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# OSGOODE HALL LAW SCHOOL

*Comparative Research in Law & Political Economy*

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**Research Paper No. 45/2010**

**After Law**

Francisco Valdes

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**Francisco Valdes**

## **After Law**

**Abstract:** After some brief preparatory notes, I will outline the time I call the “Age of Law” to explain how the making of modernity is related to the politics of progress and contradiction that define this era and its legacies. I next will summarize the dynamics of corruption, complexity and crisis that define the Age of Law and its historical construction of nation and market in material, structural terms. I then will turn to the relationship of this status quo to the emergence of internationalized law in the service of corporate globalization. Finally, to conclude, I will return to the pursuit of justice after law, including the importance of foundational values and legal criticality in social re-construction, and the role of academic activism and rebellious knowledge-production in the pursuit of social justice transformation. In the end, I hope to have provoked new insights and incited new ambitions in your own work.

**Keywords:** age of law, modernity, dynamics of corruption, historical construction, internationalized law, pursuit of justice after law, corporate globalization, social re-construction

**JEL Classification:** K 39

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## After Law

Francisco Valdes\*

### I. INTRODUCTION

Good morning, everyone—and many thanks for this moment. I want to begin by thanking all of you, and especially the organizers, for welcoming me to spend this time with you. I have been absorbing your positive energy, your commitment to social justice through and under law, your thoughtful work and presentations. In informal moments during the past couple of days, I also have been learning about your aspirations, as well as your concerns, worries or challenges.

Many of you are looking to find your ways to careers in knowledge-production at the service of social justice. Embedded in the world of law, you know both its powers and its limits. Intimate with the ways and means of the law, you elect to surge “beyond” it.<sup>1</sup> To embolden your impulse in choosing this theme, I propose to join your search by contemplating or imagining a time, place, perspective or circumstance we might call “after law.”

Initially, at least, “after law” certainly sounds like a time. But, perhaps it is also a place. Yet, I want to suggest to you today that it also can be a frame of mind, a point of view, a critically-oriented perspective on the world humans have made for us, and the role of law in this reality. “After law” can provide an epistemological or heuristic device that perhaps allows us to better visualize, to more freely imagine, a transformative alternative. Not utopian, not impractical. Yet radical; radical, and principled, and pragmatic. For today, at least, “after law” is a suggestion and framework for the collective thought exercise that I hope we begin this afternoon, and that you continue in your respective careers in the years to come.

It is, in any event, way too late to talk about the opposite—“before law.” As Professor Halley reminded us yesterday, human beings long have been busy making rules of law to exploit the corporeal nature of being human: everyone must eat and sleep, ideally every day, and those with the power to rule have used this fact through the ages to construct hierarchy through and by law.<sup>2</sup> In this and other ways, the Age of Law arose, and today we can stand back, inspect the record, consider the future, and even try to act rebelliously<sup>3</sup>—as earthlings, as legal knowledge producers, and as agents of social justice.

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\*Professor of Law, University of Miami. My special thanks go to Stu Marvel, Sujith Xavier, the organizing committee and Osgoode Hall for this invigorating experience. Many thanks also to Janet Halley for a wonderful companion lecture. All errors, ambiguities or contradictions are my own.

<sup>1</sup> The conference theme is: Beyond Law: At the Edges of Law’s Ambit.

<sup>2</sup> See Janet Halley, *Does law have an outside?*, 6 OSGOODE CLPE RESEARCH PAPER NO. 44/2010.

<sup>3</sup> For more on this concept, see GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992).

Naturally, many problems pop up the moment one begins to talk or think along these lines; what, for example, do we mean by “after” or by “law” (as we know it)? And, as Professor Halley also illustrated yesterday, lawyers long have been accustomed to expanding or contracting this thing called “law” to suit any number of purposes.<sup>4</sup> As we begin to survey these kinds of issues, it becomes clear that any single conference, lecture or exchange could not possibly capture or resolve all the questions that our minds can quickly conceive when contemplating themes like this one.<sup>5</sup> But I hope to capture—even if not resolve—a slice of the topic you have chosen for our conference theme, a slice or chunk that is thick enough to help us do some of the work that your thematic choice invites.

I therefore will not concentrate on saying something “new”—or even anything profound. Instead, I hope to begin working, together with you, on a thought exercise to help each and all of us decolonize self and society. Rather than end with conclusions today, I hope we embark on a sharpened sense of mission and ambition in our roles as scholars or practitioners of the law.

Indeed, rather than neatly resolve any of the questions raised by your topic or this lecture, or to feed a desire for certainty, I hope during this time to nudge us toward a positive and salutary embrace of ambiguity; even though, as legal professionals, we are trained thoroughly to pursue clarity and certainty with zealous advocacy, even where they lack, intellectual honesty requires us to acknowledge at the outset of *this* thought exercise that nothing about law, nothing whatsoever, is clear or certain. Instead, whether we look at specific rules or overarching norms at the sub-national, national or supra-national levels, we encounter a relentlessly variegated and shifting landscape that provides much room for discretion, much opportunity for both good and bad, and much cause to acknowledge and respect the centrality of ambiguity to the construction and operation of law.

So, today I necessarily will speak mostly at a relatively high level of generality, just to sketch some premises and propositions upon which we all might then chew.<sup>6</sup> *Please* think of this moment as an opportunity to engage in a collective thought exercise focused on what might lie “beyond the edges of law’s ambit.” While we might not arrive at any grand or definitive conclusions today, I hope this exercise will spark enduring thoughts or insights to help nurture the careers upon which you are preparing to embark.

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<sup>4</sup> To the point that Professor Halley’s keynote title yesterday at this conference asked, “Is there Anything Outside of Law?”

<sup>5</sup> For one example of the myriad types of questions that can arise, see BRIAN Z. TAMANAHA, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY* (2001).

<sup>6</sup> I also will necessarily speak from the position of someone based within the United States, although these thoughts and queries certainly implicate Canada and other modern nation states. *See, e.g.*, SHERENE H. RAZACK, *LOOKING WHITE PEOPLE IN THE EYE: GENDER, RACE, AND CULTURE IN COURTROOMS AND CLASSROOMS* (1998).

After some brief prefatory notes, I will outline the time I call the “Age of Law” to explain how the making of modernity is related to the politics of progress and contradiction that define this era and its legacies. I next will summarize the dynamics of corruption, complexity and crisis that define the Age of Law and its historical construction of nation and market in material, structural terms. I then will turn to the relationship of this status quo to the emergence of internationalized law in the service of corporate globalization. Finally, to conclude, I will return to the pursuit of justice after law, including the importance of foundational values and legal criticalities in social re-construction, and emphasizing the role of academic activism, outsider democracy and rebellious knowledge-production in the pursuit of social justice transformation. In the end, I hope to have provoked new insights and incited new ambitions in your own lives and works.

#### A. “AFTER LAW”: A PREFACE

*“In Western societies since the Middle Ages, the exercise of power has always been formulated in terms of law”<sup>7</sup>*

The law (as we know it) is everywhere; yet so is lawlessness. And even though we certainly have more “law” than ever before, in its many forms, we also still have as much lawlessness, in its many forms, as ever before. Over time, this potent brew produces the corrosive practice of lawlessness in the name of law that we might describe as the (new?) status quo.

The resulting point of tension, at some point, becomes: what has all this got to do with justice? How does law, or lawlessness, produce more or less—or different kinds—of in/justice? After all, this relationship between law and in/justice has always been crucial to modern conceptions of the rule of law; at its most basic level, law is a means toward justice; law is supposed to fix problems, cure wrongs, compensate injuries, remedy injustices.<sup>8</sup> To be and do so, we are told, law must be principled—more than merely politics, ideology, personal predilection or raw power.<sup>9</sup> But the circumstances and possibilities conjured by “after law” suggest in substantive terms an exhaustion of law, of its purposes and promises, or its utilities and capacities.<sup>10</sup> This theme and topic thus ultimately question the continued viability of the traditional relationship between law (as we know it) and justice, and queries whether the historically essential junction of the two in the construction and context of the modern, liberal democracy is at the brink of, or on a path toward, a systemic collapse of new and unique proportions.

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<sup>7</sup> Michel Foucault, *The History of Sexuality*, Vol. 1 (TRANS., ROBERT HURLEY) 82 (1978).

<sup>8</sup> See generally MELVIN I. UROFSKY, *A MARCH OF LIBERTY, A CONSTITUTIONAL HISTORY OF THE UNITED STATES* (1988).

<sup>9</sup> For a classic modern articulation of this concern, see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

<sup>10</sup> For a relatively early exploration of themes like this one, see Boaventura de Sousa Santos, *Law and Community: The Changing Nature of State Power in Late Capitalism*, 8 INT’L J. SOC. L. 379 (1980).

Two legal constructs are at the crux of this situation: the nation state and the so-called free market. Both the state and the market are, in fact, products of law: each is created, constructed, operated, limited, modified and protected by law. And each, in turn, produces much law—directly or otherwise. In fact, much law is devoted both directly and indirectly to the maintenance and administration of the nation state, the so-called free market, and the myriad actors that operate within and across each.<sup>11</sup> Yet, today, under this rule of law, all three—the nation state, the free market and law itself—are said to be in existential crises.<sup>12</sup> These vexations and crises, I submit to you, are rooted—in great measure, at least—in the intensifying phenomenon of lawlessness under Law; the increasingly systematized disjunction of law and justice, which takes the authority and legitimacy of law ever-closer to collapse, given the existential premises of modern liberal democracies like those we here inhabit.<sup>13</sup>

It is *this* dangerous amalgamation in *this* historical moment, and the stark prognostications of some celebrated minds on these phenomena and their likely socio-legal consequences, that leads from your conference theme to the notion that provides our focus in this lecture: after law. This notion therefore aims not only to inspect the role and prospects of law in conventional “domestic” or internal levels, but also to recognize urgent analyses and prominent prognostications warning that the international nation-state system perhaps has reached the limits of what the traditional power over law and lawmaking can do. This lecture invites you to consider whether we stand at the cusp of a conceptual, political, structural and/or historical moment of shifting paradigms that might be described as “after law” and, if so, what roles or actions you might undertake as earthling and legal scholars in the years and decades to come.

