FROM PRECARITY TO POSITIVE FREEDOM: CLASSCRITS AT SEVEN

CLASSCRITS VII SYMPOSIUM INTRODUCTION

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I. INTRODUCTION

The seventh ClassCrits conference, which took place November 14-15, 2014, was sponsored by the University of California - Davis School of Law and entitled "Poverty, Precarity, and Work: Struggle and Solidarity in an Era of Permanent(?) Crisis." The Southwestern Law Review has kindly agreed to publish a selection of the papers presented at that conference, as well as the ClassCrits mission statement developed in the summer of 2014. In this introduction, I first offer some comments on the ClassCrits project and its mission statement, and then reflect on the theme of the conference and the papers published in this symposium issue.

II. THE CLASSCRITS MISSION

Athena Mutua, one of the founders of the ClassCrits movement, explains that the name "ClassCrits" first appeared in print in 2006, in an article calling for new analyses of class, economic structures, and law within critical race

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theory.[1] The following year, ClassCrits began as a scholarly community with two workshops held at the University at Buffalo Law School.[2] According to Mutua, she and Martha McCluskey, the principal workshop organizers, chose the name ClassCrits in order to signal two commitments.[3] First, Mutua and McCluskey wished to signal their fidelity to the tradition of critical legal thought. "ClassCrits" thus deliberately echoed the monikers of the "race-crits," "fem-crits," "queer-crits" and just plain "crits" who had come before.[4] Second, Mutua and McCluskey were committed to exploring economic analysis as an interdisciplinary inquiry,[5] seeking "to develop an alternative to the predominant discussions of 'law and economics' grounded in neoclassical economic theory and its denial of 'class.'"[6] As Mutua, writing with LatCrit colleagues Tayyab Mahmud and Frank Valdes, explains, "ClassCrits was dedicated to exploring and better integrating the rich diversity of economic methods and theories into law, including considering the possible meaning and relevance of economic class – theories of class relations and antagonisms – to the contemporary context."[7] Since its inception, ClassCrits has flourished both as a community and as an intellectual movement.[8]

This symposium issue contains the first formal "mission statement" for the group.[9] The statement sets out three major assertions. First, it asserts that recognizing and rejecting certain pervasive, "common sense" narratives about political and economic governance is essential for moving toward a free and just society. Second, the statement asserts that "class" should be understood in both the Marxian and the Weberian senses, and that "class" is not more fundamental than identity categories like race, gender, and

1. *See* Athena D. Mutua, *The Rise, Development, and Future Directions of Critical Race Theory*, 84 DENV. U. L. REV. 329, 377-93 (2006).

2. *About ClassCrits*, CLASSCRITS (Mar. 28, 2015, 9:15 AM), https://classcrits.wordpress.com/about/ [hereinafter *About ClassCrits*]; Athena D. Mutua, *Introducing ClassCrits: From Class Blindness to a Critical Legal Analysis of Economic Inequality*, 56 BUFF. L. REV. 859, 859-61 (2008).

3. *About ClassCrits*, *supra* note 2.

4. Tayyab Mahmud, Athena Mutua & Francisco Valdes, *LatCrit Praxis @ XX: Toward Equal Justice in Law, Education and Society*, 90 CHI.-KENT L. REV. 361, 402 (2015) (forthcoming). The authors describe the members of these movements collectively as "OutCrits." *Id.*

5. *See* Mahmud et al., *supra* note 4, at 402; *About ClassCrits*, *supra* note 2.

6. *Introducing ClassCrits*, *supra* note 2, at 860-61.

7. Mahmud et al., *supra* note 4, at 403.

8. *See id*. at 403-407 (describing the evolution, projects, and governance of ClassCrits).

9. Justin Desautels-Stein et al., *ClassCrits Mission Statement*, 43 SW. U. L. REV. 651 (2014). I served on the committee that drafted this mission statement in the summer of 2013, along with Justin Desautels-Stein, James Pope, and Ann Tweedy. My reflections on the text, however, do not necessarily represent the views of the drafting committee.

sexuality, but is thoroughly entangled with them. Finally, the statement asserts that a legal perspective is essential for understanding class and market relations. I will explore each claim in turn.

