more or less explicitly choosing *not to choose* (i.e., not to engage in the discussion)? It is rather a conclusion which, *malgré elle*, i.e., in spite of some marginal discordances explicitly assumed (Tushnet 1992, 152-153), seems irresistibly close to Stanley Fish's

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[5] The case study mainly explored is an incident (reported by Dinesh D'Souza) concerning Ian MacNeil, a Harvard visiting professor criticized for "repeated instances of sexism": see Tushnet [1992, 131 ff., 137–144 ("Questions of Pedagogy")].

[6] "Administrators, lacking a vision of what a university should be, bend to whatever wind happens to be blowing the strongest…" (Tushnet 1992, 128). See in detail the development proposed in the chapter "Problems of University Administration" (Tushnet 1992, 153–162).

[7] "[T]here are two dimensions on which universities ought to take a position: the degree to which they take their mission to include the moral formation of their students, and the degree to which they are committed to the pursuit of disinterested scholarship" (Tushnet 1992, 162).

[8] The indispensable development comes with "Universities, Moral Formation, and Academic Freedom" (Tushnet 1992, 154–149)

[9] "For, if a university can take a position about that, many issues that have come up under the heading of political correctness look very different: rather than enforcing an orthodoxy in violation of academic freedom, the universities are performing their permissible role of helping shape the characters of their students" (Tushnet 1992, 144)

arguments about PC (Fish 1994, 3-11, 102 ff.; 1995, 62-70), arguments whose conclusion(s)-claims allow us to leave aside the idiosyncrasies of the academic stage and risk a global judgement. The knotty point is less the basic (however disputable[10]) corroboration of the *origins* —considering the term PC (or at least its strategic reproduction) a stunningly successful product of a conservative point of view, attributable to the "neoconservative participants in the recent culture wars" (Fish 1994, 8), but also to a "consortium of right-wing think-tanks, foundations, (…) well-placed individuals (…) [and] journalists" (Fish 1995, 62-63) — than the deconstruction of a certain binominal counterpoint. Which counterpoint? The one which opposes *"commonly shared"* ("really correct") *approaches*, reflecting "the biases of no group" — claiming a commitment to the "disinterested search for truth" and as such "eschew[ing] politics" —, and *group specific* ("merely politically correct") *views* — unavoidably condemned to the biases of specific identities ("feminists, multiculturalists, Afrocentrists, (…) gays (…) and the like") [Fish 1994, 8]. According to Fish, rejecting (overcoming) this counterpoint means in fact refusing not only the "label" of "politically correct", but also the "game" of which this label "is a part" (i.e. "denying the game´s central premise"[11]), which means assuming an unavoidable (globalizing) conclusion-claim: PC is not the "name of a deviant behavior but of the behavior that everyone necessarily practices", "[d]ebates between opposing parties can never be characterized as debates between political correctness and something else, but between competing versions of political correctness" (Fish 1994, 9). As if, in a very Foucauldian manner, we could say that refuting the label means acknowledging that every human practice (related to urgently, deeply and passionately held positions or agendas) is immanently political (i.e. manifests a *claim to political correctness*) (Butler 1999, 146-147), as well as defending that "there is no such thing as Free Speech" — "[f]ree speech" is just the name we give to verbal behaviour that serves the substantive agendas we wish to advance" (Fish 1994, 102). This is evidently considering both types of difficulties previously alluded to —concerning the signifier PC and its legal relevance —, with a response however which does not overcome them, but

[10] See for instance, explicitly refuting Fish's arguments, Geoffrey Hughes [2010, 61-65 ("Origins of the phrase"), 68ff., 74ff.]. "The modern origins of the phrase are inextricably bound up with Communist doctrine, although it evolves through various forms and tones…" (Hughes 2010, 62)

[11] The premise in question is that "*any* party to the dispute could occupy a position above or beyond politics" (Fish 1994, 9).

which rather consecrates their *"natural"* (?) insuperability and circularity. Certainly, because every *speech* (*interpretive*) *community* has its indestructible *capillary* modes of censorship, which means that everything comes in "political guises", even our attempted "apolitical abstractions" (including "the market-place of ideas, speech alone" and "speech itself").

> It is not that there are no choices to make or means of making them; it is just that the choices as well as the means are inextricable from the din and confusion of partisan struggle. There is no safe place (Fish 1994, 115).

2. Couldn't we just leave this fascinating reflexive territory (and the troubling web of ironies and perplexities that its ambivalence legitimizes) whilst concluding that, in our present circumstances, facing PC as a *societal* (legally relevant) *challenge* means simply defending an approach in terms of *public policies* (and their legislative prescriptions)? The problem at stake would then concern the (more or less extensively grasped) opportunity to sustain a *new* branch of Politics of Law, the distinctive feature of which would be an explicit progressive sensitivity and responsiveness to the pluralism of *marginalised identities* and their *narrative intersections* — involving gender, race, sexual orientation, economic condition, social status, practical-cultural and geopolitical provenance, health, mental and physical disability, as well as the status of victim, the condition of homelessness, the situation of the refugee, and last but not least, the relationship to our colonial past. In the last quarter of a century —beginning with the exemplary scission introduced into *Critical Legal Studies* by the emergence of *Feminist Jurisprudences* and *Critical Race Theories* (denouncing the *masculine identity* and/or *colour blindness* embraced both by *liberal* theorists and *critical scholars*)[12]—, Legal Theory has actually been vigorously challenged (if not *wounded*) by the blossoming of a wide range of discourses on *marginalised identities,* the core of which is undoubtedly composed of narrative *outsider* jurisprudences and *community-building counterstorytelling*[13]. This has certainly to do with a process of internal differentiation (and subdivision) affecting those two

[12] This means highlighting the fragmentation that has been opened up (or at least aggravated) by the so-called *third* (or *fourth*) generation or stage of Critical Legal Scholars: *third* according to Gary Minda's reconstruction (1995, 123 ff.); *fourth* according to Günter Frankenberg proposal (2006, 101 ff.).

[13] To use the well-known formulae proposed respectively by Mari J. Matsuda and Richard Delgado (Matsuda 1989, 2320 ff.; Delgado 2000, 60 ff.).

well-known established *fronts — Feminist Jurisprudences* and *Critical Race Theories*[14] —, but also with an explosion of other (irreducible) *identities* (with the corresponding promises of community-*experience* and community-*visée*) — the identities explored by *LGBT-GNCcrits* (*Gay, Bisexual, Transgender and Gender Non-conforming Critical Studies*), as well as those constructed by *TWAIL* (*Third World Approaches to International Law*) and by *Postcolonial Legal Theory*, inventing the Fourth World as a certain *South of the North* (Bhatia 2012) or reconstituting "the epistemologies of the global South" as the cultural legacy interrupted by colonialism (Santos 2014) —, all this in addition to the possibilities opened up by the so-called *New Social Movements*, which reconstruct the identities of the *homeless* and *landless* throughout the world, whilst also considering the specific conditions of disabled people, refugees, asylum seekers and sexual violence survivors and which thus go from the Brazilian *Landless Workers Movement* (MTST) to the globalized *#MeToo*. Simple allusion to this process of division and subdivision is, for its part, sufficient to enable us to understand that it is very difficult to conceive of all these "community"-promises as closed (*watertight*) *ways of life*. The intertwining and overlapping that inevitably interrelate them when we consider their legal relevance is, however, less an opportunity to recreate a coherent whole than (paradoxically?) an openness to new divisions. Why? On the one hand, undoubtedly because significant possibilities for connection (or at least overlapping) are due to the (more or less) *external* influence of transversal (much broader and not necessarily critical) *interdisciplinary perspectives or movements* (concerning *legal pluralism* and the mobilization of narrative as the archetypal form of practical rationality, such as *Law and Literature, Law and Performance, Law and Image, Law and film* and *Law and Emotions*) — perspectives which (on account of their internal complexity and the heterogeneity of the leading voices) certainly generate new *foci of incommensurability*, if not new academic thematic specifications (such as *Feminist Literary Criticism*, *Race and Cinema* and the *Queer Politics of Emotions*). On the other hand,

[14] Whereas *FemCrits* contribute to this multiplication simply by exploring the infinite possibilities of their own *cultural*, *radical* and *postmodern* path, *RaceCrits* intervene decisively here on the one hand by strengthening the specificities (if not the autonomy) of their basic "sub-disciplines" (African-American, Chicano(a)-Latino(a), Asian-American, Indian or Tribal *Legal Studies*), on the other hand by claiming (and projecting) an authentically globalized (and inter-disciplinarily conceived) *Critical Philosophy of Race*.

it is because storytelling in itself, experiencing the "multidimensionality of oppressions" ("what happens when an individual (…) is both gay and Native American, or both female and black?") faces the permanent challenges of *intersectionality* or "*intersectional" persons* (Delgado & Stefancic 2001, 51). These challenges are certainly an opportunity to examine the "combination" ("in various settings") of "race, sex, class, national origin, and sexual orientation" (and of fighting against race or gender or class *essentialism*(s)[15]), but also an inescapable source of subdivision (generating academic fields such as *Critical Race Feminism*, *Black Queer Studies* and *LGBT International Law Theory*, eventually with the promise of a specific *TWAIL).*

The simple allusion to this complex territory of narrative *outsider* jurisprudences (with its astonishing *vertigo* of hyper-specialized critical possibilities and its precious mass of data) shows that, contrary to expectations of simplification (and promises of overcoming ambiguity), the configuration of the intended *new* branch of Politics of Law is very far from linear, thus introducing new (but no less difficult) sources of contextual instability. In order to map these difficulties, two words will have to suffice. We could say that we have here three main problems or ensembles of problems, involving unmistakably different levels of thematization.

2.1. The first and immediate problem concerns the way how this sensitivity to PC is programmatically (contingently) pursued through statutory law. The understanding of this sensitivity admits at least two different configurations:

(a) a *pragmatic reformist* one, which may be exemplified using Libby Adler's distributive *decisionism,* "driving toward commitment to tangible law reform tasks" (Adler 2011, 11);

(b) a *deconstructive/reconstructive* one which, following Derrida, may be identified as considering the "interminable" process of "juridico-politicization" as it is (and has been) constantly pursued beyond its "identified territories" (i.e. opening up "areas" that "at first can seem like secondary and marginal") (Derrida 1992, 28-29)[16].

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[15] "[A]ntiessentalism raises such questions as whether the concerns of women of color are capable of being addressed adequately within the women's movement, or whether Hispanics and African Americans stand on similar footings with respect to the struggle for racial equality. Are black Americans one group, or several?" (Delgado 1993, 742-743).

[16] We should not forget that this text has been first presented and published in English!

The first of these configurations presupposes the absence of any plausible "meta-theory" in order to justify the use of *cost/benefit analysis* and to defend a contextualized (local) consideration of people living *in the margins* — a consideration which may be able to generate law reform proposals as a kind of *realistic* ensemble of "dispersed" possibilities (Adler 2011, 18)[17]. The second configuration faces the challenges of *otherness* by defending an ethic of unconditional and unlimited respect for singularity whilst simultaneously accepting the burden of an unavoidable *aporia* — corresponding to the abstract typification (or violent synchronic *thematization*) of the concrete problems, but also to the conclusion that each "advance in politicization obliges one to reconsider, and so to reinterpret the very foundations of law such as they had previously been calculated or delimited" (Derrida 1992, 28).

2.2. We have however a second (and much broader) problem, concerning the difficulties which this plurality (whilst favoring the fragmentation of perspectives, meanings and semantic values) effectively creates, when we consider Law's claim for an integrating context — and with this, the vocation for *comparability* (Linhares 2020, 90-98). Do the *discourses of the margins* allow us to go beyond the level where narrative *identities* impose separate perspectives in order to recognize the possibility or the pertinence of reconstituting (either from an internal or an external perspective) the normative centre of autonomies-*rights* and responsibilities-*duties* that is (or should be) globally attributed to each subject as a party in a practical legal controversy? In other words, is the celebration of *narrative incommensurability* — whilst renouncing the relevance of a successful experience of universalizability (*relativizing* the involved subjects) or to the corresponding *tertium comparationis* — still compatible with the significance (or the productivity) of an inter-discursive reference to the *status* or *dignity* of *sui juris* — the latter certainly not as a self-subsistent *hypostasis* but as a specific, historically determined, practical-cultural *artefactus* (inseparable from the claims of *audiatur et altera pars*)?

2.3. Finally, the third problem concerns specific institutionalizing procedures and social effects which the *culture* of *political correctness* — with

[17] A revised and recontextualized development of this argument is proposed in Adler (2018), specially in its fifth chapter ("Making the distributive turn").

its succession of euphemistic lexical and semantic (some of them "Orwellian") changes (Hugues 2010, 11 ff., 18-21, 26-37), its multifarious bewildering guises, but also the unilateral violence of their guardians and lobbies (replacing "reason with emotion") [Browne 2006, xiii] — has indisputably imposed: the risk of transforming more or less persuasive *counterstories* into stereotyped narratives, with characters and roles that are implacably pre-determined; the hypertrophy of duties and their concentration in apparently trivial strongholds — justifying unresolved tensions between universal and parochial claims; the legitimation of a *limitless responsibility*, with public devastating pre-juridical judgements, destroying lives and careers[18]; last but not least, the unconditional celebration of differences as a (paradoxically) ethical homogenizing reference — if not as an effective intolerance factor, generating new and subtle forms of censorship [Browne 2006, 41-58 ("The drawbacks of Political Correctness")]… and with them a plausible *inversion of hierarchies*[19]…

3. We can say that the integrated discussion of these themes (or cluster of themes), in their juridical (dogmatic and meta-dogmatic) systematic implications, is fundamentally *encore à faire*. Concerning this indispensable reflexive path, the essays which follow, with the plurality of perspectives and approaches which they manifest, certainly open some decisive doors.

The adopted sequence follows a kind of free *"arch*-form" *structure,* thus beginning and ending with essays in which the signifier PC is never explicitly dealt with, but which, however, provide enlightening contextual reconstructions — both of them with deliberately parochial "locations" (USA and Brazil respectively), with a meaning which however goes beyond their assumed frontiers. In contrast, the five in-between articles have in common a direct approach to our main thematic connection (PC and Law), even though explored under a remarkably varied spectrum of perspectives and scopes, going from specific problems to global panoramas.

The first chapter is by James Boyd White (our sole invited Author), who, notwithstanding the indisputable autonomy and self-sufficient intelligibility

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[18] As far as *#MeToo* is concerned, see the discordant diagnoses proposed by Elizabeth Bartholet (2018) and Jessica A. Clarke (2019).

[19] "Starting as a reaction to the dominant ideology, [PC] (…) has become the dominant ideology" (Browne 2006, xii).

of the diagnosis he proposes, develops an explicit commentary to his book *Keep Law Alive* (White 2019). The signs which this diagnosis evoke consider recent experiences that are specifically American *("*I hope that not much of what I say about the condition of (…) law (…) and democracy (…) in my country (…) would be true of yours*"),* but they do determine, however, a reconstitution of our global present practical-cultural and political-institutional crisis ("law is in danger of dying") which in turn requires a fundamental critical reconstruction of Law as a "complex intellectual, ethical and imaginative activity" (Law "at its best"). This reconstruction confirms Boyd White's inimitable conception of Law as a *form of life* and a *system of meaning*, inseparable from a continuously inventive *culture of argument* and its exercises of *translation,* with "a distinct set of dynamic and dialogic tensions" ("Law as a set of occasions and opportunities for the creation of meaning"[20], but also as "a rather fragile piece of our culture, requiring those who live with it to remake it constantly, over and over"). If we bear in mind that our interlocutor is one of the few authentic *Masters-Authors* of our time, this corroboration of an experience of Law "viewed from the inside" *(by someone who lives on its terms)* (White 1999, 103) is certainly not an unexpected one, although its accomplishment does however bring some precious contextual contributions. On one hand, we benefit from a remarkably spontaneous manifestation of the possibilities of an *internal point of view*, experiencing narrative not as a "story of facts" but as a "memory of memories" ("in doing law we must be centers of energy, of invention, and of life"). On the other hand, we recognize some key thematic pieces, without which the puzzle concerning PC & Law would hardly become intelligible (or which, at least, give this puzzle an unmistakable conformation): the irreducibility of Law to a "system of rules" or to an ensemble of "policy choices" or to " a set of institutional arrangements"; the danger of reducing law to economic or political perspectives ("in a way that destroys its essence"); the need to submit the *freedom of speech* principle (and First Amendment constitutional rules), as well as the problem of *discrimination by race*, to the specific contextualized perspective that *legal imagination* and *our sense of justice* significantly warrant.

[20] Unlike all the other (unidentified) citations, this one does not come from the text that is published below; it belongs to another work by James Boyd White (White 1999, 52).

American Law Institute's *Model Penal Code Project*, one of the normative materials which Boyd White exemplarily mobilizes in his diagnosis, is also a major protagonist in the second essay, written by Larry Catá Backer. The starting point is actually the discussion raised by the recent revision of Article 213 of the aforementioned project (concerning sexual offenses) — a "long road" which goes "from the initial draft of a definition for consent in 2012 to its final version in 2020" —, the aim is now however to explore semiotically the category of *consent* and the fascinating "ubiquity" (if not "malleability") which — justifying inextricable bridges between the masks of the subject-individual and the citizen-*socius* (between "interpersonal relations" and "political community") — the Western Text imposes on its *signifieds*. According to the Author, exploring this ubiquity means in fact acknowledging the constitutive ambiguity which wounds (or benefits?) the *signifians* "political correctness" ("understood" both in its "general" and its "pejorative" senses), if not explicitly defending that the "manifestation" of the signifier *consent* or the corresponding "concept" (this one seriously treated "as object, as symbol and as a cluster of political interpretation") "contains within it the Janus-faced morality of political correctness" — an approach which, thanks to an incandescent argumentative mobilization of each and every one of its components, clearly brings us back to the hard core of our leading theme.

It is in this central territory that, no less persuasively, all of them further exploring specific connections between Law and language, the next three chapters urge us to *stay*.

The third one, proposed by Silvia Niccolai, considers specifically the problem of *definitions in law* (if not the problem of the *search for the right definition*), as well as the effects of exclusion and inclusion which the different pragmatics of political correctness (with their statutory prescriptive translations) constitutively create (or claim to create) and transform. Following this path means in fact being able to counterpose the *ideals* of "objective" (certain) and "subjective" or "intersubjective" (flexible) *definitions* and the forms of (respectively) *calculating* (analytical or instrumental) *reasoning* and *practical-prudential* ("dialectical, controversial, negative, and refutative") *rationality* which, throughout the history of Western juridical discourses and practices, have dominantly (even though with a great internal diversity) assumed and specified those *ideals*. It means also being able to trace a fascinating and unusual parallel between a *regulae*-centered practical-dialectical *idea* of Law and juridical rationality (such as the one which Alessandro

Giuliani teaches us to rehabilitate and reinvent) — treating the regula *audiatur et altera pars* as a decisive component of Law's autonomous creation of meaning and its "collective/intersubjective commitment to veracity" — and the reflexive possibilities attributable to "the most important Italian feminist movement, known as The Thought of the Sexual Difference or The Thought of the Symbolic, the Italian 'radical' feminism" (which arose in the 1960s). The plausibility of this parallel opens in turn an unexpected door to critically reinvent the problem of *political correctness*, seriously taking the relevance of the case-controversy (and the practical-dialectical perspective it allows), whilst simultaneously denouncing the modern "rationalistic illusion" of a "lonely, omnipotent mind" ("being able to do without the shared experience of current language and common opinion").

The next step (our fourth chapter), which is due to Macario Alemany, concentrates its development on a very specific question, concerning the demand "to turn 'functional diversity' into the sole politically correct expression to refer to the condition of people with disabilities". The specificity of the question and its deliberately circumscribed context do not however prevent a global productive reconstitution of the problem of PC in its complex connections with statutory prescription and social (and juridical) reality (and the corresponding institutional situations). On the contrary, the specificity of the question it faces (with its disputable semantic substitution) stimulates a decisive global *distinction* concerning the relation between PC and *sensus communis*. (A parallel with Silvia Niccolai's proposal is here certainly irresistible, notwithstanding a significantly different perspective!) According to this distinction, we have situations in which the perspective demanding the substitution rests on "principles and premises shared by the relevant 'community of speakers' and other situations which involve alternative conceptions and premises" (being often even accepted with difficulty by "the discriminated minority"). The signifier *functional diversity* belongs precisely to this second field: according to the Author, its acceptance would in fact "entail an in-depth review" of many shared practices "that are generally deemed to be justified": "[i]t does not consist of adopting a perspective on disability rights, but of a new premise that is difficult to fit into many other generally accepted ones". More relevant than this *distinction* is however the judgement it allows: this judgement in fact opens up a critical reassessment of the relation between PC and Law, whilst admitting that this should be

argumentatively treated as a matter of *balance* between "freedom of expression and the interests of other people".

This is the perfect cue for the interlocutor that follows, Pablo de Lora, whose chapter reinforces the protagonism of the *principle of freedom of expression* (as far as the relationship Law/ PC is concerned), while fulfilling a dazzling close-up on an even more specific problem. This one concerns the alternatives to "refer" to "transgender people" and discusses whether the use of some of these alternatives corresponds to mere duties of civility, or, in contrast, benefits or should benefit from the consecration of specific legal duties (some of them with criminal implications), which means introducing juridically relevant limitations on free speech (does "the mandatory use of 'preferred pronouns' conflict with the right to free speech"?). Once again, the particularism of the discussion (namely when it considers academic settings) is only apparent, as apparently specific seem the (very clear) distinctive conclusions at which it arrives: it is "reasonable to require that we address trans people according to (…) the names and conventional pronouns of their choosing", it is not however "reasonable to compel the use of non-conventional pronouns" (designated pronouns or tailor-made pronouns such as "xie"). This reflexive path wouldn't in fact be possible without considering a major global issue, precisely the one which discusses the "nature" of PC rules (should they be treated dominantly as "social norms" or "legal standards"?), which means in turn (although only implicitly) reinventing the possibilities and social implications of *free speech*.

Close-up specific approaches seem in contrast far from the leading concerns of the sixth chapter, written by Barbara Sgorbati. And yet, the vertiginous *traveling* that the Author urges us to follow, touching upon almost all the thematic groups and problematic settings covered in the previous texts (concerning the cultural origins, the categories of intelligibility and the ubiquity of PC), is intended less to achieve the homogeneous finish of a synthesis than to open up a multifarious ensemble of questions, involving different perspectives and levels, as well as visiting unmistakably diverse dogmatic grounds.

I have stated that the proposed sequence pursues a kind of free "*arch*-form". Eduardo Bittar's essay fits precisely on the last step of this structure, not exactly because (as it happened with Boyd White's essay, which opened it) the *signifier* PC remains absent, but rather because this signifier is here from the beginning explicitly attached to statutory law and the corresponding arguments of policy ("the issue of political correctness (…) [refers to] the

responsibility of the legislator and the world of politics"). This starting point frees up the Author to explore the signifier *correctness* in its connections with *jurisdiction* ("The issue of *correctness* directly concerns judicial activity"); it gives him, above all, the opportunity to reconstruct *Legal Realism*, whilst defending the idea that, in addition to its better known faces (the Scandinavian and the American ones, the latter assumed through the possibilities of *CLS*), it is also possible to recognize a very specific Brazilian *way*, involving a construction of meaning which, according to the Author, today stimulates (without denying its origins and its history) the development of an authentic *Theory of Realistic Humanism* — the contemporary plausible specification of critical theory, inscribed in the practical-cultural Latin-American environment and thus giving the signifier *social injustices* a decisive role.

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Keep Law Alive

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GUEST CONTRIBUTION

ABSTRACT

An account of the author's recent book, *Keep Law Alive*, including: an assessment of the dangers which threaten law and the democracy it depends upon; an analysis of the ethically and intellectually praiseworthy methods and traditions law once enjoyed, using as examples the Model Penal Code, a pair of judicial opinions by Justice Holmes, and an essay on affirmative action; the elaboration of a way of thinking about law not as rules or policy or theory but as an inherently unstable but crucially important structure of thought and expression; and finally some attention to the question, how we might resist the corruption of law and, failing that, and using Augustine as an example, how we might live with its loss.

KEYWORDS

law, democracy, justice, tension

In this paper I want to talk about a book I recently brought out, entitled *Keep Law Alive.* As its title suggests, it rests on the view that in my country the law is in danger of dying, or at least becoming something very unhealthy. I hope that not much of what I say about the condition of our law would be true of yours.

[1] This essay includes a previously published passage: James Boyd White, "Why I Wrote This Book". Law, Culture and the Humanities. December 2020. doi: HYPERLINK "https://doi.org/10.1177/1743872120973182"10.1177/1743872120973182 Reprinted by permission of SAGE Publications.

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I

First I want to talk about the experiences that led me to suspect and fear that our law is in danger.

Although I have been a law professor for most of my professional life, I went to law school with the idea of being a practicing lawyer, and after graduation I practiced law in a small firm in Boston. I greatly liked and respected what I saw of American law in both contexts. I could see that law itself really mattered, and that it was especially important to do it well rather than badly, both in teaching and in practice. I thought the fidelities and understandings of a good lawyer were good for the world. Not that law was perfect, but that our work was in part a way of making both the law and the world better.

A.

I left practice not because I did not like it, or to become a scholar, but in order to teach law, itself in my view a form of practice. Teaching law was an activity—full of interest, richness, difficulty, and importance—that I thought could justify a life.

But as the years went on I gradually began to worry more and more about the health of law, both in law schools and in the world. To give you a sense of what I mean I will describe some of the impressions I gradually formed, with heavy emphasis on word "impression." I cannot prove any of this; I am simply reporting the progress of my own sense of what law was becoming, the sense that led to this book.

One of the feathers in the wind was my perception that some law professors felt themselves somehow superior to practicing lawyers—that their work was more interesting and more important. This seemed to me wrong on the merits—a failure to understand what the practice of law can at its best involve—and deeply inappropriate for people whose main job was to teach other people to become lawyers.

A bigger feather in the wind was what happened to the judicial opinion in the world and in law school. For me as a student, almost the whole enterprise of law school could have been summed up as learning to read and to judge judicial opinions—not in terms of their outcome but as ethical and intellectual performances. What we were taught to admire in the best opinions was

not that they "came out" as one wished, but their way of creating and doing law. Reading them offered a real education, not just about an institution, but about thought and language and honesty and justice—and about reading and writing too—for all these were at stake in what the opinions did.

In those days the work being done by the Supreme Court in particular seemed to warrant and reward this kind of critical attention. For example, I greatly admired the opinions of John Harlan though I disagreed strenuously with many of his conclusions.

But over time I got a sense that law school classes were devoted much less to what makes a good opinion—or a good brief, or judge, or lawyer—than to questions of policy or theory, questions really of outcome.

As a consequence, instead of reprinting important parts of the judicial opinions, casebooks seemed to reprint smaller and smaller segments of them, often reducing the case to its bare facts, to be discussed as a kind of abstract example in the development of theory or policy. The kind of conversation and learning that focused on the judicial opinion and what it revealed about the legal process in which our students were to live, was on this basis no longer fully possible. For me much of the air had been let out of the law school classroom.

I think the popularity of law and economics fed this tendency, not because there is anything wrong in bringing to the law what economics has to teach about economic questions that arise in law—that is of course fine, and the same would be true about sociology, or psychology, or philosophy. The problem was that economics, in some hands at least, seemed to me not so much to want to enrich law as to replace it. The idea seemed to be that legal questions could best be decided by economic methods.

This naturally led to a turning away from what seemed to me most important in the activity of law: our sense of the value and authority of the texts and traditions we had inherited and the whole legal culture they defined. You cannot really do law in the language of economics, any more than you can do economics in the language of the law.

As for the practice of law, I have heard mysterious things, some of them grim. A few years ago I was told by a couple of graduates working in different big firms that in their offices no one really read cases as we had tried to teach them to do in law school, that is, as seriously addressing real and difficult problems in a context in which much could be said on either side, and hence as offering something of an education not only about the questions at issue

but how to do law well. The associates mainly skimmed them for good language, I was told, while the partners were charging so much an hour that they could not justify the expense of reading them with care.

Maybe these people were kidding me, or just defective people, but I don't think so (Powell 2013). One reason is that my own experience of reading Supreme Court cases was more and more disappointing. I increasingly had the sense that as I read an opinion I was not hearing from the Justice as an independent mind seriously engaged with the issues the case presented. Maybe this was because the clerk wrote most of the opinion, and the Justice signed off on it, maybe it was because the culture of the Supreme Court came to permit a Justice simply to rehearse a set of arguments for a desired result, as a brief might do, without ever making the case and the opinion truly his or her own.

Whatever the reason, I felt that too many opinions were empty.[2] What this meant for legal education and practice too was that we simply could not give to judicial opinions the kind of attention and respect that used to be so rewarding—attention which is necessary to their real authority.

In my view this was a failure of law. For a comparison you might look at a volume of the Supreme Court Reports from say in the late fifties or early sixties, when I was in law school. I think you would find the difference shocking: of course there were political and theoretical tensions among the Justices then, and other imperfections of various kinds, but I always had the feeling that I was being spoken to by the Justice in his own voice and in an authentic way. These were opinions one could respond to and work with.

The trend I am tracing has had consequences concerning nominations to the bench, where almost everyone, both left and right, seems now to agree that the important thing is how the candidate will vote, not how he or she will engage in the process of deciding how to vote. This reduces law to politics in a way that destroys its essence.[3]

I was also struck by the danger to democracy, and hence to law, presented by the sky-rocketing disparity in income and wealth that we were experiencing even twenty years ago. The problem is that the very rich are not just rich; their wealth gives them immense power—economic and political power—that has no basis in democratic institutions or practices. This power

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[2] Justice Souter in particular seemed to maintain the tradition.

[3] See *Bush v. Gore* (2000).

has no meaningful regulation, but rests simply on money. Much the same could be said about rich corporations and banks, which have become increasingly unregulated. By contrast, the law once offered a rich and ultimately democratic language, and set of practices, which defined a genuine kind of authority that it is losing or has lost.

Finally, I thought our legal and constitutional system was deeply threatened when I learned that our government not only lied systematically about the justification for its war against Iraq, but secretly tortured persons they had captured. Torture seemed to me hideous, inconsistent with law in the most basic sense. Efforts were made to justify it by a corrupt form of the kind of "cost benefit analysis" that economics, in some hands at least, encouraged. In this case it led to a crime against humanity.

My experience in the last three years of life in my country is of a threat to law and democracy that is even more drastic and explicit. I won't rehearse the corruptions I have in mind—you can read about them daily—but I do think our fundamental commitments to the Constitution, to democracy, to truth, and to the law are now under serious threat. Once more for me a powerful issue is torture, this time not in the case of captives thought to have information, but in the case of children and their parents separated at the border, both groups suffering torture of the soul at the hands of our government.

We are facing the possibility of a world of "law" in which there is no serious claim to justice.

B.

Keep Law Alive is my response to the situation I describe. In it I try to do three different things: to demonstrate what seems to me essential and good about the law we once had; to urge people of the law, and citizens more generally, to try to keep that tradition alive if they possibly can; and to address the question, What should we do if we fail?

In trying to define the kind of law we are losing I focus not on such fundamental institutional elements as a democratically elected legislature; or a system of checks and balances; or the principles that no one should be detained without judicial review, that the law should be administered by an independent judiciary, or that legal process should be public—though all of these things are now under serious threat.

Rather I am concerned with the activity of law itself: the complex intellectual, ethical, and imaginative activity at the heart of legal thought and practice, without which the principles I summarize above would have little life or meaning. So I shall ask first: what is it like, and what does it mean, to do law in the sense in which I once learned it? Why is it valuable?

II.

I shall begin, as my book does, with a brief account of the Model Penal Code, a model statute prepared in the early fifties with great intellectual and moral energy by the American Law Institute, a professional organization devoted to the improvement of law.

A.

It is fair to say that at the time the ALI began to work on the Code, criminal law in my country was disorganized and incoherent, without a uniting theory or set of principles, really without an intelligible language. The ALI wanted to create a code that was based upon sensible assumptions and ethical principles, and would thus be both coherent and just.

I think they also wanted to show how it was possible for a group of lawyers working on their own time to produce a proposal for major reform of a crucial branch of the law which would be widely accepted. The Code was in this way a monument to the kind of careful, rational, ethical, public-spirited thinking that once characterized the profession at its best.

The basic idea that drove the Code was that people ought to be punished only when they were at fault, and only to the degree they were at fault. Fault was in turn defined largely in terms of mental states, so that, for example, a person who burned down a barn should be punished much more severely if they did it on purpose than if they did it out of carelessness.

In such a case prior law would also have drawn distinctions based on the state of mind of the defendant, but they tended to be haphazard, unreasoned, and unclear. Words like "willful" or "wrongful" were often used to define a state of mind, and of course they did not much help. Often a statute designated no state of mind at all.

In response to this situation The Model Penal Code established a hierarchy of mental states among which a legislature should choose for each of the elements of a criminal offense. These mental states were: *purpose*; *knowledge*; *recklessness;* and *negligence.* Of course each of these terms needed and received more elaborate definition, but for our purposes today I think it is enough just to list them as I have.

These degrees of culpability, coupled with a scale reflecting the seriousness of the injury inflicted or threatened, established a scale of appropriate punishments, meant to be just.

B.

Let me give you an example of the way in which the Code changed things, using a pre-Code case.

A Vermont statute against adultery made it a crime among other things to "for a woman to sleep with another woman's husband." A woman was charged with sleeping with a man whom she erroneously, but in good faith, believed to have had a valid divorce (*State v. Woods* 1935).

The statute said nothing about the state of mind required for a crucial element of the offense: did the prosecutor have to show that she *knew* the divorce was invalid? Or would *recklessness*—that is conscious disregard of an excessive risk—be enough? Or *negligence*? Or was she to be punished for the mistake no matter how reasonable it was? Under the principles of the Code, the legislature would have made the choice of state of mind explicit.

In the actual case, the Court did not address this question at all, but focused instead on a highly abstract and not obviously relevant matter, namely the metaphysical character of the mistake, asking whether it was a "mistake of fact" or a "mistake of law." In the former case the mistake would be an excuse, they said, in the latter not at all, under a general rule of common law that "mistake of law" is no defense to a "general intent" crime. The court concluded that her mistake was indeed one of "law," and that she could be convicted even if she was completely reasonable in her honest belief in the validity of the divorce.

In this context the words "law" and "fact" are virtually empty terms of conclusion with no clue to how they should be thought about. If the defendant was in no way at fault with respect to the status of her partner's earlier marriage, how is it just that she should be convicted of a crime?

Under the ALI approach, had it been available, there would have been no abstract and pointless talk about mistake of law and fact. Instead the legislature, after debate, would have decided the state of mind question in light of the purposes of the criminal law and the requirements of justice as they saw it, and expressed their judgment in the statute. The ALI method would thus have exposed for legislative thought and argument the important questions raised by this case but not addressed by this court. In doing so it would be making real the question of justice itself.

The ALI thought that the whole of criminal law could be constructed in this way, punishing wrongful acts according to the degree of culpability suited to each element of the offence —negligence, recklessness, knowledge, purpose—coupled with the seriousness of the harm. This was an effort to define justice in this field and to elaborate that definition with great care and openness.

Of course the ALI did not invent the Code out of whole cloth, but drew upon what seemed the best judicial insights and prior efforts at codification alike. They could do this because their education taught them how to read opinions, how to judge them on their merits, and how to learn from them.

The ALI had no law-making power. Its mode of reasoning and analysis would be adopted by others only if and when it was found persuasive. In fact its mode was immensely persuasive: I have been told that after the publication of the Code virtually every state reformed its criminal law, almost all of them using the Code as a model.

To me the kind of work that the lawyers of the ALI learned and engaged in was an elegant and noble effort to bring reason into a confused branch of the law and to do so with the objective of achieving justice.[4]

III

I want now to give you a brief example of another kind of excellence, judicial excellence, this time at the hand of Justice Holmes, in a pair of cases now 100 years old.

[4] Of course it had its limits and difficulties, which I discuss in the book, but omit here.

A.

The first case is *Schenck v. United States* (1919), which involved a statute that made it a federal offense *"willfully to obstruct the [military] recruiting and enlistment service of the United State,"* or to conspire to do so.

The defendants had sent circulars to men called for the draft in World War I. These circulars denounced the draft, as a violation of the constitutional prohibition of involuntary servitude, and the war itself, as a project designed to enrich the capitalist rich.

Did this conduct violate the statute prohibiting willful obstruction of the recruiting and enlistment service?

Today we would leap to see this as a free speech case under the first amendment of our Constitution, but there was virtually no first amendment law at this time. Holmes, writing for the Court, upheld the conviction, saying simply:

> "*Of course the document would not have been sent unless it was intended to have some effect, and we do not see what effect it could be expected to have upon a person subject to the draft except to obstruct the carrying of it out*."

Thus there was a conspiracy to effect a "willful obstruction" as required by the statute.

As people trained by the Model Penal Code, we would regard this as unsatisfactory, for Holmes is really saying that though the defendants were merely negligent with respect to the foreseeable obstruction of the draft, they could be punished under a statute that in its own terms reached only those who obstructed "willfully." Holmes does not engage in any analysis of the kind the Model Penal Code would require on this question. But that is how criminal law was done in those days.

Was this really a free speech case? Not in Holmes's view, because he thought the first amendment should not be construed to protect criminals who are engaged in conduct on other grounds criminal simply because the instrument of criminality is verbal.

But he was troubled at least a little by the free speech argument made by counsel. He noticed that some of the speakers were "well known public men," and opined that in peacetime they might have been within their rights, apparently for the reason that in such circumstances it would naturally be much less likely as a practical matter that their circulars would interfere with

the draft and enlistment of soldiers. His formulation of this position—later to have a deeply different significance—was this:

> "*The question in every case is whether the words used are used in such circumstances, and are of such a nature, as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.*"

In *Schenck* Holmes believed the clear and present danger test was met.

B.