## II. THE AGE OF LAW & THE MAKING OF MODERNITY: THE POLITICS OF PROGRESS & CONTRADICTION

The first set of points or thoughts, naturally, involve background—understanding the “Age of Law” as the historical and structural context for this moment. For centuries, during the consolidation of this age, law was the project of human “progress”. The path toward progress, toward civilization, toward modern, rational, enlightened and just problem-solving, lay in the

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<sup>11</sup> For some relatively recent efforts to grapple with these kinds of questions, see RICHARD L. ABEL, *THE POLITICS OF INFORMAL JUSTICE* (1982); JEROLD AUERBACH, *JUSTICE WITHOUT LAW?* (1983).

<sup>12</sup> For substantive accounts from different perspectives, see RICHARD A. POSNER, *A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION* (2009); PAUL KRUGMAN, *THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008* (2009); BETHANY MCLEAN & JOE NOCERA, *ALL THE DEVILS ARE HERE: THE HIDDEN HISTORY OF THE FINANCIAL CRISIS* (2010).

<sup>13</sup> For a brief sampling of background readings, see NANCY FRASER, *SCALES OF JUSTICE: REIMAGINING POLITICAL SPACE IN A GLOBALIZING WORLD* (2009); UGO MATTEI & LAURA NADER, *PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL* (2008); CULLEN MURPHY, *ARE WE ROME?: THE FALL OF AN EMPIRE AND THE FATE OF AMERICA* (2007); PHILIPPE SANDS, *LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES FROM FDR'S ATLANTIC CHARTER TO GEORGE W. BUSH'S ILLEGAL WAR* (2005); P.W. SINGER, *CORPORATE WARRIORS, THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2003).

making of new, more and better law; law by custom, law by codification, law by regulation, law by adjudication, law by reformation and restatement...law, law, law. Over time, through this age, law has become entangled with every other major social institution—with magic before it became religion, with religion before it became culture, with culture before it became nation, with nation before it became market. Law thus became central to the consolidation of groups and communities into the modern nation state, even as it is now central to the consolidation of nation states into an increasingly globalized international socio-legal system, formally based on liberal democratic values, such as liberty, property, equality, dignity, and self-determination. Law, in short, is at the core of modernity's constitution.

But, as Professor Halley's opening example yesterday showed, this historical process also exploited within and across the emergent nation states the weaknesses of the human being.<sup>14</sup> Laws repeatedly were crafted to prevent the individual human from fulfilling primal needs without paying a stiff price. So law was constructed to facilitate exploitation of the poor by the rich—of the less able by the more—as an integral element for the formation of nation states, and even as the emergent ruling elites proclaimed commitments to diametrically opposite values, again like democracy, equality, and autonomy.<sup>15</sup> Overtly, law was a liberal and democratic force but covertly it was designed to produce and perpetuate particular systems of stratification and subordination. This was “civilization”.

This gigantic contradiction—or hypocrisy—accounts for much of the grief and conflict in the histories that follow. For today, however, the main point is that this foundational and operational contradiction in the institutionalization of national law gave rise in the past few centuries to the idealized yet simultaneously corrupted form of the modern liberal democracy—corrupted by and because of the systemic, structural dissonance generated constantly by this and related contradictions (and the imperative of maintaining their force materially in society); the dissonance, say, of a society based explicitly, vociferously and simultaneously on slavery and “liberty” as expressed and enforced by formal law at the most sacred constitutional planes.<sup>16</sup> This kind of foundational and gigantic contradiction not only corrupts legal and social systems from the outset in enduring and multiplying ways, but it also necessitates undue normative complexity—like the present-day gyrations of judges to “reconcile” the apparent incongruities of the status quo—to keep tranquilized masses tranquilized.<sup>17</sup> Thus, contradiction produces systemic corruption, which creates undue socio-legal complexity. Over time, logic and history suggest, this combustible mix of contradiction, corruption and complexity can accumulate and eventually lead to crisis—even collapse.

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<sup>14</sup> See Halley, *supra* note 2.

<sup>15</sup> In the example of the United States, see, e.g., CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913); Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

<sup>16</sup> For a pithy yet incisive analysis, see LAWRENCE GOLDSTONE, DARK BARGAIN: SLAVERY, PROFITS, AND THE STRUGGLE FOR THE CONSTITUTION (2005).

<sup>17</sup> Because the juridical is at the crux of legal in many modern nation-states, I oftentimes use juridical examples in this lecture to illustrate the larger points being made about law or related themes. See *infra* Part II.



Think about it: is it not the modern liberal democracy of today that most loudly claims to live under the much-vaunted “rule of law?” It is they (we) who snort loudest at societies said to lack this rule of law. It is they (we) who claim to have a *principled* system of laws, not merely politics—a distinction thus made existential, even if hazy and wobbly in fact. It is the modern liberal democracy that insists this bedrock separation of politics and power from justice under law is what makes it the world’s exemplar of the “good” society committed to the peaceful pursuit of individual and societal happiness: free and open lands of opportunity dedicated to neutral principles under the law’s equal protection.

But, in fact, this gigantic contradiction means that law oftentimes is used mainly if not merely to launder politics. To launder the dirtiest kinds of self-interested factional politics, which in turn produce yet more “law”—in its many forms—oftentimes mainly to sustain traditional patterns of stratification and inter-group subordination.<sup>18</sup> As a result, law (as we know it) too often is rendered the servant of the “traditional” politics of neocolonialism and subordination rather than the agent of human values and rights formally endorsed by “modern” liberal democracies in their founding charters and related monuments.<sup>19</sup> And, ditto, now, at the international level. Perversely, then, law becomes the tool for implementing expressly repudiated values—like structural, law-based inequality—and for deflecting formally endorsed social goals, like equal opportunity for *all*.<sup>20</sup>

Through the centuries, this gigantic contradiction spurred historical and continuing justice claims seeking to harmonize law’s material effects with society’s overtly professed values. Typically, these antisubordination claims invoked the formal commitments to civil/human rights embodied in numerous instruments of law, thereby seeking to close the gap between profession and action.<sup>21</sup> These historical antisubordination struggles in effect sought to use law to cure or ameliorate the gigantic contradiction established by law to begin with. But of course,

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<sup>18</sup> Although this might seem like a sharp critique of contemporary law and politics, it is in fact the original vision and expectation articulated by the framers of the United States Constitution at the time of the Republic’s founding. *See, e.g.*, THE FEDERALIST NO. 51 (James Madison). For a juicy, factual and insightful analysis, see GORE VIDAL, *INVENTING A NATION: WASHINGTON, ADAMS, JEFFERSON* (2003).

<sup>19</sup> Of course, as the framers of the U.S. Constitution posited, law has, and always will have, a necessary relationship to politics. *See supra* note 18. But, even so, a distinction is maintained. Not by fiat or farce, either, not, at least, if the integrity of law is to be unquestioned. Re-drawing this distinction is part of your work, a key point in intergenerational terms. Giving real life and meaning to this existential distinction is a prerequisite to resolving or transcending the gigantic contradiction embedded in law, and the related dysfunctions of corruption and complexity. *See infra* Part IV.

<sup>20</sup> In the example of the United States, the “separate but equal” period of the last century and the continuing period of “reverse discrimination” in this one illustrates the phenomenon. *See, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding the separate but equal regime) and *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007) (upholding the reverse discrimination regime currently).

<sup>21</sup> *See, e.g.*, Dr. Martin Luther King, Jr., *I Have a Dream* (Aug. 28, 1963).

the gigantic contradiction embedded in law (as we know it) ensured these social justice quests would work only at the margins of any given socio-legal framework—typically, the nation state. Beyond sporadic and limited accommodations or concessions, the rule of law has pushed back against structural or material transformation in favor of social justice with effective fury: the reaction of the ruling classes and their agents to social justice claims historically has been to use law itself in order to delay—ideally in perpetuity—any possibility of transformative social justice.<sup>22</sup>

This dynamic of reaction and retrenchment has been costly specifically to the legal system—both its capacity and legitimacy—because it requires increasingly patent manipulations by judges and other legal actors of the law/politics distinction upon which the system’s logic and authority rests. Hoping to explain away the increasingly apparent incoherence of the legal system on its own terms, these manipulations aim to paper over the ongoing corruption of law produced by the multiplying dynamics of contradiction. But these increasing numbers and kinds of manipulation manage mainly to weigh down a supposedly neutral system purportedly dedicated to justice under law with disingenuous, undue and increasingly obvious yet untenable politicized complexity. Consequently, superficial law “reform” is as good as it gets under the still-prevalent terms of “interest convergence” that this gigantic contradiction entrenches.<sup>23</sup> Under law reform, what changes is law, not society, not ideology, not reality. This is the condition we call modernity.

## II. CORRUPTION, COMPLEXITY AND CRISIS: NATION, PROPERTY, MARKET AND LAW

The doctrinal and political history of the legal device known as the class action in Euro-American legal systems illustrates, in broad and thematic ways, the dynamics and unfolding of the Age of Law, and the related tensions set off by its gigantic contradiction, in the making of modernity and the nation-state system. As you may know, in recent decades, class actions have been demonized politically and retrenched doctrinally. Why? Well, if you know only the current noise about class actions you might think they are but a recent invention of “activist” judges or voracious lawyers bent on taking from the corporations and the rich their justly-earned profits. But the class action, much like most of law in the Age of Law, was invented many historical moons ago by the rich and powerful to serve their own interests—albeit, formally in the name of noble values like equity, and justice itself.

While today’s headlines might suggest that the class action is a one-way street, in which many greedy little plaintiffs go after some hapless rich defendant, in fact the class action is formally and functionally a two-way street; it can and has been used by a single plaintiff to sue a class of

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<sup>22</sup> In the current historical moment within the United States, this phenomenon is seen in the form of retrenchment and backlash to “liberal” law and policy. See, e.g., *infra* notes 29-52 and accompanying text.

<sup>23</sup> For more on the difference between reform and transformation, see Chuck Lawrence, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, (1995); for more on interest convergence, see Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1979-1980).

multiple defendants.<sup>24</sup> This difference is crucial to understanding the origins, the historical development, and the current controversy over the class action. This difference also illustrates how the Age of Law has worked—and works still, even in these “post-modern” times.

In the very first class action, a group of English miners were joined as defendants so that their local parson, Reverend Brown, could collect the tithe that each owed individually to him under feudal law and custom.<sup>25</sup> Otherwise, Reverend Brown would be required by existing law to initiate different litigations against the different individual defendants to enforce each one’s obligation individually. But this approach would be extraordinarily time-consuming and expensive. Under this circumstance, law did not favor the ensconced ruling class. The value and the power of the tithe, and the class system/identity politics that it both represented and reinforced, could be maintained only with a change in existing law—a change that only those in control of lawmaking power can effectuate, which typically means the rich *and* privileged.

In this instance, therefore, equity invented the class action precisely because law did not permit the relevant in-group to extract and pocket with relative ease the material goodies at issue; equity, in the name of substantive justice, filled the gap. More precisely, the class action was invented juridically in the name of equity in order to facilitate deployment of the full force and violence of the law to collect rents from multiple individual tenants all at once, collectively.<sup>26</sup> Rather than requiring the landlord to sue in individual actions—a daunting endeavor—the compliant and inventive judges of that era designed a new form of action specifically to give back to landlords the upper hand in that particular contestation over opportunity, property and justice under the then-coalescing rule of law.

It bears emphasis to note that the specific legal or doctrinal origin of the class action is in *equity*—that is, more specifically, in the posited inability of law itself to produce adequate justice in a very material context. The story of the class action thus illustrates both the overt and asserted formal relationship between law, property and justice, as well as the covert contradictions that corrupt the ideals, values and aspirations overtly promised in the shaping and enforcement of specific legal regimes, or legal cultures. Since then, the story of the class action, especially actions in recent decades, like the larger story of law and society in the making of modernity, illustrates the long, historical patterns noted above: reaction, “holy war” and retrenchment—progress, contradiction, corruption, complexity and crisis.

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<sup>24</sup> FED. R. CIV. P. 23.

<sup>25</sup> *Brown v. Vermuden*, 22 Eng. Rep. 796 (Ch. 1676).

<sup>26</sup> For a comprehensive overview of the history, see Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866 (1977); Stephen C. Yeazell, *From Group Litigation to Class Action, Part I: The Industrialization of Group Litigation*, 27 UCLA L. REV. 514 (1979–80); Stephen C. Yeazell, *From Group Litigation to Class Action Part II: Interest, Class and Representation*, 27 UCLA L. REV. 1067 (1979–80).

By the 1970's, the class action in the U.S. was being used just as vigorously by classes of plaintiffs against a single defendant, usually in a mass-tort type of action. This particular use of the class action clearly was not what the rich elites in England or elsewhere had in mind when they invented or adopted it. Therefore, as in the case of Reverend Brown, privileged modern-day elites have been clamoring for another change in the law to yet again restore their upper hand in the order of things. Thus began what Arthur Miller and other mainstream scholars have described since the 1970's as "holy war" against the class action.<sup>27</sup>

This holy war, Professor Miller and others make plain, amounts to a self-righteous but merely political backlash against the use of class actions to enforce antitrust statutes, environmental statutes, consumer protection statutes, and similar "liberal" legislation of the 1960's. This holy war against the class action, in other words, is an attempt to subvert or negate the express purpose of those democratic, legislative mandates—another assertion of power politics over existing commitments to the rule of law. This holy war, more broadly, aptly illustrates the politics of progress and contradiction during the Age of Law: this holy war, which relentlessly seeks contraction of the class action *specifically as used by plaintiffs against rich corporate defendants* is an inversion of the original case, wherein only one factor remains constant: the politics of social and material outcome in favor of ensconced ruling classes.

As in the original case, today's cases are being decided to keep valuable goodies where they are. This retrenchment, by all accounts, has been largely successful.<sup>28</sup> As in the original case, the retrenchment was engineered by compliant judges with the will and power to subordinate law to politics in the name of law itself. Hence, the gigantic contradiction, accompanied as usual by corruption, complexity and...crisis?

This ideological success is part of the larger "culture wars" that incumbent judicial appointees such as Antonin Scalia have repeatedly invoked in their formal opinions as the basic backdrop for their exercises of power and discretion over law and its interpretation.<sup>29</sup> These culture

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<sup>27</sup> See Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664 (1979).

<sup>28</sup> Once again, the judges of the era have made sure of this: see, e.g., *Snyder v. Harris*, 394 U.S. 332 (1969) (prohibiting the aggregation of members' claims in diversity class actions in order to satisfy the amount-in-controversy requirement); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (requiring 23(b)(3) class action representatives to notify all members individually and to pay the entire cost of notification); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) (insisting on strict compliance with the adequacy of representation and predominance of commonality requirements in 23(b)(3) settlement class actions); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (requiring representatives in a settlement 23(b)(1)(B) class action clearly to prove the fund's limit and to address any conflicting interest among members). Similarly, judges have aimed specifically to shut down the class action as an effective civil rights/antiracism tool. See generally George A. Martinez, *Race Discrimination and Human Rights Class Actions: The Virtual Exclusion of Racial Minorities from the Class Action Device*, 33 J. LEGIS. 181, 188 (2007). Finally, and additionally, Congress enacted special restrictions on representative plaintiffs and attorneys in securities class actions. See The Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 77z-1.

<sup>29</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting); *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

wars, which in the context of North American politics stretch back at least to the 1970's, express majoritarian resentment and reaction against Civil Rights gains and legacies of the New Deal and the Great Society.<sup>30</sup> Picking up steam in the late 1980's and 1990's, the formal declaration of cultural war proclaimed in 1992 that the very "soul of America" is at issue.<sup>31</sup> This backlashing, therefore, has not been waged or understood as a simple case of rough-and-tumble majoritarian politics as usual. On its very own terms,<sup>32</sup> it amounts to a multi-year, multi-faceted conflict waged expressly for the "soul" of the nation (the U.S.) in the name of traditionally dominant interests.<sup>33</sup>

In U.S. law and jurisprudence, this culture war backlash has been spearheaded through organizations like the Federalist Society, which was formed by now-prominent cultural warriors like Antonin Scalia.<sup>34</sup> In U.S. policy and politics, as recent history teaches, culture war agendas have been formed and advanced by politicians like Richard Nixon, Ronald Reagan and George W. Bush.<sup>35</sup> Using law, policy and politics, backlash warriors slowly but surely have striven to restructure the nation's perspective on its own values and history.<sup>36</sup> Using identity wedge politics to polarize "ins" and "outs", they have endeavored to redraw the U.S. legal landscape in favor of power and privilege, spanning categories of doctrine from anti-trust to civil rights.<sup>37</sup> Indeed, they have aimed to restructure the very structure of power, mainly to suit themselves, their sponsors and their allies.<sup>38</sup>

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<sup>30</sup> See JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1992); JAMES DAVISON HUNTER, *BEFORE THE SHOOTING BEGINS: SEARCHING FOR DEMOCRACY IN AMERICA'S CULTURE WAR* (1994).

<sup>31</sup> For contemporary news accounts reporting this remarkable declaration, see Chris Black, *Buchanan Beckons Conservatives to Come "Home,"* BOSTON GLOBE, Aug. 18, 1992, at A12; Paul Galloway, *Divided We Stand: Today's "Cultural War" Goes Deeper than Political Slogans,* CHI. TRIB., Oct. 28, 1992, at C1.

<sup>32</sup> For now-classic expositions of this backlash, see ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990) and RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977); see also Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

<sup>33</sup> See Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality and Responsibility in Social Justice Scholarship – Or, Legal Scholars as Cultural Warriors*, 75 DENVER U. L. REV. 1409 (1998).

<sup>34</sup> See Francisco Valdes, *Culture, "Kulturkampf" and Beyond: The Antidiscrimination Principle Under the Jurisprudence of Backlash*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* (Austin Sarat ed. 2003).

<sup>35</sup> For an accessible and in-depth account of key figures and events, see RICK PERLSTEIN, *NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA* (2008).

<sup>36</sup> See Francisco Valdes, *Culture by Law: Backlash as Jurisprudence*, 50 VILLANOVA L. REV. 1135 (2005).