In a similar case decided later that same year, *Abrams v. United States* (1919), Holmes dissented. This case involved a conviction under a more repressive set of statutes, making it a crime in relevant part:

> "*willfully to urge, incite, or advocate any curtailment of the production of war materials . . .with* ***intent by such curtailment*** *to cripple or hinder the United States in the prosecution of the war.*"

The defendants were fans of the new government of Russia and had distributed leaflets opposing, not our involvement in World War I but our recent invasion of Russia from the Pacific. Their leaflets condemned this action, called upon workers of the world to put down capitalism, and urged American workers to engage in a general strike, particularly with respect to munitions factories.

The defendants' purpose was not to interfere with the prosecution of the war with Germany, though what they did might have had that effect. They wanted to protect the new Russian government, not Germany. But the majority opinion said, in essence, that the defendants should be taken to have intended whatever would naturally flow from their conduct. In doing so, they made the same mistake Holmes did in *Schenck*, namely they treated what was really negligence as a form of purpose.

This time Holmes dissented. He put the situation this way:

> "*I do not doubt . . .that the United States constitutionally may punish speech that produces* ***or is intended to produce*** *a clear and imminent danger that*

it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent."

That is: in his view the government could punish the men if their leaflets either *had* the effect of interference with the war effort or *were intended* to do so—but not if they neither intended nor achieved such a result, and that is how he read the facts here.

Almost by accident, Holmes was beginning to give constitutional status to the "*clear and present danger*" language he used in *Schenck*, where he proposed it not as a constitutional rule but as a rule for the reading of criminal statutes. By his careful attention to the language of the statutes, and his trust in an instinct he could not quite articulate in *Schenck,* he was able to bring the first amendment into life. He used criminal law reasoning to give birth to first amendment law.

This is an extraordinary moment in the workings of the law. Holmes's "clear and present danger" test became the basis for the development of first amendment law in the years and decades to follow. His work of thoughtful imagination is with us still, giving us resources in language and thought with which we can address the most important questions not only about freedom of speech, but about constitutional adjudication more generally.

IV

My third example of the way the law used to work is taken not from a legislature or court but from my own work as a law professor engaged in the criticism of law.

A.

My subject is the way the Supreme Court speaks about race, especially in the context of challenges to what is called "affirmative action" on the part of government agencies, including of course universities. Here I criticize the current way of thinking and talking and propose something else.

The reason I want to speak as a critic of the law from within the institution, both in this book and to you today, is that I mean it as an invitation.

For I expect that many of my readers and hearers, especially but not only lawyers, will find themselves resisting some things I say, disagreeing, perhaps strongly, with my assumptions, my methods, or my conclusions, and I want to draw attention to that response and explain its value.

I expect disagreement not because I think my piece is deeply flawed, but because this is what happens—or what should happen--when lawyers read each other's work: they test it by argument. They just do. This kind of argument is an essential part of the way law functions—in court, in class, in a law office, in judicial conferences—and I want the reader, especially the nonlawyer, and you too, to have the experience of engaging in just this form of critical thought.

As you test what I say against your own experience, your own knowledge, your own ideas, you will find yourself engaging in legal argument of an important kind. You will in fact be doing a version of the kind of law I think we are in danger of losing, and that is the point.

B.

I cannot rehearse the whole argument here, but my basic idea is that the Court has elaborated a way of thinking about discrimination by race as though there were no relevant differences among the races. Their general rule is that state legislation using *any* racial classification is constitutionally invalid unless it is supported by "a compelling state interest," which cannot be effectively protected any other way.[5]

Given the Court's natural desire to be and to appear neutral, this approach makes a kind of sense; but I think it is wrong. In my view the hideous reality of our racial human slavery, which for centuries reduced human beings to the status of animals without any rights whatever—including the right to a family, the right to religious sacraments, the right to read, the right to sexual integrity, the right to choose how they spent their time and labor—is worse than anything that other ethnic groups have suffered, and the effects of this barbarism are still deep in our culture and society.

I think the Court should reflect this fact in its treatment of affirmative action cases.

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[5] See, e.g., *Loving v. Virginia*, 388.U.S. 1 (1967).

C.

So far this is an argument from social history and current sociology, but it can be reinforced by an argument of another kind, legal and constitutional in character.

Our nation as a whole consciously took the official position that slavery was a hideous moral deformity in two crucial ways: One was the civil war itself, which as Lincoln said was in an essential way about slavery.[6] This war was won by the opponents of slavery. The second way the country as a whole spoke to slavery was in a set of amendments to the Constitution that were clearly meant to protect former slaves and to advance their efforts to overcome the centuries of abuse: guaranteeing citizenship and the right to vote and prohibiting state action that denied due process or equal protection. The injustices suffered by no other group have been the subject either of a civil war or of such constitutional amendments. In other words, the experience of black people is not only different in historical and present fact, it has been the object of unique constitutional action.

As a result, I think that instead of treating state action that is meant to overcome the effects of racial slavery with a reluctant and anxious scepticism, as the Court now does, the Court, and the rest of us too, ought to embrace it gladly. When a State assumes responsibility for this dreadful part of our past and present, and tries to heal or correct its continuing effects, we should happily and gratefully support what they do, so long as their efforts meet a test of reasonableness.

D.

I mean this with my whole heart.

But, as I say, to make this argument is to invite response. In the book I make the argument as well as I can, much more fully than I can do today, and I hope that it will be responded to in the same spirit. This kind of debate is itself law in action just as legislation and judicial decisions are. Your responses are as much a part of law as my assertions. They can be a way of keeping law alive.

[6] In his Second Inaugural Address.

V.

I want now to elaborate an idea implicit in the three examples I have given, namely, that the law is at heart not just a system of rules, as we often think of it; nor is it simply a set of institutional arrangements that can be adequately described in a language of social science; nor is it just the expression of policy choices; rather it is an inherently unstable structure of thought and expression, built upon a distinct set of dynamic and dialogic tensions. These tensions do much to define the art of language at the heart of the law.

Law is a form of life that must work with the rules and other materials of the law, but it is not reducible to them. Likewise, it has the value of justice at its heart, but it is not reducible to abstract or philosophical talk about justice. It is a process of its own, built upon internal tensions, by which the old is made new, over and over again.

These tensions are not resolvable once and for all, but must be addressed freshly, over and over, by lawyers and judges who are responsible for what they do. They define much of the task of lawyer and judge.

I will briefly describe three of these tensions, to give you an idea of what I mean.

A.

The first is the inherent tension between law and justice I just mentioned. There is an obvious and strong tension between them, kept alive by the fact neither is allowed dominion over the other. They stay in tension, for it is an unstated convention of our law that the lawyer on each side of case must maintain that the result they are arguing for is both required by the law and fundamentally just. An argument that the law requires a certain outcome even though it is admittedly unjust, or an argument that because the law is unjust it should simply be disregarded, would both be profoundly incomplete in our legal culture. No lawyer would want to be in the position of making such a case.

The deep tension between these indispensable claims means that the lawyer or judge must labor, sometimes mightily, to harmonize them. In the process it gives lawyer and judge alike the opportunity to create something new and alive—not merely the logical working out of rules or premises, but

a deeper engagement with the texts of the past and the facts of the present, in a constant and unending search for valid and just meaning.

This tension must be addressed afresh, in almost every case. It is one aspect of the lawyer's great task, which is to bring the ideal and the real into a single field of vision.

B.

Another structural tension is that between legal language and ordinary language. Your client comes to you as one who tells his story in ordinary language, and who wants certain things, defined in that language, to happen. To be able to represent your client you need to understand their language as well as you can. But you also know you will have to translate what they are telling you into a language that will not make much sense to them. Like other translations this can never be done perfectly. The incongruity between these two languages is a challenge throughout the process of representation. It calls for an art of mind and language that can bring these two languages together. It has to be practiced again every day, always imperfectly.

C.

A third tension exists within the lawyer: between the unreasonable fear that she is a mere mouthpiece who will say anything to win and the unreasonable hope that she is a pure and active moral agent pursuing only the truth. This anxiety is a part of legal work, and has to be faced on the merits. Is what you are doing morally wrong? Can it be justified? This is not avoidable by a conscientious and responsible person. It is an important question, to which no formulaic answer will do. You have to create your own solution.

D.

There are other tensions that give life and structure to the law, which I discuss in the book but will omit here. But I can name a few of them briefly, leaving it for you to flesh them out in your own imaginations.

Between the letter and spirit of the law;

between substance and procedure;

between fact and law;

between the present and the past (and the future); between reason and intuition;

between language itself and what cannot be expressed; and there are many more.

We should not find these tensions daunting, however, because each of them, and all of them together, call upon us to use our minds and imaginations, and our sense of justice too, in new and fruitful ways.

Such tensions are structural, built into the process, resolvable only on the occasion at hand, and then always imperfectly. They demand from those who experience them, whether judges or lawyers, the exercise of an art—an art of language and mind and character.

They mean that the law cannot be reduced to rules or policy or bureaucracy, or to the exercise of power, though all those things are at work. These tensions are not as some might say, simply "noise in the system," but the life of the law itself. They make it clear that in doing law we must be centers of energy, of invention, and of life.

This means that law is not, as it is sometimes imagined, a monolithic machine working away in an impersonal fashion. Rather it is a rather fragile piece of our culture, requiring those who live with it to remake it constantly, over and over. Its existence should never be assumed or taken for granted. It is something we create and maintain when we act in its name. When we do it well, when we engage in law at its best, as I have tried to describe it, we do something of first importance. But the law does not act by itself; it needs us to keep it alive.

VI

Before it closes, my book shifts gears in a rather radical way. It speaks no longer about the legal tradition I have been describing or the dangers to which it is subject or my hopes for its rejuvenation.

Instead it addresses another question, different in kind: What if we fail to keep law alive? Suppose we do lose law as I have been defining it, and with it the Constitution, and democracy? Suppose we have already lost it? This

may seem speculative to some of you, but I think this is a serious and real possibility in my country. What then?

This is what we should be thinking about. But how?

Here I turned to Augustine of Hippo, whose autobiographical *Confessions* I had been reading. I thought of him because he was a man of great worldly success, who lived in times even worse than our own, yet somehow even under these conditions managed to maintain his psychic and intellectual integrity.[7]

His world did not have even the idea of democracy or political equality, and not much of an idea of the rule of law. There was no Constitution. Slavery—not racial like ours, not always inherited, but still slavery--was accepted as an institution by almost everyone. North Africa, where he lived, was bitterly torn with religious violence. When he was in his fifties Rome was sacked by the Visigoths, after hundreds of years of self-government, which must have felt like the end not only of government but of culture. The whole world was crashing down. Augustine was living largely in a failed world, as we too may also find ourselves doing.

A.

In his famous autobiography, *The Confessions*, he told the story of roughly the first forty years of his life, which was in many respects like that of the successful lawyer of our own day. He was trained in rhetoric, which he both practiced and taught with great success, first in Carthage, then in Rome, then in Milan, which was in those days the seat of the empire. He became one of the Emperor's rhetoricians. A marriage was arranged for him with the daughter of rich and powerful family. His future was likely to include a provincial governorship. He was ambitious and his ambitions were largely satisfied.

But in Milan, as he tells it, he had experiences of a different kind, mainly internal, that led him to convert to Christianity. He then abandoned the philosophic way of understanding the world. The whole structure of life that he had built just breaks down. All his achievements seemed to disappear.

[7] The treatment of Augustine is based upon my "Augustine's *Confessions* as Read by a Modern Law Teacher" (White 2014).

From this point he wanted to retreat into religious life with his friends, and returned to Africa with that in mind. But things worked out differently for him. He was dragooned by a congregation into being their priest, then soon made a bishop, and he was to spend the rest of his life facing these responsibilities.

B.

The story he tells in the *Confessions* is not the usual autobiographical story of success on success, but a story of a kind of benign humiliation, the destruction of his own pretenses and claims, often against his will and without his knowledge, until he is at the end as it were stripped naked and vulnerable and ignorant; but in that condition he is able to live in a new and deeper way.

How did this happen? That is the subject of his wonderful book as a whole. I discuss it at some length in my own book but today I want to draw attention only to two of his ideas, ideas that seem to me true for us as well as for him. I believe they helped him face what he had to face, and maybe they can do the same for us.

These ideas appear late in his book, after the narrative of his life. The first of them focuses on his understanding of memory, the central human capacity that he has himself been exercising. Thus far in his book he has been telling us what he remembers about his life; now he makes a memory itself a subject of thought.

As he presents it, we start out with the inexplicable and incomprehensible gift of life. Thereafter we use memory constantly, not only when we write the story of our lives as he has been doing, but in leading our lives from day to day. Memory is the embedded experience upon which we rely for everything, from the use of language to the formation of desires to the management of social relations. But, as he makes us see in our own forgetfulness of what has told us, that memory is profoundly unreliable.

What we remember, after all, is not sense data, but sense data processed by thought and imagination. Augustine is thus imagining a way of locating ourselves in a process of which we know neither the beginning nor the end; a process that is in its essential nature interior, and in a deep way unverifiable. The "narrative" he has just told—and the same would be true of any

narrative of one's life, including an internal one—is really the memory of memories, not a story of facts.

C.

In a later section he continues this line of thought by reflecting on the mystery of time. His main idea is that all that is past is no longer real, all that is future is not yet real; all we have is the present, which is itself not stable but a tiny, infinitesimal razor edge of awareness, disappearing as fast as it emerges. By the time you get the end even of a single word, its beginning is in the past.

The razor edge can be extended slightly by memory and imagination, but it is where we live, in a constantly disappearing present.

With these ideas Augustine is bringing himself to face both the essential mystery of his own existence and the essential quality of that existence. Nothing can be simply held on to and apprehended. We have to learn to let go of what we have known, and to face what we have not known.

Thus it is that in these closing portions of his book we find Augustine, who once knew so much, saying again and again, I do not know, I cannot know, this is beyond me. (He even learned that his own reading of Scripture, however learned, intelligent, and sincere was not the only valid interpretation.) On the other hand, he is showing that he has resources within himself for facing what he might well have thought could not be faced.

He sets forth here what I think are central conditions of human life, for him then and for us now, and in our future—even if our law does die.

For us, as for Augustine, the moment passes: are we alive in it, alive to it? Can we speak out of the center of ourselves, somehow aware of what we do not know, cannot be? The *Confessions* is written to bring us to the point where such questions are real for us. Can we achieve the kind of psychic and ethical integrity he attained?

Augustine found a way to work out of his awareness that all learning, all expectations, were provisional only. He knew the world could change and that he could change. He not only worked on these terms, but worked brilliantly, far better than he would have done had be remained the expert rhetorician he started out to be. The very ephemeral quality of things made it possible for him to be present as mind and imagination in a new and much more

complete way to what he was doing. The freshness and newness of life this entailed gave him immense power, in part because it seems to have erased his earlier susceptibility to embarrassment and his need to impress others.

This may seem paradoxical, but I think it is true of Augustine and can be true of us. We too can be centers of life and creativity, alone and with others, even when law is gone. We can rely on our own minds, our own characters, our own capacities, if we think about them rightly. We can be unafraid.

Of course Augustine's own experience rested in large part on his religious conversion. Obviously not everyone wants to go that way, but I think it is possible for us to hope to have an educative transformation of another sort, as a lawyer or as a person, leading to something like what Augustine comes to attain.

That is: an awareness of the evanescence of all things; of the unreliability of memory and intellect; of the essential emptiness of most goals of ambition or competition; of the springs of life and strength within oneself, upon which one may rely; of the hope of speaking always to another as that person is, in that situation at that moment, out of the center of oneself and one's mind; of the openness of our texts and practices of authority to multiple readings and uses; and ultimately of the power each of us might hope to have in speaking in ways that are true and alive—for only through such speech is justice possible.

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The Semiotics of Consent and The American Law Institute's Reform of the Model Penal Code's Sexual Assault Provisions

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ABSTRACT

The concept of consent is ubiquitous in the West. It is the foundation of its construction of meaning for sovereignty (and political legitimacy), and for personal autonomy (and human dignity). Ubiquity, however, has come with a price. The making of a transposable meaning for consent that bridges political community and interpersonal relations has drawn sharply into focus the malleability of the concept, and its utility for masking a power of politics behind an orthodoxy of meaning that is both politically correct, and at the same time its own inversion. This short essay on the semiotics of "consent" considers the manifestation of the concept as object, as symbol, and as a cluster of political interpretation that itself contains within it the Janus-faced morality of political correctness. It takes as its starting and end point the idea that *free consent is the product of a process of management that reduces consent to the sum of status and authority over the thing assented.* The exploration is framed around the recent arguments in the American Law institute's Model Penal Code Project around the meaning of consent in sexual relations. The essay first situates the *problematique* of consent—as action and object that incarnates power relations and the boundaries of the taboo. It then illustrates the way that semiotic meaning making produces a political correctness that produces paradox by critically chronicling the meaning of consent respecting sexual intimacy in criminal law. It enhances sexual liberation by placing it within a cage of limitations that ultimately transfers the power over consent form the individual to the state. That produces a perversity, and the illusion of free will which appears now only to be exercised by or with leave of the state. That meaning making suggests the way that consent as an act, and as a state of being, is transposed to the broader context of political economic relations.

KEYWORDS:

Criminal Law, Consent, American Law Institute; Model Penal Code, Sexual Offenses, feminism, sexual assault, communication, sociology of law, text interpretation

1. The Problematique[1] of Consent as the Performance of Orthodoxy.

The concept of consent is ubiquitous in the West (Craven 2018, 106).[2] It is, in some respects, a metaphor for the core engagement of idealized social relations on which communal life is organized, of which the prison stands at the opposite end of the ideal (Foucault 1995). It is the foundation of its construction of meaning for sovereignty (and political legitimacy). Within liberal democratic political orders, it is not uncommon to invoke the phrase "consent of the governed" like an incantation the power of which holds together a political community.[3] It applies as well in the context of international law (Craven 2018, 135).[4] Consent is essential to the formation of private relationships as well. Aggregations of capital and labor operating as cooperatives and corporations are authenticated on theories of consent, on the politically correct consent to engage productive forces in specific ways (Hamermesh 2014). Here, the focus is on information rather than on constitution (Rodhouse & Vanclay 2016). Non-governmental organizations brings together individuals and others who consent to join for common purposes (Hearn 2007). Consent is at the center of the most intimate personal relations, and the essence of the exercise of personal autonomy (and human dignity).

Ubiquity, thus, comes with a price. The making of a transposable meaning for consent that bridges political community and interpersonal relations has drawn sharply into focus the malleability of the concept, and its utility for masking a power of politics behind an orthodoxy of meaning that is both politically correct, and at the same time its own inversion. The politically correct, of course, is understood both in its pejorative sense—as the sometimes ruthless control (through social, legal, political, and economic mechanics) by a collective vanguard intent on reshaping communal principles and practices (Marques 2009; Ely et al. 2006; Hofstede 2006)—and in its general sense as

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1 "Nous avons proposé une définition du mot problématique: 'Dilemme récurrent auquel sont confrontés les managers', permettant de réconcilier le sens de l'adjectif et du nom d'une part, et de faire apparaître la permanence des questions que se posent les managers." (Nikitin 2006, 96).

2 Consent to be understood as a fundamental legitimating condition (Craven 2018, 106).

3 *See, e.g.*, Locke (1689). For modern variations of popular consent and state theory, *see, e.g.*, Gregg (2013).

4 Vienna Convention organized around legitimation of the notion of consent to obligation as a foundation of international law; but Krisch (2014).

communal orthodoxy generally, one which permits freedom only within the quite tightly guarded boundaries of the possible.[5]

This is especially evident in the oxymoron concept of consent freely given. *Politically correct free consent is the product of a process of management that reduces consent to the sum of status and authority over the thing assented—and in both cases it is not for the individual to decide the limits and scope of either.* Consent may be freely given only when undertaken with the approval and under the guidance of an orthodox collective[6] or the protection of a community strong enough to offer some protection.[7] Some people and institutions are incapable of giving consent, under certain circumstances. Consent can be revoked. Consent can be bartered; it may be waived. Consent can be conditioned. Consent can be exercised on behalf of others. The consent of people long dead may bind the living. Consent to certain acts may transgress a taboo (e.g., consenting to being eaten by another). One consents to marriage and to acts of physical intimacy, for example. One can consent to acts of intimacy, say, with other species, but in most societies only at one's peril. And some acts of sexual intimacy, in form or kind, may not generate interest by the state, but may produce adverse social and religious consequences. Together these produce both the mechanics of social control of which the act-thing consent becomes the expression of political correctness.[8]

This short essay on the semiotics of "consent" considers the manifestation of the concept as object, as symbol, and as a cluster of political interpretation that itself contains within it the Janus-faced morality of political correctness. The exploration is framed around the recent controversies produced by efforts to transform the meaning of consent for purpose of sexual crimes in the American Law institute's (ALI) Model Penal Code Project.[9] This was a project

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5 The notion has been most honestly stated by both fascists and Leninists in the 20th century. It is bound up in the concept of discretion within the boundaries within which action is possible. Benito Mussolini: "Nothing outside of the state; all within the state; nothing against the state." quoted in Stewart (1928); Fidel Castro (1961), "Within the Revolution everything, outside the revolution, nothing".

6 It is in this context that consent evidences its semiotic quality as object (actin) which is the essence of a sign (a thing other than itself without referent), the meaning of which (validity, possibility, consequence etc.) is determined by application of the structures of organized society (as contract through the courts, for example, or as legally forbidden taboo through the application of the criminal law, or through social measures, for example in the 1950s the effect of divorce on social position). See, e.g., Kevelson (1990).

7 In the case of consent for intimate activities that might be available through informal organizations. See, e.g., John D'Emilio (1983). In the case of action in suppressed markets, for example that is provided by outlaw organizations. See Backer (2009), reviewing Westbrook (2007).

8 See, e.g., Duncan (1995). For an interesting consideration, see, Smith (1999).

9 For purposes of this essay the focus is on the work of transforming Article 213 of the Model Penal Code

deliberately aimed at changing the orthodoxy of sexual assault regulation to one more correct.[10] Central to that project of transformed orthodoxy was the definition of "consent." [11] The essay first situates the *problematique* of consent—as action and object that incarnates power relations and the boundaries of the taboo. It then illustrates the way that semiotic meaning making produces a political correctness that produces paradox by critically chronicling the meaning of consent respecting sexual intimacy in criminal law. It enhances sexual liberation by placing it within a cage of limitations that ultimately transfers the power over consent form the individual to the state. That cage is necessary where, as here, sexual entitlement—the crumbling of the old taboos built around the chaste woman and the centrality of marriage between men and women—makes incomprehensible the old structures within which consent was confined. Confinement is still necessary—sexual liberation was coupled with enhancement of notions of autonomy,[12] specifically of personal control of one's body, again interposed consent as an act (of liberation, of autonomy, and of choice and thus hierarchy), as that assent, and of its affirmance of a new societal ordering,[13] and a new language within which to embed action and object with meaning.[14] That meaning making suggests the way that consent as an act, and as a state of being, is transposed to the broader context of political economic relations.

(Sexual Offenses) definition of consent. The general revision project was approved by the ALI membership at its May 2012 meeting and work began thereafter by the reporters, Stephen J. Schulhofer and Erin Murphy, both of New York University Law School. See American Law Institute (2013, xv). The ALI is a nongovernmental organization composed of jurists, lawyers, and academics whose purpose is to seek to bring clarity to the law of the United States through restatements of the common law and the development of ideal types of statutory law (for example, the criminal or penal law). See https://ali.org .

10 "For some time experts have told us that this portion of the MPC needed to be rewritten to fit with contemporary knowledge and values." Lance Liebman, Foreword, American Law Institute (2013), p. ix (Mr. Liebman was the ALI Director). "As a predicate to discussing procedural and evidentiary reforms of sexual assault laws, it may be helpful to have a shared understanding of the nature of sexual assault complaints today. . . In almost every other respect [e.g., with respect to sexual assault on men], however, the conventional image is wrong." American Law Institute (2012, Background Memorandum, 1).

11 Consent was initially an issue generally with respect to specific acts, and as well with respect to the sexual history of the complainant, from which circumstantial evidence of consent might be implied. See, generally, Anderson (2002).

12 See, e.g., Young (2017) arguing for an embedded rather than an individualist autonomy.

13 See, McLean (2010, 40-69). In the context of sado-masochistic sexual practices, see Hanna (2001).

14 Cf., Grossfeld (2001) (displacing the normative language and sensibility of the lawyer for the quantitative language of the accountant as corporate governance moves from the centrality of contract to that of compliance).

2. The Signification of Consent in the Shadow of "Correct" Politics and Social Relations

The signification of consent may help unpack the complexities buried within this straightforward and simple word. Consent is both a verb and a noun in English. That is, the word, as sign, simultaneously signifies both acts or actions, as well as a condition or status in relation to such acts or action. It frames the context in which consent is given and the object of the consent. Consent, then, expresses an act defining relationships between people (or institutions).[15] At the same time consent is understood as the thing ("res") that is given, received or negotiated; that is, consent is the embodiment of the relationship itself that is defined by the act of giving consent.[16] In all these senses , consent derives from the Latin *consentire*, to agree (verb) and an accord (noun), literally a meeting of the minds. The Latin itself is a compound word derived from *com* (together) and *sentire* (to perceive, feel, experience or think, realize, see, or understand).

The word consent, in both its senses of act and object, began to be used in the English language around 1300, during the course of the century after the descendants of Vikings holding the Duchy of Normandy from the French king too the English crown from its Anglo-Saxon holders.[17] As a verb, its primary meaning is to signify agreement. However, not everyone can give consent. Consent is a power reserved by societal custom or law to those with the authority to give it. As such, consent was meant to suggest a power to agree or to assent, as well as the act of agreement itself. It followed that consent as a verb signified not merely the act of assent *but also the personal status of the person* (or institution) assenting, at least in relation to the person (or institution) to which assent was given. Consent *also signified a power over the thing about which consent was given*. That power could include a power over one's body, possessions, or rights, or control of others. One would not consent unless she was recognized as being invested with the right or power to assent—and to withhold assent. The object—an act of consent—was in this

[15] Institutions may give or withhold consent as freely as people in some context. They may also unreasonably give or withhold consent, the judgment about which has pre-occupied the courts. See, e.g., Weddle (1995).

[16] This is evident, for example, in the context of consent to student testing in the US. See, e.g., Freeman et al. (2006).

[17] The etymology of the word in the discussion that follows is taken from Etymology Online ("Consent").

sense also a declaration of status in relation to the person to which consent was given, and a power over the thing about which consent was related.

As a noun, consent referenced the cluster of obligation or responsibility that followed form the act of consent. In that respect, at least from the late13th century, the word referenced an agreement of sentiment or unity in opinion as an object justifying the consequences of the act producing this unity or agreement. It is in this sense that the noun consent signified a duty to comply—consent gave rise to a compliance obligation in the consenting party and a right to require performance or to seek damages or other reedy by the person to which consent had been given. Consent, then, carried with it the notion of obligation or responsibility to see the objective of consent consummated. It was the thing that served to acknowledge the power of the act to otherwise constrain the freedom of those giving consent to its terms. Most importantly, where consent as a verb also defined the extent of the authority of the consenting party, consent as a noun transformed that act into obligation, into the thing that must be undertaken, or the relationship that must be acknowledged *without adverse consequences to either party*. That was the key significs. One moves here from an agreement deeply embedded in societally constructed power relationships and status hierarchies to an acknowledgement of the power to undertake the action consented without interference. Consent, then, properly given served as a societal imprimatur, of its willingness to be complicit in the consent by permitting its enforcement through societal organs.

Notions of the "age of consent" nicely conflated these overtones of authority, obligation, and societal permission through the direct legalization of conditions necessary to be bound or bind without adverse consequences in the undertaking of intimate or sexual contact (see Epstein et al. 2000). Again, these fold into and connect with broader discourses of power—religious and political—through which consent can be understood as derivative delegations of (societal consent) to the exercise of personal consent (Sarkar 1993; Sweeny 2014). At the same time this reference to "age of consent" also reminds us that the Middle English origins of the term is also embedded with a moral element. That mora element is derived from the understanding of consent as an act of "yielding" or "yielding up" something to someone. Here one moves from an active to a passive and immoral sense of the term in the sense, for example, of consenting or "yielding" to temptation, to sinful (or unlawful) behavior. Here the word acknowledges the power to assent but at the same time suggesting the application of a superior (moral, political, or

societal) force to exact adverse consequences from that act and the resulting condition. Fornication and adultery were the traditional examples (Eskridge Jr. 1995). Here one encounters the Janus face of the morality of consent, one built into the signification of consent yet not of its object. Consent speaks to an empowering, of the vesting of a power in those entitled to consent over the matter that is its object. Yet it also constitutes its subject as the holder of a set of characteristics that a society has vesed with capacity to consent.

The semiotics of consent, then, is nicely drawn from its origins. It serves as an object and symbol around which meaning is constructed, even as such constructed meaning gives form to that object as act and thing. Consent, then, *signifies* action and simultaneously objectifies the act signified (an incarnation of meaning). At the same time, consent also signals the status of the parties (they may give and receive consent, their authority over the thing consented, and acknowledges an obligation represented by the consent, and the like), and in this way reconstitutes them as a function of that assenting power. The signification, then, embeds that object (now recognized as act and thing) within a complex ecology of relationships and webs of power/authority which themselves are also signified by the act of consent and the obligations that consent produces. Consent embodies within its meaning a powerful "network of power relations . . . forming a dense web that passes through apparatuses and institutions, without being exactly localized in them" (Foucault 1978, 96). The power to affect the meaning of any of these interlinked signs can change the social order; an idea especially relevant in the context of sexual assault.[18] To that end, consent requires a new language to fit the model of principles of social relations within which it is embedded, a social semiotics of the language (the significs) of (legitimate and forbidden) consent (van Leeuwen 2005, 91-171). These, as will become clearer in the section that follows, then revolve around language, but also of context, facial expressions, movement, interactions, dress, and other signs that together will be interpreted or re-interpreted as the performance of consent and as consent itself which is then acquires meaning when the community moves to impose consequences on the basis of the character of the consent. Politically correct consent produces reward or at least indifference, the other, punishment.

[18] "True primary prevention is population-based using environmental and system-level strategies, policies, and actions that prevent sexual violence from initially occurring." (American College Health Association 2018, 5).

The webs of relationships signified through consent were becoming increasingly unstable in the context of the regulation of prohibited and permitted sexual (or sexualized activity). Much of that instability was initially focused on youth—especially in the university, where sexual assault constituted a new frontier of managing cultural norms through law. That involved changes to the way that sexual assault was defined and disciplined within university grievance and disciplinary processes,[19] and enforcement.[20] And indeed, the Guidance[21] issued by the US Department of Education in 2012 in the wake of the Obama Administration's White House Task Force to Protect Students from Sexual Assault.

The criminalization of sexual assault has also become an issue of general concern, and of meaning making with the bite of state power. The issues raised go to the heart of two great trends in U.S jurisprudence. The first is the move toward the criminalization of behaviors that society, through the state, seeks to control. This is an ancient impulse, and one natural to the leadership of collectives. The second touches on the value of the use of the criminal law as an instrument of social and cultural change. This is also an ancient impulse but its manifestation in the early 21st century suggests its renewed utility as a center of coercive meaning making. A subsidiary issue that is related to the use of the criminal law as an agent for cultural change involves the way that customary rules of process fairness are bent to the greater policy goals. There are many who view criminalization and the use of law instrumentally, and especially the criminal law, as a valuable tool for societal progress. There are many who disagree. Consider the position of 16

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[19] U.S. Department of Education (n.d.) "The Obama administration is committed to putting an end to sexual violence—particularly on college campuses. That's why the President established the Task Force earlier this year with a mandate to strengthen federal enforcement efforts and provide schools with additional tools to combat sexual assault on their campuses. As part of that work, the Education Department released updated guidance earlier this week describing the responsibilities of colleges, universities and schools receiving federal funds to address sexual violence and other forms of sex discrimination under Title IX. The guidelines provide greater clarity about the requirements of the law around sexual violence—as requested by institutions and students."

[20] "The UC released new systemwide policies for the handling of sexual violence and harassment cases last year and adopted standards requiring consent to be unambiguous, voluntary, informed and revocable. 'A primary goal in our efforts at the University of California to prevent and respond to sexual violence and sexual assault has been to make sure law enforcement agencies are more fully engaged with us on this serious issue', Napolitano said." (Johnson 2016).

[21] U. S. Department of Education (2014), rescinded under the Trump Administration.

Penn Law faculty members wrote this open letter criticizing aspects of that policy, and of the federal government's actions.[22]

3. Consent in the Laboratory of Control: The American Law Institute Struggle to Reprogram the Principles of Authoritative Consent.

The ALI project to reconceive the criminal law of sexual assault commenced in 2012. The issue of the definition of consent appeared in 2014 after consideration of other issues.[23] Already by this time, the effort to reconsider this portion of American criminal law "in light of experience and changed values" was meeting with responses from the ALI's "Consultative Group participants who see these issues from different perspectives."[24] The issue arose first in the context of the performance of consent—that is of the signs that are unambiguous indicators of the action of consent in the context of rape.[25] The Reporters would have opted for affirmative consent, but "existing ambiguity of social norms in this regard" got in the way (ALI 2014, xix). Instead the focus turned to nonconsent—the meaning of an unambiguous 'no', at least in the "absence of subsequent indicia of positive agreement" (ALI 2014, xix).

> (3) "Consent" means a person's positive agreement, communicated by either words or actions, to engage in sexual intercourse or sexual contact.

[22] Open Letter From Members Of The Penn Law School Faculty (2015): "Although our comments and criticisms focus on universities' procedures for adjudicating sexual assault complaints, we recognize the far more important issue: how can universities help to change the culture and attitudes that lead to sexual assaults? Our first priority should be to reduce the frequency of assaults. After-the-fact disciplinary proceedings, while useful, cannot by themselves adequately protect our students. Universities must take more steps to deal with excessive use of alcohol and drugs, substances that all too often fuel the conditions that lead to contested sexual assault complaints" (p. 1).

[23] "In 2012, the Council approved a project to revise Article 213 of the Model Penal Code. The Reporters began by focusing on two subject-matter areas—issues of procedure and evidence; and the collateral consequences of conviction. Attention then turned to the issues of definition of substantive offenses and procedural and evidentiary issues." (ALI 2014, xv).

[24] Lance Liebman, Foreword, (ALI 2014, ix).

[25] "Section 213.4 endorses the position that an affirmative expression of consent, either by words or conduct, is always an appropriate prerequisite to sexual intercourse, and that the failure to obtain such consent should be punishable under Article 213." (ALI 2014, xviii).

> (4) "Nonconsent" means a person's refusal to consent to sexual intercourse or sexual contact, communicated by either words or actions; a verbally expressed refusal establishes nonconsent in the absence of subsequent words or actions indicating positive agreement. [ALI 2014, §213.0 (3) and (4), p. 1]

Changes to the notion of consent was bound up in two not necessarily coherent movement of societal norms. The first was to situate sexual assault as a species of crimes of force (and bound up in its general psychological, physical and emotional effects, rather than as a sui generis species of aberrational violence. The second, however, touched on the sexual liberation of (mostly) women but also men to more freely engage in a broader spectrum of intimate activities of their own choosing, a "liberation" that fundamentally undercut the traditional notions of consent for women grounded in notions of chastity.[26] For some feminists, though, this suggested consent as a sign for the joining of two distinct clusters of meaning making, one protective and the other enabling.[27] The Reporters concluded, "Overall, the evolution of reform toward a more consent-based conception of the offense has been unmistakable, not only in the United States but throughout the world," (ALI 2014, General Commentary, 13) which now serves as the marker of the difference between lawful and unlawful sexual contact. The original vision was to divide consent into two categories. The first—affirmative consent, required positive affirmance signaled in some societally understood manner (language, actions, etc.), and by a person with the capacity to undertake that consent (as that is defined for each offense). The second—nonconsent—applied in the context of refusals to consent; these circumstances (when does "no" mean "no!)[28] proved the more interesting. Commission of an offense

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[26] ALI (2014, General Commentary, 12), citing not merely the work of one of the Reporters but also the more germinal Comment, Harris (1976) ("Although the force element has traditionally furthered the policy of physical protection, as well as serving an evidentiary function, . . . freedom of sexual choice rather than physical protection is the primary value served by criminalization of rape.")

[27] See, Franke (2001, 181–182) noting that "feminists in other [non-legal] disciplines . . . approach questions of sexuality in both negative (freedom from) and positive (freedom to) terms."), cited by the ALI Reporters in ALI (2015c, General Commentary, 23, n. 30).

[28] The Reporters cited two approaches: "CAL. PENAL CODE § 261.6 (defining consent to require "positive cooperation"); Commonwealth v. Lefkowitz, 481 N.E.2d 227, 232 (Mass. App. 1985) (holding that "when a woman says 'no,' . . . any implication other than a manifestation of non-consent that might arise in a person's psyche is legally irrelevant, and thus no defense"), with N.Y. PENAL LAW § 130.05(2)(d) (defining lack of consent to require that "the victim clearly expressed that he or she did not consent .

in the presence of nonconsent was treated as an aggravating circumstance increasing the criminal penalty.

The semiotics of the active-passive binary suggests the way that consent loses its autonomy and becomes deeply embedded in power relations mediated by the state which acts on the basis of what it perceives (or desires) to represent an idealized model of societal relations—the essence of political correctness. Thus, for example, the initial position of the Reporters was that language trumped other signs ALI (2014, Satutory Commentary, 22). In the process they engaged in both an act of cultural reduction (e.g., sound as the primary means of communication), followed by action. A verbal nonconsent has special power—it may be revoked only by an act of positive consent, communicated by words or actions. The problem for the criminal law, then, shifts. It centers consent on its forms and history. Consent binds for an instant, and may be instantaneously revoked. Its manifestation as communication is the consent—that is consent becomes the communicative act—with the primary focus on verbal communication, followed by actions that might be interpreted as communicative in a shared sense.