<sup>37</sup> See Francisco Valdes, *Anomalies, Warts and All: Four Score of Liberty, Privacy and Equality*, 65 OHIO ST. L.J. 1341(2004) and Francisco Valdes, *"We Are Now of the View": Backlash, Jurisprudence and the Kulturkampf to Resurrect Old Deals*, 35 SETON HALL L. REV. 1401 (2005); see also *infra* notes 38-51 and sources cited therein (on backlash and retrenchment).

<sup>38</sup> For an overview focused on the judicial role in this phenomenon, see HERMAN SCHWARTZ, *PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION* (1988).

Of course, the culture wars find “different” out-groups in the U.S. positioned “differently” vis-à-vis core constitutional commitments like formal equality and key structural issues like democracy and judicial review, and thus vis-à-vis their formal and actual retrenchment through backlash. These differentials mean that the specific aspects or techniques of cultural warfare have been tailored for and directed at “different” groups in group-specific ways—ways that account for each group's standing in relationship both to formal law and to social reality.<sup>39</sup> As the still-ongoing California marriage equality controversy illustrates, the tactic with sexual minorities often is refusing to recognize even formal equality,<sup>40</sup> whereas the tactic with racial/ethnic minorities and women typically is to neutralize formal equality by denying substantive or functional equality through procedural tricks, doctrinal manipulations or, sometimes, simple fiat.<sup>41</sup>

Experience thus indicates that the overarching pattern of backlash politics (and jurisprudence) constitutes the pursuit of a self-subscribed “anti-antidiscrimination” agenda in which judicial power and majoritarian power combine to roll back “liberal” laws of the past century that provided fragile life-lines to vulnerable out-groups.<sup>42</sup> Experience specifically teaches that law is central—integral and pervasive—in the contemporary politics of this cultural warfare. This self-subscribed agenda presents in our own times a classic example of power politics in the name of justice, democracy and equality under the assertedly neutral eye of the law—a current and acute demonstration of contradiction, corruption and complexity in this very moment.

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<sup>39</sup> See, e.g., Nicolas Espiritu, *(E)Racing Youth: The Racialized Construction of California's Proposition 21 and the Development of Alternate Contestations*, 52 CLEV. ST. L. REV. 189 (2005) (focusing on cultural warfare against youth of color in California through use of proposition system in that state); Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 122 (1995) (deconstruction racialized political dynamics of that early Proposition); Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 650–58 (1995) (analyzing racial rhetoric and politics of Proposition 187). See generally Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender and Class*, 42 UCLA L. REV. 1509 (1995) (analyzing identity politics and social consequences of recent legal “reforms”).

<sup>40</sup> David B. Cruz, *Equality's Centrality: Proposition 8 and the California Constitution*, 19 S. CAL. REV. L. & SOC. JUST. 45 (2010); see also *infra* note 48 and sources cited therein.

<sup>41</sup> Consequently, numerous scholars have critiqued judicial willfulness or other institutional misbehaviors specifically in the context of race/ethnicity or sex/gender. See, e.g., Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928 (2001); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996); see also Marina Angel, *The Glass Ceiling of Women in Legal Education: Contract Positions and the Death of Tenure*, 50 J. LEGAL EDUC. 1 (2000); Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537 (1988); Richard Delgado, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349 (1989); Richard Delgado, *Affirmative Action as Majoritarian Device: Or, Do You Really Want to be a Role Model?*, 89 MICH. L. REV. 1222 (1991); Rachel F. Moran, *Commentary: The Implications of Being a Society of One*, 20 U.S.F. L. REV. 503 (1986). See also *infra* notes 39-51 and sources cited therein (providing similar critiques of judicial civil rights rollbacks).

<sup>42</sup> See Jeb Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002) (evaluating current judges' manipulation or disregard of precedent and canons of interpretation in pursuit of their anti-antidiscrimination political agenda).

Consequently, as in prior centuries and decades, the dissonant dynamics of the Age of Law continue to define the current socio-political zeitgeist. The gigantic contradiction, and the societal dislocations that its corruption of the legal system engenders, seem only to gather strength with the passage of time, the increase of impunity, and the weight of cumulative and multiplying effects.<sup>43</sup> It is absolutely no coincidence that legal observers of many different stripes have long been detailing and critiquing patterns of willful judicial and related political misbehavior in furtherance of culture war agendas against minority civil rights—misconduct that recycles in contemporary times the contradiction, corruption and complexity defining the Age of Law.<sup>44</sup>

The gathering sense of crisis resulting from these growing patterns of contradiction, corruption and complexity might therefore be not too surprising. These culture wars, by design, slowly but surely have unhinged law from justice, arresting in modern times the fitful but discernible historical path of law toward justice—interrupting what Martin Luther King once called the arc of history; unleashed by ideologically reactionary in-groups seeking to reassert traditional identity supremacies over the rest of us, these culture wars have replicated the socio-political dynamics established throughout the Age of Law, employing mostly law and policy as the

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<sup>43</sup> See generally THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* (2004).

<sup>44</sup> E.g., Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467 (1996); Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75; Stephanie M. Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265 (1984). See generally Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547 (2003) (focusing on judicial bias against plaintiffs in employment discrimination cases); Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947 (2002) (also focusing on judicial bias against plaintiffs in employment discrimination cases); William B. Gould, IV, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TUL. L. REV. 1485 (1990) (focusing on retrenchment in that key term of the Supreme Court); Nancy Levit, *The Caseload Conundrum, Constitutional Restraints and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321 (1989) (critiquing interposition of jurisdictional and prudential barriers to deflect civil rights actions); Robert P. Smith, Jr., *Explaining Judicial Lawgivers*, 11 FLA. ST. U. L. REV. 153 (1983–1984) (surveying techniques of judicial manipulation of facts and doctrine); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 293 (1992) (noting that “liberal activist judges” are the frequent targets of backslashers, who “promise that their replacements will not be so free-wheeling”); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) (questioning the premises and practices of judicial review in recent decades); C. Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677 (1984) (critiquing heightened rules of pleading that various federal judges had erected to rebuff civil rights claimants); Charles R. Lawrence, III, *“Justice” or “Just Us”: Racism and the Role of Ideology*, 35 STAN. L. REV. 831 (1983) (focusing on race and white supremacy).

instruments of power for reassertion of neocolonial or “traditional” hierarchies.<sup>45</sup> Like the “holy war” being waged specifically against contemporary uses of the class action, these broader culture wars—also dedicated to backlash precisely against history’s arc toward justice under law—have denied long-postponed measures of substantive justice to historical struggles, and thereby brought law ever-closer to the brink of crisis, or worse.

Let me tick off just a few examples of this lawlessness in the name of law from very recent (U.S.) history. Of course, the torture memos of the Bush regime, which flouted the Geneva Conventions and trivialized them as merely “quaint” artifacts of law, readily come to mind.<sup>46</sup> But recall also the judicial theft of the 2000 elections in the United States, which in the name of Law installed into power the regime that produced the torture memos, a theft which in itself is a continuing crime that exemplifies in breathtaking terms the gigantic contradiction, undue complexity and systemic corruption defining the Age of Law.<sup>47</sup> More recently, consider California’s “democratic” choice to re-establish “legal” marriage inequality and re-impose formally a scandalous “separate-but-equal” regime for family law in that state to prop up the ideology of straight supremacy—a policy choice made in the midst of reactionary hysteria that is as glaringly incoherent, self-interested and unconstitutional as it was in the context of racial policy to prop up the ideology of white supremacy during the earlier two centuries.<sup>48</sup> And presently, even as we gather here today, consider the brazen racism in Arizona to formally re-institutionalize white supremacy legally;<sup>49</sup> significantly, this ongoing effort is reflected not just in the recent state legislation mandating racial profiling by law, but also by the new Arizona statute banning the teaching of history in full in that state’s public education system.<sup>50</sup> Still

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<sup>45</sup> See generally JEAN STEFANCIC & RICHARD DELGADO, *NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA* (1996).

<sup>46</sup> For more on the torture memos, see Adam Liptak, *The Reach of War: Penal Law; Legal Scholars Criticize Memos on Torture*, N.Y. TIMES, Jun. 25, 2004 at A14; Jeffrey Rosen, *The Nation; The Struggle Over the Torture Memos*, N.Y. TIMES, Aug. 15, 2004 at §4 at 45; Richard A. Serrano, *Torture Memos Draw no Sanctions; A Justice Dept. Report Says Two Lawyers Who Cleared Waterboarding Used ‘Poor Judgment’*, L.A. TIMES, Feb. 20, 2010 at §LATEXtra at 1.

<sup>47</sup> For more on the 2000 elections, see *Bush v. Gore*, 531 U.S. 98 (2000) (in which 5 of 9 judges order the state of Florida to halt counting votes which might determine the elections outcome unfavorably to those 5 judges and their political sponsors). The continuing crime is illustrated by rulings like *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010) decided by appointees installed into judicial offices by the Bush regime, and which could/would not have occurred but for judicial theft of the 2000 elections in the first place. See generally JOHN W. DEAN, *WORSE THAN WATERGATE: THE SECRET PRESIDENCY OF GEORGE W. BUSH* (2005).

<sup>48</sup> For more on California’s Proposition 8, see John Wildermuth, *Prop. 8 Supporters Fight Fierce TV Ad Battle*, SAN FRANCISCO CHRONICLE, October 11, 2008 at A6; Bob Egelko, *Prop. 8 Backers Take Fight to Kindergarten; Same-sex Marriage; Teachers Would be Required to Tell Young Children that Gay and Straight Marriages the Same, Claims Ballot Pamphlet Argument*, SAN FRANCISCO CHRONICLE, July 25, 2008 at B1; Joe Garofoli, *Report Contends Anti-gay TV Ads Swayed Voters*, SAN FRANCISCO CHRONICLE, August 4, 2010 at C7; see also Joyce H. Hahn, *Proposition 8 and Education: Teaching Our Children to be Gay?*, 19 S. CAL. REV. L. & SOC. JUST. 149 (2010).

<sup>49</sup> For more on this effort, see, e.g., Gabriel J. Chin, Carissa Byrne Hessick, Toni M. Massaro, & Marc L. Miller, *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, GEO. IMMIGR. L. J. (forthcoming 2010).

<sup>50</sup> For more on this effort, exemplified by the demand that the Tucson Unified School District shutdown its ethnic studies program, see Jonathan J. Cooper, *Arizona Ethnic Studies Law Signed by Governor Brewer, Condemned by*



looking to the United States as one example, these dynamics of crisis and breakdown can be seen in the public behaviors of many individuals who gather in so-called “Tea Party” events nationwide—behaviors that include gun-toting, race-baiting, tantrum-throwing and a host of similar behavior patterns that in earlier historical moments would have been considered socially deviant at a minimum, and probably outright antisocial, even criminal.<sup>51</sup> But now, all this—and more—occurs and is normalized under color of “free” expression and constitutional law itself.

In California, Arizona and elsewhere in these concrete examples of contradiction and corruption through and by law, we see in full glory what the Age of Law has wrought: we see what law as we know it is in fact, in practice, in action. In these instances, and similar ones across Earth, we bear witness to traditionally privileged in-groups, including self-righteous majorities, exercising their political control of law and policy to enact regimes of self-opportunity, and of mass coercion, for identitarian demarcations of inclusion and exclusion that just happen to coincide neatly and tidily with historical fault lines defining supremacy and subordination in inter-group terms anchored, as always, in *traditional* identity politics—race/white supremacy, sex/patriarchy, orientation/heterosexism, etc. In these and similar instances, we see time and again the Orwellian deployment of law to justify oppression, exploitation and deception in the name of liberty, equality and democracy.

In my view, all of these recent or ongoing instances are, in fact, examples of lawlessness through and by lawmaking. Each one illustrates how law is used to subvert the very values professedly and righteously embedded in law. Of course, we might rejoin, “law” always has been flouted by the rich and powerful, including spoiled majorities, to get their way, and others be damned—if necessary. Just recall the origins of the class action. True enough. But the accumulating layers of dissonance and dysfunction left behind by the political excesses of each generation, and the expertise in legal manipulation learned along the way from one generation to the next, have imposed an increasingly heavy weight on the legal system’s capacity, if not its legitimacy.<sup>52</sup> Contradiction has bred corruption, which has bred complexity, which has entailed more and more sophisticated corruption, which increasingly intensifies complexity...and so the cycle spins, careening toward crisis, lurching toward collapse?

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*UN Human Rights Experts*, THE HUFFINGTON POST (May 11/2010, 11:50 PM), [http://www.huffingtonpost.com/2010/05/12/arizona-ethnic-studies-la\\_n\\_572864.html](http://www.huffingtonpost.com/2010/05/12/arizona-ethnic-studies-la_n_572864.html).

<sup>51</sup> For background information on this “movement”, see Michiko Kakutani, *The Engine of Right-Wing Rage, Fueled by More Than Just Anger*, N.Y. TIMES, September 14, 2010 at C1; Paul Froese, *The Tea Party's Unifying Bogeyman: The Socialist*, USA TODAY, September 13, 2010, [http://www.usatoday.com/news/opinion/forum/2010-09-13-column13\\_ST1\\_N.htm](http://www.usatoday.com/news/opinion/forum/2010-09-13-column13_ST1_N.htm); Jacob Weisberg, *A Tea Party Taxonomy: The Insurgent Movement is Indeed Something New In American Politics—But What, Exactly?*, NEWSWEEK, September 27, 2010 at 33.

<sup>52</sup> For recent expressions of similar thoughts or concerns, see DAVID CALLAHAN, *THE CHEATING CULTURE: WHY MORE AMERICANS ARE DOING WRONG TO GET AHEAD* (2004); see also DAVID CAY JOHNSTON, *PERFECTLY LEGAL: THE COVERT CAMPAIGN TO RIG OUR TAX SYSTEM TO BENEFIT THE SUPER RICH—AND CHEAT EVERYBODY ELSE* (2005).

Thus goes the story of law during the Age of Law: when established rules no longer give the upper hand to ensconced ruling elites or their friends, the law must change to preserve this ancient status quo, usually and perversely in the name of equity, justice, tradition or apple pie. In the case of class actions, as we saw above, equity—or justice—was the sponsor of the change; today, in the holy war to change the class action again and reinforce or restore anew the perks of power and status, we see echoes of these dynamics in the aspersions thrown on class-action plaintiffs who advance claims on behalf of consumers, environmental justice, antitrust principles, and civil/human rights. Today, as in the case of Reverend Brown a millennium ago, the poor victims of the law, in need of a change to rescue them from law's injustice, are the powerful ruling classes of the epoch. This gigantic contradiction—the overt promises versus the covert designs of the law—is the travesty of law that, over time, cumulatively, leads to contradiction, complexity, crisis and eventually, perhaps, collapse.

### **III. CORPORATE GLOBALIZATION: ABOVE THE NATION STATE, ABOVE THE LAW?**

Most recently in historical terms, the widespread establishment of multinational corporations, and the intensifying virulence of top-down corporate globalization, have put new and morphing pressures on this uncertain relationship between law and justice in the material, political and constitutional context of the modern liberal democracy.<sup>53</sup> Whereas both laws and corporations are, formally, creatures and creations of the modern nation state, both laws and corporations seem operationally to have decisively outgrown the limits of their creators.<sup>54</sup> Perhaps the interplay of laws, corporations and nation states now threatens the very viability of the traditional world order based on the rule of law because the efficacy of foundational notions and premises—borders, territoriality, jurisdiction and the like—seem increasingly antiquated or impotent in the face of challenges and trajectories during this still-young century.<sup>55</sup> Or so we are warned by some prominent analysts.

Indeed, the decline or the collapse of the nation state is said to be impending, even as the nation state continues to be a key pivot point in everything, both sub and supra-national. Under this forecast, nation states will become increasingly irrelevant because they will become progressively less able to deliver on the traditional goods that undergird their existence: under this kind of analysis, the nation state increasingly will become unable to protect itself and its people from increasingly globalized social, economic, and environmental problems, or from increasingly proliferating weapons of mass destruction, or from increasingly Borg-like assimilation of culture and market in the form of corporate globalization. Under this type of

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<sup>53</sup> For background readings, see e.g., MICHAEL LIKOSKY, *TRANSNATIONAL LEGAL PROCESSES: GLOBALIZATION AND POWER DISPARITIES* (2002); DAVID HELD & ANTHONY MCGREW, *GOVERNING GLOBALIZATION: POWER, AUTHORITY AND GLOBAL GOVERNANCE* (2002).

<sup>54</sup> For some provocative follow-up reading, see STEVEN DROBNY, *INSIDE THE HOUSE OF MONEY: TOP HEDGE FUND TRADERS ON PROFITING IN THE GLOBAL MARKETS* (2006); ANDREW ROSS SORKIN, *TOO BIG TO FAIL* (2009).

<sup>55</sup> For a good overview of issues, see CURTIS J. MILHAUPT & KATHARINA PISTOR, *LAW & CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD* (2008).

account, the nation state will give way to the market state, which will be devoted mainly to sustaining the conditions necessary for fundamentalist market capitalism to operate much as we know it today, except even more so.<sup>56</sup>

Under this sort of scenario, traditional identities “naturally” tend to become irrelevant; so do relative or diverse cultural and political normativities; all that matters is “the market,” in which multiculturalism will occur, if at all, organically, as it should, of course. The market state will be not only color blind, but identity blind: blind, for example, to the increasingly documented exploitation of traditionally subordinated identity groups—women, indigenous people, children, poor communities, oftentimes of color—throughout the entire planet by the agro-industrial complex owned and controlled by traditionally elite groups.<sup>57</sup> Under this account, in effect, globalization and capitalism are a done deal; “free-market fundamentalism” is the new normativity, if one exists at all.<sup>58</sup> The traditional nation state increasingly becomes (mainly/merely?) the means of advancing corporate activity—a condition some might say is already the case, and perhaps has been all along, at least in the Age of Law.<sup>59</sup>

As in the case of the class action and its future, this predicted (or ongoing) transition from the nation state to the market state no doubt will depend in great measure on the management of law—both internal and international, both as written and as applied. Already, however, we can see (again) at the international or transnational level the replication of contradiction, corruption, complexity, and the makings of crisis. The same dynamics that historically gave shape to law’s structural dissonance and systemic dysfunction at the national/internal level are today giving shape to internationalized or transnationalized law.<sup>60</sup>

Historically, the dominant narrative of international law is that it is the result of practical and political arrangements devised pragmatically by dominant sovereigns on the basis of the nation state system. But the origins of international law—like the origins of law generally—are found

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<sup>56</sup>For a widely-noted rendition of this line of thinking, see PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* (2002); PHILIP BOBBITT, *TERROR AND CONSENT* (2008).

<sup>57</sup> See generally, BERTA ESPERANZA HERNÁNDEZ-TRUYOL & STEPHEN J. POWELL, *JUST TRADE: A NEW COVENANT LINKING TRADE AND HUMAN RIGHTS* (2009); AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* (2003); see also *JUST SUSTAINABILITIES: DEVELOPMENT IN AN UNEQUAL WORLD* (Julian Agyeman, Robert D. Bullard & Bob Evans, eds. 2003).