The result produced some confusion—and especially respecting the legal consequences of signaling—that is the performance of consent (or nonconsenting) in politically (now legally) correct ways. That resulted in the production of a response memo from the Reporters who sought to both press their view of a new regime of politically (and legally) correct performance or communication of consent and to defend the construction of consent as a Janus figure of affirmative consent-non-consent.[29] The issues touched at the margins of communication which now appeared to serve as both the act of consent and as the consent itself.[30] The first touched on the borderlands of affirmative and non-consent: "Should the draft criminalize sexual intercourse, in the absence of physical force or specific coercive circumstances, when the defendant is subjectively aware of a risk that the complainant has not expressed consent to that intercourse through words or conduct" (ALI 2015a). In at least one

. . and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances" (emphasis added)); State v. Gangahar, 609 N.W.2d 690, 695 (Neb. App. 2000) (holding that "while [the victim] said 'no,' the statute allows Gangahar to argue that given all of her actions or inaction, 'no did not really mean no'")." ALI (2014, Statutory Commentary, 22, footnote 61).

[29] See, ALI (2015a, Reporters' Memo and Recommended Reading).

[30] These included what the Reporters called the (1) force and consent spectrum, (2) intoxication and consent; (3) minors and consent; and (4) tainted consent. (ALI 2015a).

circumstance the answer would be liability, in effect for failing to interpret societal sexual cues in accordance with the measure now imposed by the state ALI (2015a, Reporters' Memo and Recommended Reading).[31] The intoxication standard drew a line between incapacity to consent ("actor has reckless awareness of a risk that victim never gave a words- or-conduct "yes") and authoritative performance ["Yes by words or conduct (i.e., capacity to assent, even if in hindsight regrets it or judgment clouded by intoxication)"] (ALI 2015a, Reporters' Memo and Recommended Reading).[32]

The reaction was strongly expressed by the ALI members.[33] They resisted the transformative vision of the Reporters and criticized the tendency that draft expressed toward overbreadth and overcriminalization.[34] ALI members argued that the revision tilted too heavily on the side of overcriminalization and overincarceration. It suggested that an affirmative consent standard would imperil both parties even (especially) in otherwise innocent situations, and that, in that sense, it contributes to ripping rather than mending the social fabric respecting personal autonomy and sexual freedom.[35] The critics noted absurd results from the provisions describing threats that otherwise invalidate a coerced consent and noted as well that the statute made no effort to consider the potential disproportionate racial effect of the statutory scheme.[36]

The resistance to this approach produced somewhat dramatic changes to the vision of consent as a communicative act with its own hierarchy and

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[31] "CW did not push away D, but also did not embrace D, reciprocate D's advances, or otherwise act like CW willing (although never acted unwilling, either)" (ALI 2015a, Chart: Nonconsent Spectrum); compare no liability for "CW felt 'yes' but expressed 'no'" (ALI, 2015a, Reporters' Memo and Recommended Reading).

[32] Visual Statutory Scheme—Proposed Article 2013; Intercourse Liability Scheme.

[33] The reaction was technically to the language in ALI (2015b). Tentative Draft No. 1 was presented to the ALI membership in May 2014, but given the controversy around several of its provisions, there had been no time to consider the definitional provisions. Discussion Draft 5 brought forward the black letter of Tentative Draft No. 1 but with substantially expanded commentary. (ALI 2015b, xviii).

[34] Undersigned ALI Members and Advisers (2015) reproduced at Sexual Assault at the American Law Institute (2015).

[35] Undersigned ALI Members and Advisers (2015). "The draft states that it is difficult to distinguish "threats" from mere "offers" of a benefit to which the benefitted party is not entitled and, accordingly, the draft chooses to treat "offers" as the equivalent of "threats." (Id. at 77–80). Thus, an offer to vote in favor of your sex partner's preferred "American Idol" contestant is also a third degree felony if the complainant later asserts that the offer was the cause of the consent to sexual intercourse. The draft candidly admits that it "represents a largely new direction for legislation in this area." (Id. at 75).

[36] Undersigned ALI Members and Advisers (2015): "the criminal law has an unfortunate history of excessive punishment in the name of protecting women especially when issues of race are present". See Coker v. Georgia, 433 U.S. 584 (1977)" and noting the racist as well as sexist failings of US approaches to rape law).

resultant distribution of responsibilities and consequences. The changes, however, refined the notion of consent more precisely in ways that appeared to take a transactional approach to intimate acts leading up to penetration even as it abandoned the initial affirmative consent-nonconsent binary. Those changes were unveiled in September 2015, when the Reporters produced a substantially revised definition of consent:

> (3) "Consent"
> (a) "Consent" means a person's positive, freely given agreement to engage in a specific act of sexual penetration or sexual contact.
> (b) Consent is absent until such agreement is communicated by conduct, words, or both.
> (c) Consent can be revoked at any time by communicating unwillingness by conduct, words, or both. Any verbal expression of unwillingness suffices to establish the lack of consent, in the absence of subsequent words or actions indicating positive agreement.
> (d) Lack of physical or verbal resistance does not by itself constitute consent to sexual penetration.
> (e) Consent is not "freely given" when it is the product of force, restraint, threat, coercion, or exploitation under any of the circumstances described in this Article, or when it is the product of any force or restraint that inflicts serious bodily injury. (ALI 2015c, 1)

The changes from the initial draft preserved the fundamental premise of the original—that intimacy was centered on affirmative consent, but that action in the face of non-consent aggravated the violation.[37] The question, then, was on the definition of affirmation and the characteristics of non-consent. These followed the 2015 Memorandum described above (ALI 2015a). The semiotics of the changes were unavoidable: "In ordinary understanding, consent is something a person does, not something a person feels. Consent given reluctantly or with regret is still valid consent, absent impermissible coercion." (ALI 2015c, Statutory Commentary, 34). The Reporters acknowl-

[37] This was underlined by the Reporters in their Model Penal Code: Sexual Assault, Memorandum for Advisors and MCG (1 October 2016): "the Reporters presently expect to recommend defining consent as communicated willingness, so that the Code will penalize conduct as the misdemeanor offense of Penetration Without Consent when the totality of the other person's behavior communicates neither willingness nor unwillingness" (ALI 2015c, 2).

edged the contention around the question of affirmative consent rather than the absence of active opposition as the basis for determining the validity of consent, and opted for the affirmative consent standard. It rejected the criticism of this approach by suggesting that "the concept of conduct is not restricted to active bodily movement. It includes the totality of a person's behavior; silence and passivity are forms of conduct" (ALI 2015c).[38]

The difficulty, though, of course, was that the semiotics of the ALI's consent provision was post hoc—its meaning would be made after the fact and by the interpretive community of prosecutors, juries and judges. To that extent the definition developed a two level semiotic meaning making—the first in the concept of consent to be applied by the parties, and the second, that of those who judge the "correctness" of the interpretation ex ante but in post hoc proceedings (ALI 2015c, 35).[39] The consequence is clear—the definition serves as a means of shifting interpretive risk to the persons engaging in intimate conduct potentially covered by the statute. The risk here is of misalignment between interpretant at the time of the actions communicating consent and the making of meaning respecting that consent after the fact. Given the consequences, the effect should be for most (even risk neutral individuals) an incentive to avoid intimacy rather than to embrace it.[40] The Reporters noted: [T]he appropriate default position clearly is to err in the direction of protecting individuals against unwanted sexual imposition." (ALI 2015b, Substantive Material, 53). Even so, the Reporters remained suspicious that the incentive to avoid engagement had not gone far enough, that is not far enough to ensure the politically correct result.[41]

The Reporters now appeared more defensive—but also quite strong in their belief in their role as societal vanguards moving conceptions of con-

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[38] It thus rejected the criticism that the definition would require either an affirmative formal (written agreement or some recording of a verbal affirmation. (ALI 2015c).

[39] "The issue arises at two levels—first when acts of intimacy occur and subsequently, in the event of alleged abuse, when the legal process is called upon to determine culpability" (ALI 2015c, 35).

[40] "The point is simply to stress that in interpersonal conduct, willingness cannot be taken for granted, and that before sexual penetration occurs, the person initiating that act must look for affirmative indications that consent is present, exercising common sense and taking into account all the relevant circumstances." (ALI 2015c, 35).

[41] "Certain recurring fact patterns cause problems that require a legislative gloss; otherwise the statutory concept of consent could easily degenerate into a mere placeholder for divergent norms of sexual behavior or, even worse, an enabling mechanism for the wishful thinking of sexual aggressors"). (ALI 2015c, 35).

sent forward toward a correct politics enforced through law.[42] The position was awkward, balancing an acknowledgement that the state had no role in legislating ideal forms of sexual intimacy but did have a role in protecting people against undesired penetration (ALI 2015c, General Commentary, 15). Yet the refusal to move away from their earlier conception for mediating between the two remained awkward, especially in light of the earlier protests, and the clear lack of consensus among the ALI membership. The process involved an odd semiotic contest—a contest of storytelling, of competing idealizing fictions, hypotheticals and interpretations, hurled like missiles between factions intent on moving the constraining structures of consent in different directions.[43] Still, the process of meaning making can sometimes be violent—in the sense that it is coercively imposed by that faction with the power to impose its will on those who would not consent.[44] Through this, the Reporters held to their view that the language of the law, revolving around consent, must be changed to reflect the social realities around which the law ought to point, if not lead (ALI 2015c, 21-23).

Again, resistance to the form of the revisions to the provisions for consent required additional modification. These were circulated in Council Draft No. 5 dated December 15, 2015 (ALI 2015d). The Reporters appeared to retreat from their insistence on affirmative consent principles.[45] The definition was now drafted this way:

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[42] The language in the Commentary is worth quoting at some length: "Because criminal law is the site of the most afflictive sanctions that public authority can bring to bear on individuals, it necessarily must and will reflect prevailing social norms. But for the same reason, it must often be called upon to help shape those norms by communicating effectively the conditions under which commonplace or seemingly innocuous behavior can be unacceptably abusive or dangerous. Nearly all law-reform efforts addressed to the sexual offenses are met at some point by the objection that they go beyond social standards currently accepted by a good many law-abiding citizens. That protest was heard in response to the Institute's 1962 Model Code, and it has been raised on the occasion of most, perhaps all, subsequent state efforts to revise the law of rape" (ALI 2015c, General Commentary, 15).

[43] For a discussion in semiosis see Valsiner (2009).

[44] See, e.g., Coney, D. & Dickinson, G. (2010).

[45] They noted in their initial Reporters' Memorandum: "The treatment of consent and associated offenses in Preliminary Draft No. 5 provoked great controversy at the last Annual Meeting and at October's meeting of the Council. Many argued that the definition adopted an ideal of 'affirmative consent' at the expense of the largely tacit ways that people engage in sexual behavior in the real world. There was concern expressed that the definition covered behavior that was innocent, and that the criminal law should not dictate sexual mores in this evolving area. Taking into account both the breadth and depth of those concerns, this Council Draft presents a thoroughly reconsidered approach to the issue of consent. Given the contested state of current sexual mores and the risk of overbreadth in penal statutes, the revised Draft rejects these 'affirmative consent' formulations" (ALI 2015d, xi).

(3) "Consent"

(a) "Consent" means a person's agreement to engage in a specific act of sexual penetration or sexual contact, evidenced by words, conduct, or both, including both acts and omissions, as assessed under the totality of the circumstances; provided, however, that agreement does not constitute consent when it is the product of the force, fear, restraint, threat, coercion, or exploitation specifically prohibited by Section 213.1, Section 213.4, or Section 213.6 of this Article.

(b) Consent may be expressed or it may be inferred from the totality of a person's conduct. Neither verbal nor physical resistance is required to establish the absence of consent, but lack of physical or verbal resistance may be considered, together with all other circumstances, in determining whether a person has given consent.

(c) Consent can be revoked at any time prior to or during the act by communicating unwillingness through words, conduct, or both. A verbal expression of unwillingness suffices to establish the lack of consent, in the absence of subsequent words or conduct indicating positive agreement prior to the act in question. (ALI 2015d, 1)

In addition, the Reporters, understanding the crucial role of illustration in making the case for their opponents, also included illustrations intended to show the way the law would apply in idealized hypothetical cases (ALI 2015d, xii and Commentary, 4-7). Consent remains the principal concept used to distinguish lawful from unlawful conduct. Consent (in its quality of firstness) remains a signifier of both the act (permission or assent) and signification (legality). But the quality of consent changes, and in the changing speaks to the distribution of interpretive risk (*ex ante* and *post hoc*) and its negotiated quality (between ex ante and post hoc) is sharpened.[46] Consent, then, becomes significant not just for the parties, but the vehicle through which societally coercive institutions will use the bodies and experiences of those brought before it to help shape the meaning of sexual communications—judging it licit or illicit. The politically correct becomes both a gamble and a dynamic conversation between the lived

[46] "The Code tales into account the complexities of mutually desired sexual interaction and leaves room for the evolving character of sexual communication. The Code endorses the prevailing norm that requires each party to be alert to the wishes of the other. It likewise requires a trier of fact to take into account all the surrounding circumstances in reaching a contextually sensitive judgment" (ALI 2015d, Comment, 1-2).

experiences of those involved in the assent and those that thereafter judge its consequences. Consent is embedded in context—that is its meaning cannot be extracted from itself (the affirmation) but by the circumstances in which it occurs. Consent, then, becomes a function of a judgment of the meaning of the quality of the relationship (however long or brief) among the parties leading to the acts that might constitute affirmation or its negation. It is spoken in the language of risk ("disregards a substantial and unjustifiable risk that the other person has not given consent to such act") (ALI 2015d, §213.2, p. 4).

Continued dissatisfaction prompted the Reporters to produce another explanatory memorandum, this time "On the State of the Law of Consent" (ALI 2016b). The issue was the basis for counting states whose jurisprudence incorporated in some way the affirmative consent doctrine, either by defining consent in some manner related to affirmative consent or defining an element of liability for penetration as the absence of affirmative consent. The analysis exposed the difficulty of answering this question without interpretive leaps. "In sum, the variety of judgment calls necessary to tally "affirmative consent" can lead to legitimate disagreement about the way to categorize the 32 American jurisdictions that define consent" (ALI 2016b, 4). Meaning making becomes more elusive where the meaning depends on the way in which one approaches the evidence for its foundation. Exposure here undermined signification coherence and thus the power of the definition put forward by the Reporters, exposing it for its normative objectives. Along with the Memorandum can a slight revision to the proposed definition. That revision eliminated the "totality of the circumstances" language of §213.0(3)(a) and substituted "under the context of all the circumstances" (ALI 2016a).

By March 2016 yet another round of substantial revisions. Preliminary Draft No. 6 (ALI 2016c) acknowledged the movement from *affirmative consent* in the original draft to *contextual consent* presented in 2015. After further modification, what would become the bulk of the final form of the provisions for consent were presented to the ALI members as Tentative Draft No. 2 (15 April 2016) (ALI 2016d).

> (3) "Consent"
>
> (a) "Consent" means a person's behavior, including words and conduct—both action and inaction—that communicates the person's willingness to engage in a specific act of sexual penetration or sexual contact.

(b) Notwithstanding subsection (3)(a) of this Section, behavior does not constitute consent when it is the result of conduct specifically prohibited by Sections [reserved].
(c) Consent may be express, or it may be inferred from a person's behavior. Neither verbal nor physical resistance is required to establish the absence of consent; the person's behavior must be assessed in the context of all the circumstances to determine whether the person has consented.
(d) Consent may be revoked any time before or during the act of sexual penetration or sexual contact, by behavior communicating that the person is no longer willing. A clear verbal refusal—such as "No," "Stop," or "Don't"—suffices to establish the lack of consent. A clear verbal refusal also suffices to withdraw previously communicated willingness in the absence of subsequent behavior that communicates willingness before the sexual act occurs. (ALI 2016d, 1)

At the 2016 meeting of ALI, an additional modification was proposed and approved by the membership. As amended the ALI formally approved a final version of the definition of consent as §213.0(4) (ALI 2017, Reporters' Memorandum, xvii). In this form the definition appeared in Tentative Daft No. 3 (ALI 2017, 51). It underwent additional changes and renumbering, appearing in its current final form as §213.0(2)(d) in Tentative Draft No. 4 (18 August 2020), the provision reads in full as follows:

(d) "Consent"
(i) "Consent" for purposes of Article 213 means a person's willingness to engage in a specific act of sexual penetration or sexual contact.
(ii) Consent may be express or it may be inferred from behavior—both action and inaction—in the context of all the circumstances.
(iii) Neither verbal nor physical resistance is required to establish that consent is lacking, but their absence may be considered, in the context of all the circumstances, in determining whether there was consent.
(iv) Notwithstanding subsection (2)(d)(ii) of this Section, consent is ineffective when given by a person incompetent to consent or under circumstances precluding the free exercise of consent, as provided in Sections 213.1, 213.2, 213.3, 213.4, 213.5, 213.7, 213.8, and 213.9.
(v) Consent may be revoked or withdrawn any time before or during the act of sexual penetration, oral sex, or sexual contact. A clear verbal

> refusal—such as "No," "Stop," or "Don't"—establishes the lack of consent or the revocation or withdrawal of previous consent. Lack of consent or revocation or withdrawal of consent may be overridden by subsequent consent given prior to the act of sexual penetration, oral sex, or sexual contact (ALI 2020, 14).

Contextual, dynamic consent now becomes the center of meaning for determining the character of consent as lawful or illicit. Consent becomes a sign, signifying by act the object's intent ("a person's consent is something that a person does that communicates what the person intends or feels, not that intention or feeling") (ALI 2020, Comment). Statutory meaning becomes the operative element (ALI 2020, 2-5). But that meaning within the definition of consent s then embedded within a broader framework in which the power to freely consent is deemed to be precluded. These include all of the provisions covered by sexual assault. Excluded are §213.6 (Sexual Assault in the Absence of Consent), and §213.10 (Affirmative Defense of Explicit Prior Permission). The effect, then, might be to relegate consent to a secondary issue—the primary issue being, in every case, whether the circumstances permitted the lawful exercise of consent. Or put another way, the structure of the consent definition reimposes the original affirmative consent requirements of the initial drafts but now through the back door of reducing the scope of the licit consent.[47]

It followed that even in its final form, the definition produced substantial criticism among the ALI membership. Much of the criticism, though, shifted from the definition of consent to the grading of offenses. The issue, however, was the same—the extent to which efforts to protect autonomy by shifting the risk to those who engage in defined acts, produce traps for the unwary and reduces sexual activity to strategic interplay of shifting responsibility.[48] More importantly, debate now shifted to the exception

[47] For example with respect to Offensive Sexual Contact (§213.7) "But what distinguishes culpable from nonculpable sexual 13 contact is not just that it lacks consent or occurred under impermissible circumstances, but also that the actor has an awareness of that lack of consent or those circumstances." [ALI 2020, 276 (Issues of vulnerability)].

[48] Memorandum to ALI Director, Deputy Director, Project Reporters, Council and Members (18 May 2017). "It is no longer possible to be surprised that outside reviewers have criticized this project and its drafts as 'a game of Whack-a-Mole' that reshuffles the old deck of ideas rather than propose new solutions to the problems that have been identified. "ALI critics of the sexual assault proposal could not be faulted for feeling as if they are in a game of Whack-a-Mole." (Cole 2016, 5)

provided in new §213.0(4)(d), which threatened to become the exception which made the rule. For example, the use of a "knowingly or recklessly" standard in the definition of forcible rape (§213.1).[49] The insertion of specific exceptions was also criticized for creating additional risk shifting that effectively discouraged intimate activity. For example, the provisions touching on sexual assault on vulnerable persons was criticized for substituting a "substantial risk" standard for a consent standard.[50] In the end, the protagonists and their opponents continue to battle over the understanding of licit and illicit sexual activity within a context in which the traditional structures within which those notions were given meaning—chastity and marriage (between a man and a woman)—and given way to principles of personal autonomy and sexual liberation (though still within broad limits of capacity based on age and mental condition and increasingly power relationships). Consent, in this context served as an instrument of this reorientation of societal taboos.

While at the level of the individual it retained its form and function as an act and a thig (permission) given, at the collective level it served as the polestar around which societal sexual order was crafted, and policed. Yet the battle over the political correctness of the choices evidenced the continuing dynamism in societal views of the acceptability of sex, and the sexualization of relations between humans which, like markets, can only be free when subject to substantial regulation at the margins. One moves here from autonomy and sexual liberation to vulnerability as the organizing principle of law and as the lens through which signs are signified.[51] And in the end

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[49] The issue revolved around whether the *mens rea* applied to the action of force or to the sexual act that followed. The difference was important as the consent element to the sexual act would be effectively eliminated by the act that would be deemed to constitute force. The example: "She says, 'I know that I screamed and slapped him and threatened to file for divorce and sole custody, but when we had sex that night, I thought we were having 'make-up' sex after the fight. It never occurred to me that he would say my behavior 'caused' him to have sex with me. Result under TD3: She is guilty of forcible rape because she 'knowingly' acted (slap) even though she did not know it would 'cause' sexual penetration." [American Law Institute (2017, April 6). Model Penal Code: Sexual Assault and Related Offenses (Tentative Draft No. 3), supra].

[50] Memorandum to ALI Director, Deputy Director, Project Reporters, Council and Members (9 October 2018):"First is that this provision creates criminal liability if the defendant "knows there is a substantial risk" that the other person is incapacitated. The offense is committed even if the other person in fact is not incapacitated because no element of the crime requires incapacity. If you know there is a "substantial risk" the other person has been drinking and might be "unable to communicate unwillingness," you are guilty even if the other person is not actually incapacitated".

[51] Cf. Fineman & Grear (2013) seeking to consider vulnerability in place of the autonomous liberal subject at the center of law and politics. This is a concept compatible with one of the Reporters' academic

the Reporters appear to have gotten what they wanted—the adoption oof an effective standard of affirmative consent, written into the law of sexual relations mediated by the state.

4. The Janus Face of Political Correctness in the Significs of Consent.

The long road from the initial draft of a definition for consent in 2012 to its final version in 2020 nicely illustrate the complexities the aggregations which incarnate not just a single faced God, but a God with two faces, and of two minds—each looking fixedly but in opposite directions, neither conscious of what the other sees, and each endlessly intent on pushing away from the other even where such an effort produces nothing. The ALI project reminds that society must be ordered, the way that humanity orders the world around it (Cf. Linnaeus 1964), including curiously humanity within it on the basis of sex,[52] and that in that ordering reveal the way that the abstract shapes the way that society sees the things and values the actions around it (see Foucault 1994).[53] In that context, political correctness implies the power to impose an orthodoxy, a way of seeing, and of believing in the truth of what is seen, on others. It is itself the label used to reveal the means by which individuals are embedded in a social system that rewards and punishes based on fidelity to a specific way of encountering (and responding) to the world. The ALI Project reminds us that at its heart, the search for a taxonomy of consent, and its application to the lied realities of societally embedded individuals is a political act, an act of coercion, and an expression of moral-political power to enforce of way of seeing things and bringing people closer toward an ideal based on a classification system that orders (sexual) activity along a spectrum of value.

In the name of the embrace of personal autonomy and sexual liberation the drafters of the definition of consent, within the broader context of pro-

resonates, though one speaks the language of vulnerability and the other the language of affirmative consent. See, Schulhofer (1998).

[52] For a delightful and profound discussion, see Steinbrügge (1995).

[53] Critically, here: "On what 'table', according to what grid of identities, similitudes, analogies, have we become accustomed to sort out so many different and similar things? . . . For it is not a question of linking consequences, but of grouping and isolating, of analyzing, of matching and pigeon-holing concrete contents; there is nothing more tentative, nothing more empirical. . . than the process of establishing an order among things." (Foucault 1994, xxi).

ducing an ecology of (illicit) sexual conduct regulation produced a scheme in which consent, in all of its definitional glory was submerged within a matrix of exclusions designed to advance the notion of vulnerability at the core of liberation. What sexual liberation produced, then, was the need for greater protection of the liberated from the failures of their own powers to effectively consent. The other road—to enhance the effectiveness of that power, and to permit is exercise, was never considered.[54] Put differently, sexual liberation was advanced by the definition of consent. But state paternalism was advanced (reducing the scope and effectiveness of consent in many contexts) by embracing notions of vulnerability and with it concepts that suggested substantial limits to the purity necessary to make a free and fully informed assent (Travis 2019). The vulnerable may consent, but like children and the incapacitates, that consent is necessarily (in the eyes of the state) illicit (Chamallas 1988).[55] Freedom, then, means acceptance of a fundamental notion that one is vulnerable, and vulnerability that one is never truly free but always embedded within the webs of power that may only be sorted and managed through the superior authority of the state. What was at issue, then, was the semiotics of the autonomous liberal person, expressed through action and embedded within a dynamic communal web of relationships over which those with the power to do so sought (as they have for centuries in the West) invoked the power of the state to direct.[56] It was to the politics of the ordering of that web that the battle over consent contributed.

Consent, then, defines the (small) space within which the individual is deemed free to exercise her liberation as a series of well constrained discretionary decisions. Yet, in the definition of the "correct" meaning of consent, the ALI, over the course of eight years of battles, also sought to define that (much larger) societal space in which consent was reserved not to the individual, but to the state. This represented not a revolution but rather, as the Reporters and the high officials noted at the outset of the project n 2012, a rearrangement of

[54] Cf. Camille Paglia; "The recent trend in feminism, notably in sexual harassment policy, has been to over rely on regulation and legislation rather than to promote personal responsibility. Women must not become wards and suppliants of authority figures. Freedom means rejecting dependency." (1988, xii).

[55] "Rules intended to foster sexual freedom for women cannot unreflectively judge the propriety of sex by the acquiescence of individual women. The risk is too great that acquiescence reflects inequality, not free choice." (Chamallas 1988, 862).

[56] From the perspective of vulnerability, see, e.g., Gilson (2013, 213).

that space reserved for the exercise of individual choice. It was not surprising, then, that over the course of eight years, consent became more sharply drawn as an object the meaning of which could only be constructed through the addition of appropriate modifiers. Consent could be "affirmative." At the opposite end of the spectrum was "nonconsent"—the absence of consent. In the middle existed a large range of consent, the character of which—as licit or illicit--was determined by the context in which it was given. The state was designated as the arbiter of those judgments (an office now long held by the sovereign, and will virtually unchallenged authority since religious and societal institutions in the West ceded formal control). Over the course of eight years, then, consent became the object of adjectives and modifiers. Its firstness exposed by the mechanics of rhetorical signification of consent as an object (and as the fundamental pure state of assent).

Consent, then, was transformed from an action into the ultimate objective representation (the sign) of liberation and of autonomy. It expressed a philosophy of sex (Marino 2014) that was manifested in an object (consent) that itself was manifested by an action (consent), the purity of which was the responsibility of the state to detect and protect—on the basis of its philosophy of sex. Consent, the ALI Reporters explained in 2012, must serve as the fundamental basis for ordering the law of sexual assault. It became both thing and the encapsulation of an ideal set of narratives of *pure* intimate relations among individuals;[57] not yet with non-humans for that appeared still a step too far.[58] There is irony here, of course. In some respects, one returns here to the ancient foundation of meaning making within which consent plays a subsidiary role—the social purpose of intimate contact. What separates the ALI Reporters from Aquinas (Milhaven 1977), or from Foucault (1990), is merely a moral-political stance grounded in peculiar values and an ideological adherence to a view of the "natural" (Mortimer-Sandilands, C. & Erickson 2010). And the natural in this case applies not merely to sex, but to the concept of consent as object (the assent), as a sign (the expression of the ideologies of autonomy, liberation and vulnerability manifested in the object), as a

[57] "The law of sex, however, can operate as a value generating force when those who create or are governed by it perceive in the law an underlying vision of appropriate sexual conduct" (Chamallas 1988, 777).

[58] This falls within a broader and ancient construction of the meaning of nature and the natural—again as a semiotic construction of signification drawn out of the extraction of meaning from things and action which are invested with significance. See, e g., Garlick (2009).

communication of meaning (here the nexus between the communication of consent and its receipt by another party, and thereafter the meaning given to that ritual of the delivery and receipt of consent adjudged by the community of meaning makers through law or societal consequential systems). This can be expressed as morals, religion, science, or societal expectation (see Backer 1993). But the irony in the case of the ALI's Reporters, is the insistence on cloaking what is the delegation of autonomy from the individual to the state in a discourse of liberation and autonomy now constrained by an overarching doctrine of vulnerability. This effectively cultivated a false illusion of free will (Nietzsche 1888/2016, 41-42.[59]

The eight years of struggle for the control of the meaning of consent, thus, evidenced a much more basic struggle for control of the moral-ideological basis through which intimate interactions could be judged, rewarded or condemned. It remains a struggle for the control, and the performance, of will. Affirmative consent, and the expansion (or contraction) of nonconsent, represented a moral political view based on the ideal of equals engaging in unambiguous communicative foreplay of a quantity and form sufficient to provide the bed on which their subsequent physical (and perhaps psychological) intimacy might be consummated. But contextual consent provided only a difference in form but not in function to that role. But the difference could be critical.[60] Each substantially affected the communal expectations, the meaning making rituals necessary to produce a licit intimacy that reaffirmed societal expectations. Contextual consent continued to embed determinations in the interpretation of acts against societal expectations. Affirmative consent was more abstract—it judged actions against its own ideals.

That in the end the political forces of affirmative consent appeared to win the day on the field of moral-ideological battle the control of the ideal might serve more as an aspirational ideal than the expression of communal practice. On that basis, the ALI project, as it expressly stated, acquired a Leninist tinge (Stalin 1953, esp. Ch. 8). That is, the Reporters constituted themselves the mouthpieces of a vanguard organization whose role was to use the levers of

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[59] "The doctrine of the will was invented principally for the purpose of punishment,—that is to say, with the intention of tracing guilt. The whole of ancient psychology, or the psychology of the will, is the outcome of the fact that its originators, who were the priests at the head of ancient communities, wanted to create for themselves a right to administer punishments" (Nietzsche 1888/2016, 42).

[60] Cf., Grello et al. (2006). Of great interest are the assumptions underlying the structuring of the analysis, assumptions that review a moral-political lens through which assessment may be undertaken.

power at their disposal to change (to better engineer) societal practices by controlling the ideals against which these would be measured and through which punishments and rewards would be applied. That is Western style Leninism practiced by an elite social, political, and moral leading force. And it is against this that the other, reactive factions within ALI reacted, and reacted strongly. The politically "correct" then, was a central element of the discussions. And it was this Western style Leninism, the forefront of which appear to be academics seeking implementation of their (published) vision for society and the political order, that was the subject of intense criticism by those who sought greater connection with (evolving) custos and traditions and offered the contextual consent principle (eventually undermined by the exceptions carved into its application in the normative sections of the Sexual Assault provisions.

The battles over control, then, were fought in the shadow of idealized narratives of societal expectations—of its evolving customs and traditions. These served as the baseline against which the ALI vanguard might push (forward—always forward—in the stye of Western discourse) and as the shield that might be used to effectively resist this forward thrusting. Here another element becomes decisive—the scientism (Stenmark 2001) that marks advanced Enlightenment society. In the case of the battle over the meaning of consent, however, that focus was on the social sciences. And thus, the ALI debates were marked by invocations of the techniques and sensibilities of social sciences—its ideologies of empirics (Hyslop-Margison & Naseem 2007), along with the constraints imposed by the assumptions and principles which structure the "scientific" approach of social science in their search for "truth" in data (see Backer 2018). The Reporters began the project with an appeal to data—carefully curated to serve their purpose—the customs and traditions of the nation had changed, reality was at variance with the idealized expectations embedded in legal rule, and the resulting dissonance required cure. The irony, of course, was that the modified idea they proffered was itself subject to the same criticism and on the same basis (De Haan 2013). The greater irony was the quite carefully narrow skepticism of scientism that appeared in the work of at least one of the Reporters.[61]

[61] See Murphy (2015). Yet there was no irony here. Indeed, the framework proposed fit in nicely with the approach adopted in the ALI approach to consent and its embedding within the substantive provisions of §213. It issue was misuse rather than use and thus a fight among experts over the semiotic meaning of truth of the absolutes that science might provide in shaping social meaning and judgment.

More importantly, perhaps, was the battle of the illustrations. These produced a critical space from which meaning could be extracted and insights generalized that was framed around two approaches to the construction of facts to support ideal—that is to the signification of narrative objects in the advancement of a specific construction of meaning. These two sorts of approaches to supporting "facts" suggest an interesting division in the way that reality was offered for the consumption of meaning. On the one hand, there was a substantial reliance on abstract truth from data. This was represented by the product of data driven aggregations of "little" or "discrete" truths into one larger "truth" that could then be folded back onto the universe of discrete truths. This was the realm of modeling, of what Foucault referred a generation ago as statistics[62] constructing a population from out of the aggregations of its offal—the data it left in the aftermath of its actions. On the other was the reliance on storytelling, now deeply embedded in the culture of lawmaking in the West, and its rebellion against the appearance (at least) of legal discourse (Massaro 1988; Baron & Epstein 1997). This is the realm of anecdote, but a strategic and essentializing collection of anecdotes that are meant to make (collective) meaning obvious. It elevates data out of abstraction and into context. It is based on the idea that stories reveal the essence of the truth within them, and that truth can be transposed (replicated) among classes of stories (Oderberg 2007; Ellis 2001). It is meant to produce the representation of the ideal type—the ideal person and the ideal situation in which actions occurs.[63] It works like data aggregation in that sense: that the essence of the story is the fact that when aggregated reveals collective truth (as meaning) that can then be folded back onto the population of truth makers.

Illustration was essential to the ALI project—both hiding and exposing the injection of meaning in terms such as consent (constrained by its modifiers), as well as managing away from its meaning (shrinking its scope) by the collection of illustrations within distinct (expanding and contracting scope) provisions. Storytelling was particularly effective in its use against the imposition of the affirmative consent standard advanced by the Reporters. But then the Reporters used storytelling as effectively

[62] Discussed in Mader (2007).

[63] American courts have a long history of constructing, and lawyers have a significant role in the construction of ideal types through which law is applied to particular litigants. It serves as a means of both stripping the individual of singularity and of imposing a meaning on her. See Backer (1996).

to rip large areas of activity from the realm of contextual consent back to functional affirmative consent regimes within the substantive provisions of sexual assault. And, indeed, the essence of the definition of consent (and especially the borderlands between consent and its modifiers in the substantive provisions of § 213) was deliberately constructed to invite judicial tweaking of the sort that the American legal system appears to have developed a substantial appetite, especially in the area of the regulation of sexual conduct (Backer 1998).

Lastly, the *problematique* would be incomplete without reference to a fundamental mechanics driving the system: risk. There are two levels of risk allocation and risk shifting that produces a consequential significs on the concept of consent as sign. Law serves as a risk router.[64] Sexual conduct regulation was structured as a risk-reward system framed through law. Traditionally the risk fell to the idealized chaste woman. That created certain incentives—virginity, chastity, and the avoidance of situations that might put her "in danger" of men who were not spouses or family members. Law was crafted to enforce the benefits of this risk framework. Consent can be understood, in this sense, as a sign of risk, to the benefit of patriarchy, and one easily adjusted to changes in the expression or parameters of patriarchy. This was well understood by the ALI Reporters. They did not object to the framework (which would have perhaps moved them more toward an autonomy liberty model grounded in the individual), but rather to the way in which risk was allocated (Schulhofer 1998). They effectively proposed an inversion.

> With their revised code, Schulhofer and Murphy recognize that at times, the expression of consent is ambiguous; one person may think there is a risk that consent was lacking, but choose to disregard that concern. They propose that the harm of the mistake fall on the person who proceeded in the face of uncertainty, rather than on the other person. "The hope is that the law will encourage people to clear up ambiguity," says Murphy, "instead of shielding those who take advantage of ambiguity." (NYU Law 2015)

[64] See, e.g., Fletcher (1972). He identifies two ideological viewpoints for embedding meaning in risk routing—a principle of reciprocity and one of utility. A third might also be posited—a principle of incentive. See, e.g., Garber (2000); Cooter (1988).

The risk shifting occurs at two levels. The first is at the level of individual choices. Those engaging in sexual activity are invited to be risk averse in the face of ambiguity. And yet the great irony is that this nudging towards a constant state of risk aversion is applied to an area of human conduct, sexual intimacy, much of which is grounded in ambiguity. The result takes society back from principles of sexual liberation to those of sexual confinement. Confinement is no longer within the boundaries of the state of marriage, but now within those of affirmative consent (as noun). In the absence of safe harbors, the risk of sex becomes significant and is held by those with the power to control ambiguity. The second is at the level of social choices. Those engaging in sexual intimacy effectively agree that the state may, at the instance of any party (or the state) have the nature of their sexual interactions reviewed for compliance with societal expectation by the courts. Here even a risk averse individual may find herself on the wrong side of consent if after the fact the court determines that her reading of societal cues, however conservative, did not meet societal expectations and standards. This double risk shifting—decisions made ex ante by the individuals and made for the individual post hoc by the courts (as societal organs) ensure enforcement of emerging societal taboos (now grounded in notions of vulnerability) and reinforce value systems, through exercises in the art of informed discretionary decision making infused by ordering ideology (see Backer 1998). The risk, though, is the continuing replication of (now inverted) structures of gender hierarchies and stereotyping (Klein 1996), compounded by the reductionism inherent in strategically utilized statistics.

And its semiotics? Consent becomes the vessel through which the social value of personal choices are developed and the metaphor through which risk is signaled. Consent has now become engorged with significance. It signifies action—an assent, but one bound up in a complex web of modifiers each bearing on the relation of those who act with the authority of the action. It signifies a thing—the four corners of the permission, of the assent, itself. But it signifies more than that; it signifies an acceptance of the structures of risk associated with the reception of consent from another to whom ownership of both action and thing has been ceded. whose "ownership" has been ceded to another. That reception is then adjudged both by the actors and society for its legitimacy, for the authority to make it, and for the identity between the consent and the actions that follow. These significations then point to the construction of meaning of which the meaning of consent is merely an

affirmation—of the extent of individual autonomy, of the judging of context, on the authority of storytelling, on the value of statistics in ordering a reality used to apply and mold generalized meaning onto individual activity, and on the character and taste of society for acts of (sexual) intimacy.