<sup>58</sup> For more on this concept, see generally Symposium—*Free Market Fundamentalism: A Critical Review of Dogmas and Consequences*, 5 SEATTLE J. FOR SOC. JUST. 497 (2007).

<sup>59</sup> For a chilling but (still) fictional rendition of everyday human life in this predicted future, see GARY SHTEYNGART, *SUPER SAD TRUE LOVE STORY* (2010). For a non-fictional rendition, see MORRIS BERMAN, *DARK AGES AMERICA: THE FINAL PHASE OF EMPIRE* (2006).

<sup>60</sup> Of course, oftentimes the two—internal and international—interact, overlap or blur. See generally JORDAN PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* (2003).

in the more specific need of the ruler to rule the ruled. International law, like internal law, is the product of local and national elites reproducing at the trans-national level the same arrangements imposed at the national and sub-national levels: relationships of domination and subordination in the name of goals and values like justice, equality and dignity.

Thus, the origins of internationalized law are found in the structural need of colonial elites to control and exploit their colonies. It is found in the need of dominant nation states in the North and West of the globe during the 15<sup>th</sup> to 19<sup>th</sup> centuries to promote their own sense of security, and their self-serving systems of exploitative commerce.<sup>61</sup> More recently, after World War II, we see the emergent and consolidating system of international law take on a tripartite agenda that crystallizes during the 20<sup>th</sup> century these original and historical imperatives. The first item on this modern agenda remains the management of former colonies—now denominated as a “third world”—in a manner that still preserves “traditional” neocolonial privilege. The second agenda item is the management of Cold War politics at a global level, a strategy designed to ensure again the triumph of the North and West nation states, and their political or economic preferences, in the “new” world order through the concession of formal “human rights” in the wake of the Second World War. And the third item of this modern agenda for internationalized law has been the promotion of economic “globalization” as a process that buttresses neocolonial hierarchies and related socioeconomic arrangements through the care and feeding of mega multinational monsters.<sup>62</sup> Notice, again, how these three modern-day and continuing pursuits effectively crystallize the historical imperatives and “traditional” utilities of international law.

Of course, since World War II, international law also has been increasingly influenced by the mobilization of mass social movements, initially organized around national and class interests but more recently organized around other categories of identity such as race, sex, sexual orientation, religion, and other axes of identification and regulation.<sup>63</sup> Thus, the emergence of “civil society” at both the national and transnational levels has added additional actors to the historical makers of international law.<sup>64</sup> More importantly, the emergence of social movements in this increasingly globalized political setting has created an opening for the articulation of antisubordination principles within the making of international law.<sup>65</sup>

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<sup>61</sup> See generally ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005); NIALL FERGUSON, *EMPIRE: THE RISE AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSONS FOR GLOBAL POWER* (2002); NICK ROBINS, *THE CORPORATION THAT CHANGED THE WORLD: HOW THE EAST INDIA COMPANY SHAPED THE MODERN MULTINATIONAL* (2006).

<sup>62</sup> Indeed, an entire system of international institutions created by nation states to pursue these interests has been a principal feature of international lawmaking since World War II. See, e.g., Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions*, 41 HARV. INT'L L. J. 529 (2000).

<sup>63</sup> *Id.* at 561-576; see also Balakrishnan Rajagopal, *International Law and Social Movements: Challenges of Theorizing Resistance*, 41 COLUM. J. INT'L L. (2003)

<sup>64</sup> See, e.g., NGO INVOLVEMENT IN INTERNATIONAL GOVERNANCE AND POLICY: SOURCES OF LEGITIMACY (Anton Vedder ed., 2007).

<sup>65</sup> See generally GAETANO PENTASSUGLIA, *MINORITIES IN INTERNATIONAL LAW* (2002).

Nonetheless, the contemporary transnational status quo engendered by this complex of forces slowly but surely has led to a “neoliberal” conception of globalization and internationalization that effectively demands a normative, political and legal preference for profit over people. As many observers have noted, this neoliberalization of internationalized legal arrangements has promoted human rights mostly for corporations.<sup>66</sup> Despite protest, critique and resistance, neoliberalism, in practice, has amounted to corporate globalization.

This legacy, most recently and ironically, is being consolidated by the “neoconservative” construction of globalization under internationalized law. Some observers say this neoconservative approach to law, transnationalism and globalization aims to construct an imperial sovereign, or an “imperial sovereignty,” to push for a *nationalist* international law.<sup>67</sup> Either way, then, the structural and material bottom line once again remains constant: neoconservatism, like neoliberalism, is perfectly okay with a transnational system of law designed to freeze tops and bottoms in the current global order precisely in their traditional, neocolonial and subordinated/privileged places.

Thus, as it was in the beginning, international law today continues to be a project of the North and the West in which the Global South is the object of material control and political rule. International law, like internal law, protects the interests and legacies of colonialism and imperialism in the name of democracy and human rights. International law, like internal law, is a project freighted with contradiction, corruption and complexity. Like internal law, international law is a recipe for brewing crisis.

In material and more concrete terms, internationalized law is being used to produce a *global* economic space, much like internal law was used to produce a *national* economic space: much like internal law has been deployed to produce and prop up a national capitalist class hierarchy, international law is being used to produce and prop up a transnational capitalist class hierarchy. At both levels, injustice is a key hallmark of these legal regimes, which relentlessly commodify both the human species and its habitats in the avowed name of “liberty” but in the actual interest of those elites who profit most directly from today’s version of “free” market fundamentalism. Thus, contemporary international law typically protects the interests of capital over labor, of the corporation over the environment or the community, of exploitation over sustainability. The non-stop chatter about human rights for humans oftentimes remains mostly just that: chatter.

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<sup>66</sup> See, e.g., Bhupinder Chimni, *Past, Present and Future of International Law: A Critical Third World Approach*, 8 MELBOURNE J. INT’L L., 499 (2007).

<sup>67</sup> See Alejandro Lorite Escorihuela, *Cultural Relativism the American Way: The Nationalist School of International Law in the United States*, 5 GLOBAL JURIST FRONTIERS 1 (2005).

No wonder, then, that international law now is increasingly characterized by the same dynamics that gave shape to internal law during the Age of Law. Both levels of law are based on noble and inspiring specified values but applied by judicial appointees and other legal actors in direct or indirect repudiation or subversion of them; both are characterized by an overt commitment to justice coupled with a covert sabotaging of that commitment. Like internal law, international law ensures instability, exploitation, violence, and inequality—all in the name of development, security, freedom and justice. Like internal law, international law is driven more by raw power than by principled justice.<sup>68</sup>

This, my new friends and colleagues, is the juncture in human history relating to law, justice and society at which you are about to enter the profession. Under these circumstances, under the weight of the accumulating layers of contradiction, corruption, complexity and crisis, what deserves our honor or respect as “law”? Surely, at some point, this becomes the ultimate existential question in a modern, liberal democracy committed to a real and operational, if unsteady, distinction between “law” and (mere) politics. Whatever the level, how do we distinguish law from politics without resort to constant gyration or repeated manipulation? This distinction, after all, is at the crux of the modern liberal democracy structured in the form of the nation state that (still) upholds and facilitates the system of corporate globalization of which we speak today. As the already-gigantic contradiction embedded in law is stretched by current or coming generations beyond all limits of reason and decency, will the world’s long-tranquilized masses—the multitudes—continue to believe that the naked emperor remains clothed in law’s claimed majesty?<sup>69</sup> As law, corporate globalization and the nation state continue to converge in this devolutionary path, do we get closer and closer to a space or moment we might call “after law”?

These are some of the substantive questions for our collective thought exercise, as we work through the profound implications of your conference theme. Indeed, these are some of the foundational questions facing the planet and, in particular, your generation. Take the lead in generating principled answers, workable solutions, ethical options, critical discourses. Don’t wait for “law” or its masters to do it for you. Remember: you/we must see through law to get beyond, and to imagine after, law... by this I mean, to begin with, simply that we cannot proceed in our collective thought exercise from *within* the law; we cannot begin from within the law to imagine what comes next simply because we then become immediately entangled in what the law, as currently constructed, will not permit. In other words, to make this exercise worthwhile we must begin the process of imagination not from what law already is, but from what law currently is not.

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<sup>68</sup> For a terrifying insider account, see JOHN PERKINS, *CONFESSIONS OF AN ECONOMIC HIT MAN* (2005).

<sup>69</sup> See generally MICHAEL HARTD & ANTONIO NEGRI, *EMPIRE*, 216-236 (2000).

#### **IV. JUSTICE AFTER LAW: ACADEMIC ACTIVISM, OUTSIDER DEMOCRACY & REBELLIOUS KNOWLEDGE-PRODUCTION**

Rather than beginning with law as we know it, we begin instead with what law *claims* to be, or purports to attempt, on its own terms in the context of a modern liberal democracy. This small shift is indeed small; conceptually, it would seem to represent very little, as it expressly remains within the context of the modern liberal democracy. Yet, this small shift can be monumentally consequential from a social justice or antisubordination perspective because it begins to hold law (and lawmakers) substantively more accountable for social results. This small shift begins to center the gap between law in theory and law in action. It spotlights the causes and dynamics of contradiction, corruption, complexity and crisis. It challenges the gigantic contradiction between the overt and covert goals of law that define the Age of Law and its socio-legal legacies. This small shift aims effectively to re-ground law in justice, and in struggles for it, by focusing our attentions and energies on what *should* come after law as we know it today.

To help us imagine—and perhaps then engineer—“after law,” let us try to sketch some of the general, basic indicia that we might expect to find in a time or place that we might recognize as after or beyond law. Now, as with most critical projects, we probably would begin with negative indicia—that is, with a critical identification of the markers that currently define or characterize “law” as we know it. As we begin this process, we aim through critique to shed or minimize these markers of law as we currently know it...the newly-open spaces of analysis and action thereby created bring into view what might come after law.

To get the ball rolling and inspire your own thoughts and questions, both today and later, let me list but a handful of possible markers to guide our path beyond or after law. Below, in brief bullet-point synopses, are some of the indicia that might characterize a transition from the current status quo to an era or mindset after law:

- Presently, law as we know it oftentimes is the first resort in social problem-solving. As noted earlier, this is a key characteristic of the Age of Law. In a transition toward an era after law, law would become in fact but one tool or technology in our problem-solving kit, and not typically the one of first resort.
- Under the liberal construction of law, categorization is an elemental mode of organization and operation. The key practice of law, of legal analysis and action, is in the act of categorization using entrenched conceptual templates; all follows from this “traditional” (and stultifying) practice. Therefore, in a transition to a time after law, the impulse toward bright-line or clear-cut categorization adhering blindly to old conceptions of social order as the perpetual pivot point for legal activity might also be backgrounded, much as the resort to law in the prior bullet point also would

background the resort to law as an initial matter. Rather than obsess on the increasingly formalistic practice of traditionalist categorization to produce law and organize material reality, we might instead in a time after law begin “from the bottom”<sup>70</sup> to imagine and implement social organization.

- Law as we know it proclaims stability and predictability as key systemic virtues; in other words, law is said to provide the sound and sturdy framework within which individuals can organize their projects and plans knowing that the rules of the game will not be suddenly or capriciously altered after they have relied on a given set of rules. In a time after or beyond law, stability and predictability could, of course, remain as virtues—and probably should; I certainly have no quarrel with this proposition. However, these virtues need not trump, or be used strategically and selectively, to deflect other foundational values or virtues to which the nation is professedly committed in constitutional terms—commitments to, for example, equality. Thus, under the regime of law as we know it, stability or tradition oftentimes are invoked as imperatives of legal decision making. Related to the practice of traditionalist categorization, this invocation oftentimes is interposed to impede progress toward formally embraced constitutional values, once again like equality, in a manner that effectively further entrenches in the constitutional norms and practices of contemporary society the historical gigantic contradiction that we sketched above.
- Under law as we know it, control and order likewise serve as social imperatives of policy making and legal action. In fact, “law and order” are as culturally intertwined as “scotch and water.” And, of course, “order” is code for control—the use of “law and order” by those who control law in order to control those who don’t. This same dynamic is evident today in the still-unfolding dramas of law, politics, policy, justice and the nation state, as evidenced in locales like Arizona, California and elsewhere. In a place or time after law, law would better aim to serve substantive justice based on professedly shared fundamental values “for all”—rather than mere order in the ongoing service of ruling elites and their self-interested “traditions”.

This quartet of general indicia, remember, are designed only to get the ball rolling in a collective thought exercise based on your choice of conference themes: while starting with critique or “negative” analysis might be the first step in critical approaches to knowledge-production, the construction of alternatives requires more...it requires a positive vision of an imaginable, or plausible, alternative. Let me therefore conclude with a few, very limited, words about this second step—a step that goes beyond criticality and toward a transformative reconstruction of law as we know it, a reconstruction that can be transformative precisely because we begin to

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<sup>70</sup> For a classic exposition of bottom-up theory and praxis from the legal academy of the United States, see Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).



imagine it from outside the law, rather than from within it, and what its dictates already do not permit.<sup>71</sup>

At its most basic level, law (as we know it) under a modern liberal democracy is said to be but a means to an end; an instrument for the implementation of foundational shared values, values or social goals enshrined in the supreme law of the land, or, in our case within the United States, the federal Constitution itself. So, what would happen if we forget about the rules and doctrines of law—to borrow a phrase from Professor Halley, “take a break” from law<sup>72</sup>—and begin instead with values, or social goals, or collective ends—not those of our own choosing, but those expressly identified in the text or structure of the federal Constitution. How might our collective thought exercise unfold then, if we began directly from the original document and its implications for *us*, rather than from what previous generations of black-robed appointees have laid down in the path of social justice struggles to obstruct, delay or avert the age of reckoning. What if we begin with the “plain” (to us) meanings of constitutional commitments or values rather than with the doctrinal detritus of contradiction, corruption and complexity left behind in multiple and accumulating layers by the gyrations and manipulations of the Age of Law?

It is difficult, I know, to proceed with confidence as we nudge our minds to roam beyond the familiar. In my own case, this process has been nurtured over the past few years by my experience teaching an innovative course that slowly but surely requires us—both teacher and student—to embark on this type of exercise. For the past several years I have been developing a course on “Law & Popular Culture” in which we “read” and discuss cinematic “texts” focused on legal practice and the profession.<sup>73</sup> Students compose weekly essays responding to specific questions calling for nuanced judgments. Although only I read these essays, they provide one key basis for classroom discussions; each week, I extract themes from the student essays to enrich class discussion of the course materials. Throughout this process, two recurring experiences with this course get my attention each year.

Each year, as we screen and write about and then discuss these materials, the class inevitably finds itself confronting the need to discuss social values in order to make sense of the legal

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<sup>71</sup> For more on this type of practice, see Mari Matsuda, *Besides My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183 (1991); Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming To See Correspondences Through Work in Women's Studies*, in POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER (Leslie Bender & Daan Braveman, eds., 1995); Devon Carbado, *Straight Out of the Closet: Race, Gender, and Sexual Orientation*, in CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002); Francisco Valdes, *Outsider Scholars, Critical Race Theory, and “OutCrit” Perspectivity: Postsubordination Vision as Jurisprudential Method*, in CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002).

<sup>72</sup> JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM (2006).

<sup>73</sup> For more information on this course, visit the LatCrit Syllabi Bank at [www.latcrit.org](http://www.latcrit.org).

issues or situations depicted in the course films. In other words, the students individually and collectively become increasingly self-aware that their understanding or analysis of the “law” ultimately cannot be disentangled from the social or underlying values implicated in any “legal” issue or situation, even if it all boils down to a cauldron of diverse subjectivities. This self awareness, acquired by them without any preaching from me, oftentimes seems to hit them like a new revelation, one which then helps to fertilize the classroom for deeper discussions of this linkage. To my surprise, we all then discover that these students actually hunger for values—values packaged with integrity, offered for inspection and critical discussion, not sold or asserted in conclusory fashion from the classroom pulpit or elsewhere as group-think ideology. In their “private” essays to me, they increasingly cry out with eloquence for educational opportunities to express thoughts on the value choices that legal decisions inevitably make, but which rarely make their way into opinions and classrooms.

By the way, oftentimes these are the very same students that typically tend to sit mute in typical, doctrinal courses. But in these essays they lament the technocratic bent of their formal legal education, and our focus on doctrines expressed in the form of opinions—ossified texts which appear to them to be worlds apart from the values-drenched depiction of life and the law that we study and discuss in this course. Why, they ask privately in their essays, is legal education devoid of a focus—a *critical* focus—on values? Why do we cram rules and doctrines into the course but not the underlying, oftentimes unstated, values, goals or ends that they promote or support over viable (and perhaps “better”) decisional alternatives?

Now, I do not think for one moment that any self-respecting educator imagines ourselves to be teaching without regard to values. Nor that we aim for mere doctrinal genuflection and regurgitation. But I also think I get what the students mean: oftentimes, as individual teachers, we are forced to rely on books and other mainstream materials that bleach out any explicit discussion of values from their presentation of legal knowledge. The institutional and circumstantial pressures for “just the rule” affect us all—teacher as well as student. Under these conditions, values enter the picture only if we insert them from the pulpit, and then they tend to remain at the margins. Moreover, oftentimes this kind of contextualizing effort can be discounted or dismissed by some students as merely professorial editorializing—something, they might mistakenly think, amounting to “brainwashing” with little if anything to do with the rule.

In this class, we end up talking about this vexing situation quite a bit. We discuss many possible reasons for this status quo, including the polarization of just about everything in North American life during the past three decades of cultural warfare against specifically “liberal” values—a polarization that makes it extremely difficult for both faculty and students to discuss candidly and critically the different kinds of values served by different choices of policy regimes.<sup>74</sup> Indeed, a polarization that exemplifies in contemporary times and terms the gigantic contradiction and related dynamics that define the systemic corruption and undue complexity of the Age of Law, and of its current legacy of crisis.

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<sup>74</sup> See *supra* notes 29-52 and accompanying text (on the culture wars).

To me, however, the bottom line of my recurring experiences with this course is this: whereas in doctrinal courses focused on opinions the social context—and therefore values—are edited out by judges and/or editors, in this course, the exact opposite occurs. In this course, all legal questions necessarily come embedded in a (usually fictionalized) real-life situation. In this way, students readily see, *on their own*, the social values implicated by the array of possible outcomes to any legal question.

As a result, in this course we—both teacher and student—end up foregrounding “values” (or goals, ends, etc.) and backgrounding “law.” We only get to law (as we know it) once we are clear of the *ends* that we are trying to achieve by and through law. We focus on in/justice, not rules. We might say we focus not on what doctrine prohibits, but on what justice demands. Over time, law becomes clay in our hands; a means to an end.