5. Conclusion.

One can conclude, then, by a return to the fundamental *problematique* posed by consent—and consent especially in the context of intimate relations—or that is to say in the manifestation of state power to divide intimate relations into the realms of the licit and the illicit (as it has since the formation of society). One deals here not with the abstract issue of giving meaning its due to words. But words themselves, as especially consent in the context of sexual intimacy, opens the interpretive doorway to the process of making ideal social relations. Social order requires orthodoxy—it requires the politically correct—and a ruthlessness in its application. When a specific world view loses its authority over a population, vanguards appoint themselves (as the ALI is of a habit of doing since its formation, and from a political perspective rightly so given the societal realities of our political-moral system) champions of reframing that orthodoxy. That is what the ALI Reporters attempted here. And they will drag the rest of society along with them to the extent they retain a large enough (and influential enough) well placed vanguard of like-minded elites to make this possible. But orthodoxy is selective—and it carries with it its own seeds of resistance. The ALI Reporters have offered American society (social) vulnerability and the state (again) as *parens patriae*. Against that another political correctness appears at the margins—rejected for the moment but still potent—that of individual autonomy and liberation.

These conflicts were played out in the conflict over the role and meaning of consent in the context of the criminal regulation of sexual assault (as well as in the understanding of those terms). This short essay used the framework of semiotics, of legal meaning making, as a structure for extracting the complexities and stakes involved in the simple exercise of finding consensus on the meaning of consent. It took as its starting and end point the idea that *free consent is the product of a process of management that reduces consent to the sum of status and authority over the thing assented.* It situated that analysis in concepts of taboo, and of the objectification and signification of

terms that both embody and abstract the realities of societal practices and predilections—to the extent those could also be mined. The ALI's eight year project to develop a new law of sexual assault grounded in notions (highly contested) of consent provided the basis for this exploration. It then illustrated the way that semiotic meaning making produces a political correctness that produces paradox by critically chronicling the meaning of consent respecting sexual intimacy in criminal law. It enhances sexual liberation by placing it within a cage of limitations that ultimately transfers the power over consent from the individual to the state. That meaning making suggested the way that consent as an act, and as a state of being, is transposed to the broader context of political economic relations.

> Law, then, does not merely make the world within which it exists; it does more. To make the world requires two distinct forms of action. The first, and the usual subject of lawyers, is to fill the world with substance. . . The second, sometimes the object of lawyers, and central to the tasks of judges and legislators. . . is the task of making and protecting the boundaries of this world law makes. (Broekman & Backer 2013, vii)

The ALI has reset the machinery of meaning making; it will be for others to observe (and to contribute each in their own ways) to the inevitable collisions of this impost on of meaning to those built one action at a time by the individuals who exist disaggregated from the process of aggregated meaning making that process both the certainty of law and its uncertain application and embedding in the lives of the individuals touched by it.

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The Risky Temptation Of Wanting to be the Legislator of Language

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ABSTRACT

In criticizing the modern, rationalistic temptation to legislate on language, this article argues that issues of "political correctness" are an aspect of the eternal problem of definitions in law. This problem has in its turn profound connections, on the one hand, with the need, entirely human, for a correct (not one-sided or arbitrary) relationship with reality; and, on the other hand, with the insidious attempt – which is all the same typically human – to deny reality, with its conflicts and ambiguities, and to replace it with a false, less challenging reality of "objective" certainties. In law, the problem of definitions has historically followed many and different itineraries; this article briefly traces some of them, trying to show that the ideal of an objective definition – an ideal epitomized in the "norm" idealized by legal positivism – has always co-existed, in the legal experience, with the different ideal of a subjective definition (dialectical, controversial, negative, and refutative), of which the ancient maxims of equity, the *regulae iuris*, offer a model. Thus, the problem of legal definitions in law is a matter of forms of reason that confront each other throughout the history of law, the one investing on a calculating and instrumental rationality, the other relying on a more porous and flexible reason. In the legacy of the second point of view – which, the article maintains, has more than one analogy with the paths of contemporary Feminist "Radical" Thought – antidotes can be found to the temptation to legislate on language, which is risky. If objectivity tries to suppress subjectivity, in fact, this is in the name of the illusion that problems troubling the human conditions can be fixed, defined, and solved once and for all. It is instead the open texture of these problems, which cannot be defined once and for all, which encourages the work of language and thought. And the latter are the resources for a living together really capable of freedom and equality, of change and future.

KEYWORDS:

political correctness, sex, gender, feminism, norms and rules, legal definitions, legal maxims, *regulae iuris*

1. Quarrelling about Words. – The list of politically incorrect words is increasing; recently, the term "woman" has joined the group. It may be argued indeed that this word reflects a cultural construct ("woman" is not but a role socially ascribed to a biological sex) which has exclusionary effects, particularly towards those who, although biologically female, do not recognize themselves in the corresponding social role, as it is in the case of transgender people. Therefore, the word "woman" should give way – in some contexts at least (as in medical or statistical analyses and reports) – to more inclusive words, such as "individuals with a cervix", or "people who menstruate"[1].

It makes sense, however, that medical research on cervical cancer targets those who have a cervix, independently from whether or not they perceive/express themselves as women. But it is nevertheless a fact, that as far as male persons are concerned, no comparable new linguistic uses have been until now signaled to the public opinion (assuming that they exist). No one has never heard of medical research on prostate cancer investigating "individuals with a prostate"; and the word "man" is not accused to be exclusionary, or, at least, it is not accused so loudly as "woman" is (more precisely, and as I will recall in the following, "man" is, if anything, accused of being exclusionary to the extent that it is coupled with "woman" to designate an allegedly natural sexual binarism).

"Radical feminists" claim that the attack toward the word "woman" has a symbolical scope, because it attempts to cancel, with the word that designates it, the female subjectivity. The latter, historically, has assumed a texture just through the choice of concrete women of saying "I am a woman", putting into discussion, by this means, the neutrality of the "subject" built on a male subjectivity proposed as universal, whilst it does not include the female experience (Ferrando 2017, 211).

Comparable linguistic issues are emerging in relation to the terms "homosexual" and "transsexual". In Italy, a law project is under parliamentary exam, aiming to introduce, according to its original intentions at least, the crime of homophobia and transphobia. The text that has been actually submitted to Parliament and started the exam in August 2020, however, does not

[1] In the first half of 2020, the guidance of the American Cancer Association addressed to "individuals with a cervix" was reported by the CNN; a website used the expression 'people who menstruate' when describing new equality needs following the Covid-19 pandemic. A large debate spread around both tweets, particularly after J.K. Rowling posted an opinion article which costed to the Harry Potter's author the accuse of transphobia.

mention homosexuality nor trans-sexuality. Instead, it punishes incitement to hate and discrimination on the ground of "sex, gender, sexual orientation, gender identity". Like the word "woman", the words "homosexuality" and "transsexuality" are deemed exclusionary.

In the parliamentary debate, spokesman Mr. Zan, drawing on a Foucault-Derrida style vocabulary, explained that, because the new law is a matter of "devices", it must adopt the most inclusive possible definitions[2]. Arguably, the words sex, gender, sexual orientation and gender identity adopted by the law refers to gender-neutral concepts rotating around, on the one hand, of the definition of sex as a merely "biological" aspect of a person, and, on the other hand, of the notion of gender, which indicates the social roles connected to a given sex (Niccolai 2020, 6). Gender studies teach that "gender identity" pertains to the "internal perception" of belonging to one of the two "genders" or to none of them, and, that, on the whole, people can be or cis-gender or trans-gender persons. Cisgenders manifest themselves conforming to social roles and expectation connected with their biological sex. Transgenders are the non-conforming ones.

The notions of cisgender and transgender people do provide a bipartition of humanity that should take the place of the bipartition male/female, which is deemed discriminatory (because loaded with sexual binarism and mandatory heterosexuality), and scientifically wrong (because not correspondent to the plural manifestations of sexual identities). Many words common in language ("mother", to say one) are in this light condemnable.

2. Constitutional Cultures and Feminist Cultures (in Italy). – Reducing sex to mere biology is certainly a novelty, at least for the Italian legal culture. Art. 3 of the Italian Constitution (enforced in 1948) prevents the law from introducing any discrimination on the ground of sex and, according to the Italian Constitutional Court, "sex" has a profound psychological and social meaning, it is not only "biological". The Court considers the "sexual identity" a fundamental constitutional good, pertaining to the "free development of personality" (It. Const. Art. 2).

The understanding of "sex" as not limited to biology which distinguishes Italian Law is an interesting example of the encounter between constitutional

[2] Detailed documentation on the reported law project (T.U. 107-569-868-2171-2255) can be found at the Italian Chamber of Deputies website (www.camera.it).

cultures and feminist cultures (Di Martino 2020). "Sex" is in fact a word highly valued also by the most important Italian feminist movement, known as The Thought of the Sexual Difference or The Thought of the Symbolic, the Italian "radical" feminism (Fanciullacci 2019, 111)[3]. This feminist conception understands "sex" as a history and a genealogy, with which every woman, being born woman, finds herself *in relation*; a living matter of vicissitudes and contingencies, that each woman can take upon herself, of which she can make what she wants, but which she cannot leave aside, ignore, deny. Not without paying the cost of *alienation*; the cost of losing the contact with reality, and, together with the latter, the strength to modify it.

Convinced that transforming reality depends on the capability of staying anchored to it, the Feminism of the Symbolic promotes the "free sense of the sexual difference": everybody can take on their sex and can leverage it in order to become other, to introduce the unexpected, the diverse.

It is fairly difficult to think this way, however, when sex is fixed at a mute "biological" level and all the rest in any individual is "social construction" (gender). Therefore, exponents of this Feminist Thought oppose to the word "gender" and its derivates. The same goes for some lesbian associations, persuaded that new political correctness in language is bound to cancel lesbian identity and experience under a general label of transgenderism (Gramolini 2020).

Although it arose in the 1960s, the Feminist Thought of the Symbolic has strong connections with the cultural orientations critical towards modernity, or even pre-modern, which this Thought inventively elaborates together with many other components, among which a prominent attention to the unconscious and psychoanalysis.

Thus, the "real", which this Feminism refers to, is clearly rooted in Vico's *verum ipsum factum*. Sex is a word that describes a fact, a reality; but facts are not mere "material given", they are interpreted by living human beings: humans shape the human experience and for that reason "reality" always brings within, with its constants, an opening to something unexpected and new.

The idea that reality exists, but at the same time *it is not all what can exist*, bridges to the Symbolic, a key concept in this feminist thought, where the word, coming from Lacan's vocabulary, also recalls a pre-modern idea

[3] Philosopher Riccardo Fanciullacci is a sensible male interpreter of the Italian Feminist Thought of the Symbolic.

of the notion of "conscience": not a solipsistic dimension but a relational, intersubjective process, which has thereby a degree of "objectivity" and could also be called "intellect".

The Symbolic is thereby the fabric through which the human beings, with the resources of their intellect – sense and reason, memory and imagination – do interact, perceive each other, incessantly modifying these perceptions, by naming their experience, the meaning and value of it. Therefore, changing the meaning (the value), of being a woman entails fighting on the terrain, and with the instruments, of the Symbolic, the first of which is language: "a living language is an always open bargaining in which a shared reality is formed and changed" in contact with life, as the main exponent of this Thought, philosopher Luisa Muraro, puts it (Muraro 2003, 59). In a nutshell, far from thinking that humans are mere social products, this Feminist Thought claims that we are all creative generators of our sociability, which is to say, of our world. This means investing on "the possibility of a subjective thought, capable of thinking the reality of lived experience", which is to say, capable of opening to relations with the others. After all, "being real" means accepting that "reality is never a private property" and it always brings within it the conflicts and pitfalls that come "from the reality of the existence of the other", psychoanalysis reveals (Faccincani 2009, 35). The Feminism of the Symbolic calls "*politics*" these conflicts, through which humans make, and change, the sense and value of their experience (the sense and value of being a woman, for example).

Considering sex not an "essence" but a "quality", this Feminism refuses the accuse of "essentialism"[4] but not the appellative of "radical": it is a radical thought indeed, in that as it goes to the "roots" of the problems (which is to say, in the literal meaning of the term), as Fanciullacci (2019, 143) exactly acknowledges, stressing that this Feminism teaches "an alternative" to the dominant idea of politics and political change.

> This alternative consists "in focusing on the potentiality for change offered by single and concrete contexts of relations and experiences, and in keeping into mind that always, at the center of political conflicts, there

[4] "The Thought of Difference is not an absolutization of the fact that I am a woman. Saying 'I am a woman' goes hand in hand with accepting a series of interpretative acts referring to me" (Muraro 2011, 63). The English reader can see on these points Muraro (1994).

> are some "untreatable issues", which is to say issues that will never be settled once and for all by the means of some procedure" (Fanciullacci 2019, 147). From psychoanalysis comes indeed the awareness that reality is a sense (the sense of reality), which stems from the continuous effort to search for a correspondence between words and things but also from the acceptance that such a correspondence will never be absolute, ideally perfect and objectively certain. If it were so, there would be no future, no change, no diverse possibility: the "becoming" would disappear and individuals would fall in the sense of unreality, risking to falling hostages to discourses, that, pretending to take the place of reality, do paralyze the resources for liberty that the effort to "think the reality" entails (Faccincani 2009, 37).

3.Definitions. Or Therapies? – The fascination for the exact, *certain* correspondence between words and things, the fascination for the *right definition* is what emerges resolutely from the discussion on the Italian law's project on homophobia and transphobia and from the global movement aiming at substituting the word "woman" with another, more correct, abstract, objective and neuter; less burdened with history, subjectivity, experience. Those who want to speak of "persons with a cervix", and those who aim at defining (in the most inclusive way) the words "sex", "gender", "sexual orientation", "gender identity" are convinced that a good definition, or a complex of good definitions, can settle not only the problems connected to the redaction and application of a legal text but also a good deal of the problems of our societies. Arguably, such a belief is premised on the convincement that conflicts are problems much more than opportunities, and thereby they need a cure, they must be *treated*: definitions are therapies, and in a late sense, "procedures" (for governing the language, the ideas, the symbolic) granting a "correct" relation between the things and the words, an exact description of reality. At the cost of canceling the evocative strength of the words, and the reality of the subjective experience they relate to[5], which are reduced to mere, erroneous, *opinions*.

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[5] One could say for example that the word "trans-sexual" is linked in the common mind to prostitution and social marginalization and for that it is stigmatizing. In this regard, it is worth mentioning the opinion of the Italian trans activist Porpora Marcasciano, who has reflected on how the freedom and equality for trans people depends on whether theirs is recognized as a "meaningful human experience" (2018, 101); to her, in order to become so, trans people experience's needs history (or a story) that gives sense to it while

In this, there is something troubling, however. No one would deny that, at least from Olympe de Gouges' Declaration of the Rights of Woman (1791) onwards, women have contributed to shape the meaning of the word "woman". Then, it is true or the one or the other thing: or the "political correctness" that considers the word "woman" exclusionary denies feminist struggles, or it equates these latter – and all what they have brought – to the "errors" that characterize the common sense and stain the ordinary language[6].

Looking at the ongoing flourishing of newest and more correct definitions, the jurist cannot help recalling that the problem of definitions goes together with our science from the origins, signaling the different moments of it, in its relationships with the various epochs of the philosophical and political thought. The legislator (not only the Italian one) of the 2000s assumes indeed the same attitude that led modern philosophers (and in their wake the jurists) to mistrust common opinion and the current language, which they regarded as burdened with errors and in need of a scientific purification (or even "epuration").

But jurists have not *always* thought this way.

Everyone knows Javolenus' warning (*Omnis definitio in iure periculosa est*); and even more significant is Paulus' remark, admonishing that a rule should never be taken for granted. If it is *in aliquo vitiata* (under some respects flawed), the rule is better let aside[7]. And when is a rule "flawed"? Arguably, when there is no correspondence between the words it uses and the things

narrating it. Therefore, Marcasciano has advocated the theory of the "Faboulous Identity" of Trans People. According to Marcasciano, trans people should not deny nor remove the origins of trans experience in prostitution and social marginality; instead, they should recognize in the Prostituted Trans the courageous and transgressive "symbolical mothers" of the liberties of all trans. In Marcasciano's ideas does resonate something similar to the views of the Feminist Thought of the Symbolic: being trans is a "fact" (as it is a fact being a woman), but the meaning of this fact is the result of a creative dialectics through which the living experience and the point of view of trans persons (as well as that of women) can shape the sense of the words that name them. Although Marcasciano numbers today among the sustainers of LGTBQ+ instances, it is apparent that the neuter word "trans-gender" severely neutralizes the Faboulous Trans Identity and normalizes the trans experience.

6 Prof. Paola Rudan, a historical of the Modernity, vigorously reacts to these implications of today's suggested setting aside of the word 'woman' (2020). Focusing especially on the Anglo-American feminist debate from the XVII Century to now, Rudan argues that "woman" is a "polemical concept" that takes life from the fights and the transforming social operations that women have practiced in the course of time, particularly the contestation of capitalistic exploitation. Therefore, the suppression of the word "woman" suppresses a criticism, which, internal to the modern concept of subjectivity (neuter because pivoting on the false male universal), also puts in question its capitalistic stamp.

7 These two rules are part of the *regulae iuris*, to which I will refer in the text. In particular, the Paulus' rule opens the Book V of the Digest, *De antiquis regulis iuris*. About the *regulae iuris* see Peter Stein (1966).

which it refers to. In those cases, the rule is not able to respond to a need or to a relation that *exists in the reality*, it loses contact with the latter and, with it, it loses its function of tool to reach an end, which is of actual interest to someone[8]. Artificial concepts are to be avoided and living words are to be preferred, words to which people do attach sense, this was the warning.

Of course, Paulus' remark is true to the extent in which law is seen "*ex parte homini*", as classical jurists did; which is to say *subjectively*, as an instrument, or a means, through which individuals try to reach their ends and thereby they regulate their relations, observing the effects and consequences of the various human (inter-)actions.

The more law is seen *objectively,* which is to say, from the part of the power, from the point of view of the governmental actors that lead the society, the less it is important that a definition, or a rule, concretely serves to a given human being and is meaningful to him[9]. What matters, in this case, is that the rule serves to realize *a social goal* (which can be, among others, that of governing the mentalities, the ways of thinking of people, their sense of needs and of the means apt to satisfy them)[10].

The necessity (or the temptation) to rule on language can thereby be seen as a peculiar propension of the modern, rationalistic conceptions, which see law as an instrument for the reform of society, and the past (which forms a large part of language) as what must be continuously reformed. There is something authoritarian in such an inclination: when adopting "scientific" words and

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[8] In Paulus' maxim, the rule which is said '*in aliquo vitiata*' is the "Catonian rule", according to which a will was valid only it could have been executed at the death of the testator. This made impossible to emancipate a slave by testament (because the *manumissio* demanded the presence of the master). In Paulus' point of view the Catonian Rule on testamentary wills was "*in aliquo vitiate*" because in some concrete cases, like the *mancipatio* of the slave, it did not fit the reasons, for which wills actually exist. According to Paolo, in order to establish if a rule is useful (thus "valid") the jurist must take the point of view of those who make use of the rule.

[9] In today's prevailing "objective" notion of law, an example of rules given to people, notwithstanding these rules can even contravene to individual interests (being tuned on public, general, objective interests) is offered by European anti-discrimination Law (which was born as 'gender' anti-discrimination). Violations of the EU anti-discriminatory law can be denounced not only by those, who feel themselves victim of a discrimination, but also by the EU Commission, as infringements of the duties of the Member States (to implement and respect EU law). Discrimination, in this context, transforms from a subjective harm (of which only the victim can complain: Cerri [1984, 164]) to an objective offense, that is, a harm to an interest of the legal system, that the latter identifies regardless of whether the person concerned feels it as such. About the public or objective nature of EU anti-discrimination law and its functionality to the market economy interests see Somek (2010).

[10] The words I am using (means, ends) can recall Jhering definition of law "as a means to an end" (Jhering 1913, 108); but it goes with no saying that Jhering saw law no longer as a means to individual ends; instead, he portrayed law as an instrument to *cause* people to act functionally to societal ends.

concepts in order to replace those in use in the current language the ruler ensures to itself a space, wherein it can operate without being controlled by the ruled. Common speakers can't control nor the sense neither the scope of words and of concepts that they have not contributed to mold, and once subjected to a process of purification, language does not lose its normative character and its contact with the world of opinions and values does not diminish. What happens instead, is only that *the single value, that is imposed by those who claim to make language more rational, is strengthened* (Giuliani 1953, 189).

Social sciences, particularly sociology, are the best and most willing suppliers of the legislators of the language. It is not by chance if these disciplines were defined "nomothetic". Of course a long time has passed since Wilhelm Windelband in the late 1800s introduced this wording, but social sciences remain "nomothetic" also nowadays, to the extent in which they adhere to the positivistic conviction (an unwavering conviction indeed) that not only there are "laws" that rule society – laws that can be discovered, and must be, in order to condition the development of society – but also that such a work is "scientific" (which is to say "objective", "neutral" and, at the very end, "true" and leading to "certain" results). For example, an Italian gender studies handbook asserts that dissent towards gender theories is rooted in a "kind of thought and reasoning based on an 'intuitive tradition', which is to say a scheme of reasoning pre-critical and pre-scientific" (Ferrari et al. 2017, 15). This is too much a simplistic rhetorical expedient, however, which pretends ignoring that, in the course of time, severe and extremely serious objections have been addressed toward the social sciences, if constructed in a normative way and following criteria still adhering to positivistic methods. To mention a famous one, Horkheimer and Adorno harshly criticized the belief that everything in the human being is determined by life in society, and therefore the humans can be directed, conditioned, entirely shaped with the tools of society (e.g. criminal laws, or social models and theories). Their question was: what does remain, in such a framework, of the very idea of freedom?[11]

The question was precise and it remains unavoidable (it is *radical* indeed); it is so, at least, if one understands "liberty" as the capability of humans of originating the "unforeseen", as the capability of individuals of putting into the world, into reality, something that is not already established by someone

[11] See Adorno and Horkheimer's critique of the "technical reason" (1980, 127 ff.).

else in advance and which stems, instead, from their subjective experience, from the way they interpret it. This is exactly what the Italian "radical" feminism thinks, when it says that the possibility for overcoming social conventions (otherwise called "gender norms") comes from the capability of putting in free words the experience of being born woman[12].

The words addressed by Ateius Capito to Emperor Tiberius: *Tu enim civitatem potes dare hominibus, non verbis*, come straight into mind[13]. Since the very moment it was pronounced, this warning has meant nothing but this: the liberty of language is the liberty of humanity. Because it is the liberty of *thinking* freely, of giving sense and meaning to the experience we live, autonomously from what the power establishes, rules, admits or support. And thereby, it is the liberty to change it.

Likewise, radical feminism, convinced that language is the first tool for subversion[14], thinks that a woman who could no longer say "I am a woman" would lose her liberty to interpreting her experience from within and, by this way, to change the "external", "objective" meaning, the meaning socially attached to what being a woman means. And this would imply a loss of liberty for everyone.

Of course, such a point of view is at odds with the essence, if not of Modernity, of the abuses of Reason to which it can lead, when "Reason" eclipses in the merely "instrumental" conception, according to which the subjective experience has no sense, it does not produce knowledge, it can receive meaning only by the outside (particularly by the means of norms that "define" that experience) and its scope is limited to merely adaptive and calculating operations[15].

4. Another Idea of "Definition" (Antique and Ever New): the Dialectical Definitions. – According to Horkheimer, the modern, instrumental reason

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[12] Instead, positivist conceptions fall into the error of "absolutizing what we know", preventing us from seeing that there is something beyond "the reality constructed with the mediations in force, beyond the 'conventional' reality that reflects only relations of power" (Muraro 2003, 76, 70).

[13] The jurist was recalling that, if it was in the Emperor's power to grant citizenship to individuals, he had no analogous power over their words: see the quotation in Giuliani, who explains: "Law is, like language, something that cannot be changed by the will or whim of those who temporarily hold political power" (1953, 193).

[14] "Speaking a living language is not combining words according to established rules, but inventing always new combinations" (Muraro 2003, 46).

[15] I am referring transparently to Horkheimer's description of the Eclipse of Reason (1969).

perpetrates abuses when it distrusts the subjective/intersubjective experience as a form of knowledge. When the subjective experiences are denied intellect, humans are reduced to the mere objects of norms.

To such abuses, the studies of the Italian law philosopher Alessandro Giuliani propose an antidote. Modernity is corroded by a terrible anxiety for error, Giuliani maintains; the antidote consists in moderating such a destructive anxiety. It is a matter of a better "cohabitation" with our humanity. This latter is surely limited and leads us to error; but, on the other hand, it also gives us the resource, by the means of which we can reduce our errors. This resource is offered mainly by language, which is where we reason and confront each another's opinions and sensations, the meaning of our actions and their value, also in the dimension of time (Giuliani 1975, 25).

We could live better with ourselves, Giuliani says, if instead of distrusting the language, the vehicle of the common opinion, we learned to relate to it critically, but also with confidence. Of such an attitude, Giuliani maintains, the legal experience has been the training ground over the centuries.

Dear to Giuliani is the idea of "dialectical definition", with which he re-reads in an original way the Aristotelian Logic. Aristotle's definition of justice, Giuliani maintains, is a practical example of dialectical definition (Giuliani 1971, 59, 72; 1972, 129). This starts from common opinions conveyed by language, tries to see how they are valid and convincing, and what instead in those opinions deserves to be abandoned. Giuliani argues that, doing so, Aristotle, on the one hand, succeeds in going beyond the idea of a mathematical, quantitative, solely formal idea of justice, which was that of the Pythagoreans, but, on the other hands, he avoids the risk of canceling the valid intuition which is contained in the common opinion; the intuition, logical and emotional at the same time, which recognizes the link between the desire of justice and the desire of revenge (Giuliani 1971, 80).

Giuliani's point is that Aristotle, by putting the definition in a dialectical relation with the common opinion and the ordinary language, succeeds in elaborating a more comprehensive idea of justice; the "justice as reciprocity", which expresses strong isonomic values ("what applies to one applies to the other", [Giuliani 1971, 108]).

It is apparent that, similarly to equity that moderates the rigor of law, the dialectical definition moderates (corrects) those aspects of the common opinion, of what is commonly said, which result, at the examination, less justifiable, which do not resist to confutation (in that they lead to abuse or

excesses, if brought to their consequences). At the same time, however, the dialectical definition does not sweep the common opinion away, because it does not doubt that, being it the common opinion, it has some grounds and can be useful to a better understanding of the thing at stake. There is a great profit in reasoning in this manner: for example, the awareness is kept that we never do justice among angels, but only and always among human beings, who can be (humanly) eager for revenge and who for that reason, or others (the extreme sorrow they feel, for example), can incur in the vice of the "abuse of redress", which is to say in the (abusive) desire of "having more". This is the reason why Giuliani's Aristotle retains that a mathematical, scientifically exact measure of justice, wherein is only up to the will of the offended to establish the right redress (as the Pythagoreans thought), is not reliable. The point of view of others – with its moderating, because dialectical, effect – is instead needed in issues of justice. Only with the help of others (by confronting, debating, reflecting intersubjectively and thus achieving "the degree of objectivity that is possible in the field of opinion", which is the field of human action and relations[16]) we can hopefully find the "right mean", without losing (as it could instead happen to an abstract and formalistic rationalism), the sense of reality, which warns us that justice is rooted in the human passions.

According to Giuliani, the *regulae iuris* – which were at the core of the European common law until the age of codification (and beyond) and are recognizable under many traditional maxims of the Common Law – were in their turn dialectical definitions. To quote a famous example of *regulae* let us just think to *audiatur et altera pars* (listen to the other part).

Giuliani gives the greatest importance to fact that a *regula* originates as an *observation and interpretation of behaviors* (it is the traditional to say that the *regulae* come from a "long series of observations" [Gargiulo 1905, 1]). One can *observe* that a decision taken after having carefully listened to both parts is normally better than one taken unilaterally. The making of a *regula* consists indeed in the operation (mental and linguistical, ethical and social) of assigning value, which is to say *sense*, to human actions and relations (to facts) by other humans who observe these facts and consider their implications and consequences. Fueled by an ethics of reciprocity, a

[16] On these aspects of Giuliani's thought, which draw into Aristotelian themes, see Cerrone (2012, 622), Mootz et al. (2013).

regula is posed by an observer which is impartial, but also involved: a human among humans, plunged in the same reality, of which no one is the master[17].

Then, a *regula* tells what, by the means of an intersubjective exchange, in the course of time, has appeared preferable; in this sense - which is qualitative – a *regula* expresses the probable and the normal. In its turn, a *regula* is never shielded from a dialectics, which verifies its relevance and usefulness to a better understanding of a given problem. Only, who affirms that the normal (the preferable, the probable) does not apply to a given case, has the bound to prove it[18].

For these reasons a *regula* is comparable to a dialectical definition: on the one side the *regula* is shaped with reference to concrete actions and behaviors and to their justifications (all vehicles of opinions expressed in words); on the other side, the *regula* does not prescribe a given conduct, it does not depict a "precise" case and a "certain" consequence expected to be always the same. The *regula* is instead *a position taken*, a choice, in its turn *an opinion*: the opinion which appears the preferable one after a careful, fair debate. It is preferable, for example, that people do not enrich from their frauds (and one easily understands why), as the maxim *Nemo locupletior ex aliena iactura* says. And *regulae* do express the preferable in *negative terms*: they only say what preferably should *not happen*, what preferably should *be avoided* (e.g. the *favor rei* rule means: the judge or the other party in trial should never abuse of the position of inferiority, in which the accused finds himself [Giuliani 1971, 103]). For the rest, it is the responsibility of those who use the rule to ascertain the practical consequences to which it leads in the concreteness of the cases[19].

A *regula* forms itself throughout confutation and negation, in the dispute, by the means of arguments aiming to justify and explain motives and reasons: and a *regula*, which forms itself in the exchange of opinions on what

[17] It is easy to understand the moral inherent to Giuliani's interpretation of the *regulae*: law can be seen as a means for the living together among people rather than as a means for governing over people. The choice among the two alternatives is in its turn a matter of the 'preferable' and Giuliani, who strongly opposes to instrumental conceptions of law, certainly prefers the first.

[18] Then, a *regula* is never true nor false, it is never valid nor invalid: what counts, is whether it is relevant or not to understand a problem (also the Catonian Rule for Paulus was vitiated only in some cases, but valid elsewhere). The *regulae iuris* are a constant reference in Giuliani's work; for some of his opinions, on which I rely particularly in this article, see Giuliani (1953, 17, 119).

[19] The *regulae* express mere advices, not prescriptions, modern Authors critically maintain. Bobbio (1966, 894) condemns for that reason the *regulae* as useless and pointless.

is normal and preferable, is not only not exempted from dialectics, but it is what allows a (fair and constructive) dialectic to take place.

The judicial controversy is then the space of dialectics, and the controversy is made possible by a "commonplace" in relation to which opposite arguments are made confrontable to each other. It is the commonplace indeed, that makes diverse opinions capable of mutually speaking. A *regula* offers a "center of arguments", a "dialogical (topical) agreement" ("the substitute of an ontological order", Giuliani calls it [1975, 29]) and has to be verified not in the light of the true/false alternative, but in the, more ductile, "porous" logic of the relevance: is a *regula* capable of favoring a better understanding of an issue? Has it or not to do with the problem at stake? Then the *regula*, which is dialectical because its making is confutative and justificative, resists to confutation while makes confutation possible, thus opening to change. It accompanies an effort to comprehension, not of *manipulation* of reality. What is the condition that makes all this possible? It is easy to recognize that this is what Vico called *veriloquium*, the mutual commitment to tell one's own *subjective truth*.

5. Do We (Still) Reason in Law? – The *regula* is, in Giuliani's view, an elementary unit of law, and an extremely valuable one. With its etymology rooted in the Latin verb *reor* (I think, I judge, I reason), the *regula* recalls the constitutive connection between law and the human experience, made of conscience and intellect (Giuliani 1953, 197). The "norm", a modern concept (Orestano 1989, 74), is instead the moment of the split between the two. The norm renounces to the demanding engagement required by the *regula*, which is searching the preferable in the debate of opinions and pretends to belong instead to the field of necessity, of what *must* be. Thus the norm wants, so to say, to establish the *true nature* of things, without offering however any help to investigate it and often puts it even out of sight, because, concentrated as it is on the "essence", the norm is not able to be a good companion in the qualitative problems, which are instead (it is a true paradox) the problems typical of law. The fact is that, unlike the norm, a *regula* is loaded with history – with human history – and, bringing with it a great deal of human vicissitudes and contingencies, a *regula* is far more familiar than a norm to the latter, and it is thereby a more ductile instrument for their understanding.

The *regula nemo audiatur allegans turpidudinem suam* (transparently correspondent to the maxim of equity "he who comes to justice must come with clean hands") offer a useful example to clarify this. In Italy, in the XX

Century, the *regula* was interpreted in a modern key, as if it is was a norm. This pushed forward the need to previously establish in a positive, certain and clear way what is *turpis* ("shameful"), and it also brought to understand the rule as a "sanction" against those who perform "shameful acts". Dealing with a *regula* which has (at a rationalistic view) the severe defect of not establishing exactly *what* the *turpitudes* are, and under the pressure of the need to *clearly define* them, in order not to leave any uncertainty and opacity in the law, the Italian scholars stated that "*turpis*" had *necessarily* to do with sexual behavior and with sexual behavior *only* (Rescigno 1966, 175). Such an interpretation of the word was intended to reduce the space of operation of the rule. However, this attempt to define the *regula* as much and as best as possible ended up denying it any space, given that over time the link between *turpitudo* and sexuality has appeared steeped in old-fashioned moralism. Thereby the rule, considered aiming to "sanction" non-conforming sexual behaviors, was set aside and no longer used by Courts.

In the light of the dialectical definition, instead, we can never know "*a priori*", once and for all, what is "*turpis*": we need to make reference to the common sense, to the opinions, as they take relevance in relation to a given act or a concrete revendication, always taking into account the circumstances of time and space, all qualitative aspects. Besides, in the logic of the preferable, it appears clear that the meaning of the rule is not to sanction, punish or impede "*turpitudines*", but to avoid that someone takes advantage from an illicit. The modern approach forgets all of this.

The point is, that by dint of defining the *turpis* and pushing it into the sexual sphere; by dint of wanting to deal with a maxim *as if it were a norm* (that is, as the prescription of certain behaviors to be kept and avoided, and of the related sanctions), a rule has been annulled which, if a morality it expressed, was in the civic field, not in the sexual one. In fact, in Italy, the *regula* had typically been used until the 1900s against corrupt and fraudulent commercial agreements, detrimental for the community. Interestingly enough, some authors have recently complained that with the disappearance of the maxim, a principle of "morality of the economy" has disappeared, of which the present times seem to be in strong need (Breccia 1999, 218 ff.). This is why I said that the effort to define can lead to losing sight of what a rule is for, what values it underlies; and perhaps this was what Javolenus wanted to communicate to us. Never put a "normative", abstract formulation in the place of the living meaning of a precept, this was his advice.

Javolenus' admonishment notwithstanding, definitions have always been researched in law, and then it is important to understand what the advantage is of so much desired "certain" definitions. If all modern law explains what this advantage is, the merit of fixing the point in the most explicit and neat way goes to the standard bearers of legal positivism. According to them, a definition serves to suppress to the most possible extent the moment of the *reor*, when establishing, observing, applying or interpreting the law. Famously indeed, a legal norm is expected to be a sufficient "reason for action" (without thinking much about), thanks to the "exact" definitions which it gives to an actor, one who is always supposed to operate alone and only in order to "execute" or "apply" a will of the law[20]. On the contrary, a *regula* asks us to reason, and to reason very much and thoroughly, to reason all of us (the ruled as the ruler, the judges as the parties); it asks to us, also, that we reason by taking into account the others, what is out and around us, including what has been said and done before, which is a benchmark for comprehending and valuing our choices, even the non-conforming, unexpected, new. This is the work of a commonplace.

6. The Subversive Strength of Commonplaces. – Parallels can be traced between the mentality premised to a *regulae*-centered idea of law and the views of the Italian Feminism of the Symbolic. To begin with, this latter conceives of the female freedom in a confutative and negative terms, as a sort of a dialectical definition. The Feminism of the Symbolic has always maintained, in fact, that the female freedom (and the freedom in general, indeed) has not a given content, is not definable (it is not, for example, wage-parity or sexual emancipation). If freedom was indeed definable, it would not be liberty at all[21].

Nor is "sex" an *objective* fact, in the Feminist of the Symbolic' view; it is a fabric of history and experience with respect to which one takes a stand, also thanks to the commonplaces that define it. The notion of commonplace

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[20] These theories mirror a "contemporary social life" that results in "making the ability of men to think superfluous", (Weil 1983, 108). I am referring in the text to a recent Italian apology of legal positivism (Civitarese Matteucci 2016, 708).

[21] This is an expressed criticism against the ethical instrumentalism that often accompanies the claim of rights in favor of a social group (in an ethical instrumentalist view, women "deserve" wage-parity, for example, because they are as good as men at working, or because they will make the world better). See among many examples Muraro (2011, 31); Libreria delle donne di Milano (1987, 152). The English reader can see Milan Women's Bookstore Collective (1990).

is crucial for this feminist thought, according to which the words with which I freely express my subjectivity cannot but operate within a commonplace *already* offered by language. In order to say what of new I have to say, I can't but confront "what another has in mind" (Muraro 1991, 68). Are "commonplaces" what makes it possible for me to refute and confute them, because at the other term of a commonplace ("women are inferior to men, they have to stay at home, etc."), I meet someone else to whom I can show, with my words and actions, that things are not like that the commonplace says, that we can modify it. Or, also, that we can find within the commonplace the beginning, the "principle" or the possibility for a different truth, which has not yet been seen and pronounced[22]. At the other end of the commonplace, I meet reality, history, and so, dialectically entering the commonplace, I in turn take part in reality and history. Without the commonplace instead I have no interlocutors, and I carry out a pointless, sophistical debate. Under these conditions my anxiety for freedom can become solipsism, fantasy, if not delirium; it is somewhat confined to *irrelevance*. If I do not want my intellect to be suppressed or made insignificant, in other words, I must attach myself to those social institutions in which the intellect lives and has manifested itself; and one of these, the main one, is the current language, the opinions it conveys, the judgments it makes possible to form and therefore also to modify. Of course, with commitment and effort[23].

Analogies can be traced between this order of ideas and the vision of law premised to the *regulae iuris*. Giuliani stresses that, in the light of the "dialectical reason" from which the *regulae* stem, a fact is never a mere material given, instead, it is always "the assignment of value to something"; a rule is a "testimony"; law is a collective/intersubjective commitment to veracity; and the *regula*, the *locus communis*, is what helps avoid sophistry, i.e. deceptive and fallacious speeches[24]. There is a momentous reason for safeguarding the relationship between law and ordinary language, and both

[22] The Feminism of the Symbolic famously reinvents the *locus communis* 'motherhood is a natural/social destiny for women' finding within it the far different idea that women are the only human beings that have the *liberty* of becoming mothers (Muraro 1991, 111).

[23] "These are the burdens of thought, which are inherent in the very fact that words and things cannot coincide with reality and reality is there to testify itself, but, in order to this testimony exists, it is necessary that the profound crossing of doubt opens up, with its uncertainty, with the pain of lack, with all the insecurity deriving from the absence of any *a priori* guarantee, from the absence of any absolute certainty" (Faccincani 2009, 38).

[24] On these points, that recur many times in Giuliani's work, see esp. (1975, 16).

from an excess of objectifying rationalization: that relationship prevents law from being reduced to "someone's will" and preserves law as "the result of an infinity of choices, of initiatives, of individual compromises"; as "something typically human that cannot be understood unless it is referred to the individual members in their continuous making up the community in which law is effective" (Giuliani 1953, 193). The point is, that there is not much difference between giving oneself rules and giving oneself words: they are different ways of doing the same thing, which is expressing and sharing among us what we think of a thing, a fact or an action, how we judge them, and thus making a living together possible.

All of this is at odds with the rationalistic idea of a Legislator of the Language, with the idea that things can be created with words. This idea is premised on the assumption that things, like words, are mere relative constructs at the basis of which there is not the spontaneous labor for liberty made by subjectivities thinking and feeling, but a rational, and merely instrumental, act of will (or of adaptation). In this second order of ideas – in philosophy, in political thought, as well as in law – the "certain" definition makes its way, taking the place of the lived experience. The success of these views is understandable; the "seductive discourse that claims to replace reality by eliminating its testimony" promises a "security based on the exclusion of fatigue and of the risk of thought, on the claim of a certainty achievable without any emotional travail" (Faccincani 2009, 37). Doing so, however the Legislator of the Language militates against the "subversive force" (to use a Marcuse's expression) of history and memory. A severe danger then looms, when the legislator of language truly believes that its propositions are true. "Subject of the unreal discourse", the legislator is then the "true slave", therefore it cannot but subjugate: "the claim of absolute certainty in fact enchains to a condition of unreality which, enticing us, holds us hostage, acts as a form of slavery" (Faccincani 2009, 38).

7. Reassessing the Concept of Political Correctness. - The "person with cervix", an "objective" concept without history, a definition that does not tell the experience of anybody, militates against "woman", a "confused" concept mixed with the subjective experience of concrete women. It is the same labor of all the "operational" and objective concepts dear to the instrumental reason, in their fight against the "obscure words" like peace, freedom, justice (Marcuse 1966, 114). In the "obscurity" of these words there is the

possibility of opening new horizons; whereas scientific, objective, words, in their "exactness" have no "holes", no "shadows", through which unexpected possibilities can pass. In a too much "exact" word nothing *transitates*, capable of going beyond what has *already* been said, because its "objectivity" nullifies the contact with the lived, subjective experience.

We could therefore say that the advent of the "correct words" that pretend to define "exactly" the sphere of sexuality, brings to completion the trajectory of a form of reason, aiming to the confinement of experience within the limits of a private, irrelevant subjectivism, thus depriving any subjectivity of the first political resource: that of giving sense to reality, starting from one's own experience.

Then, it becomes possible to reverse the problem of the political correctness of the definitions used in the language and sanctioned by the law. Is it "politically correct" for the legislator to establish for you and me how each of us must name our own experience, denying that we have competence, and knowledge, about it? Or is it not true, rather, that this threatens reciprocity and isonomy, and puts in question the fundamental political agreement of a civil coexistence, the principle according to which "what is applies to one applies to the other"?

Indeed, in the law establishing how people must talk (about themselves and their most intimate experiences), in the law committed to denying the current language and the common opinion, we recognize the hard core of beliefs that would seem dated, and that reveal instead to be still current: the equality among the ruled is just an equality *below* the law, which is superior and thinks (and speaks) for all. The "political correctness" would then appear as the ultimate struggle of power against the political force of subjectivities, a struggle that has identified the terrain of sexual difference (and of the conflicts it opens up) as a field to be silenced.

> "But what are you talking about?" One might ask to me. "Don't you know that the very idea of 'sexual difference' is 'essentialist' and we must say 'gender'?"

It is relevant here the opinion of philosopher and publicist Ida Dominijanni who, with reference to the law on hate speech I mentioned at the beginning, has found a very precise reason why the legislator should not use the word

"gender". Because, she writes, it is *a political word*, a *word of struggle*, a word around which and with which many people conflict: feminism and transfeminism, LGTBQ+ movements and "radical feminism", all those who debate on whether this term threatens the free sense of the sexual difference and of the human experience, or it is a tool for more liberty for all (Dominijanni 2020). Let's leave its space to politics, says Dominijanni. She is a Feminist who, by politics, means the conflicts that stir and fill with meaning the human relationships, not the political power that rules *on* these relationships. In her analysis, the drum still rolls of Ateius' warning: "*tu potes civitatem dare, non verbis*".

Dominijanni also reflects on how deeply, in the battle for "exclusionary words" to be banned, the fascinating image of the law as an affirmative instrument of freedom and recognition enters the field (with women today playing the part of the "caste" that must be demolished, as a corollary of heteronormativity). She recalls why Italian feminist thinkers have long warned against the idea that freedom can be created by law[25]. To start with, the "norm" always has a component that is suppressive of freedom, because the norm is supposed to be there to solve, in our place, the basic question of liberty (how should I act?). Of course, this ambiguous promise is great part of the seduction of power: but it has its costs. For example, when we ask the legislator to solve our problems with a law, we can stay certain that the law that will come out of political mediations will resemble little or nothing to the imaginary, ideal law that you or I would have dictated for ourselves; a deeply desired law can then disappoint our deepest aspirations. In Italy, LGTBQ+ associations have already felt disappointed, because an amendment introduced in the draft law on hate speech establishes that all what "falls within the normal pluralism of ideas and lifestyles" cannot be considered a crime. Lastly, one should never forget that a law is a thing that walks by itself, not without unwelcome repercussions. Recently in France, where a legislation similar to that is likely to be introduced in Italy is in force, an official of the Ministry for Equality denounced the author of a feminist book, deemed culpable of misandry[26].

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[25] The theses summarized in the text are all from Libreria delle donne di Milano (1987).

[26] The French government official's attempt to ban Pauline Armange's book *I Hate Men*, is reported for example on the dailymail.co.uk (Jewers 2020).

There is a puzzling truth here: the traditionally stronger subjectivity, the male one, could profit from a law aimed to protect new and diverse subjectivities. After all: who could impede, under the new Italian hate-crimes law, to a group of heterosexual men keen on cultivating their "cis-gender" identity, to close their club to transgenders?

It may be argued (and it will surely be argued): no fear, the good sense of the judge will help avoiding excesses of any sort (and good sense will also be needed, that is sure, also to understand what falls within the "normal pluralism of opinions and lifestyles"). With good sense, the judge will wisely consider the circumstances and the concrete features of each single case; he will take into account the orientations of mentalities and widespread feelings, which are as many indicators of the existence and the extent of an offense or a claim. That will suffice to avoiding abuses, and pure stupidity.

If this is true, this only means that the rationalistic illusion of being able to do without common sense, which is to say of the shared experience, of current language and common opinion – the modern illusion of a lonely, omnipotent mind that governs a society purified from conflicts – is flawed from the start. In the very end, no matter how many rules can be dictated and objectively defined: "the honest man" remains the elemental source of the "rules of conduct" and these can be defined "only in negative terms" (Giuliani 1997,161); because, for sure, we know that we want to avoid abuse; but knowing when something is an abuse, that is another kettle of fish.

If we want to remedy the defects of our humanity, we cannot do without it; no heteronomous norm can make up for the autonomous capability to give oneself rules, and no norm can function without it, which is the capability of responding to the question: how should I behave? We should also not lose sight of the fact that all we can do in liberty issues is trying to reduce the errors, not to establish an absolute truth, if liberty we want preserve.

That is why the legislator – one aspiring to mold means for living together, not for dominating – and all those who want more freedom should take example from her, who started saying "I am a woman". As when Aristotle recognized that, on the one hand, there is some truth in saying, that justice is linked to revenge, but, on the other hand, once this said *there is still much to say* – she too came to terms with prejudice and social conditioning without surrendering to them. How? By prying up that spark of reality and truth (a woman *is*) that, voyaging in the language, and generating *opinions*, provides the sole lever to change *the real*.

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Should We Say "Functional Diversity" To Refer To "Disability"?

A Critique Of The New Postulates Of Political Correctness Around Disability[1]

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ABSTRACT

This article addresses "political correctness" (PC) regarding the rights of people with disabilities and specifically the state of the question in Spain. First, we focus on the expression itself and clarify what is understood by PC. This implies reviewing, albeit briefly, the main conceptual and ideological framework PC is grounded in. Second, we describe the new conceptualisation of disability given by the *United Nations Committee on the Rights of Persons with Disabilities*, tasked with ensuring compliance with the *Convention on the Rights of Persons with Disabilities*. In Spain, this Convention is about to give rise to substantial legislative reforms in civil and procedural matters, leading to a turnaround in the way the matter has been traditionally treated. Thirdly, we expose a critique of the demands to turn "functional diversity" into the sole politically correct expression to refer to the condition of people with disabilities. To finish, I come back to the question of PC and present my position on the effects of this doctrine on the prevention of discrimination against marginalised groups.

KEYWORDS

Disability, disease, political correctness, medical model, social model, functional diversity, human rights, bioethics, paternalism, discrimination.

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1. Introduction

This article focuses on "political correctness" (hereinafter, PC) regarding the rights of people with disabilities. I address the state of the matter specifically in Spain.

First, I concentrate on the question itself, clarifying what I understand by PC. For this, it is necessary to briefly review the main conceptual and ideological framework PC is grounded in.

Second, I describe the new conceptualisation of disability given by the *United Nations Committee on the Rights of Persons with Disabilities* (hereinafter, the Committee), which must ensure that the *Convention on the Rights of Persons with Disabilities* (hereinafter the Convention) is complied with. In Spain, this Convention is about to lead to major legislative reforms in civil and procedural matters, representing a turnaround with respect to the traditional way of dealing with disability[2].

Third, I expose a critique of the demands to turn "functional diversity" into the sole politically correct expression to refer to the condition of persons with disabilities. I argue that the defence of this term can be explained by political tactics to claim the rights of persons with disabilities. This defence, however, is not justified, in that to my mind, the traditional view of disability—which links disability to a context of disease and medicine, the so-called medical model— resists its criticisms. The medical model is based on a certain objectivity of values as well as scientific knowledge. In the medical field, disease is an evil that must be prevented, but, naturally, this does not imply that sick people are bad; on the contrary, respect and empathy for the sick lie at the heart of the origin and meaning of the medical profession. This view is consistent with a wide range of principles underpinning our practices regarding sick and disabled people, including: the major role of prevention, treatment and rehabilitation, social medicine, public health, reverse discrimination measures, etc. Conversely, the model in which the "functional diversity" idea is inserted i.e. the social model, leads to a cascade of inconsistencies in our horizon of moral assessment. As the model's very defenders often claim, it would be a real revolution: one that, to my mind, should not occur.

[2] Draft Bill reforming civil and procedural legislation to support persons with disabilities in the exercise of their legal capacity. *Boletín Oficial de las Cortes Generales* (Official Gazette of the Spanish Parliament), 17 July 2020, 21(1).

To finish, I come back to the issue of PC and set out my position on the effects of this doctrine on the prevention of discrimination against marginalised groups.

2. The idea of political correctness

2.1. A global battlefield and different local battles

To understand the phenomenon of PC, it is necessary to place it at the centre of an ideological battle between Right and Left. Such a battle takes place on a global stage as well as in a multiplicity of local scenarios, where it is modulated differently.

The battle's global setting is marked by the fall of the Berlin Wall, the end of the Cold War, and the triumph of global capitalism, generating major supra-State economic power, a network of global economic actors powerful beyond comprehension (Capella, 2005, 19); an industrial and military superpower, the United States, which is producing an ideology that serves its interests; and a communications network, the Internet, which, while allowing billions of people to interact freely, in so far as these interactions are not mediated or filtered by any institution, also operates as a monumental instrument for manipulating and deforming reality. The result is that in the global village's agora, propaganda has acquired unprecedented power, while the critical capacities of those taking part in the communications have in fact only diminished (Sartori 1998).

To complete this picture, we should bear in mind that since the beginning of the twenty-first century, other phenomena have clearly come to the fore, such as China's and Russia's consolidation of power as politically stable and successful —especially China—non-democratic states, with a growing capacity for global influence; the incidence (and awareness) of climate change; the global economic system's fragility in relation to averting crises such as that of 2008; the rise of populism, both on the Right and on the Left, with its potential for destabilisation; the consolidation of global crime and terrorism networks (Ferrajoli 2006); the risk of pandemics; and finally, population movements, large-scale migrations from poor to rich countries. In addition, the lot is occurring in a world where, as pointed out by Pinker (2012), there are less wars and widespread violence than in the past. In this way, ideological and economic power have grown, correlatively.

In this global scenario, the discussions around PC take the form, on the Right, of an attack on an ideology that would have emerged during France's May 68. This ideology would be characterised—according to this right-wing vision—by left-wing radicalism, which is deeply irrational and destructive of true social progress. It would have originated recalcitrant attitudes towards economic and human development. On the Left, capitalism is attacked. It is understood as incompatible with a whole series of demands that require correcting the political agenda. The Right's idea of progress is criticised, since it is based—as argued by the Left—solely on economic growth. Among these new political causes we find climate change, feminism, racial integration, the defence of migrants' rights, animalism, etc. The idea of PC on the global battlefront therefore alludes to an ideological controversy regarding the definition of progress i.e. what the essential values underlying the idea of human development are. In this context, the concept of PC plays an ambivalent role, since it serves both to vilify and to describe one of the two contenders: the left-wing contender.

According to Wilson (1995, 4), the expression PC was originally used ironically by the Left itself, to refer to an excessively rigid behaviour proper to communist orthodoxy; in other words, a form of fundamentalism. Films and literature have often characterised a politically correct life as one doomed to becoming fanatical or to dissolve, out of lack of integrity regarding its principles. However, the use of the expression has evolved and has been assumed by the Left as an appropriate term to refer to one of its ideological theses and to a general attitude towards reality (an attitude of moral commitment).

For the Right on the other hand, PC designates a series of ideas and attitudes at best immature, though well-intentioned, and at worst, an expression of deep moral perversity and irrationality born of envy, hatred of freedom and of others' prosperity. The moral attitude of the defenders of PC, be it true or hypocritical, would thus oppose their opponents' pragmatic attitude, the only attitude that can potentially bring some benefit to humanity.

However, I believe that this global battle is only an apparent one, or a "fake" one to use the language currently in circulation over networks. The victory of the Right came about a long time ago. The proof of this is that the Right has allowed itself to choose its enemy, i.e. May 68 intellectuals, and this enemy was as destructive of the Right's foundations as that of the Left (more of the Left's foundations I would say). Since the 1980s, the conservative ideological revolution, launched by Anglo-Saxon countries, has met most

of its objectives. Not even the overwhelming reality of potential human extinction due to climate change has succeeded in shaking its foundations.

The same cannot be said in other areas, whether regional areas or different spheres, such as the academic field. In the United States, major discussions have taken place around PC. It has certainly drawn a lot of attention from conservative *think tanks,* who have devoted huge amounts of resources to denounce PC's anti-liberal revolution. They argue that the scope and intensity of this revolution is so extensive, it poses a threat to the American constitutional system and, in particular, to the rights derived from the First Amendment (D'Souza 1991). Special attention has been given to the situation of universities, in particular regarding measures against racial and sexual discrimination. The Left, for its part, often argues that the notion of a PC threat is a myth created and financed by the Right and that PC does not possess such power, nor even that liberticidal desire, neither in the country nor in universities (Wilson 1995).

But, in my opinion, in contrast to the global situation, social mobilisations at the state level around PC issues can have a significant legal, political and social impact. The recent iconoclastic movement in the United States, and also to some extent, *the "black lives matter"* protests at its root, illustrate how PC debates can turn into concrete political actions.

2.2. Political correctness in Spain

In Spain, the notion of PC is also linked to the same spectrum of moral attitudes and political positions regarding the causes referred to above. However, we could say that PC is more directly related to certain language restrictions. In fact, the Right has created a derogatory term to refer to the agenda one could associate with PC: political "*buenismo*" (goodness, or righteous intentions). The meaning is the same as that alluded to above: a well-meaning but immature attitude.

According to Alvarez Ortega, PC is a language prohibition mechanism, included within the same conceptual field as "taboos" or "censorship", though with some differences[3]. According to him, PC should be understood as "a

[3] Álvarez Ortega, relying on the work of Casas Gómez (1996), argues that there are "today at least three different coexisting notions of linguistic taboo: 1) the original Polynesian notion, of prohibition of transcendent (magical-religious) origin, that implies avoiding words or else risk a transmissible contamination that carries diverse negative consequences; 2) the strict western notion, of lexical elision for magico-religious motives (identifying mainly with the realistic perspective); 3) the generic western

mechanism of linguistic interdiction which, with the pretext of accommodating an ideology of progress and focusing on the public visibility of minorities, as well as the removal of historical affronts, imposes the avoidance of units that allegedly carry discriminatory connotations in favour of others, allegedly neutral and inclusive" (Alvarez Ortega 2010, 335-336).

The two main manifestations of PC thus understood would be inclusive language and the use of euphemisms. With regard to the former, we have witnessed over the last decade in Spain a significant growth of the feminist movement. This movement has requested, among other things, the use of inclusive language—to varying degrees, depending on which feminists one is talking about. I believe that it is in relation to disability that euphemisms, for their part, have been the most extensively used or valued. Whereas as in other countries, it is racial issues that perhaps prevail, in Spain, the question of PC is given most importance when referring to the state of persons with disabilities. Similarly, there is a general tendency to develop language restriction mechanisms in relation to some categories of victims of crime, such as victims of gender-based violence and victims of terrorism, but also, to a lesser degree, victims of racism.

In Spain, PC is also at the centre of a Left-Right battle, especially between the radical Left and radical Right. As far as feminism is concerned, we are witnessing fierce confrontations and manifest extremism. The latter is not the subject of this article, although it cannot be completely overlooked. A thorough and complete presentation of the situation can be found in De Lora (2019).

The concept provided by Alvarez Ortega seems to be a good starting point. Various notions of PC could be projected onto his concept. In one version, one that is in my view as reasonable and moderate as its use is limited, the notion would encompass two major aspects. First, that certain disrespectful forms of expression have a social impact and perpetuate racial, sexual, etc. discrimination. This does not necessarily imply that people who use such forms of expression consciously assume some form of discrimination. In some cases, the people discriminated against themselves share use such language. Second, a moderate principle of non-offense is also valid, according to which persons belonging to discriminated groups have the right not to be offended,

notion, which includes lexical prohibition regardless of its material and/or motivational scope"(2010, 329). The technical use of censorship, in his opinion, would consist of a restrictive state-institutional measure that applies essentially to written texts (2010, 333).

even if the offense consists solely in the practice of a society's common way of speaking. Correlatively, it would be justifiable, if only *"prima facie",* that speakers have an obligation to limit the use of certain expressions. Speech thus acquires greater moral, political and legal significance. This concept of PC, based on these two aspects, is fairly simple and, as I say, difficult to reject.

Nevertheless, a different concept of PC exists and it is generating a growing predicament. It would rest on two fundamental pillars: demands for a right to identity and an absolute interpretation of the principle according to which others should not be offended. This concept of PC, or ideology, does seriously threaten the continuity of critical thinking because, underlying the demands for a single language is the demand for a single thought.

As Alvarez Ortega points out, the repercussions of extending PC, with its continuous resorting to euphemisms, for example, in relation to situations in which people suffer from illness or disability, "create a mirage of symmetry that can lead to claims and situations; what is more, possible ensuing discussions also constitute genuine political incorrectness" (Alvarez Ortega 2010, 338). In addition, this combination of identity demands and the no-offense principle paradoxically leads some traditionally right-wing groups, such as religious faiths, to discover that PC can also be used in their own defence. In short, based on this concept, PC results in turning the no-offence principle into an absolute principle. Thus, by merely considering that a belief or way of life, or a simple custom forms part of its identity, a group can claim the right to define the correct terms to refer to it and, ultimately, to define the terms of the discussion.

Garzón Valdés illustrated the concept of fundamental rights using the notion of "preserve" of majority decisions (Garzón Valdés 1989). For Garzón Valdés, rights, in democracies represent a sphere that is "non-decidable" by the majority. Likewise, PC represents a demand for a sphere of the "non-speakable". We explore next how this sphere is configured as well as its foundations regarding the subject of disability.

3. A policy of transformation of the social mindset: from "incapacity" to "functional diversity"

3.1. Brief description of the transformation sought after

Javier Romañach and Agustina Palacios, the latter a deep connoisseur (and advocate) of the social model of disability, gave the following title to

an article they jointly wrote: "*El modelo de la diversidad: una nueva visión de la bioética desde la perspectiva de las personas con diversidad funcional (discapacidad)*" ("The diversity model: a new vision of bioethics from the perspective of people with functional diversity (disabilities)"). The first paragraph states that "people with functional diversity (disabilities) (...) Over certain periods, for example, during German Nazism, were killed in a vain attempt to eradicate their 'imperfection'" (translation of Palacios & Romañach 2008, 37). In a quick summary of discriminations that "do not die out", the authors illustrate the presence of discrimination in the laws, giving the example of Article 417 bis of Spain's Penal Code which allows abortion when "the foetus is to be born with functional diversity" (sic) (2008, 39) and that this is the only case for which it is allowed to extend the period of abortion to 22 weeks. This demonstrates that the lives of people are clearly given a different assessment depending on whether they have functional diversity (2008, 40). Later, they emphasise that a conceptual confusion caused by Spain's scarce implementation of the social model (at that time) is the mixing up of the concepts of disease and functional diversity (2008, 40). This confusion occurs in the context of the "rehabilitative model" or medical model of disability, which, according to these authors, should have already been abandoned. For this change—that is, the shift from the old and unacceptable rehabilitative model to the new model of diversity—to occur, they argue that [4]:

> it is imperative to eliminate the concepts of ability or worth from our language and seek a new term through which a person can find an identity that is not perceived as negative. The term proposed and defended in the diversity model is that *of women and men discriminated against for their functional diversity*, in short, *people with functional diversity*. Since its inception, the term has spread rapidly and generated a new identity in which diversity and the enrichment that comes with it is key (Palacios & Romañach 2008, 41).

[4] The authors refer to the wording of the crime of abortion (which is not currently in force) and which was introduced in *Organic Law 9/1985, of 5 July, on the reform of article 417a of the Penal Code*. According to this law, abortion will not be punishable when, among other cases, "It is presumed that the foetus will be born with serious physical or psychic impairments, provided that the abortion is performed within the first twenty-two weeks of gestation and that the opinion of two specialists, expressed prior to the practice of abortion, is issued by an accredited public or private health centre or facility, and by persons other than that by whom or under whose direction the abortion is performed". In point 2 of the same article, the legal period for performing an abortion resulting from rape is 22 weeks.

The footnote clarifies that "the term functional *diversity* (sic) was first proposed by Manuel Lobato and Javier Romañach on 12 May 2005, in message No. 13.457 of the Independent Living Forum" (p. 41). It is also indicated as a reference that in February 2007, the search for this expression in Google in Spanish yielded 26,000 results compared to 705 in 2005. As this article is written, as of September 2020, a total of 1,840,000 responses is obtained when performing a search for the Spanish term "diversidad funcional" (and 2,070,000 when googling "functional diversity" in English). It is understandably elating to be credited with the coining of the label.

The term "functional diversity" does not appear in the Convention. However, the text gives rise to a "social model" interpretation as it defends the following three characteristics of disability: (1) disability "is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers" (Preamble, paragraph "e"); (2) "Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity" (Art. 3(d)); and (3) disability is a homogeneous notion, so the same regulation should affect all people who "have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others" (Art. 1). This Convention can also be interpreted in such a way as to be compatible with the traditional —and, in my view, reasonable—medical or rehabilitative model, but there is no doubt that the Committee responsible for ensuring compliance with the Convention has endorsed the social model.

In my opinion, many criticisms should be voiced on the position of this Committee. They should focus in particular both on its famous *General Comment No. 1 (2014) of the United Nations Committee on the Rights of Persons with Disabilities* (Alemany 2018), and the regulatory consequences of the claim to eliminate or minimise the representation of persons with mental and/or intellectual disabilities (Alemany 2020). I wish to point out here that while the Committee does not accept the terminology that these authors deem "essential" for the full development of the social model, all its considerations are in line with this model and the elimination of the categories of the disabled, incapacitation, guardianship, representation of the incapacitated, etc. The Committee advocates a support system involving a series of radical changes in the way disability is legally treated. Examples of these changes are as follow:

1) "Replace regimes based on alternative decision-making with others based on support to decision-making" (Comment 28).
2) "Give the same credit to the complaints and statements of persons with disabilities as they would to people without disabilities (...) including the capacity to testify in judicial, administrative and other legal proceedings" (Comment 39).
3) "... their detention in institutions against their will, either without their consent or with the consent of a substitute decision-maker, is an ongoing problem. This practice constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention" (Comment 40).
4) In the area of health, "States parties have an obligation not to permit substitute decision-makers to provide consent on behalf of persons with disabilities" (Comment 41).
5) As for forced psychiatric treatments, "Forced treatment is a particular problem for persons with psychosocial, intellectual and other cognitive disabilities. States parties must abolish policies and legislative provisions that allow or perpetrate forced treatment" (Comment 42). (...) deinstitutionalization must be achieved and legal capacity must be restored to all persons with disabilities, who must be able to choose where and with whom to live" (Comment 46).
6) "States parties have an obligation to protect and promote the right of persons with disabilities to access the support of their choice in voting by secret ballot, and to participate in all elections and referendums without discrimination" (Comment, 49).

In Spain, the Convention has been in force since 3 May 2008. Between this date and the *Committee's Comment* I have just referred to, a number of reforms have been adopted based on the Convention. The Convention was still interpreted, however, as being compatible with traditional mechanisms for the protection of persons with disabilities, provided the disabilities were mental and/or intellectual. An illustration of this approach worthy of note is the Judgment of Spain's Supreme Court No 282/2009, Chamber 1, of the Civil Court, of 29 April 2009 (*Sentencia del Tribunal Supremo Español* nº 282/2009, *Sala 1ª, de lo Civil, de 29 de abril de 2009).* The sentence judges a case of incapacitation of an elderly woman at the request of her children. The Court accepts the forensic reports of the previous two instances: in the first instance, Parkinson's disease is discovered as well as a slight cortical

atrophy with no signs of dementia and with symptoms of depression; whereas in the second instance, a "moderate cognitive disorder, senile dementia, which functionally limits the ability to be self-governing and manage her assets completely and permanently" is found. The prosecutor, who in Spanish law has the power to protect minors and persons who are incompetent, or "incapable" (the legal term commonly used in Spanish is "*incapaces*"), did not deny the veracity of the diagnoses but strongly argued against the incapacitation request based on the Convention.

In the arguments presented before the Supreme Court, the prosecutor deems that the main problem with the appeal is to determine whether the lower court's interpretation of Arts. 199 and 200 of the Civil Code[5] is consistent with the Convention, specifically with article 12 of the Convention (legal basis 3). In the prosecutor's view, "the declaration of incapacity violates the dignity of the incapable person and that person's right to equality by depriving him or her of the ability to act and is discriminative with respect to capable persons". To reach this conclusion, the prosecutor adopts the concept of disability assumed by the Convention, which would be a "minimum and open", "dynamic" concept, "an ongoing process", which accounts for the individual, biological and social dimensions of health; the prosecutor is referring to the "social model of disability" in contrast to the "medical or rehabilitative model". According to the prosecutor, the Convention adopts "the social model and the principle of non-discrimination, colliding with the traditional representation of incapacitation, as a mechanism that replaces the capacity to act. It forces the "adoption" of a new instrument based on the support system that is projected onto the specific circumstances of the person, act or business to be carried out". As a result, the Convention brings together "the legal capacity and capacity to act in an inseparable whole" and "exercises restrictions on the incapacitation instrument if the latter has an impact on the nullifying of the capacity to act". Finally, the prosecutor proposes a solution, while reforms are made to the Spanish legal system: "the supervision, reinterpreted in the light of the convention, based on the model of support and assistance and the principle of the best interest of the person with disabilities".

[5] Art. 199. No one can be declared incapable, except by a judicial ruling by virtue of the causes established in the Law; Art. 200. Causes of incapacitation are persistent physical or mental illnesses or deficiencies that prevent the person from being self-governing.

The answer of Chamber 1 to this reprimand of the Public Prosecutor's Office on the Convention's correct interpretation is precisely based on considering the existence of a *nominal question* about how to refer to legal situations and procedures affecting persons with disabilities. The legislature will have to resolve this nominal issue. Yet, beyond how the question is resolved, mental and/or intellectual disability sometimes entails problems that limit the capacity for volition and comprehension. Therefore, incapacitation as a mechanism to protect the disabled is a requirement based both on the principle of the person's dignity and the principle of equality. The judgment concludes:

> In this way, the present interpretation is the only one that renders the current regulation appropriate according to the Convention. Thus, the protection system established in the Civil Code remains in force, though based on the following proposed reading:
> 1. Always taking into consideration that incapable persons retain their fundamental rights and their incapacitation is only a form of protection. This is the only possible interpretation of Article 200C and Article 760.1 LEC.
> 2. Incapacitation is not a discriminatory measure because situations that call for protection present their own specific characteristics. We are referring to persons the intellective and volition powers of whom do not allow them to exercise their rights as persons because they prevent them from self-government. The system is therefore not a family protection system, but a system of protection only of the person concerned (Legal basis 7).

On 17 July 2020, the *Draft Bill reforming civil and procedural legislation for the support of persons with disabilities in the exercise of their legal capacity* entered the Spanish Congress of Deputies. This project does not use the "functional diversity" label and maintains the apparently politically correct term: "people with disabilities". However, this is not the nominal solution given by the legislature that was assumed by the Supreme Court judges. It constitutes rather an incorporation of the social model into our system and, to some extent, the acceptance of the idea of "functional diversity". The triumph of the thesis of Palacios and Romañach is complete *in the pars destruens*. Indeed, the terms "incapacitation" and "incapable" have been completely removed from the draft's articles and, if the reform takes place,

from Spain's future Civil Code and Law on Civil Procedure—in the same way that guardianship is only contemplated in the case of minors.

In the Preamble, the legislator, as if he were remembering the judges' words pronounced in 2009, clarifies that

> it is not, therefore, a mere change in terminology that replaces the traditional terms of "incapacity" and "incapacitation" with more precise and respectful ones, but a new and more accurate approach to reality, that raises awareness about a matter that has long gone unnoticed: persons with disabilities hold the right to make their own decisions, a right to be respected; the issue is therefore a human rights issue.

Later, he advocates a transformation of the social mindset "based on the new principles and not on the paternalistic visions that are now out of date".

3.2. Criticism of a PC's shift towards the social model

The article of Palacios and Romañach reveals how the authors put the term "disability" in parentheses together with the expression "functional diversity". They do so undoubtedly to reach more readers or, in other words, to let them know what they are talking about. Often, a problem of inclusive language and euphemisms is that most speakers do not put them into practice. Thus, the terms are locked away within academic or activist circles, thus raising the paradoxical risk of generating a subculture, when the idea is in fact to influence the idiosyncrasies of society at large.

The terms "handicapped", "the disabled" or "crippled" have been replaced by the expressions "disabled persons" or "persons with disabilities"; moreover, in legal fields, the intention is to eliminate the term of "incapable" or "incapacitated" in relation to some mental and/or intellectual disabilities. In the general culture, as well as in legal culture, other terms have been used in the past that are now considered grossly pejorative. A paradigmatic example is the famous *1927 U.S. Supreme Court Judgment Buck v. Bell* case. Discussing the mandatory sterilisation of people with mental disabilities, Judge Holmes concludes in favour of it, commenting that "*Three generations of imbeciles are enough*". Holmes' arguments were not as unacceptable as these words suggest, but the comment is undoubtedly disrespectful towards

people affected by the constitutionality judgment. Naturally, today, they appear insulting.

Therefore, it is clearly justified to apply the PC doctrine's removal of disparaging terms and expressions in a given language context. In reality, PC, thus understood, departs little from the traditional concept of freedom of expression as a right to which limitations apply, including that of not insulting or slandering others, at least publicly. However, it is a different matter when PC attempts to restrict or eliminate the use of terms or expressions that are only pejorative once a particular approach has been assumed, in the present case, regarding disability. I am referring to a perspective that rests on a series of principles and premises which are not at all shared by the community of speakers (often, not even within the discriminated minority) and whose acceptance, in fact, would entail an in-depth review of many practices that are generally deemed to be justified. In this sense, the expression PC operates as a wedge that cuts through established custom, more or less inadvertently. In other words, they resemble new premises more than conclusions based on established premises. I believe the term "functional diversity" to be of this nature. It does not consist of adopting a perspective on disability rights, but of a new premise that is difficult to fit into many other generally accepted ones.

As advocates of functional diversity point out, the enemy to beat is the medical or rehabilitative model. According to this latter model, the concept of disease is basic and the concept of disability derives from it. The *International Classification of Impairments, Disabilities and Handicaps* (ICIDH), proposed by *the World Health Organization* in the 1980s, clearly responds to this model (WHO 1980). According to this classification, disability is the manifestation of impairments that are found in the body of the person with a disability—they are somatic. The given definition of disability is as follows: "any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being"(WHO 1980, 28). The disease, as a somatic condition, is the efficient cause, in the Aristotelian sense (Riese 1953, 69), of impairments in parts of the body that are necessary, although not sufficient, conditions of disability (Edwards 2017, 150). In the ICIDH's conception, disability is linked to the field of health, the body and, ultimately, medical practice. For their part, the social aspects that can affect the quality of life of those with a disability are conceptually separated: they would consist of social difficulties and handicaps. For example, polio is a disease that can affect motor neurons,

causing paralysis (an impairment) that prevents the patient from walking (a disability), which, depending on the social context, level of wealth, means available, etc., will be a major or minor handicap to carrying out a life plan. Contrary to popular belief, this approach does not ignore the social aspects that affect sick and disabled people. In fact, within medical practice, the discipline of social medicine has a long tradition, which has emphasised the social aspects of illness and its consequences.

Consequently, to my mind, when describing the disability model panorama as a scale that goes from centring on the individual's psychosomatic factors to focusing on contextual or social factors, saying that the ICIDH is at one extreme can lead to confusion (Braddock and Parish 2001; Edward 2017). Quite the reverse: nothing at the "individualistic" extreme corresponds to some versions of the social model that do seem to have reached an extreme. The reason for this is that the ICIDH is a reasonable proposal and, as such, it takes the social aspects of illness and disability into consideration; in fact, as Shakespeare points out, this classification was originally an attempt to give more importance to the social consequences of the impairments caused by the disease (Shakespeare 2014, 15).

The problem with this medical model cannot be, therefore, that it ignores the social conditions of disease and disability, and even less that it ignores the individual affected by the disease and disability. The problem, in my opinion, is that, in the first place, this model does not fit well with the political tactics of certain activists; the model is about forging, so to speak, the most appropriate doctrine to accelerate and transform the situation of people with disabilities (Oliver 1990). Secondly, the biomedical concept of disease and the scientific concept of medicine generally is not compatible with the very influential doctrine of social constructivism and philosophy's relapse into powerful—both epistemological and axiological—subjectivism. Both lines of criticism converge in the identity concept of disability. Based on this latter concept, the fight for the equality of the disabled (since it would no longer be politically correct to speak of "people with disabilities", as if it were a contingent property of the individual; Oliver 1990, p. xiii) is assimilated with the fight against sexual or racial discrimination.

From the perspective of political tactics, the insistence to eliminate *biomedical* notions of disease and disability from the narrative seems to suggest that the element of deviation from normality that, indeed, is intrinsic to this biomedical perspective, carries with it a "moral deviation". Consequently, we

fall back on the classical conception of disease as an unnatural disposition, according to which "without health there is no possible ethics" (Gracia 2008, 36) and an unacceptable conclusion is assumed: that qualifying someone as "sick" is an insult.

From a philosophical standpoint, there are many reasons to criticise social constructivism in this matter (even though it is also very useful for political tactics). Manuel Atienza brings up the opinion of Mario Bunge on this issue, according to which *constructivism* is a mere destructive fashion of the Humanities faculties that is "as false as it is dangerous" (Atienza 2016, 265; Bunge 2009, 161). It would be a question of affirming that diseases are "inventions of the medical profession".