It is an empowering realization and experience for the students, long accustomed to being asked mainly to memorize and regurgitate facts and doctrines, and to manipulate legal rules technocratically within the already-strained frameworks of judicial opinions, rather than to pierce those thick clouds of verbiage to produce promised social results based on expressly shared values or foundational commitments. Rather than fret over the many things not permitted by the cumulative contradictions of a corrupted legal system, we are able to visualize, somewhat more vividly and concretely than otherwise, the world we choose to construct through, by and under law. Along the way we effectively map a world *after* law—at least law as we know it.

A similar tactic might help us today: beginning with purportedly common values, or socially shared goals, or formally endorsed ends—rather than with the contradictions and complexities of law as we know it—perhaps we can liberate our vision this afternoon, to see a world beyond and after law.<sup>75</sup> If everything is, as we know, a social construction, then, by definition, everything is in the process at all times of social re/construction...so where, I ask you in conclusion, is your role in the re/construction of law at this particular historical juncture, during this time of gathering crisis and possible systemic collapse or exhaustion, as reflected in the dynamics of polarization and backlash that your generation inherits from mine?

Thus far, I have tried, in broad-brush style, to paint you a picture with several basic highlights. The starting point is simple: reflecting a consensus that these are times of crisis, prominent prognostications warn us of an impending paradigm shift, one in which the law-based system of nations states that has defined modernity to date will give way to something else, something fundamentally different. In addition, I have tried to point out that these prognostications are based in sound fact; the internationalization of law and the proliferation of mega-multinational corporations indeed do seem to portend a new era of market fundamentalism. Nonetheless

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<sup>75</sup> For a similar exercise from a very different perspective, see SAM HARRIS, *THE MORAL LANDSCAPE* (2010).

the landscape is more complex, and more in flux, than these prognostications might suggest. In other words, as we see all around us in these times of crisis, the nation state still matters, and very much indeed. These prognostications, and the complex landscape before us, thus indicate mostly that much hangs in the balance—that much will be decided by what people like you, in your generation, decide to do (or not) in the coming decade or two.

So yes, you enter this profession in a time of much flux, not only in the air, but also on the ground. The ongoing furor over the class action, much like the outrages in California and Arizona reasserting straight and white supremacies, illustrate how the power of the nation state remains resilient, relevant—capable of breaking lives and fortunes. What we call “law” still matters very, very much, and so, therefore, does what we make it—and what we make of it. With these thoughts and concluding words, I turn to you insistently and ask again: when you look and imagine “beyond law,” what do you see and want “after law”...how will your life’s work help take humanity there...how will law be and act after law?

In closing, let me point out that many generations of critical scholars and academic activists have wrestled with these types of big-picture questions.<sup>76</sup> In the jurisprudential history of the United States, for instance, we can see “realist” scholars and practitioners grappling with questions of social relevance and legal utility even as they questioned the coherent nature of law or its principled application.<sup>77</sup> We see this same jurisprudential struggle continuing more recently in the work of critical legal scholars, whose work intervene across categories of nation, class, culture, race, gender, sexuality and other sectors of law, policy and society.<sup>78</sup> In my own case, this commitment to continuing this historical, multi-generational struggle for justice under law has unfolded principally within the framework of LatCrit theory, praxis and community.<sup>79</sup> Much has been written to elucidate the jurisprudential experiment that many of us call “LatCrit” theory,<sup>80</sup> so I will not repeat those materials here, even as I encourage you to spend some of your scarce time learning about this jurisprudential project because it has many

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<sup>76</sup> See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992).

<sup>77</sup> For Realist texts of the era, see Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935), Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930) and Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489, 516 (1912). For historical accounts of the Realist experiment, see LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986) and WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973); see also John Henry Schlegel, *Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor*, 35 J. LEGAL EDUC. 311 (1985).

<sup>78</sup> See Berta Hernández-Truyol, Angela Harris & Francisco Valdes, *Beyond the First Decade: A Forward-Looking History of LatCrit Theory, Community and Praxis*, 17 BERKELEY LA RAZA L. REV. 169 (2006) & 26 CHICANO-LATINO L. REV. 237 (2006).

<sup>79</sup> See Francisco Valdes, *Theorizing “OutCrit” Theories: Coalitional Method and Comparative Jurisprudential Experience – RaceCrits, QueerCrits, LatCrits*, 53 U. MIAMI L. REV. 1265 (1999).

<sup>80</sup> See <http://www.latcrit.org>, for Publications (follow “Publications” drop down menu; then “Published Symposia” hyperlink) and for the Research Toolkit (follow “Publications” drop down menu; then “Research Toolkit” hyperlink).

lessons for your generation to consider and develop. For me, LatCrit theory, praxis and community have created the intellectual, human and professional framework for living an ethical life as an academic activist committed to rebellious knowledge-production.<sup>81</sup> LatCrit theory, praxis and community have enabled me to act in principled collaborations with many diverse groups and individuals in a common pursuit of a post-subordination society.<sup>82</sup> The LatCrit experiment in critical outsider jurisprudence has created a sturdy vehicle for “personal collective praxis” and for the cultivation of “outsider democracy” as scholarly methods in legal knowledge-production.<sup>83</sup> In short, LatCrit theory, praxis and community have provided to me (and others) the opportunities to act on a daily basis toward ushering in the normative world that we imagine and demand.<sup>84</sup>

I encourage you to do something similar; I encourage you to find an academic home, a network of principled and ethical collaborators, a framework that encompasses theory, community and praxis for the cultivation and production of your own work over the long span of a daring and productive career. Collective praxis and action are difficult, to be sure; the proverbial herding of cats to motivate and sustain concerted acts of self-decolonization over the long haul is a perennial and trying necessity. Developing substantive relationships of mutual trust to enable critical coalitions anchored to multidimensional analysis and committed to antisubordination activism in critical and self-critical terms therefore *is* the perpetual project.<sup>85</sup> And remember always: we can only do a bit of this endless work at a time, individually and collectively, and always imperfectly. But if we persist in good faith and with goodwill, if we insist on ethical ambition and principled activism,<sup>86</sup> if we learn from our failures, shortcomings and challenges in organic and democratic ways, then, and only then, are we likely to make incremental but inexorable progress toward the promise of equal social justice, even if it is justice after law.

## V. CONCLUSION

Like most generations, yours receives a sullied legacy. A legacy in crisis, if the many commentators whose work provides the backdrop for this lecture turn out to be correct in any

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<sup>81</sup>See Francisco Valdes, *Rebellious Knowledge-Production, Academic Activism, & Outsider Democracy: From Principles to Practices in LatCrit Theory, 1995 to 2008*, 8 SEATTLE J. SOC. JUST. 1 (2010).

<sup>82</sup>See Francisco Valdes, *Outsider Scholars, Legal Theory and OutCrit Perspectivity: Postsubordination Vision as Jurisprudential Method*, 49 DEPAUL L. REV. 101 (2000).

<sup>83</sup> See Margaret Montoya & Francisco Valdes, “Latinas/os” and Latina/o Legal Studies: A Critical Review of Legal Knowledge-Production Models, 4 FLA. INT’L U.L. REV. 187 (2008)

<sup>84</sup> See generally GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992).

<sup>85</sup> See generally Julie A. Su & Eric K. Yamamoto, *Critical Coalitions: Theory and Praxis*, in *CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY* (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002).

<sup>86</sup> See generally DERRICK A. BELL, *ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH* (2002).

significant measure. Moreover, the viral spread of corporate globalization is making the trajectory of this situation no better, and fast. And so, my friends, your work is cut out for you, and for many, many years to come.

But, I began by promising that I would not resolve any of the compelling questions raised by this topic and the vexed situation of law and justice in this world of ours. As I prepare now to conclude, I aim to deliver on that promise; I would hate to disappoint any of you on that score. Instead, I hope to leave with you a sense of history, context and prospect at this crucial time in your professional lives: I hope, during this lecture, to have interjected into your current thinking a bit of big-picture perspective, fully aware of the minutiae that tend to rule our daily lives and crowd out much of what our work, and our humanity, most values. Remember, laws, like other creatures of our invention, are means to ends that we envision and elect.

I hope that the questions raised by the topic of this lecture, which in turn was inspired by the theme of your conference, will help you navigate the many complexities and contradictions that you will encounter in your careers as practitioners or scholars of the law—contradictions and complexities that will surpass those that you already have navigated successfully to be here. More important, perhaps, I hope that these questions stay with you for a long time, as you pursue your professional destinies. More than anything else, these questions and the topic itself—after law—invite and encourage you to take and keep a critical stance toward your life in and with the law.

Criticality in principled and multidimensional terms is especially urgent these days because much, if not most, of the contemporary legal status quo would be held illegal if current laws were applied with common-sense integrity. Indeed, diverse legal criticalities will be needed because *everything* needs to be reconsidered from the bottom up; multiple criticalities are essential because socially-relevant antisubordination analysis and action require substantive interrogation of the “whole thing” facing humanity in the years and decades to come. To decolonize self and society, we must map both the patterns and particularities, both the continuities and discontinuities, both the internalities and externalities, of structural privilege and systematized subordination under the rule of law. But, as I have emphasized today, politics oftentimes triumphs over law—even though the distinction between the two is said to be existential to the legitimacy of law itself. Without doubt, therefore, the multidimensional practice of antisubordination legal criticalities will be an indispensable part of cleaning up the mess.

Yet, to be successful, antisubordination criticalities will be necessary but not sufficient. In addition, you—we—will need vision, action, ethics, and perseverance. And we will need all four of these virtues both as individuals and collectives. Articulating substantive visions of justice, insisting on conscientious actions toward those visions, and persevering ethically in their dogged pursuit over the long term, are the simple and basic yet fundamental take-away points that I hope will endure with you from this lecture as you grapple with your legacy, and future, over the course of your lifetimes.

Peace.