Adopting a sociological approach to the concept of disease, Freidson points out that it may or may not be based on a biological reality (Freidson 1978, 215). Let us consider, for example, Parsons' conceptual approach to the "sick person role", characterised by four elements: 1) it involves a disability the individual cannot be held responsible for and which cannot be cured by one's own will-power, a healing process is necessary; 2) the person is exempted from normal obligations due to the condition; 3) it consists of a deviation, but a legitimate deviation; and 4) the patient is expected to seek help to recover and cooperate in his or her own recovery (Parsons 1951, 229). Parsons presupposes that the disease has been diagnosed according to the medical profession's criteria, but these criteria are situated from the profession's internal standpoint. The criteria are not of sociologists' direct interest. If attraction towards one's own sex is socially classified as a disease called "homosexuality", the sociologist will consider it from that point of view, regardless of whether it is a significant medical error. Conversely, an individual's condition, which is a disease from a biomedical viewpoint, may not be considered as such from a social standpoint, as was the case in some indigenous communities in South America where syphilis was endemic and its manifestations were deemed normal (Gil 1969, 31). However, logically, the sociological approach does not deny the possible biomedical foundations of the qualification of a situation as a disease or disability (in the previous example, the reality of endemic spirochetosis); specifically, modern medicine would be characterised by its claim to be a science and to have scientific foundations, compared to other practices that it deems irrational.

This does not mean that medicine is exempt from evaluation. This is a key point in the discussion: I believe that it is not sufficiently justified to

assimilate evaluative with subjective. From there, the step of assimilating evaluative with political is taken too easily; let us recall the title of Oliver's book *The Politics of Disablement*, which reminds us of Carol Hanisch's commonplace expression, so valuable for contemporary feminism: "the personal is political". It also reminds us of De Lora's book *Sexual is political (and legal),* although the latter adopts a critical approach (De Lora 2019). Medicine is a praxis in the Aristotelian sense: a professional practice that incorporates certain values that give it meaning and social justification[6]. Fundamentally, medicine is oriented towards avoiding certain harm to individuals. What counts as "harm"? "Harm" is any "setback to interest" (Feinberg 1984, 31) and "interests" are more stable than mere desires. They represent stakes that individuals have in certain "goods", so according to the extent to which these interests are more or less satisfied, the individual "gains" more or less. Some interests are only interests because the subjects make them their own, they are purely subjective. Others are objective, even if the individuals do not make them their own. This latter case includes all the interests that by their very nature are an objective condition for the possibility of subjective interests (Nino 1989): for example, the interest in staying alive.

A large part of human beings' objective interests are linked to the human species' condition of animal. The absence of pain or disability, staying alive or avoiding death are human beings' objective interests (Culver & Gert 1982, 27). For this reason, disease is an evil, a harmful condition, a state that it is rational to avoid. The condition of "disease" summarises evil for the human being, as *"soma"*. Mental illness is also somatic, one might say "psychosomatic", as a brain disorder. The basic notion of disease is the one that delimits medicine's "battlefield" against these evils (the criminal law

[6] The notion of "praxis" is fundamental. I believe that philosophers generally share the same idea of praxis: roughly speaking, a social practice oriented to certain ends and values. To interpret the deontological notion of profession (an expression of "professional deontology", that is ultimately a pleonasm) it is now a classic to go to the concept of "praxis": Adela Cortina, for example, after defining "practice" as a "social cooperative activity that is characterised by tending to achieve goods that are internal to itself and that can be provided by no other", affirms that professions are "practical" in this sense. From this follows that, first, not all occupational activities are professions, and second, medicine is naturally a profession, in which the "internal good" is the "good of the patient." See Cortina (1997). The problem is that outside philosophical circles, that is, where most of those directly involved in bioethical questions operate, "praxis" or "practice" is understood as that which is opposed to theory or what is theoretical (which is the meaning provided in the dictionary of the Spanish Royal Academy (RAE). Kant allows us to acknowledge that this opposition is nothing more than a false opposition, but since Kant's writings are not widely disseminated, it is worth noting that when we speak of medical "praxis" or "practice" we seek to describe all that is medicine: the medical technique, theory and ethics. See Kant (1999).

system also protects life and equality, yet it does not fight disease, it fights criminal conduct).

It is useful to distinguish between the concept of disease and its conceptions. What has been said so far refers to the *concept* of disease: a pathological condition of the body that produces (or increases the risk of suffering) any of the following ills: suffering, loss of the ability to experience pleasure, limitation of a healthy body's capacity, shortening of life or death.

The various *conceptions* of illness are different explanations of it: an imbalance that breaks the harmony of the body in the Platonic or cosmological conception (described in the *Timaeus*); a malaise caused by the lack of education regarding eating habits as in Hippocratic thought; or, according to Rousseau, the opposite, that is, the consequence of the pathological effect of civilisation on man's original and healthy nature; a manifestation of sin, of the immoral nature of the sick; an altered functioning of some of the parts of the body; the presence of foreign bodies, be they demons or germs, that harm the body; a social condition that is the result of discrimination against a minority; etc. (Riese 1953).

An *adequate conception* of disease depends, in turn, on what an adequate interpretation of medical practice would be, which needs to be considered in its context and within a particular problem horizon. The procedures of Homeric Greece's medicine—of a homeopathic nature and contrary-based cures, based on the principles "*similia similibus, contraria contrariis*"—well deserve to be considered "medicine" as long as the knowledge of disease and human experience remain within the forms of life and spirit of the ancients (Gil 1969). The passage from myth to logos determines a new understanding of medicine, which implies, first of all, a distinction between folk medicine and technical medicine and, over time, as from the beginning of the nineteenth century, a form of scientific medicine (Bunge 2017, 44). One cannot understand medical practice without understanding the concept of "progress in medicine." According to Bunge, this progress is mainly characterised by

> the adoption of scientism, with the consequent rejection of anti-science and pseudoscience; the close union of medicine with basic biology; the adoption of the experimental method, in particular randomised trials; the search for mechanisms of action, in particular aetiologies; and the tacit adoption of emergentist and systemic materialism (translated from Bunge 2017, 58).

To conclude, the modern understanding of medicine presupposes a *biomedical conception* of disease, which is based on a scientific explanation of the body's normal functioning and, correlatively, on a medical treatment of the deviation from normality when it carries some of the evils that medical practice must avoid.

This defence of the medical model and therefore the criticism of the conception of the "functional diversity" label and of the social model of disability, does not imply that one incurs in any of the errors below (contrary to what is usually affirmed):

1) It does not deny the fact that, from a sociological perspective, *some* "diseases" or "disabilities", that is, behaviours or situations that are socially considered legitimate deviations from normality and that must be "cured", may be biomedically unfounded; they may be pure social constructions (as, for example, "individualism" under the Stalinist regime). With respect to mental illnesses, we must be particularly attentive to the influence of social morality when qualifying behaviour as pathological. But this only means that an operational definition of disease will necessarily offer a well-defined scope of application (a set of clear cases that deserve to be considered diseases from a biomedical point of view—for example, malaria—and what should not be considered a disease from this same point of view—for example, gender, race or childhood— and a series of cases in the twilight zone (for example, controversial "paraphilias"). But neither this conceptual problem, nor the various links between medicine, values and social circumstances imply, as is claimed, that social constructivism theses are true.

2) In the same way, the medical model does not deny the complexity of the operational criteria duality for the concept of normal/abnormal and functional/dysfunctional disease (Chadwick 2017), nor does it say that evaluative questions are alien to them. But the model does contest that, in modern medical practice, these criteria are merely social constructs, even in the case of mental illness. As has just been pointed out, the qualification of "abnormality" may conceal, as indicated by Dupré and others (Dupré 1998), purely a manifestation of the transgression of social norms, but this is not necessarily the case.

3) The model does not imply a negative evaluation of sick or disabled people. The fact that disability is an evil does not mean that people with disabilities are bad, nor does it mean that the existence of disabled people

is necessarily painful or that their life is meaningless or worthless. As Laín Entralgo points out, when reporting the personalisation process of the disease, the person can face it in two different genuine and opposite ways: aversion and assumption (1981, 146). In the latter case, the essentially afflictive character of the disease may also take on a positive dimension, of benefit to the person, either of an immaterial nature (the blessedness of suffering for the religious, the strength of character resulting from overcoming, etc.), or a material nature (the pension obtained due to the illness, withdrawal from daily work, etc.). But this positive and subjective dimension of the disease does not put into question its objectively bad nature. It takes it for granted: happiness, improvement, compensation, etc., come because the evil is assumed, overcome, compensated, etc. In this sense, the process of identification with the condition of the disabled (now a substantive condition, not an adjective) is not denied by the medical model of disability, it is situated at a different level. But identifying it with the category of "functional diversity" would mean blurring all the problems generated by the condition of disabled people. Hence, some associations such as COCEMFE (Spanish Confederation of People with Physical and Organic Disabilities) advise against the use of "functional diversity". It considers it a euphemism loaded with condescension, which generates confusion as "we are all diverse" and it detracts "from the problem of having a disability" (COCEMFE and Parliament of Navarra 2019, 5).

4) Finally, my position does not deny the value of individual autonomy nor the importance of groups to defend their interests. It does not entail unjustified medical paternalism, nor does it call into question the importance of the participation of people with disabilities in the political and legal decision-making that directly affects them. However, it does challenge the thesis, widespread today, that a given group's representation can only be conducted by those belonging to that same group. Or, stated in terms of representation theory, the practical representation of interests can be exercised by individuals or institutions that are not representative, in a non-practical sense (Lifante Vidal 2018; Pitkin 1985). This thesis is essential to protect the interests of people affected by some types (and degrees) of mental and/or intellectual disability that seriously undermine their autonomy. Perhaps the most objectionable series of postulates that make up the "social model" is that of the unitary treatment of the phenomenon of disability. The identity conception of disability and the

denial of the possibility of representation eclipses the existence of diversity within disability and, as a result, the fact that there is inevitably a practical representation of interests among people in different circumstances: generally, the representation of people with mental and/or intellectual disabilities by people with physical and/or sensory disabilities.

4. PC and the fight for equality

To finish, I will come back to the general question of PC. Ayim (1998) clearly outlined, in my view, the arguments against PC. First, there would be the arguments against the ideological content of PC: the PC movement has resulted in a threat to freedom of expression, especially to academic freedom (whether regarding contents or in the way of teaching, as well as research restrictions) (Ayim 1998, 453-459). Second, a series of arguments is related to the methods employed by PC advocates: they ultimately end up applying the same sort of discrimination they wish to denounce and they use unacceptable methods (such as *escraches*—direct action demonstrations—, or using force to stop someone from speaking, etc.) (Ayim 1998, 459-461). As I indicated from the outset, these criticisms are assessed in a highly contextualised manner, in the sense that their degree of relevance depends on the specific case. The reason is that PC acceptability depends on its extent and form.

It is a matter of achieving a balance between freedom of expression and the interests of other people. In my view, gender-oriented inclusive language, for example, seriously undermines a principle of economy of words and hinders communication, without contributing much in the other direction, that is, in promoting equality between men and women. The main problem is that the interests one can weigh against freedom of expression are understood to justify an almost absolute principle of not offending third parties. According to this principle, it is enough for a group—the identity of which rests on its own will to be understood as a group—to feel offended, for this feeling to be regarded as a major reason for a sanction. The form of this sanction may be the diffuse social sanction of rejection (which can reach notably high levels of coercion through social media), or the concentrated form of sanction of (public or private) institutions or, even more seriously, criminal sanction.

Accepting a principle of offense as I have just described does not serve groups that are considered progressive only, far from it. In Spain, the cross-

fire of offended feelings is becoming so intense that artists, for example, are increasingly calling for a return to the situation of a couple of decades ago; as Vazquez points out (2010, 334-335), by removing irreverence or even the desecration of taboos, one is emptying artistic freedom of its value.

When I completed the first section of this article, I went to Garzón Valdés to suggest the idea that PC corresponded to the sphere of the "non-speakable", a preserve of freedom of expression. This same author gave a very clear conceptualisation of tolerance, emphasising that tolerance only made sense if what is not tolerable is acceptably delimited (Garzón Valdés 1993). Thus, in a first basic valuation system, the fact of saying something can be deemed reprehensible, while in a second valuation system, the same words are not considered sufficiently reprehensible to deserve to be prohibited and/or punished. The second system incorporates both justification and limits to tolerance. In the PC battlefield, there is a marked tendency for supporters to believe that no circumstances allow for a given utterance, and for opponents to believe that no circumstances justify such intolerance. I must stress that the right balance is a matter of degree. The just balance is flexible, contextual and the limits are undefined. As in the case of almost all issues concerning freedom and equality.

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Political correctness and the right to free speech:
the case of preferred pronouns

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ABSTRACT

In this paper I argue for the general duty to refer to transgender people by their preferred pronouns when they are conventional. In the case of non-conventional, tailor-made pronouns, there is no such duty because those so-called "designated pronouns" are not actually functional pronouns. Last, but not least, even though there is a duty of civility to use the designated name and conventional pronoun of trans-people, individuals retain the right to speak out their belief in that sex and gender are biological facts, and thus, the right to state in reference to a transwoman: "She is not a woman".

KEYWORDS

Transgender; Pronouns; Sexual dimorphism; Compelled Speech; Free speech; Freedom of conscience.

I. Introduction:

Limitations on free speech might be justified for various reasons. In the iconic example of Judge Oliver Wendell Holmes Jr., someone yelling "fire!" inside a packed theater may cause a stampede and thereby harm individuals (*Schenck v. United States* 1919). Freedom of speech does not license insults, offences, blatant lies that affect the respectability of others, or the public spread of intimate details of the private lives of individuals, to name just a

few of the plausible and justifiable restrictions that most of our legal systems impose on the right to free of speech.

Political correctness (hereafter PC), understood as the use of non-derogatory terms, mostly euphemistic, in public discussion or the avoidance of behavior considered "offensive", also sets boundaries on what is permissible to say and do, although, in my view, the nature of PC rules is more akin to social norms rather than legal standards. Using "mentally disabled" instead of "neuro-diverse", or "immigrant" instead of "newcomer", or black-facing at a party, may gather social reproach but it does not generally prompt legal consequences[1]. The use of PC utterances or terms is seen as the discharging of a duty to respect minorities, vulnerable or less-empowered people. It has been argued that, for particular individuals, the use of derogatory labels might trigger past or present traumatic or damaging experiences.

In this short paper my focus will be on the mandatory use of "preferred pronouns" to refer to transgender people. More specifically, I will deal with the question of whether that obligation conflicts with the right to free speech. In section II, I will review the underlying reasons behind the request to be referred to by non-conventional pronouns. In Section III I will describe the basic facts of the case of Professor Nicholas K. Meriwether (Shawnee State University in Ohio) which aptly illuminates this discussion, and in section IV I will review the constitutional doctrine of so-called "compelled speech" to test whether the duty to use preferred pronouns might fall into the category of those utterances or expressions that we have good reasons to impose. In Section V I will defend that the duty to use non-conventional pronouns that do not correlate with biological sex might be construed as a "duty of civility", and yet, as I will argue in Section VI, there are exceptions to such duties based on the freedom of conscience. This exception generates an interesting – albeit paradoxical- consequence: even though there is a duty to use the preferred conventional pronoun that does not correspond to the biological sex of the requesting individual, the right to free expression and thought should allow the spread of discourses that deny transgenderism. Thus, as I will conclude in Section VI, the statement "Mrs. Smith is a man" should be admitted as a justified exercise of the right to free speech.

[1] Certainly, in certain settings it might prompt disciplinary consequences.

II. In the beginning was the name... and the sex

With marginal exceptions, the vast majority of the scientific community considers that sexual dimorphism is a pervasive feature of our species and many other animal species. By sexual dimorphism we generally understand the existence of significant morphological – primary and secondary sexual characteristics-, physiological – hormonal make-up- and genetic differences between individuals labeled as "male" and individuals labeled as "female". Ultimately males produce one kind of sexual cells or gametes (sperm) and females a different kind (ova).

Yet, as in other biological phenomena, we cannot give individually necessary conditions that are jointly sufficient to identify who is male and female, or in other words, there are "deviations" from the norm[2], namely genetic malfunctions in the development of the embryo that cause the well-known phenomenon of "intersexuality"[3]. Yet, the marginal existence of intersexual individuals does not imply that sexual dimorphism is a social, institutional or cultural construction, even though historically the sexualization of individuals has varied. Thus, what is to be taken as biologically determinant of one sex or the other is not given by nature. The specific political, social and legal relevance that such differentiation should have is a wholly different matter (Fausto-Sterling 2018, 2000).

In contrast to intersexuality, transgenderism is a different phenomenon. Transgender individuals live, for a variety of reasons, in a state of non-conformity with their assigned biological sex. Initially transgenderism was institutionally categorized under clinical standards – gender dysphoria[4]– and legally regulated for the sake of channeling a problem deemed as fundamentally psychiatric.

Currently, however, the LGTBIQ+ community demands the "depathologization" of gender identity and thus its understanding as the exercise of personal autonomy which includes the demand to be referred to by the chosen pronoun that best suits the self-perceived gender identity of the individual.

[2] Consider bipedalism as a human feature, for instance.

[3] According to the WHO, syndromes such as the Klinefester, SRY and other syndromes cause 1 out of 2.000 newborns to be intersex (http://www.who.int/genomics/gender/en/index1.html#Gender%20Assignment%20of%20Intersex%20Infants%20and%20Children).

[4] The term is included in the latest version of the famous and controversial *Diagnostic and Statistics Manual of Mental Disorders* issued by the American Psychiatric Association.

These demands are underlined by a cluster of philosophical thesis. First and foremost the iconic distinction made by Simone de Beauvoir between "sex" and "gender". When the acclaimed French philosopher argued in *The Second Sex* that "one is not born but rather becomes a woman" she was implying that biology (namely female biology) was not to be the fate of individuals (namely women). Thus, a certain array of material conditions ought not to be determinant of women's expectations, roles, social positions, efforts, and, ultimately citizenship. This set of traits and attributes is to be taken as "gender" – a social and cultural construction- as opposed to "sex".

Since the phenomenal spread of de Beauvoir's book, a certain interpretation of her ideas has been increasingly influential in some quarters of academe – mainly philosophy and social sciences departments – and political activism. To wit: that biological sex is a spectrum and that the primal reality of biological sex is not even required to, paraphrasing de Beauvoir, become a woman (or man). This is one of the central tenets of the so-called "queer theory". One of its most conspicuous champions, Judith Butler, has stated:

> If being a woman is one cultural interpretation of being female, and if that interpretation is in no way necessitated by being female, then it appears that the female body is the arbitrary locus of the gender 'woman', and there is no reason to preclude the possibility of that body becoming the locus of other constructions of gender… Not only is gender no longer dictated by anatomy, but anatomy does not seem to pose any necessary limits to the possibilities of gender (1986, 35-36, 45).

Within the transgender community, the basic request has been to be named and identified according to this understanding of self-perception.

In a strictly logical sense, naming is a technique for individuation (Laporta 2013, 24-25). Our first steps in logic were given understanding conditionality ("given any X, if X is a man then X is mortal") and, in the minor premise, the name of an individual - a unique combination of gametes, a coincidence among billions of possibilities.

Thus, naming a human being is a way to distinguish him from the grey. Naming comes along with civilization and is its product. Proper names signal our intimate conviction that we live "biographical" lives and not only a "biological" existence. Thus, we have a basic right to be given a proper name as stated in article 24.2 of the International Covenant on Civil and Political

Rights. In a case that affected the Kurdish minority settled in Turkey, the European Court of Human Rights has claimed that the Government has the duty to respect the Kurdish characters of their proper names as an expression of the right to respect for private and family life (*Taskin and others, v. Turkey* 2010). And yet, as happens with every other human right, the scope of the right to be named or officially registered using our designated name is not unlimited. It seems obvious that the Government, public officials and civil servants at large ought to use our officially registered proper name, but when we consider our private interactions things look quite different. We certainly have a duty not to refer to individuals using derogatory terms or insults, but it does not seem that there is a universal duty to refer to them using their proper names even though the refusal to do so is not the best tactic to befriend them. On the other hand, in our private legal dealings properly naming the parties is a necessary condition for the validity of the contract.

Trans individuals are particularly prone to be referred to by their preferred names, those who match their gender identity. They censor particularly the practice labelled as "dead-naming", that is, the use of their given name at birth once they have transitioned to their new identity. But there are other forms of offensive mis-gendering that have to do with their preferred pronouns. To those forms I turn now.

Which pronouns and ways of treatment are requested by trans people? According to the Center of Resources for the LGTBQ+ community run by the University of Wisconsin (Milwaukee), people whose self-perceived gender identity does not align with the sex ascribed at birth on the basis of biology, or that challenge that sex is dichotomist (intersex, non-binary, etc.) are circulating pronouns of their own when their language (as is the case of English or Spanish) does not include a third neutral gender. Thus, conventional pronouns such as "he" or "she" are replaced by expressions such as "zie", "sie" or "ey" among others (see University of Wisconsin 2020). To give just one example, in his presentation card in Twitter, Robin Dembroff, a philosopher at Yale University, self-identifies as "non-binary" and states that the pronoun to be referred to is "they" thus making the sentence "they (Robin Dembroff) is professor at Yale" is a well-formed sentence in English. "They", as the singular pronoun widely chosen for people as Robin Dembroff was actually selected as the "Word of the Year 2015" by the *American Dialect Society* (Bennet 2016).

In order to protect interests such as Professor Dembroff's, on January 25th 2019 the State of New York enacted the Gender Expression Non-Discrimina-

tion Act (GENDA) including, as one of the forms of banned discrimination, the refusal to use the requested name or pronoun. Regardless of the biological sex of the individual, employers, leasers, and other professionals have the duty to use the name and sex indicated by their employees or clients. Institutions such as the Kennedy School of Government (Harvard University) and many other Universities have followed suit and enable their students to designate their preferred pronouns and make it compulsory for all personnel, namely professors, to use them in their academic exchanges (see Hartocollis 2020 and Campus Pride n.d.).

III. The case of Nicholas K. Meriwether:

However, this growing tendency to abide by the linguistic usage requested by trans people is not immune to controversy and resistance. One of the most well-known episodes took place in 2016 at the University of Toronto when the acclaimed psychologist Jordan Peterson, the author of the best-selling book *Twelve rules for life*, publicly declared that he would not follow statutory proposition C-16 which included "gender identity or gender expression" as one of the traits susceptible of protection by criminal law as a hate crime. Peterson argued that such legal provision would compel him to speak in a way which is incompatible with his conscience and against the linguistic conventions that enable peaceful coexistence.

In a similar vein, in 2019 Nicholas K. Meriwether, a Professor at Shawnee State University (Ohio) filed suit against the authorities of his University claiming that freedom of religion and speech under the First Amendment were undermined when he was forced to express himself as if sexual identity is not fixed by nature. That was implied, according to Meriwether, when, under the threat of being sanctioned, he was obliged to use the preferred pronouns of his gender non-conforming students. Interestingly enough, he was not even authorized to designate his student using his proper name or by the title of "Mr." – instead of the chosen female pronoun- because singling her out was a form of heinous discrimination.

It was Professor Meriwether's contention that words are never innocent and that the use of mandatory "new" pronouns is a way to express a specific vision of reality. By forcing individuals to use unconventional pronouns designated by others, their basic freedoms are compromised. From a dif-

ferent perspective some voices coming from the feminist camp denounce the "silencing effect" that preferred pronouns have on the reality of women. The reason should be clear: once you conceal the correlation between sex and gender that is evinced by the use of pronouns or gendered expressions, we lose sight on the dimension of women's achievements as well as their pervasive oppression (Kerr 2019).

Is Professor Meriwether right in his claim? Are higher education institutions infringing on the right to free speech or conscience when compelling us to use designated, non-conventional pronouns for trans people?[5]

Above I mentioned the practice of "dead-naming" as one of the ways in which trans individuals might be mis-gendered. Three other forms of mis-gendering merit our attention: (1) the sheer rejection of gender self-identification when it does not correlate with sex; (2) the rejection of the use of the non-conventional pronoun designated by the individual and (3) the rejection of the use of the conventional pronoun designated by the individual when it does not correlate with its sex. Take for instance the non-conforming individual Mary Smith who self-identifies as a woman albeit she is biologically male and has "xie" as her preferred pronoun. In the first case we would incur mis-gendering when stating: "Mrs. Smith is not a woman". In the second case, because we reject the use of the non-conventional pronoun "xie", we incur mis-gendering if we address Mary Smith saying: "She is a woman" instead of "Xie is a woman". In the third case, we misgender Mary Smith if we say: "He is now a woman".

Does free speech cover any of those statements? According to Professor Meriwether and many others, the answer should be affirmative and the reason is that in our liberal democracies "compelled speech" is generally banned.

We might be legally compelled to discharge certain formalities that include the use of specific expressions, namely for the sake of acquiring certain powers or enjoy certain rights. A very significant example in point is Barack Obama's oath in his first term as President of the United States in 2008. The person in charge of administering the oath, the Supreme Court Chief Justice John Roberts, inadvertently changed the order of the words in the oath and made him say: "I will execute the office of president to the United States faithfully," instead of "I will faithfully execute the office of president

[5] Not for Cossman (2018).

of the United States". Barack Obama had to repeat the oath on the next day and pronounce the sentence in its proper order.

For the lay citizen the mandatory use of certain expressions is less abundant precisely because freedom of speech and thought ought to prevail. In a number of iconic decisions, the US Supreme Court has declared that the First Amendment not only protects speech as an immunity-right that correlates with a duty of "non-interference" – banning censorship, for instance – but also the liberty-interest in "not saying" with the correlated banning of compelled speech[6]. In the landmark decision of *West Virginia State Bd. of Educ. v. Barnette* (1943) the Supreme Court considered that the duty of students to make the pledge of allegiance was a form of "compelled speech" repugnant to freedom of expression and religion insofar the authorities force individuals to say what they might not think or embrace (*West Virginia State Bd. of Educ. v. Barnette* 1943, 634). In a similar vein the Supreme Court decided that forcing the drivers of New Hampshire to use the sticker "To live free or die" in their cars was against the free exercise of religion by Jehovah's Witness (*Wooley v. Maynard* 1977). More specifically, the Court so argued, it was unconstitutional to force any individual who deems it unacceptable to be a tool in the fostering of an ideological creed (*Wooley v. Maynard* 1977, 715). Similarly, it is unconstitutional to compel a private agent the inclusion of a float sponsored by a LGTBIQ+ association in a Saint Patrick's Day parade (*Hurley v. Irish American Gay* 1995), or to force pro-life organizations whose goal is to give medical attention to pregnant women to provide them with information about public subsidies to abortion (*NIFLA v. Becerra* 2018).

IV. Pronouns and linguistic conventions: freedom of conscience and duties of respect

In the case of Professor Meriwether, the Court decided that, since the duty to use the preferred pronouns and treatment demanded by the student pertains to the domain of his professional duties as a Professor and not as a common citizen, his avoiding the compelled speech is not guaranteed by the First Amendment (*Meriwether v. Trs. of Shawnee State Univ.* 2019). It

[6] See Eugene Volokh (2018).

has been also argued that this is a question of respect, a duty of civility that, as in many other cases, we believe should trump over our intimate beliefs. In that vein goes the famous adagio by La Rochefoucauld: "hypocrisy is a tribute that vice pays to virtue".

Consider, for instance, the very plausible and admissible belief that paternity is a strictly natural or biological phenomenon. Thus, adoptive parents or individuals who resorted to artificial reproductive technologies and bear no genetic link to the offspring are not "fathers" or "mothers". It seems reasonable to argue that holding such belief should be compatible with not unveiling the sons or daughters of those not taken as "parents" that they are not their offspring. The reason for such a form of "compelled speech" lies in the fact that the unbridled expression of my intimate belief about the ethically correct form of human reproduction very likely harms those individuals, particularly if they are underage. Teachers, for example, are not entitled to the exercise of their right to free speech in the classroom if that implies this form of evincing their rejection of family diversity. In these contexts, a professional or social courtesy duty may trump freedom of conscience.

Similarly, it may be argued that accepting the consequences of gender identity or sexual orientation is similar and equally non-violent to our intimate convictions. By using "mother" to refer to the woman who hired a gestational surrogate mother to bear a child, we don't refrain from believing that motherhood is essentially a biological fact; by using "partner" or "spouse" to refer to someone who is legally married to a person of the same sex, one still may intimately think that homosexuality is a sin, and by the same token, by using preferred pronouns one may stick to the conviction that gender self-identification is nonsensical (Schauer 1982).

And yet there might be cases in which forcing us to say something out of respect of others' self-assumed identity truly violates our conscience and freedom of thought. There are, for example, individuals who self-identify as not belonging to the human species ("otherkin" or "trans-animals"). Suppose someone identifies with the species *canis lupus familiaris* and requests to be greeted with the sound "whoof". Could it be sensible to impose a universal duty to bark at him? Could it be sensibly affirmed that by not doing so we would be offensive to him? Could our refusal be considered a form of discrimination based on species-identity? It seems preposterous.

But back to our discussion on preferred non-conventional pronouns by trans people, actually, if you think carefully, in our daily social interactions

speakers do not use the pronouns that correlate with biological sex but with the physical appearance as male or female (McNamarah 2020). So we may conform ourselves with such a rough approach, and that shows that our commitment with the biological fact of sexual dimorphism and its relevant correlation with several linguistic and social institutions does not compel us to any degree with a thorough biological scrutiny of the individual before we address him or her with the corresponding pronoun.

And yet the use of non-conventional, tailor-made pronouns such as "xie" or similar made-up words, suffers from a fatal flaw: they cannot function properly as pronouns. An ordinary tale may suffice to prove my point: we are always excused from our inability to refer to someone by his or her proper name. These slips of memory are part of the fabric or our routine coexistence. This is precisely the reason why pronouns are useful, but if every individual is entitled to a personalized or non-conventional pronoun, the pronominal function is lost. No one could be required to remember everyone's preferred pronoun in the same way in which everyone is excused for having forgotten any other's proper names.

To sum up, from my previous analysis it follows that the right to free speech is not violated when we are compelled to treat non-conforming people according to their gender identity and to use their preferred pronouns insofar as they are conventional pronouns and irrespective of whether they correlate with their biology or not. For instrumental reasons, though, it is justified to refuse to use non-conventional pronouns until a neutral pronoun to be used to refer to non-conforming or trans people is conventionally agreed upon. The consequence should be that, regarding the forms of mis-gendering that I identified previously it is not acceptable to say in reference to Mary Smith: "He is now a woman". A duty of respect or civility that do not impinge on our freedom of conscience compels us to say: "She is now a woman".

V. Conscience, expression and the value of diversity

From what I have just said, it should not be concluded that we have a duty to respect gender self-identification itself, even when claiming that our sexual condition is not at our disposal and such statement causes grievances or discomfort to trans people. Here comes, then, the paradox: although freedom of expression or thought does not allow the misgendering of statement (3)

"He is now a woman" referred to Mary Smith, those very same basic rights should make the statement "She is not a woman" in reference to Mary Smith as a justified manifestation of the right to free speech. Similarly the broader claim: "trans women are not women"[7].

As a matter of fact, PC speech confirms that there is a discordance between sex and gender and that the self-proclaimed gender of trans or non-conforming individuals is somehow different from so-called cis or conforming individuals. The best proof comes from the realization that the statement "trans women are women" is not an obvious platitude but a meaningful, debatable statement whose sensible interpretation might be: "even though trans women are not biological females they ought to be treated as women". Thus, we cannot possibly curtail the expression of those who bluntly consider gender non-conformity as nonsensical, equivocal, misleading or plainly false.

Banning the possibility of speaking out loud an altogether rejection of transgender ideology erodes the marketplace of ideas causing overall damage, as John Stuart Mill defended in *On liberty*. We benefit from the right to free speech even when we don't say what is true, or what is correct: in Mill's own words:

> … the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error (1856, Chapter 2).

A form of compelled speech that erases criticism of mainstream political ideologies short-circuits the diversity of discourses at hand for the public, and thus undermines the rights and interests of individuals who are willing to develop as self-autonomous agents by the promotion of their capabilities for criticism and suspicion from revealed dogmas. That includes LGTBIQ+ dogmas (Scanlon 1972, 215; Sacharoff 2008, 362).

[7] An opposite opinion was issued by the British judge J. Tayler in the case of the firing of Maya Fostater by CGD Europe/Centre for Global Development (*Maya Forstater v. CGD Europe and Others*, 2019).

VI. Concluding remarks

Whatever the gender identity or sexual orientation of individuals might be, whatever their accidental, non-voluntary traits, all individuals are entitled to equal concern and respect by public authorities.

In the previous pages I attempted to argue that a basic duty of civility or courtesy trumps the right to freedom of speech so that it is reasonable to require that we address trans people according to their gender identity as self-proclaimed, and also the names and conventional pronouns of their choosing. But it is not reasonable to compel the use of non-conventional pronouns.

Yet freedom of thought or conscience entitles individuals to be permitted to respectfully affirm the cluster of philosophical, religious, scientific and political ideas that are implied in propositions such as "Mary Smith is not a woman" or more broadly "Trans women or trans men are not women or men". Even more so in academic settings where it is particularly necessary to maintain an environment of non-coercive exchange of ideas, perspectives and values.

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Political Correctness and the Law

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ABSTRACT

This paper aims at calling attention to some of the ways in which "political correctness" can impact the legal field, from relationships in the workplace to language guidelines, from teaching in law school to the evolution of legal definitions, suggesting further space for study and research.

KEYWORDS

political correctness; workplace; language; law school, legal definitions

Introduction

"*At any given moment there is an orthodoxy, a body of ideas which is assumed that all right-thinking people will accept without question. It is not exactly forbidden to say this, that or the other, but it is 'not done' to say it, just as in mid-Victorian times it was 'not done' to mention trousers in the presence of a lady*", George Orwell once wrote, in what he meant to be a preface to "Animal Farm" (Popova 2013): each and every era, of course, has its own "political correctness", its own sensitive topics, its own forbidden words.

The phrase "political correctness", in fact, first appeared in Marxist-Leninist vocabulary following the Russian Revolution of 1917; in the 1930-40s, it referred to the adherence to the teaching of one's political party. It then came to be used (in the 1970-80s and 1990s) – mostly by conservatives – to refer to (and criticize) some left-wing issues and teaching methods (Roper 2020).

Some commentators, nowadays, feel there is an "overdose" of political correctness, transforming our society into an overly sensitive one, where people are afraid to voice their opinions (Marques 2009), while others believe that the lamented "dictatorship of political correctness" is in fact a myth (Dupuis-Deri 2001; Poltier 2006).

Some authors (Moller 2016) recognize the legitimate ends at which "political correctness" is aimed, but argue that we should pay greater attention to the possible conflict with other values we hold dear; others highlight the fact that, when we penalise offensive speech, we have to determine not only what is offensive, but also who decides what is offensive, and that these boundaries are likely to be determined by the beliefs and values of those in power (Reynolds 2009).

Weber (2016, 113-114) suggests forgoing the expression "politically correct" and using "culturally respectful/acceptable", instead.

Whatever our opinion on these matters might be, it is undeniable that we are seeing a surge of attention in how we speak and what we say, the kind of words we use, the things "it won't do" to say.

This increased attention is of great importance in journalism and the media in general; it is also extremely significant in the legal field: words shape the way we debate social issues, which will influence the direction our legislation follows in the future.

Even more than that, laws are – in fact – essentially *made of* words: using one word or the other can completely change the rules that shape our society, and the personal fate of given individuals at crucial times in their existence. The legal implications of language, and especially of "politically correct" language and mentality, are therefore immense.

How do we balance the right of employees to be protected from discrimination with the right of other workers to freely express their opinions and beliefs?

How do we keep legal definitions up-to-date with the latest progress in inclusive language?

How do we approach difficult topics in law school while guaranteeing that our students feel safe?

How do we make sure minorities are protected from violence while keeping clarity in legal definitions, especially when it comes to criminal law?

This paper will attempt to briefly touch on just a few of these topics, with no pretence of giving definite solutions, in the sole hope of suggesting further study and reflection.

1. Political correctness in the workplace

Anti-discrimination laws' main concern is the relationship between employer and employees; but an increasingly diverse society means that co-workers share an ever greater portion of their daily lives with people with different backgrounds and sensitivities, which can lead to conflict.

American courts (ICAEW 2019) recently ruled that opposition to political correctness is not a "belief" protected by anti-discrimination law, as an employee's "beliefs" include only religious or philosophical beliefs (or lack thereof) that govern or affect how the employee lives their life.

But while "opposition to political correctness" is not a belief in itself, it may happen that a person's beliefs come to clash with what is perceived to be "politically correct" in the work environment.

It might also happen that employees' ways of speaking and behaving offend their colleagues and make them feel less welcome in the workplace.

How do we deal with such situations?

Some experts (Ely et al. 2006) believe that "political correctness" with its "unspoken canons of propriety" can be a "double-edged sword" and pose barriers to constructive and engaged relationships in the work environment. Employees belonging to minorities can often be reluctant to raise concerns about inappropriate behaviour they experience, worrying about being seen as too sensitive or over-complaining; if harsh sanctions are established, they can also keep silent for fear of "causing trouble" for co-workers. (How many of us, even if hurt or offended, would actually want our insensitive colleague to lose their job and income?). Other employees can feel exposed to excessive scrutiny and judged too harshly for what they perceive as well-meaning remarks or attitudes. All of this can lead to a tense and non-productive workplace, while open communication could improve relationship and work performance.

Some legal theorists (Simpson 2018) even argue that the regulation of offence can actually increase the incidence of offence, by nurturing and reinforcing offence-taking sensibilities, and others (writing on the subject of workplace sexual harassment) have highlighted how excessively broadening the range of prohibited speech "would not only undermine the central guarantee of free speech, but it also would fail to serve the avowed purpose of advancing gender equality" (Strossen 1992), undermining equal and full participation of certain groups (such as female workers) by depicting them as needing special protection.

To successfully strike a balance between different principles and goals, a thing to keep in mind is intent.

A recent opinion piece (Yoffe 2020) has remarked that, when it comes to hate crime and discrimination, we increasingly tend to overlook whether or not the person *meant* to be hurtful: the hurt is real and must be punished, regardless of intent. But this attitude (aside from being incompatible with a criminal justice system worthy of the name) can lead to a double feeling of injustice: one person feels unjustly offended or discriminated against, while the other feels unjustly disciplined as they did not mean anything bad by their words or gestures.

Of course, it can be said that a workplace (or university) code of conduct does not need to meet the strict requirements of *mens rea* that need to be met in criminal law, but – when compiling hate speech regulations – much can be done to make rules narrower or broader and more or less dependent on intent.

Altman (1993), for example, compares different University regulations in the 1990s, highlighting that while some (e.g. Stanford) sanctioned the speakers who "intended" to "insult or stigmatize" others on the basis of race, gender or sexual orientation by using "epithets or terms that ... convey 'visceral hate or contempt'", others (e.g. the University of Connecticut) included "inconsiderate jokes" and "stereotyping the experiences, background, and skills of individuals".

Are we sure all of these behaviours can be considered equally reprehensible?

Or can we say that the aim of hate speech regulations should not be to "prohibit speech that has undesirable psychological effects on individuals" (Altman 1993, 315), but only to reprimand the use of language and behaviour that deliberately degrades others?

For simply inconsiderate/ignorant behaviour, communication and education could arguably be more effective both in recognising and repairing offence and, in the long run, in building a more inclusive and respectful work environment.

2. Political correctness and the evolution of language

From a linguistics point of view, "political correctness" aims to eliminate exclusion of various identity groups through language evolution: language shapes our reality and how we think about it, as well as revealing and pro-

moting our biases; therefore, it is argued, sexist and racist language promotes sexism and racism (Roper 2020).

With that in mind, attempts have been made in many countries to achieve more inclusive language in administrative and legal documents, with special attention paid to sexist patterns of speech.

In some languages (such as Spanish and Italian), for example, the masculine is the non-marked gender (e.g. in Italian the male plural "bambini" includes both male and female children, while the female plural "bambine" means only little girls) and this gives less visibility to women, especially when speaking of categories such as scientists, teachers or politicians. To avoid this – now undesired – "sexist" effect, the suggestion (see Maldonado García 2015) has been to use splits ("profesores y profesoras"), neutral expressions ("personas", "profesionales", "ser humano") or feminine words for professions ("ministra"). English-speaking countries, too, are abandoning words like "policeman" in favour of more gender-neutral solutions, such as "police officer".

These guidelines and suggestions can be implemented easily enough in legislation: since most laws apply to individuals regardless of sex or gender identity, legal language often uses neutral expressions already (the use of terms such as "individual", "person", "human being" is already common in texts such as international conventions or national laws) and, when it doesn't, it can be adapted without too much effort.

How effective is it to police every-day language through legislation or official guidelines, though?

As some scholars have noted (Maldonado García 2015; Agudo 2012), what works for the press, the administration, in public speeches or official documents, often doesn't work for the spoken language, which doesn't accept artificial changes and needs to be practical more than it likes to be inclusive.

The question, here, is: should we promote change through our use of language, or wait for language evolution to naturally follow social change?

When forbidding certain language (aside from the obvious racist, ableist or sexist slurs) in legislation or codes of conduct, where do we draw the line? Can a worker or a student be sanctioned for using a common expression, not yet felt as "wrong" in his social circle, but already frowned upon by the inclusivity advisers of the corporation or the faculty?

"Politically correct" language can sometimes seem excessively careful, and too-quickly changing to be actually used by people in everyday life

(Crisafulli 2004, 40-41): *"person with special needs"*, which was considered not long ago an acceptable substitute for the more problematic *"handicapped"* (which had earlier replaced words now universally seen as offensive, such as *"cripple"*), is already being abandoned in favour of *"person with disabilities"*; some disabled rights activists, however, reject it, preferring to refer to themselves as *"disabled"*.

In half a century, black people in America "have traveled almost full circle in the name of PC: from 'colored people', to 'negroes' to 'blacks' to 'Afro-Americans' to 'African-Americans' and, most currently, to people of color" (Lasson 1996, 693).

How can a person make sure they do not offend? When designing guidelines and legislation (especially those that provide heavy consequences for transgressions) we should remember that most people have no specific knowledge of linguistic changes. Aside from obvious slurs and insults, we should keep intent in mind and be open to educate more than to punish, trying to foster a universally respectful attitude more than to sanction specific violations.

This becomes even more critical when the (actual or perceived) offence does not pertain to "material" characteristics, such as colour or disability, but to more "immaterial" ones, like cultural identity or religious beliefs.

Some scholars, such as Letsas (2012), dispute the claim – endorsed by the European Court of Human Rights and many courts in Europe – that there is a right not to be insulted in one's religious beliefs "by the public expression of the views of others: we should distinguish between 'the claim that something is the right thing to do'" (not insulting others' beliefs) from "the claim that others have a right that you do it, in the sense that they have a right that collective force be used against you if you don't". And if there is no such right, there is no need to "balance" it with the right to freedom of expression.

Others, however, argue that western commentators' objections to blasphemy laws are "fuelled by a failure to understand the significance for the religiously devout of their religious beliefs as their primary point of self-identification" (Cox 2014), thus making offence to religious beliefs not much different from offence based on race or gender.

Interestingly, Edgar (2006) argues that, far from having a *right not to be offended*, we all have *a right to be offended*: that is, a right to have our ideas and beliefs challenged, for "defence of free speech is not primarily a matter of the rights of the speaker but the rights of the listener".

3. Political correctness in law school

Freedom of expression is even more vital in universities than it is in workplaces: for this reason, it has been said that speech regulation should be less restrictive on campus than in other settings (Altman 1993, 308).

In the USA, academic freedom (even though there is some debate on what exactly it is: is it a right in itself? and if so, who possesses it: institutions, professors or students? and against whom can it be invoked?) seems closely tied with the more general right to free speech, as protected by the First Amendment (Smolla 2018). The Italian Constitution, like many other European fundamental laws, explicitly protects both free expression of thought (art. 21) and freedom of art and sciences, which may be freely taught (art. 33).

The practical application of these principles, however, is not always easy, and researchers have spoken of "today's growing confusion of what is permissible in academia".

Let's consider this example: recently, there has been some debate in Italy over a text adopted by a University professor for her bioethics course: the text, written by a well-known bioethics scholar (who happened to also be a Cardinal in the Catholic Church), expressed some views about procreation and homosexuality that were considered unacceptable by some commentators (Bernadini de Pace 2020). However, not only had the text in question been influential in the bioethics debate for years, but also the University was privately owned by a religious congregation and the views expressed by the author were consistent with the Catholic magisterium, so that criticism led to worries about religious freedom (Vitale 2020). The question here is: can a professor, or an academic institution, teach according to a certain philosophical, ethical or religious worldview, even if their opinions are considered outdated and even offensive by some? Would the answer be the same, if the ideas of - say - a more "progressive" professor clashed with those of a more "conservative" institution or public, or vice-versa?

In the last few years, we have often seen universities and other institutions revoke invitations and engagements with speakers after protests over controversial statements: even such a reputed philosopher as Peter Singer has had speaking events cancelled over some of his stances on disability (Zhou 2020).

It seems, as "de-platforming" becomes more common, that some ideas are not even worthy of discussion any more: this, however, doesn't seem very productive for academic progress, and especially so in law school.

Studying law inevitably means dealing with harsh realities and difficult topics, charged with ethical significance and cultural influences. Students' backgrounds can lead them to find some topics (for example, domestic or sexual violence) hard to discuss; students and professors can hold different political and religious beliefs that might make discussions particularly heated.

What happens, then, when professors are intolerant of political opinions different from their own, or students feel they cannot share their ideas with their classmates? When certain topics or viewpoints become too politically or emotionally charged to be discussed in the classroom?

Students grow wary of expressing their opinions (Bahls 1991), and professors are afraid to ask their student to explore certain topics; some may even suggest that subjects such as rape law should not be taught because of their potential to cause distress (Gersen 2014).

Many instructors (especially male professors), in fact, feel anxious about teaching rape law: students who have been victims of rape might find it traumatic to discuss the topic; discussions could become emotionally charged; issues of identity and gender are involved [there may be the feeling that "All women are potential victims. All men are potential defendants" (Tomkovicz 2012, 498)].

Lasson reports that "in 1993, a group of female law students threatened Professor Alan Dershowitz with formal charges of sexual harassment for having created a hostile atmosphere during two days of classroom discussion about men falsely accused of rape. According to Dershowitz, many professors avoid teaching classes where issues of race, gender, or sexual preference might arise" (1996, 705).

Professors either do not teach these topics at all, or they teach these classes in a very different manner from the way they normally teach criminal law subjects (Denbow 2014).

This is especially problematic for law students, because "the law school classroom is one place where future legal professionals, many of whom will have substantial power, form their ideas" (Denbow 2014, 29; Bahls 1991).

Law students (more than students in other fields of education) need to understand how different values and political objectives influence the law; they need to be able to test their own views, as well as to discuss difficult topics and learn how to defend even (one could say especially) unpopular opinions.

During their career, a lawyer or a judge might well be called upon to deal with cases of discrimination, violence, rape: how will they be able to do that, if we do not train them properly?

Though some scholars - perhaps rightly - believe it is problematic to urge students (for example, in moot court exercises) to appear to support positions that they find morally repugnant (Tushnet 1992), we should nevertheless encourage students to discuss them, as, once they become legal professionals, they might well be called to defend or judge (and, perhaps, even acquit) someone who is accused of the worst crimes.

As others have remarked, "hard cases make better classes" (Estrich 1992): shielding students from controversial topics can seriously undermine their training.

4. Political correctness and legal definitions

Let's say we have established that some word or expression is perceived to be offensive and hurtful for some people and shouldn't be used in polite conversation. Could it still be used in legal definitions? Should we update our legislation every few years in order to avoid any possible slight?

For example, some guidelines for the medical field,[1] in relation to transgender patients, suggest avoiding expressions such as "biologically male/female", "born a man/woman", or "sex reassignment surgery". Can a legislator keep using these phrases, if needed for clarity?

Most legislation uses the word "mother" to refer to the parent giving birth, and takes it for granted that it is a woman[2]: as we now know that transgender men and non-binary people born with female reproductive systems can and sometimes do get pregnant, should we update our legal definitions?

Do we need to stop referring to "women's reproductive rights" or "the woman's choice" (often merely an euphemism for "abortion") in our policies and legislations?

Laws, by their own nature, need to be general and abstract; they also need to be as clear and precise as possible. This is especially true for criminal law.

[1] See the list of *Terms and Phrases to Avoid* compiled by Alberta Health Services (n.d) from the *Guide To Creating Safe and Welcoming Places for Sexual & Gender Diverse (LGBTQ*) People* (2016).

[2] Italian L. n. 194/1978 on social protection for maternity and voluntary termination of pregnancy, for example, always refers to the pregnant person as "the woman" (https://www.gazzettaufficiale.it/atto/vediMenuHTML?atto.dataPubblicazioneGazzetta=1978-05-22&atto.codiceRedazionale=078U0194&tipoSerie=serie_generale&tipoVigenza=originario).

Exact determination of the offence (closely tied with the principle of legality) is, in fact, one of the basic principles of Italian criminal law:[3] nobody can be punished for a criminal offence unless the legislator has told them - beforehand and in clear and precise terms - what they are *not* allowed to do.

When it comes to issues that relate to our main topic ("political correctness"), as we have just seen, terms tend not to be so clear; but while it is natural for language to shift and evolve quickly in society, academia and the media, law (especially criminal law) needs much more stability and certainty.

Just to give one example: Italy is currently updating its legislation against "hate crime" with a bill[4] that will extend to gender identity and sexual orientation the same protection given to race, ethnicity and religion. It is, of course, a laudable effort, but some legal experts disagree with the wording of the bill.[5]

In fact, considering that many actions that would constitute criminal offences under the proposed new Italian legislation are already punishable in themselves (without consideration of their motives), and that a homophobic motive could already be considered an aggravating circumstance under the provision that allows for an increased sentence when a crime is committed for futile or abject reasons, it has been argued that the choice to specifically criminalize homophobic discriminations would lead (as, to some extent, already happened with provisions targeting racial discriminations) to a mostly "symbolic" piece of legislation, aimed more at cultural change than at actually persecuting well determined, socially offensive behaviours (Riccardi 2013).

Moreover, while it seems easy enough to determine what constitutes an "act of discrimination" - it is less clear what could be seen as "instigating" discrimination (which would be penalized as well in the proposed bill): it has been argued that disagreement on topics such as same-sex marriage (in accordance, for example, to one's religious beliefs) or access to IVF and surrogacy for same-sex couples could be seen as "discrimination" and lead to a criminal charge (Tettamanti 2020). Even though, at present, surrogacy is illegal in Italy for all kind of couples, the opinion that it should remain so is at times labelled in the public debate as "homophobic", as it deprives gay couples of a pathway to parenthood that is seen by many as the only option,

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[3] For a quick overview, see Canestrini (2012).

[4] The text of the bill is available at https://www.camera.it/leg18/126?tab=&leg=18&idDocumento=0569

[5] For a brief review of the bill and some of its critics, see Di Leo (2020).

as (with few exceptions) only married heterosexual couples can legally adopt in the country.

In fact, worry over the legal protection of children born via surrogacy abroad (and who are legally considered to be children of the biological parent only) has sparked much debate and a strong suggestion from the Constitutional Court towards some sort of recognition: but the practice itself remains illegal.[6]

Could an opinion in accordance to current legislation constitute a criminal offence? It does not seem reasonable, but the terms used are open and vague enough not to completely rule out the possibility.

If "discrimination" becomes a criminal offence (and not, perhaps, simply ground for a tort claim) what constitutes "discrimination" needs to be defined with the utmost precision, and cannot be left to the fluctuating evolution of language guidelines and "politically correct" opinions.

Moller (2016, 8) reports how some Canadian jurisdictions have made it a human rights violation to make any "vexatious comment" known to be "unwelcome by the individual or class" on grounds that include "political belief": a definition he agrees 'one might reasonably fear as absurdly overboard'.

Not only that, but criminal offences require - alongside a well-defined behaviour or event causally depending on the offender's action or inaction – a subjective element: does discrimination or otherwise offensive behaviour need to be wilful/intentional/malicious, or can someone be accused of it on the grounds of negligence?

"Hate crimes" (a term so closely tied to US history and legal system that even translating it into other languages becomes problematic) seem to require a strong psychological participation (legally expressed as *mens rea*), not really compatible with – say – a careless choice of words or the expression of a controversial opinion.

One could argue that some opinions are, indeed, criminal in themselves: there are, after all, laws that punish Holocaust denial.

Such provisions have spread in Europe since the early 1990s and, having been upheld by the courts (which have stated that denying the reality of clearly established historical facts such as the Holocaust constitutes a serious threat to public order and is incompatible with democracy and human rights), now tend to broaden their scope to other genocides and crimes against humanity,

[6] See Press Office of the Italian Constitutional Court (2021).

potentially expanding "criminal restrictions on freedom of expression in an area – the formation and preservation of a shared memory on a country's founding past events – that is critical to the contemporaneous demands of identity building" (Lobba 2015).

The *threat to public peace* is also one of the criteria used by the European Court of Human Rights (alongside others such as humorous/satirical intent, context, explicitness of the message, target, reasonable avoidability of exposure to the content, etc.) when regulating matters of freedom of expression and controversial humour (Godioli 2020). By "threat to public peace", the Court means whether the material is susceptible to increasing sentiments of contempt, rejection, and hate towards a certain religious or ethnic group; however, in the public debate, it is often remarked that some material could create a negative (perhaps event violent) reaction *from* the targeted group (e.g. a religious minority).

That is a much more questionable criteria to follow: it is one thing to ban speech or art because it could encourage violence *against* those who are targeted, it is another thing for some group or the other to *use* the threat of violence in order to be protected from criticism or satire.

It is a dangerous road to go down: respect for victims and concern over inclusiveness, if not correctly balanced, can lead to excessive restrictions on the freedom of speech, research and criticism.

Criminal law, in itself, does not seem to be the right tool to teach people "how to behave" or (even more so) "what to think" in an evolving society: criminal laws (should) reflect an already agreed-upon – even if not always respected – code of behaviour (we punish murder so harshly because we all – more or less intuitively – agree it is a grave wrong) and are not suited to regulate matters in which social attitudes and values still differ and clash. Bad ideas should always be fought, primarily, with other (better) ideas.

Conclusion

Clearly this paper includes more questions than answers, as studying the impact of "political correctness" on legal matters opens vast fields of research.

One thing can be said here: the laudable aim of avoiding discrimination and fostering inclusion can hardly be pursued through prohibition alone. We cannot claim that erasing certain words from speech (if even possible)

will "magically" change the way people think; fear of harsh penalties – such as being fired from work – can lead to external compliance, but also to resentment and division, which could be counterproductive in the long run ... while time, dialogue and education seem potentially more effective.

That being said, criminal law seems a particularly ill-suited tool to foster inclusion; law school, on the other hand, is an excellent setting for discussion and improvement: provided it doesn't shy away from hard, uncomfortable topics and difficult questions.

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CONSONANCES AND DISSONANCES BETWEEN *LEGAL REALISMS*:

a comparative study of the Theory of Law[1]

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SUMMARY:

ABSTRACT

This *paper* is a *comparative reflection* of the models of *Legal Realism* in the *Theory of Law*, considering North-American Legal Realism, Scandinavian Legal Realism and Brazilian Legal Realism. This article presents the *Theory of Realistic Humanism* (TRH) within *Legal Realism* with the *Critical Theory of Law*.

KEYWORDS

Theory of Law; Legal Realism; Theory of the Humanistic Realism.

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Introduction

The search for *correctness* has been one of the most important fronts of work of the *Theory of Law*, in recent decades. The issue of *correctness* directly concerns judicial activity, which is the responsibility of the judge, and has little to do with the issue of *political correctness*, which is the responsibility of the legislator and the world of politics. This is a great challenge for the Law, because it challenges the *Theory of Law* to think about the control of judicial decisions and the role of reason in the exercise of jurisdiction. The *justification* of legal decisions implies a concern for the *power of decision* that is established, at the boundary of legal activity, as an activity of concretisation, application and the accuracy of Law, as Oliver W. Holmes has already detected.[3] Although the issues of *correctness*, *predictability* and *justification* of the field of *practical reasoning* are not assumed here as identical categories from the theoretical-conceptual point of view, it is important to draw attention to the idea that the issues that occupied the attention of the *Theory of Law* in the past, now, re-emerge under another guise, through the requirements contained in the most current debates of the *Theory of Law*.[4]

However, if the *Theory of Law* contemporaneously leans towards this discussion, it is not that it has not known other previous attempts to discuss and think about the limits of legal action. Thus, the search for *correctness* echoes an older search for Law, historically precedent, for *exactness* and *predictability*, as can be seen in the landmark study by Jerome Frank.[5] It is here that a study of the varied theoretical perspectives of *Legal Realism*, and its internal nuances, finds its place. And this is because the entire effort of the theoretical currents of *Legal Realism* tilted Law towards the discussion of the role of judges and legal decisions,[6] shifting the axis previously fixed by

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3 "The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts" (Holmes Junior 1897, 01).

4 *Vide* Linhares (2020).

5 "Only a limited degree of legal certainty can be attained. The current demand for exactness and predictability in law is incapable of satisfaction because a greater degree of legal finality is sought than is procurable, desirable or necessary" (Frank 2009, 12).

6 "The Law can easily be made to play an important part in the attempted rediscovery of the father. For,

the tradition of *Legal Positivism*, the universe of the legislator and legality. Therefore, what we want to highlight in this paper is precisely this, that is, the importance of advances promoted by the tradition of *Legal Realism* in the face of *Legal Positivism*, with the introduction and deepening of the debates regarding the field of *practical rationality* in Law.

In this sense, in a current environment of discussion that *re-thinks* the value of jurisprudence, it is wise to ask, again, if the stock of concepts of *Legal Realism* does not keep a certain degree of relevance. The psychology of decision, the power of the decision and the ideology of the decision are issues that are present and dormant. It is also important, to verify whether or not *Legal Realism* has been renewed, and, hence, ascertain whether the exhaustion of its first manifestations has represented, for our days, the exhaustion of the potential of all its conceptions.[7] Even - although the limits of this article do not allow for the development of this topic -, attention should be drawn to the fact that, beyond the consecrated and longer-lasting views of *Legal Realism*, there are new perspectives of *Legal Realism*,[8] emerging and gaining theoretical ground in our times.[9] Now, this is what justifies that, in *Special Volume* (I) of the *Coimbra Journal of Legal Studies*, one of the topics addressed is precisely the philosophical reflection around *Legal Realism*, its theoretical currents, historical stimuli, opponents, academic environments, challenges and timeliness.

Thus, one of the first findings to be made, in this respect, is that the conceptions, which the currents of *Legal Realism* have concerning Law, are not dead. Quite the contrary, this study will try to show that there are new perspectives of *Legal Realism*, that they vary and complement each other, especially considering the perspectives that emerge from Latin American approaches. Various currents of *Legal Realism* are known and well consecrated, such as (i) *Scandinavian Legal Realism* (Axel Hägerström; Anders Sandöe Örsted; Karl Olivecrona; Wilhelm Lundstedt; Alf Ross); (ii) *American Legal Realism* (Karl N. Llewellyn; Jerome Frank; Carl Sustein; H. Oliphant; R. M.

functionally, the law apparently resembles the Father-as-Judge" (Frank 2009, 21).

7 "Thus, *Critical Legal Studies* and feminist theory, on the one hand, and the economic analysis of law on the other, are keeping alive, in the contemporary debate, the dialectic existing between a more radical wing and a more moderate one; both wings owe much to legal realism (...)" (Faralli 2005, 81).

8 *Vide* Dagan (2017).

9 "My realistic perspective is informed by the classical pragmatism of William James, John Dewey, Charles Sandes Peirce, and George Herbert Mead" (Tamanaha 2017, 02).

Unger); (iii) *Genovese Legal Realism* (Giovanni Tarello; Ricardo Guastini); (iv) *French Legal Realism* (Michel Troper) (Guastini 2005, 107-128).

In this regard, there is little to add, and it would be unproductive to attempt to take up these quadrants again, since this acquisition is considered already obtained through many papers previously published in this respect.[10] For this reason, this paper will focus on considering only three (3) of these models, and examine the *consonances* and *dissonances* between them, seeking to verify how *The Theory of Realistic Humanism* is placed among these trends and conceptions, whether considering the local historical development, or considering the great traditions of *Legal Realism* developed to date. Thus, it is not a paper that evokes the memory of *Legal Realism*, but rather emphasises the distinction between its currents, to direct the reader towards the field of problematization, differentiation and criticism between its conceptual options and theoretical fields. Hence, the title *Consonances and Dissonances between the legal realisms, Scandinavian, American and Brazilian*: *a comparative study of the Theory of Law*.

Each of these versions of *Legal Realism* will be studied separately, in the items below, but what matters first is examining what the different versions have in common: i) criticism of *Natural Law Theory* and of the *Legal Positivism*; ii) the empirical treatment of juridical problems; iii) criticism of the *Legal Doctrine* and its methods; iv) criticism of abstraction in the definition and conceptualisation of Law; v) the role of the *Science of Law*; vi) the idea that Law is undetermined by its language[11] and defeasibility may permeate the condition of the practical treatment of the rights (Regla 2014, 130-131).

1. *The School of Uppsala*: Scandinavian legal realism

The *School of Uppsala* is developed through numerous contributions and are influential precedents for the thinking of Alf Ross, *English Realism* by John Austin and Oliver Wendell Holmes, in addition to *Scandinavian Realism* by Anders Sandöe Örsted, Axel Hägerström, Karl Olivecrona and Wilhelm Lundstedt. But the *Realism* which will develop because of Alf Ross will be a *moderate Realism*, if we closely follow the interpretation of Carlos Santiago

[10] *Vide* Aarnio (2010); *Vide* Tusseau (2014); *Vide* Vaquero (2012).

[11] These observations were established by A. N. Vaquero (2012, 725).

Nino (2015, 56) in this respect, in that it is more directly influenced, on one hand, by Axel Högerström and Karl Olivecrona, and, on the other hand, by Hans Kelsen.[12] Despite the wide scope of *Scandinavian Legal Realism*, and its impact on the world, it is important to leave a clear warning that its scope is limited in Latin countries, especially in France, Spain and Latin America, as the study by Carla Faralli warns (2000, 427). Even today, the example of Brazil, *Scandinavian Legal Realism* has a limited number of supporters and specialised studies.

The main work by Alf Ross, *On Law and Justice* (*Om ret og retfaerdighed* 1953; *On Law and Justice* 1958), contains the purpose of leading the principles of empiricism to the determinant conclusions for the understanding and description of Law.[13] The context of the emergence of the work is at the beginning of the 20th century, under the strong influence of the emerging conception of *Legal Logic* and the *Modern Science of Law*. Therefore, the epistemological perspective from which the model of *realism* of Alf Ross is, according to which can only be said of Science, when faced with Law, to the extent that an *Empirical Science* develops, since empiricism is a quality of the *Modern Science of Law*.[14]

For no other reason, the object of the *Theory of Law* is the scientific language of Law, and its imposing assertiveness, given that the method of the *Theory of Law* is scientific empiricism.[15] The strangeness provoked by the *Theory*, in its role, is to demonstrate that the Law is not pure logical-mental activity, in the sense of being a conceptual and rational activity. Therefore, A. Ross's conception cannot agree with the universal deductivism of the opposing conception of natural Law, or even with the dualism that correlates *Sein* and *Sollen* with positivist conception of Hans Kelsen.

Realism is, within the limits of scientific empiricism, a descriptive explanation of the real and concrete functioning of the juridical system as a

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12 *Vide* Guastini (2005, 109).

13 In the words of A. Ross: "The main idea of this piece of work is to consider the principles of empiricism in the right field to his last conclusions. From this idea emerges the methodological need for the study of law to follow the traditional patterns of observation and assessment which encourage all empirical modern science, and the analytical need of fundamental legal ideas to be interpreted obligatorily as ideas of social reality, behaviour of man in society and nothing more" (Ross 2000, 19).

14 Within these presumptions of empiricism, follows the explanation of E. Pattaro: "Il movente del comportamento, come abbiamo appena visto, sono realtà *intrapsichiche* o, addirittura, nel caso dei bisogni fisiologici, sono realtà *biochimiche*. Di essi possiamo parlare e scrivere: per esempio, esprimiamo bisogni, interessi, valori e norme in espressioni linguistiche" (Pattaro 2011, 29).

15 *Vide* Aarnio (2010, 456).

command system that generates *psychological effects* and, and from then on, generates effective commands on the conduct of citizens in society, and whose main task is to make predictions for the future, as R. Guastini points out (2005, 125). There is no compromise, because of this, for the *Theory of Law* to have abstract ideas, but with decision-making predictability.[16]

Law is seen as a system of standards and directives of conduct,[17] but it is significantly much more what judges practise in Court,[18] and its validity is only measurable in judicial practice (Nino 2015, 57). The empirical assessment of valid law is about the prediction of what judges have in mind when it comes to making legal decisions.[19] If judicial practice is so fundamental for realism, it is because A. Ross has shifted the whole exercise of Law in the power of the Courts. There is, in this sense, an identification of Law and Power, as a manifestation of the power to impose conduct that the Courts have, as A. Aarnio analyses.[20] Consequently, *legal decisions* are more important than *legal rules*, which have been predicted by the legislator, since the power that emanates from the Courts through their uses, practices and interpretation of Law is what in fact ends up determining the results of the effective application of Law.[21] Thus, steering the service of the legislator towards the service of judging, where the expressions of power are clearly with the exercise of power of imposition of the Modern State.

The main consequence of this view is that the concept of validity of Law is conditioned to what judges think in fact the Law applicable in legal decisions. For this reason, what supports the concrete existence of Law is the legal decision, and nothing more. Following this closely, R. Guastini's observation (2005, 125), *validity* and *duration* are concepts that end up being

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16 In the words of Vaquero: "Por tanto, los realistas se encuentran comprometidos teoricamente con oferecer predicciones sobre como decidirán los jueces" (Vaquero 2012, 739).

17 "C´est pourquoi un système juridique national peut se définir comme l´ensemble des normes qui, étant ressenties comme obligatoires, opèrent effectivemente dans l´esprit des juges" (Tusseau 2014, 03-04).

18 The study by Gaudêncio stops vertically to observer the meaning of CLS. Because of this, his comments and analysis are added here: "Understand law more as a set of legal decisions than a standard" (Gaudêncio 2013, 17).

19 In the definition presented by Alf Ross: "...a national legal order, considered as a valid system of norms, can be defined as a set of norms which effectively operate in the mind of a judge because he feels socially responsible and thus abides by them" (2000, 59).

20 In the comments by Aulis Aarnio: "En términos rossianos, derecho, coerción y aplicación forman el núcleo del Derecho válido" (2010, 457).

21 "Law only allows you to foresee how the tribunals will behave, not which are their duties or possibilities" (Nino 2015, 53).

confused,[22] within Ross's theory, in that the view of the theory points to the idea that the effectiveness of Law is given by legal application.

Faced with such a conception of Law, the idea of justice is seen as an emotional and abstract concept,[23] even metaphysical, and, thus, at this point, a target of the theoretical rejection by A. Ross. This division between "Law" and "Justice", within A. Ross's theory, leads to equating *realism* to *positivism*, as well pointed out by M. Barberis's analysis (2014, 26-27), in the measure of empirical scepticism before the concept of justice. In the realistic conception, the concept of "justice" ends up being confused with the correct application and interpretation of Law within a legal tradition, and the concept of "justice" ends up being formalised as the result of the practical activity of the courts. Therefore, "justice" is the result of judicious activity, and nothing more.[24]

It is no exaggeration to say that A. Ross gave little importance to the validity of legal norms, as a formal and legal provision of a part of Law, because he intended to shift the attention given to legal norms by H. Kelsen. But, in doing so, he goes to the other extreme, namely, moving towards the *mental attitude* of judges and his convictions about them, as A. Aarnio[25] rightly points out.

This conception, in all its empiricism, ends up being exhausted in a *juridical conductivism*.[26] This allows Ross to escape from the *conceptual abstraction*, from the *purely logical* nature of Law, but paradoxically falls into an *idealistic* view, as noted in A. Aarnio's[27] criticism. The *Theory of Law* is also reduced in its task, considering that its role closely touches *judicial psychologism*.[28]

There is no *radical predictability* in A. Ross's work, but judicial empiricism points towards the importance of verifying the way in which Courts have made sense of legal norms, and therefore, the prediction that is the usefulness

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[22] "The *validity* of law is so defined by the effectiveness of its application, that is to say, by its efficiency" (Billier, Maryioli 2005, 285).

[23] In the very words of A. Ross: "Asserting justice is like banging your fist on the table" (2000, 320).

[24] In the words A. Ross: "The decision is objective (just in the meaning of objective) when the principles of interpretation or valuation which are trends in practice, all fit within" (2000, 331).

[25] In the comments of Aulis Aarnio: "Como realista jurídico, A. Ross consideró que el Derecho producido por vía legislativa no era válido (*gültig*, en alemán) sino en un sentido *formal*" (2010, 457).

[26] In the comments of Vaquero: "En este sentido, el modelo de ciencia jurídica de Ross termina haciéndose indistinguible del conductivismo holmesiano pues son sólo normas (o las disposiciones) aplicadas por los jueces las que constituyen objeto de la ciencia jurídica realista" (Vaquero 2012, 730).

[27] In the critic by A. Aarnio: "La teoría de Ross es tanto conductista como *idealista*" (Aarnio 2010, 467).

[28] "A. Ross analyse alors la validité comme la rationalisation et l´objectivation d´impulsions psychologiques" (Tusseau 2014, 03).

of the *Theory of Law*, can give rise to the predictability that the *Theory* is able to provide to the interpreters of the legal system, aiming to allocate even more legal certainty to Law.[29] It can even be said that scepticism regarding legal rules leads to the recognition of a certain level of *rhetorical emotivism* and, therefore, to a certain degree of *irrationality* in the way Law is practised, in the work of M. Atienza (2014, 50).

2. *Critical Legal Studies*: North-American legal realism

The debt of *Critical Legal Studies* (CLS) to *North-American Legal Realism* of the 1920s-1930s is huge.[30] This is due to the fact the confrontation provoked by *Legal Realism* has opened cracks in the project of *Legal Positivism*, which were never re-established. *Formalism*, *abstractionism*, *objectivism* are features of the *Traditional Theory of Law* already frontally challenged by the *empirical*, *critical* and *interdisciplinary* efforts of *North-American Legal Realism* in the 1920s-1930s (Felix S. Cohen, Jerome Frank, Karl N. Llewellyn, Herman Oliphant),[31] and will be revisited by *Critical Legal Studies* (CLS). Here, there is a theoretical effort to continue the initial studies made by the realism in 1920s-1930s,[32] radicalizing some of its premises, such as that Law can be *predictable*.[33] But, even though CLS arose from these influences, at various points, it will gain its originality, and in this it will overcome its relationship with the tradition of *North-American Legal Realism*.

Dealing with *Critical Legal Studies* is, however, a complex task, in that through this perspective, one can discuss what is method, what is project and what is movement within it.[34] Even so, it can be said that *Critical Legal Studies* is a theoretical movement developed in the U.S., between 1970 and 1980, well towards the end of the 20th century, in a *Zeitgeist* inspired by a

[29] "Por consiguiente, una predicción se refiere a la probabilidad de una cierta norma perteneciente a la ideología judicial formada por las fuentes del Derecho" (Aarnio 2010, 462).

[30] "The debt owed to realism is acknowledged from within critical legal studies (...)" (Faralli 2005, 78).

[31] Tarello (2017, 48-49).

[32] "Mais dans la mesure où les *Critical Legal Studies* se sont intéressées explicitement à ces questions, on peut considérer la plupart de ces chercheurs comme continuant le programme réaliste" (Schauer 2018, 149-150).

[33] "We revert to our thesis: The essence of the basic legal myth or illusion is that law can be entirely predictable. Back of this illusion is the childish desire to have a fixed father-controlled universe, free of chance and error due to human fallibility" (Frank 2009, 37).

[34] *Vide* Gaudêncio (2013, 04).

context marked by the presence of *May of 68*, the movement for black *civil rights* and the emergence of *feminism*. Considering that the CLS can be divided into generations, one must consider the huge influence received from post-modern studies and philosophical deconstructivism, all placed at the service of the dilution of the categories of objectivity and truth of Law, which identify the view of liberalism and formalism.[35]

Although it forms a movement, with no monolithic view inside - bearing in mind the diversity of proposals and ideas -,[36] it was marked by notable differences between currents and theoretical conceptions, ranging from the most radical to the most moderate. The CLS is put together by many authors and authoresses (Elisabeth Mensch; Morton Horwitz; Mark Tushnet; Dunkan Kennedy; Roberto Mangabeira Unger), and, in depth, discusses in truth *Law and Society*,[37] having also been marked by strong influences stemming from the pragmatic North-American method (Charles Sanders Peirce; John Dewey), from the very tradition from the debate between *Legal Realism* in the 1920s-1930s (Roscoe Pound; Oliver Wendell Holmes; Karl Lewellyn; John Chipman Gray; Felix Cohen; Thrumond Arnold; Jerome Frank) as opposed to *Scientific Jurisprudence*, and, even, from the first generation of the *Frankfurt School* (Theodor Adorno; Max Horkheimer; Herbert Marcuse).

In this line of understanding, the *Theory of Law* leads to developing a role that dissolves the specialised, technical and dogmatic nature of Law. The influence received from the theoretical Marxism of the *Frankfurt School*,[38] in its deconstructive nature, enables the *Theory of Law* to demystify the scientific and analytical nature of Law, being able to deepen the problematization of the relationship between *Law and Society*. This is the reason for the proximity and the complementarity between the *Science of Law* and *Social Sciences*.[39] From there, the path of no return is established, in the identification of

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35 *Vide* Gaudêncio (2013, 06-07).

36 Clarity comes from within *Critical Legal Movement*, in the words of Fischl: "First, CLS is not a monolith" (1987, 507).

37 *Vide* Godoy (2007, 49-63).

38 In the comments and explanations of Gaudêncio: "The Critical Theory of Frankfurt School accepts Marxism, and projects in *Legal Studies*, in its categories of main intelligibility – ideology, alienation, emancipation – and some of its fundamental concepts – domination, rectification, internal critic" (Gaudêncio 2013, 23, *translated*).

39 "The Realistis' orientation towards policy-choice made them receptive to the claim of social science, for, they thought, if they were concerned about the actual implementation of policy in the ´real world´, they had to understand how the ´real world´ actually worked. Social Science promised to inform them about that" (Tushnet 2011, 296).

the objective of the *democratic remaking of social life*.[40] *Theory of Law* now has the role of accusing the indetermination of Law as a point of support for the dissolution of the ideas of *certainty*, *rationality* and *consistency* of Law, as traditionally addressed. The CLS ends, therefore, starting from the previous *realistic tradition* to deepen the *scepticism* and denial of the value of certainty of the legal norms[41] derived from the *Traditional Theory of Law*, and, so revealing how much *Law is Politics*.[42]

In the field of legal decision, *American Realism* in the 1920s-1930s tradition had already disbanded important taboos within the *Theory of Law*, maintaining a vision in which all the idealisation of the legal rules whilst capable of creating legal certainty becomes a questionable theoretical stand. To this extent, *Legal Realism*, produces *tabula rasa* of *legal rules*, reduced to mere patterns of judgement, to the extent that the texts of law are seen as containing significant *ambiguity* and *indetermination*,[43] which results in leading to a legal psychologism, as well as taking the *Theory of Law* to the field of an anti-conceptualism which makes the concepts less important for Law, whilst all research is drawn to the area of legal decisions.[44] A good example of this is the difference made by K. Llewellyn, between *real rules* and *written rules*.[45]

The CLS will radicalise this attitude stemming from *Legal Realism*, as M. Tushnet evaluates.[46] It is this, then, understood that if a legal activity is not subsunctive but free and creative, and therefore, it is able of leading to the political exercise of jurisdiction, not being predetermined by absolute legal rules.[47] Legal reasoning, therefore, is not merely formal and logical, nor an

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[40] In the words of R. M. Unger: "The first area of our transformative activity is the contribution of our substantive ideas to the democratic remaking of social life" (Unger 2015, 199).

[41] "The principal legacy of *Legal Realism* for mainstream legal thought is the introduction of ´social policy´ analysis as an acceptable and indeed indispensable element of sophisticated legal reasoning and argument" (Fischl 1987, 522).

[42] "After all, what else can you mean when you say that all law is politics?" (Tushnet 2011, 291).

[43] "In an explicit rejection of that approach, the Realists argued that law is indeterminate – that is, that what we call legal reasoning can rarely be said to require, in any objective sense, a particular result in a given case" (Fischl 1987, 513).

[44] *Vide* Billier & Maryioli (2005, 252-261).

[45] "Les 'règles réelles' et les droits réels – 'ce que les tribunaux feront dans un cas donné, et rien de plus extraordinaire' – sont des predictions" (Llewellyn 1992, 131).

[46] "That history holds that CLS carries forward the intellectual program of the Legal Realists of the 1930´s" (Tushnet 2011, 291).

[47] In the comments by A. M. S. Gaudêncio: "Opposed to this *formalist* concept, Realism adopts a perspective – which *Critical Legal Scholars* recover – Whereby a judge's decision is not pre-determinable, the subsumption of the facts does not sit with the judge as norms, but indeed with judges of *policy*: legal activity assumes itself as creative and political" (Gaudêncio 2013, 11, *translated*).

expression of pure will,[48] but reasoning located both politically and morally. Hence, one of the most important consequences of the theoretical approaches of CLS is that the *Theory of Law* ends up compromising the credibility of the ideas that maintain legal objectivity and neutrality, as R. M. Fischl clearly points out,[49] especially in the face of *hard cases*.[50]

The outcome of this vision is an extremely strong approximation of the boundaries between the *Science of Law* and *Political Science*. Even so, Law continues to be seen as a *Science*,[51] but the aims of the *Theory of Law* are projected in the field of the de-constitution of the mysticism of Law, on one hand, and, allocated in the field of *Social Emancipation*, on the other hand. Here is an important connection, elaborated by CLS towards bringing *Justice*, *Politics* and *Law* closer together, in order to criticise the neutrality of the *Traditional Science of Law* and point to *politics* as an attitude of *social justice*. As far as the boundaries between the *Science of Law* and *Political Science* become blurred, the theme of democracy becomes the structure of CLS - and, in particular, within the more systematic work of reconstruction elaborated by R. M. Unger –,[52] wanting precisely to see a more vigorous and participatory democratic activity capable of overcoming the already *established system*, than that found in the traditional representation of vision of *liberal democracy*.[53]

Thus, CLS opposes formalism, liberalism and positivism seen here as expressions of *Traditional Theory*.[54] But, results in greatly expanding its perspective of action, intersecting its concerns with issues and topics concerning the relations between *Law and Society*, *Law and Economics*, *Law and Politics*, leading to what could be called an *'amplified radical reformism'* of the modern world. CLS will steer away from the influence of Marxism, but

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48 "It does not mean, however, that judicial decisionmaking is altogether *arbitry*" (Fischl 1987, 529).

49 "To Critical Legal Studies, however, judicial interpretation is not and can never be an ´objective and neutral´ activity" (Fischl 1987, 525).

50 "The critic of conservative legal formalism, of Holmes of Legal Realism, amplified by the *Critical Legal Studies Movement*, ruined the academic trust of (*judicial neutrality*), at least before *hard cases*" (Gaudêncio 2013, 19, *translated*).

51 "Remain, here, nevertheless, the pretension of constructing law as science – even as a *pragmatic empirical* definition of science –, understanding that law is a science and in as far as legal thinking, from an empirical approach of facts, allowing the enunciation of forecasts which will guide legal operators in the implementation of its objectives" (Gaudêncio 2013, 16, *translated*).

52 One more radical idea of democracy. *Vide* Unger (2015, 111-113).

53 In the vision of R. M. Unger: "The social ideal and the view of the relation of law to social life that I have just described can be translated into a program for the reconstruction of democracy and, more generally, of the established institutional regime" (Unger 2015, 107).

54 *Vide* Gaudêncio (2013, 09-12).

free itself from its revolutionary and radical vision, to pursue a *critical and emancipatory reformism*, aimed at the re-understanding of governmental institutions and established forms for the exercise of modern power. It is for this precise reason, CLS has received a great deal of criticism from both the left and right and has been the target of numerous accusations,[55] such as those pointed out by R. M. Fischl (1987, 505-507). And this is because a radical posture surrounding the modern institutions is produced, which then leads all the efforts of the *Theory of Law* to a dissolute understanding of Law, such that is *Laws is Politics*. This is how legal activity is more connected to the dimension of *policy* than that of *correctness* (Gaudêncio 2013, 11).

Contrary to A. Ross's view, for which justice is something emotional and abstract, CLS understands the idea that justice can be sought by the *revision* and *surpassing* of the model of economy, society and the functioning of institutions. For this reason, moving towards forming firm proposals of *redesign* and *restructuring* of institutions, acting from a critical perspective (*criticism)* and constructive perspective (*construction*) (Unger 2015, 83-93; 95-107), starting from social ideas (*Social Ideal*), towards institutional programmes (*Institutional Program*), to the formulation of a deviationist doctrine (*Deviationist Doctrine*) (Unger 2015, 95-96), making use of this a theoretical-political vision that points towards equality and justice (Gaudêncio 2013, 7). And, thus, particularly in the R. M. Unger's conception, in the work, *The Critical Legal Studies Movement*, the centre of the *deviationist doctrine* is the critical understanding that Law forms an ideal system of legal rules (*idealized system*).[56]

3. *A Theory of Realistic Humanism*: Brazilian legal realism

It is in the context of *fin de siècle* – considering the exhaustion of the 20th century – one can see the erosion of the ideals of *modernity*, which raises the discussions about the *postmodern condition*, and its impacts on *modern Law* (Bittar 2014). It is impossible to think of Law without considering the

[55] "The critics from the left might be correct in their claim that CLS diverts leftists from more productive political activities or even that CLS weakens the left" (Tushnet 2011, 295).

[56] "On an alternative account, the decisive feature of deviationist doctrine is the refusal to see law as an idealized system" (Unger 2015, 97).

empirical and historical diagnosis of the 20th century – a *Century of Catastrophes* – as defined by E. Hobsbawn (1995). There are significant initial influences of sociology by J.-F. Lyotard (1989) and Z. Bauman, which will be consolidated in later influences of J. Habermas and A. Honneth. To this extent, *Brazilian legal realism* is starting to emerge from *epochal consciousness*, from a Latin-American perspective, of social and paradigmatic mutations and transformations of *postmodernist context*, and which will disassemble the solid and structured architecture of *modern Law*.

This conception of *legal realism* thus unfolds, after the well- undertaken *linguistic turn* in the Brazilian *Theory of Law* (Streck 2009, 49-50), and the attention kept by the hermeneutic dimension of Law (Streck 2012, 227-228) – and in the scenario of *economic*, *moral* and *political crisis*, in the local and global contexts. This conception is entitled the *Theory of Realistic Humanism* – from this, simply entitled TRH –, affirming itself as the direct derivation of *Critical Theory* studies, especially from the influence of the second and third generations, in which the broadest consolidation of overlapping correlation stands out between *democracy* and *human rights*.[57]

As a perspective of Latin-American thought, *Brazilian legal realism* is developed through the *Theory of Realistic Humanism* (TRH), brought to the public in a recent publication entitled *Introdução ao Estudo do Direito: humanismo, democracia e justiça* (*Introduction to Law: humanism, democracy and justice*).[58] Its formulation took costly years of work, and went through the maturing of previous stages, better established in autonomous works. It was, therefore, gradual that the formulation of the proposal of the *Theory of Realistic Humanism* (TRH) has been consolidating, especially considering the central theses of *Legal Realism*.

Firstly, the idea of *indetermination of Law* was clearly established in the work *Linguagem Jurídica: semiótica, discurso e direito* (*Legal Language: semiotic, discourse and law*), whose 1st edition dates back to 2001, a work deeply influenced by the studies of the *Semiotics of Law* and the *Theory of Language* (Bittar 2017). Secondly, the idea of Law connected with the *public sphere* (Öffentlichkeit) and the transformations of the contemporary world, was clearly established through two works, namely, *O direito na pós-mod-*

[57] For more on this, consult the specific and upright specific previous study about the theme. *Vide* Bittar, (2013).

[58] *Vide* Bittar (2018).

ernidade (*The law in post-modernity*) (Bittar 2014), whose first edition dates back to 2005, *Democracia, Justiça e Direitos Humanos* (*Democracy, Justice and Human Rights*) (Bittar 2016, 148-160), whose first edition dates back to 2011, and *Democracia, Justiça e Emancipação Social* (*Democracy and Social Emancipation*), whose first edition dates back to 2013 (Bittar 2013). In the last three works, the presence of the influences of *Critical Theory*, *Sociology* and the *Frankfurt School*.

It is true that, in Brazil, *legal realism* has precedents, after its first tendencies were expressed in the 1920s-1930s, with authors such as Alberto Torres, Oliveira Viana and João Mangabeira, under the influence of American *Legal Realism*.[59] In addition to these conceptions, more recently, at the beginning of the 21st century, a series of studies have emerged, from a *critical Latin-American perspective* in the decades 1990-2010. Although it is not a properly *realistic* conception, the line of the *critical* and *emancipatory* work developed by A. C. Wolkmer, from the current entitled *Legal Pluralism,* is of huge contribution (Wolkmer 2006, 192; 2001, 169 ff.). Furthermore, a proposal for *Critical Theory* is clearly defined by L. F. Coelho (2012), strongly derived from Marxism and the influences of the tradition of the first generation of the *Frankfurt School*. The *Theory of Realistic Humanism* (TRH) fits into this context of plurality of Latin-American ideas, and – in comparison to other earlier Theories –, its study constitutes an important task for the current debates of the *Theory of Law*. And, this is because this conception gives them a historical sequence, and this, also, because it incorporates similarities and differences that should be better marked, to the point of conferring their epistemological *autonomy*, both in relation to Brazilian conceptions, and to Scandinavian and American conceptions.

The first step, in this sense, is to consider that it is impossible to develop a *Critical Theory*, from the Latin-American perspective, without making *social injustices* a central problem to the whole discussion of *Justice*, or even, to the role of Law. The topic of justice draws attention to the topics of equality, equity and social justice. This *theoretical sensitivity* is shared by all Latin-American critical conceptions; this is the reflection of Latin-American context, where the *social injustices*, *social inequalities* and *violence* are strikingly present in discussions about *Law* and *Justice*.

[59] *Vide* Garcia Neto (2008, 91–94, 110).

It is here that a *Critical Theory of Law* assumes its uniqueness. And one of its central starting points is the perception that the *crisis of Law*, in the contemporary world, threatens the very survival of effectiveness of the *legal system*, and consequently, threatens the collapse of the legal system as a whole. The vast distance between a *state of social justice* and a *state of social injustice* is responsible for this condition.[60] However, the experiences of *injustice*[61] can become constructive precisely there where they become forces of struggle for the fight of human dignity and justice.

Unlike the systemic views of Law, where the *human* element disappears - derived from the vision of T. Parsons and N. Luhmann - because it is functionally adhered to in social structures and sociological rationalism, the *Theory of Realistic Humanism*, radicalises the understanding of *humanism* such that, *humanity* is responsible for its own destiny, and the destinies of *justice* and *injustice* are seen as the fruits of *social action*. Here, it is a *non-metaphysical*, *social*, *secular*, *pragmatic* and *republican humanism*. Here we see how much, within in theoretical model of the *Theory of Realistic Humanism* (TRH), the meeting of realistic, critical and humanistic demands reveals itself to be a complex meeting. In any case, it is attempted to make clear that the *Theory of Law* cannot be enough with the understanding of Law only as *law*, as a set of *formal operations*, with *Legal Science* having only a descriptive task of Law. The *Theory of Realistic Humanism* (TRH) wants to reinforce the approach of Law beyond *legalism* and *formalism*, emphasising the reconnection between *Law and Morality*, between *Law and Justice*, and, finally, between *Law and Society*.

Thus, social action and social interactions constitute the process of creating and re-creating Law. Law is a social and pragmatically situated construction. It is to this extent that the *Theory of Law* requires, first of all, a *Social Theory* in order to assert itself. Moreover, the *Theory of Law*, points to paths of the *de-repression* of the legal system, the *processes of humanisation* of the legal system, there where it is not *inclusive*, *participative*, *accessible* and able to face *violence*, *discrimination*, *hunger*, *social inequalities* and *social injustices*.

[60] The perspective is equally developed by Robert Alexy: "A legal system which will not be socially successful in global terms when a legal system collapses" (2011, 110).

[61] "Ungerechtigkeit bedeutet primär Einschränkung von Freiheit um Verletzung der Menschenwürde" (Habermas 1998, 505).

It is clear, therefore, that the TRH is based, above all, on a *secular*, *rational*, *republican* and *pragmatic-democratic* conception of *humanism*, a form of *humanism* that goes along with the processes of modernisation to dynamically and permanently *correct* the *exclusions* and the *reification* which it creates. It is a critical and modern reaction to the processes of modernisation. Thus, Law transcends a mere bureaucratic task. The task of Law can only be fully achieved to the extent that it becomes an instrument capable of meeting social needs arising from social reality. Each society knows the challenges arising from their reality, and it is from this that the jurist's critical self-awareness must exercise it important and unique role of *social transformation*. Thus, the struggle for rights, and the practical achievement of rights, involves, first of all, an exercise in *humanism*, in so far as it accomplishes the essential tasks of respecting the dignity of human beings. It is a *realistic humanism*, aimed at the *qualitative*, *moral*, *social* and *political transformation* of social reality in which it is inserted locally, aiming at the *social emancipation* of *injustices*, *starvation*, *misery*, *ignorance*, *culturally* and *spiritual poverty* that holds *citizenship hostage*, *undermined* and *subservient*.

Contrary to the *Traditional Theory*, here there is an explicit presentation of the importance and the centrality of *values* in the construction of the *Theory of Law*. Of course, this is not a set of personal values, but the set of values socially consolidated in the derivation of the *Universal Declaration of Human Rights* (1948), as revealing the limits to the will and distribution of justice in society. Contrary to the need and the attempt to construct a conception of *Law* unrelated to *Morality*, or *disruptive* and *aseptic* to *social values*, the TRH returns values to the centre of the legal system, considering the danger of relapsing into *barbarism*, bearing in mind the warnings of Theodor Adorno, in *Erziehung zur Mündgkeit* (1971),[62] before the abyss represented by Auschwitz. Here the paradigm of *modern horror*, *instrumental reason, deadly technique* is placed as a nerve point of the risks of instrumental modernity and its *pathologies*.[63] *Humanism* is based on the centrality of *dignity of the human being*, from where all the whole *foundation* of Positive Law should emerge, considering it the beacon from which every attempt (permanent and durable) to avoid a relapse

[62] "The requirement of which Auschwitz does not repeat itself is first in all education" (Adorno 2003, 119, *translation*).

[63] "In the context of social theory, we can say in 'social pathology' which we always relate to social developments which they cause notable deterioration of rational capacity of members of society to participate in social cooperation in a competent manner" (Honneth 2015, 157).

of barbarism should be derived. At this point, one feels the strong inflection of Jürgen Habermas, in his last essay on the subject (*Das konzept der Menschwürde und die realistiche Utopie der Menschenrechte,* 2010) (see Habermas 2012).

The *Theory* plays a double role, and is as much *descriptive* as *normative*, in the sense that it points towards the *Theory of Law*, and from the *Theory of Law* points towards the *Science of Law*, in its practical and operational challenges in the everyday life of the production of acts of justice and concrete decision-making. For this reason, the TRH fundamentally opposes *Traditional Theory* in a critical manner, namely in the worldview derived from *legal positivism,* which has been predominant in Brazil in legal culture since the 19th century, throughout the 20th century, reaching its crisis only at the end of the century. Normally, it is admitted that Law is a social phenomenon, but if the *Science of Law,* based on the model of the *Traditional Theory of Law*, becomes autonomous and distances itself from society, what bridges will remain between *Law* and *Society*? (Ferrari 2012, 04-06).

Therefore, from the epistemological point of view, in place of the modern ideal of the *scientific autonomy* of the *Science of Law*, it affirms the dependence of the *Science of Law*, by the interdisciplinary, complementarity and interconnection of knowledge with the other empirical contributions extracted from *Human and Social Sciences*.

Here, the most important task is the *redefinition* of the horizon of understanding of the *Science of Law* itself, which navigates society in operating social and legal understandings in disconnection with the other *Social Sciences*. *Humanism*, during the *formation* of a lawyer, becomes a source of knowledge to which the lawyer can address the *complexity* and *multidimensionality of the* "*reality*", strengthening with this an approximation of *social phenomena* by the *legal form*, which does not hinder the *critical* and *humanised* vision in the relationship between *Law and Society*.

And, in this, contrary to what the *Pure of Theory of Law* by Hans Kelsen[64] states, a strong capacity for collaboration is attributed between the boundaries of *humanistic knowledge*. In this, he understands that the *pretension of purity* is only a *self-alienation* of legal, technical and specialised knowledge,

[64] In the words of H. Kelsen: "When designs itself as 'pure' theory of Law, this means that it proposes to guarantee knowledge only directed to Law. This is to say that it intends to free legal science from all elements, which are strange. This is its fundamental methodological principle" (Kelsen 1976, 17, *translation*).

differing from the processes of methodological reduction and the scientific terminology. Therefore, in place of the artificial opposition between *Sein* and *Sollen* of *Traditional Theory*, its replacement by idea of *tension* (*Spannung*) between *facticity* (*Faktizität*) and *validity* (*Geltung*).[65]

From the methodological point of view, the TRH shares the concern for criticism of the *logical* nature of Law, which the other currents of *Legal Realism,* American and Scandinavian, have already established, but in a gradually different way. *Empiricism* here does not stem from the conception of *modern-scientific* empiricism, emphasising, on the contrary, that the results of empirical research of the *Social Sciences* can be the *sources of interlocution* for the *Science of Law*, and in this, supplies it with the best empirical instruments for the promotion of *justice* and fight against *injustice*. It is, therefore, another vision of *empiricism*, not *behaviourist empiricism* that arises from *legal decision*, but from a *methodological empiricism* focused on the *Science of Law*, at the level of understanding of *Law and Society*, aiming at improving conditions of access and achievement of justice in society. It is, therefore, an *epistemological*, *critical* and *interdisciplinary empiricism*.

The *Theory of Realistic Humanism* does not refer to the attempt to *predict* by which the judges will decide on the basis of norms. The TRH indeed identifies the importance of the *humanization of the system of justice*, as a task of distinct importance for the Judiciary to be able to exercise the task of *socially correct trials* and defence of the *Democratic Rule of Law*. In this sense, Law is not pure logic. *Realistic humanism* wants to emphasise that Law is formed by a *scheme of multiple social factors*. That is to say, the "*reality of Law*" is a "*complex reality*" (historical, multifactorial and local) in which it is inserted with the function of promoting *justice*, acting in such a way that it performs a double and simultaneous role, that of *social conservation* and that of *social transformation*. The TRH is a way of understanding that leads to a better understanding of the *social medium* in which a *determined* Positive Law will operate, in local-contextual manner. This approach results in favouring a better interconnection between *Law and Society*, turning neither to any *legal psychologism* nor any *behaviourist decisionism*.

Realistic humanism understands that the *legal system* is a system of *social institutions of justice*, and not systems of legal norms, so that its mode of action

[65] "Der Blick richtet sich vielmehr nach wie vor auf eine dem Recht *innewohnende* Spannung von Faktizität und Geltung" (Habermas 1998, 171).

is concrete and realistic, and not abstract and based on *Sollen*. The task of the *Theory of Law* is not only to understand and describe the *legal system*, but also to propose its improvement, and therefore, one of the reformist proposals of the system of the *institutions of justice* that form the legal system consists of its *harmonisation*. In this conception, the core of the *legal system* now taking into account the *legal rules* and the *legal principles* described in its positive Constitution, derives from a non-specific vision of the *dignity of the human being*, that is to say, capable of understanding the breadth of the *forms of life* in the world as equally relevant for the *equilibrium* and the merger of horizons of respect and preservation of the *forms* of life between sentient beings.

But, if it is true that the *legal system* retains within itself the *core values of modernity* that must be preserved, it is also true that Law is basically expressed by way of *legal texts*.[66] Here, the *indetermination of Law* is evident. This is a strong common meeting point amongst the many conceptions of *Legal Realism*. Under the influence of the *Semiotics* of the Lithuanian semioticist A. J. Greimas, the TRH states that *legal texts* confer objective existence onto rights and duties, and should be interpreted, being the subject of debates, arguments and legal discussions. Consequently, the *polemic* nature of Law is neither a field for the expression of the *pure discretion* of judges, nor for the expression of *pure analytically-deduced rationality* of Law. With this position, the TRH moves away from the discretion stemming from the tradition of *Legal Positivism*, without embracing *legal psychologism* of the *Scandinavian realism* of Alf Ross tradition. On the contrary, Law will concretely be carried out by the constant pragmatic-semiotic activity in legal actors of *construction* and *reconstruction* of the *legal meanings* in light of objective and subjective determinants existing at the time of each *legal decision*.

This does not mean that only legal decisions create Law; it is not only *legal power*, and what judges understand about valid Law, that in fact becomes the existing Law in a given society. In fact, according to TRH, Law already exists (partially) in legal rules, it is certain that Law will be held *in concrete* as an individual rule through the legal reasoning exercised by judges. Thus, *normative text* is seen as a *pre-text*, that is, as a *project of meaning*, and the *full meaning of legal discourse* will only emerge through the use by the community of interpreters, emphasising the end of the complex task

[66] Elsewhere it can clarify this in a more upright way: "Juridicity, consists of a reality of texts, called *legal textuality*..." (Bittar 2017, 81).

of reducing Law to *decision* by the judges, using *argumentative rationality*. Law will then be updated, referring to concrete facts and cases, carried out in *legal decision*, which means that Law *is not formed,* but indeed *complete*, in legal decision. Therefore, where *Scandinavian realism* by A. Ross finds a coincidence between *validity* and *existence* of Law, TRH sees the *anteriority* of *formal existence* of legal rules, which will be added to the *realisation* of legal decisions, in friction with the facts through *legal decision*.

Law is seen as a *powerful social instrument*, among several, acting in society, with high *decision-making power*. Beside *legal decision*, studied by the *Science of Law*, however, are *political decisions*, studied by *Political Science*, and the *economic decisions*, studied by Economics. Law does not act in a society disconnected from the interfaces with Politics, nor Economics, and is seen as a social instrument which acts, in both the sense of social transformation, and social conservation, understanding that within it *legal actors* act in both directions, dialectically opposite.

If the *Theory of Law* offers *normative horizons*, and does not only have a descriptive and cognitive role, *social emancipation* and *human dignity* form the field of *realistic utopia* of *human rights*,[67] with glimpses of *integral development of the human being* placed in society. Thus, each society finds itself at its own stage of development, knowing and pointing to its challenges and main specific social bottlenecks, in order to face them locally. In order to reach this *utopian-realistic horizon*, the means weigh as heavily as the ends, thus avoiding the *dystopian conceptions* of the 20th century history, ensuring that the path to the *effectiveness of human rights* is the means by which priorities and social efforts can be chosen for the purpose of achieving a more *free*, *just, pacific*, *inclusive*, *solidary* and *socially balanced* society, considering the horizons of *instrumental modernisation* and *emancipatory modernisation* mutually codetermined and in motion throughout history.

Justice is not merely a value between values - as highlighted by J. Habermas —,[68] but a vector of the orientation of *normative horizon* of Law, always beyond the horizons of *Positive Law* too, and is connected to the universal traits and demands of Responsibility (R) and Discourse (D). Thus, a *positive-legal system* should be evaluated for its capability to create *justice*, understood as a *social*

[67] "Mit der Idee einer gerechten Gesellschaft verbindet sich das Versprechen von Emanzipation und Menschenwürde" (Habermas 1998, 504).

[68] "Deshalb ist Gerechtigkeit kein Wert unter anderen Werten" (Habermas 1998, 190).

balance, in the task of assigning *responsibility* for social duties and actions, and *realise* legislative promises, rights and fair distribution of resources for social life. Thus, it will be fair if it is able to promote *values-structuring* democratic life, that is *inclusion*, *correction of social injustice*, *recognition of diversity*, and, above all, *grant effectiveness* to human rights. The TRH preserves *legality*, *freedom*, *diversity*, *equality*, *redistribution*, *recognition*, *solidarity*, *democracy* and *human rights* as *interconnected values*, considering that these values are expressly consecrated as central categories of modern Constitutions. That is where the legal system can be described as fair.

4. Comparative Study of the *Theory of Law*

Musical Theory usually talks about consonances and dissonances. The metaphoric use of the terms consonance and dissonance here wants to mean and indicate the points of agreement and disagreement between the diverse ideas of *Legal Realism* analysed at length in this paper. And, one of the points, which should be stressed, right from the start, when it comes to making a comparative analysis between legal realisms, is precisely the historicity and the contexts of their developments. Now, the *Theory of Law* is form of universal knowledge, and one that develops in different countries, regardless of the tradition of *civil law* and *common law*. But, every study originates situated and determined by certain sources of influence to which they react. Thus, *Legal Realism*, despite the same name, does not draw on the same influences, generating the false impression of being faced with the same theoretical idea. What will be sought from here are the most central consonances and dissonances amongst the ideas of *legal realism* studied here.

A comparative study between the tradition of *Uppsala School* (US), the tradition of *Critical Legal Studies* (CLS) and the tradition of the *Theory of Realistic Humanism* (TRH) should, firstly, take into account these differences determined by the traditions of *legal systems, cultures* and *historical moments* so different from each other. The *opposing theories*, *methods of study*, *dogmatic ideas* and the *view of Law* differ everywhere.[69] Thus, subsequently, Swedish, North American

[69] An example affirmed by Oliver Holmes, "Les moyens de cette étude sont un ensemble de recueils, de traités et de lois, ici et en Angleterre, qui remontent à dix siècles et qui augmentent maintenant par centaines chaque année..." (Holmes 1992, 123).

and Brazilian legal systems are not the same. In addition to this, the traditions of *civil law* and *common law* create differences in the weight given to the role of the legislator and the role of the judge, within the legal system. Finally, the conditions of social, economic, cultural and political reality are very diverse, forming environments conducive to other realistic stimuli and theoretical influences. However, what will be sought here is a reading of equivalence at the theoretical level, and in this sense, each School can be thought of from the perspective of its contributions, differences and potential complementarities.

To this end, points of consonances and dissonances will be pointed out, considering three models of analysis undertaken below, amongst the three models of *Legal Realism* in the next topics:

i. Consonances and dissonances between Scandinavian realism (US) and American realism (CLS):

i.a. consonances: *American realism*,[70] in its origin (1920-30), had already introduced a *radical scepticism* before legal rules, which will be harnessed and radicalised by the CLS (1970-80), and, at this point, there is clear *consonance* between the *American realism* and the *Scandinavian realism*, leading to an assessment of power and decision-making conduct of judges, knowing that for both universes, the vision of *common law* prevails above the vision of *civil law*;

i.b. dissonances: *Scandinavian realism* understands that *justice* is an abstract and emotional notion, whilst CLS understands that the notion of *justice* is a democratic effort for the *transformation* of institutions through the *political organisation* of society. *Law is Politics*, in the sense that it is possible to achieve another way of doing justice in society. The notion of *justice* preserves a trace of *normativity* within the *Theory of Law*, guiding *Politics*, *Economics* and *Law*. This is why, at this point, there are several *dissonances* between *American realism* (CLS) and *Scandinavian realism*, especially considering the radical role and *progressiveness* of rebuilding institutions, where A. Ross (US) only finds the *conservative* role of ascertaining the power of judges, the power of legal decisions and the capacity of coercion of the State.

[70] See, about the impact of the *North-American Legal Realism* in Italy, Gazzolo (2017, 447 ff.).

ii. Consonances and dissonances between Scandinavian realism (US) and Brazilian realism (THR):

ii.a. Consonances: A. Ross's version of *realism* has a significant precursory nature,[71] and opens the door to the weakening and criticism of jus-naturalism and jus-positivism, make another form of understanding of the role of the *Theory of Law* possible, considering *epistemological realism* contained in *Uppsala School* (US). Despite the low presence of the influence of the *Uppsala School,* in the Latin-American studies, and, even more of the tradition of the *Philosophy of Law* formed in Brazil, it can be said that at this point, there is a significant *consonance* with *Brazilian realism* (TRH), in that it seeks to escape from the abstraction, supposition and the sphere of should-be, in order to constitute the foundations of the *Theory of Law* in a more concrete and empirical way;

ii.b. Consonances: The *active methodology*, which undoes the *abstract standard* of the *Theory of Law*, the undemonstrated deductive truths, the excessive cult of conceptualism, as well as the anti-formalist theoretical attitude, in recognising the lack of traditional methods, be it jus-naturalism which considers what is given before in the *nature of things*, or of jus-positivism which considers what is given in the positive norms of the legislator, are admirable marks of effort of the realistic currents, and, therefore, a strong point of connection in the inspiration of common tasks and challenges in the projects of the reconstruction of the *Theory of Law*. However, *Brazilian realism* (TRH) did not rely on these conceptions to structure itself, maintaining roots of tradition of the *Critical Theory*;

ii.c. Dissonances: *Scandinavian legal realism* (US) contains no concerns for *social emancipation* and there where the *Theory of Law* wishes to see and examine *how* judges decide, it plays the role of promoting *legal certainty* by offering *predictability* of legal decisions. This is a clear point of *dissonance* with *Brazilian legal realism*. And so the *Uppsala School* sees the power accommodated under the judges' robes, and does not allow for identifying any sense of *sovereign power* – of the republican tradition

[71] "Il apparaît au contraire comme un précurseur du 'postpositivisme' qui tend à considérer que les sciences – y compris les 'sciences de la nature' - formulent des narrations possibles, relatives et révisables, qui reconstruisent une trame d´événements intelligible à partir du flot indifférencié des perceptions" (Tusseau 2014, 15).

– prior to legal power, not even leaving horizons for a relative burden of *realistic utopia* beyond the curtains of Courts;

ii.d. Dissonances: *Scandinavian legal realism* (US) results in *mentalist jurisprudentialism*, that is, it credits the full force of the *valid existence* of Law to the knowledge that judges have of *legal rules*. In the end, it strengthens one of the tripods of the tripartite of powers of the modern State, something very appropriate to the tradition of *common law*, but less capable of making sense of the tradition of *civil law*, from which Brazilian Law is derived. Therefore, where A. Ross should be an *empiricist*, in truth, he ends up leading the *Theory of Law* to see in Law only a *legal mentalism*. Here is a clear point of *dissonance*. And this because *Brazilian legal realism* (TRH) is not a *psychological realism*, working with the idea that Law is a social phenomenon, and not mental, derived from the clash of social forces that operate at a historical, cultural, economic and political level. In this sense, for a semiotic understanding, the TRH highlights the importance of the Judiciary's action, because no *legal meaning* is formed without *legal decisions*, so that the legal action complements the *project-of-meaning* previously presented in the legislation.

iii. Consonances and dissonances between American Realism (CLS) and Brazilian realism (TRH):

iii.a Consonances: *Critical Legal Studies* is influenced by various philosophical traditions, but receives an important and significant influence from the tradition of the *American Realism* and from the *Frankfurter Schule*. In this, the *consonance* with *Brazilian legal realism* (TRH) is clear. However, in view of the *democratic turn* occurring in *Critical Theory*, it is clear that CLS operates mainly with concepts extracted from the first generation (Theodor Adorno; Max Horkheimer; Herbert Marcuse), and that *Brazilian legal realism* (TRH) is inspired by the second, third and fourth generations of the Frankfurt School (Jürgen Habermas; Axel Honneth; Rainer Forst). Even so, both tendencies are opposed to *Traditional Theory* in their environments of academic debates, and are inspired by reformist motives in which they gamble on the conception of *participative democracy*. Therefore, both theoretical perspectives point to greater demands of *democracy*;

iii.b. Dissonances: *Critical Legal Studies* (CLS) promotes a radical blurring of boundaries between *Law* and *Politics*, and leads the epistemological boundaries between the *Science of Law* and *Political Science* to a near fusion of horizons. Here is a clear point of *dissonance* between the two conceptions, in that *Brazilian legal realism* (TRH), despite the interdisciplinary connections and the reciprocal collaborations between the *Social and Human Sciences*, seeks to preserve the *autonomy* of the *Science of Law*. Here, it is important to underline that the *Science of Law* will only achieve its epistemological maximisation, in the measure of dialogue and interdisciplinarity with the scientific advances of *Social and Human Sciences*, which provide the empirical elements necessary to complete the training of the lawyer;

iii.c. Dissonances: CLS works along the lines of *radical reformism* operated on the basis of the *Theory of Law*, which results in becoming *Political-Economical Theory* and *Theory of Law*. This is a point of dissonance, in as far as *Brazilian legal realism* (TRH) operates considering the weight of *legal decision*, alongside the weight of *economic decisions* and *political decisions*, knowing that a dialectic of opposites exists within Law, so that Law is only a social instrument, amongst others, which acts towards *social transformation*, or *social conservation*. For TRH, there is a quality to *social transformation*, which is, *push forward* the boundaries of Law (towards more justice), and there is a quality to *social conservation*, which is to *preserve* the legal symbolic and social accomplishments already incorporated in earlier stages in the development of Law (towards the preservation of justice). In this sense, the form of Law and institutionality of Law act as *forces of conservation*, as the dynamics of society and the demands of democracy act as *forces of transformation*.

Conclusion

Amongst the diverse conceptions of *legal realism*, an attempt was made to emphasise consonances and dissonances between *Critical Legal Studies* (CLS), *Uppsala School* (US) and *Brazilian legal realism* (TRH). This paper sought to compare three (3) perspectives of *legal realism* (Scandinavian; North American; Brazilian), and cut out with the utmost precision its field of *definitions*, *context*, *influences*, *theoretical premises* and *central conclusions*.

And, the first conclusion that can be reached cannot be any other than that of which *there is no unity* in this model of *Legal Theory*.

Although the currents of *legal realism* have the same *nomen* in common, they differ substantially with regards to: i.) *concept* of Law (i.a. Law as a set of legal decisions; ib. Law as politics i.c. Law as a system of institutions); ii) *legal method* of the *Theory of Law* (ii.a. scientific empiricism; ii.b. radical criticism of the liberal political model; ii.c. criticism, interdisciplinarity and complementarity in Human and Social Sciences); iii) and above all, the *finality* of the *Theory of Law* (iii.a. description of Law, promotion of legal certainty and provision of legal decisions; iii.b. reform of the political system and social emancipation; iii.c. social emancipation, promotion of a fair society and dignity of human beings through the effectiveness of human rights).

These theoretical qualities make the conceptions of *legal realism* differ on many points. Subsequently, once the *differences* in perspectives have been acknowledged, it is possible to identify a common stand in *legal realism*, in as far as all theoretical lines present themselves as criticisms of *legal formalism* and traditional *legal reasoning*, moving away from *abstract* concepts and the views centred on premises based on a *legalistic* and *dogmatic* view of Law.

Thus, one begins to notice the global dimension of *legal realism*, in its diverse *local appearances*, revealing itself with very peculiar characteristics, depending on stimuli, challenges and influences, which it receives locally. It appears that the various local developments in *legal realism*, in the U.S. (*Critical Legal Studies* – CLS), in Sweden (*Uppsala School* - US), in Brazil (*Theory of Realistic Humanism* – TRH) are *genuine contributions* around Law, and from whose *theoretical power* can draw important concepts in the face of the *Traditional Theory of Law*.

In their original environment, they contrast with *social forces* and different *lines of thought*. Among them, it seems that these *legal realisms* are in different degrees of *critical intensity*, going from the leftmost of the U.S. (*Critical Legal Studies*), to the dialectic profile of *conservation/transformation* in Brazil (*Theory of Realistic Humanism*), to the right of concepts, with the Scandinavian concept (*Uppsala School*). In any case, if the TRH can be considered the most incipient and recent of these conceptions, it is clear that, configuring itself as a *humanism*, maintains its *theoretical autonomy*, and in this preserves its conditions of struggle and affirmation, in the face of the Latin-American scene and its present and future challenges.

Finally, after this analysis, it can still be seen that the conceptions studied in a comparative way in this paper point to many diverse solutions, when the question is that of *legal reasoning*. In the *Scandinavian Realism* approach, the idea of *legal certainty* offered by the actions of judges is clear, given that the empiricism of this tradition leads to a *legal psychologism*. Therefore, it should be pointed out that the mistake by Alf Ross involves shifting the attention of the legislator, placing excessive importance on the activity of judges. In the *North-American Legal Realism* approach, there is an important criticism of the formalism of *Legal Positivism*, but the *predictability* becomes a false point of the theoretical project. However, its legacy is reabsorbed by *Critical Legal Studies*, which will meta-model the *Science of Law* on *Social Sciences*, dissolving, despite the autonomy and the internal identity of Law. In this line, the *decision-making process* serves as the *logic of policy*, and not as *logical syllogism*. In the *Brazilian Legal Realism* approach, the *decision-making process* is influenced by multiple factors, which leads to the requirement that legal education is interdisciplinary, marked by dialogue with other empirical sciences in the area of *Humans and Social Sciences*. But, what qualifies *legal reasoning* is not its full independence from legislation, and much less its purely political nature, and indeed its role as a *construction of meaning*, an exercise that depends on the intricate meeting between the fields of *legal language*, *semiotics of legal discourse* and *legal argument*.

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