A. The Myth of the Free Market

ClassCrits scholars call for a critical conversation about the whole range of institutions, beliefs, practices, and actors that together are conventionally called "the market" or "the economy." As the ClassCrits account has it, conventional economic and policy analyses tend to treat the market as a set of natural dynamics, governed by abstract laws of supply and demand that can be mathematically modeled.[10] Further, popular discourse imagines "the market" and its institutions as free, nonpolitical, and conducive to creativity and innovation, whereas "government" and its institutions are widely perceived as coercive, political (in a bad way), inept (if not outright corrupt), and destructive of innovation.[11] Building on the American Legal Realists, who made a similar critique,[12] ClassCrits scholars argue that the dichotomy between market freedom and state coercion misrepresents both forms of governance and their mutual entanglement with legal rules – a point explored further in subsection C, below.[13] Moreover, they argue, the dichotomy, which strongly favors "private," market-based governance over "public"

10. *See* BERNARD HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER (2011). In recent years, however, so-called "neoclassical" economics has been up-ended by scholars who have brought insights from cognitive psychology, sociology, and anthropology into economic analysis. *See, e.g.*, ROBIN PAUL MALLOY, LAW IN A MARKET CONTEXT: AN INTRODUCTION TO MARKET CONCEPTS IN LEGAL REASONING (2004); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051 (2000); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476 (1998); Robert Ashford, *What Is Socioeconomics?*, 41 SAN DIEGO L. REV. 5 (2004); Lynne L. Dallas, *Teaching Law and Socioeconomics*, 41 SAN DIEGO L. REV. 11, 11-12 (2004).

11. *See* HARCOURT, *supra* note 10; *see also* Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783 (2003).

12. *See, e.g.*, Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923). For a careful and detailed history of critique of the market-state distinction, see generally Justin Desautels-Stein, *The Market as a Legal Concept*, 60 BUFF. L. REV. 387 (2012).

13. As Justin Desautels-Stein puts it:

> Among the most powerful obstacles in the way of imagining alternative institutional variations of market society is the false distinction between free competition and the regulatory state. This distinction stifles our imaginative powers because the very notion that naturally free markets actually exist blinds us from the market's socially and politically contingent legal structure.

Desautels-Stein, *supra* note 12, at 392.

governance, in practice promotes oligarchy, facilitating programs of "upward distribution" of wealth and power to the already-advantaged.[14]

B. Class as Status and Relation

In addition to calling for a more complex and realistic understanding of political economy and practices of governance, ClassCrits scholars call for a renewed public conversation about class, by which they include both the Weberian and Marxian senses of the word.[15] The Weberian view – in which society is divided into several economic tiers ranging from the very poor "underclass" up to the super-rich, each with distinctive access to wealth, income, goods, services, and social prestige and each exhibiting distinctive "taste cultures"[16] – is more or less analogous to the way we typically think about identity groups based on race, gender, and sexuality. When critical academics add "class" to lists including those other groups, the parallel is often what they (we) mean.[17]

ClassCrits scholars, however, have also returned to the Marxian tradition of class as "relational."[18] The relational account of class places its origins in capitalist exploitation, the creation of an economic world in which "the wealth and power of some depends on the subordination and poverty of others."[19] In earlier eras, Americans had a thriving public language of relational class, centered in the labor movement. The brutality and violence of class struggle in the pre-Wagner Act United States, however, began to fade from popular memory with the decision of capital to share some measure of wealth and governance with labor unions and the workers those unions

14. *See generally* Martha McCluskey, *How Equality Became Elitist: The Cultural Politics of Economics from the Court to the "Nanny Wars,"* 35 SETON HALL L. REV. 1291 (2006); LISA DUGGAN, THE TWILIGHT OF EQUALITY?: NEOLIBERALISM, CULTURAL POLITICS AND THE ATTACK ON DEMOCRACY (2003).

15. *See generally* Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799, 818-19 (2003) (explaining the Weberian and Marxist concepts of class).

16. MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 80 (1947).

17. *See, e.g.*, Jill M. Fraley, *Invisible Histories and the Failure of the Protected Classes*, 29 HARV. J. ON RACIAL & ETHNIC JUST. 95, 100 (2013) (elaborating on stereotypes of Appalachians as, among other things, poor whites, and consequent discrimination against Appalachians); Lucille A. Jewel, *On Merit and Mobility: A Progressive View of Class, Culture and the Law*, 43 U. MEM. L. REV. 239 (2012); Lisa R. Pruitt, *The Geography of the Class Culture Wars*, 34 SEATTLE U. L. REV. 767 (2011).

18. *See Introducing ClassCrits*, *supra* note 2, at 897-98; *see also* Martha R. Mahoney, *What's Left of Solidarity: Reflections on Law, Race and Labor History*, 57 BUFF. L. REV. 1515 (2009).

19. *Introducing ClassCrits*, *supra* note 2, at 901 (quoting Frank Munger).

represented.[20] The economic boom following World War II (which allowed President Lyndon Johnson to declare a "war on poverty"), and the Cold War with its virulent anti-Communism, further buried the memory of American labor radicalism. As American Communists, socialists, and radical unionists suffered public persecution and vanished from the intellectual mainstream, along with them went a popular understanding of relational class – at least until the Occupy movement. The ClassCrits movement calls for an end to the silence that red-baiting and chastened unions brought about, and a return to the homegrown American language of class struggle.

In addition to enriching our understanding of political economy, the relational understanding of class enriches our accounts of identity and difference. The popular concept of "diversity" tends to implicitly adopt the Weberian view of class, seeking, for example, the inclusion of low-income and working-class people in affirmative action programs for the sake of embracing different perspectives and experiences.[21] Understanding the role of capitalist exploitation in creating and maintaining class identity, however, suggests that the goal of economic justice should not simply be "recognition" of different class identities, but rather an egalitarian program of redistribution of wealth, power, and property.[22]

At the same time, ClassCrits scholars break with the Marx-inspired tradition under which dimensions of identity and subordination such as gender, race, and sexuality are considered secondary to the primary, "real" social division of class. Building on the critical race theory concept of "intersectionality," ClassCrits scholars take the position that arguments about the primacy of class, race, or gender have been counterproductive; these dynamics are so enmeshed that they should be considered mutually constitutive. More generally, ClassCrit scholars reject a bright line between "redistribution" and "recognition," between material relations and identity. Although it is true that social movements organized around redistribution

20. *See generally* Ahmed White, *The Wagner Act on Trial: The 1937 'Little Steel' Strike and the Limits of New Deal Reform* (2014); CHRISTOPHER TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960 (1985).

21. For an exploration of the popular notion of "diversity" as the embrace of difference in various institutional settings, see generally ELLEN BERREY, THE ENIGMA OF DIVERSITY: THE LANGUAGE OF RACE AND THE LIMITS OF RACIAL JUSTICE (2015).

22. *See* NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION 2 (1997); Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a Post-Socialist Age*, 212 NEW LEFT REV. 68 (1995) (distinguishing between social movements that seek "recognition" by the state and by civil society, and social movements that seek economic and political "redistribution."). *But see* Judith Butler, *Merely Cultural*, 227 NEW LEFT REV. 33 (1998) (responding that the new social movements have always sought economic redistribution as well as recognition.).

might cheer the disappearance of social classes in a way that social movements organized around recognition might not cheer the disappearance, say, of race, redistribution and recognition are intertwined in most social movements. This reflects the fact that material and symbolic relations of power are similarly always intertwined: sex and race "differences," for instance, are at least in part the effect of (or justification for) economic marginalization and exploitation, and wealth and income disparities have formed around race and sexuality.

C. Class and the Law

Third and finally, ClassCrits scholars assert that law is central to the economic justice project. There are two ways in which this is true. First, "class," in both its status and relational aspects, is a product of legal rules and state action, and the same is true of "the market."[23] Second, legal rules and institutions serve a distinct ideological function in stabilizing liberal societies: making class relations and market institutions seem natural, normal, and necessary. This legitimation function extends to the racialization and sexualization of economic relations – of poverty and privilege. As the ClassCrits mission statement puts it: "Legal institutions and legal language – including, ironically, the language of equality and liberty – make hierarchies of class, race, and gender seem both natural and fair."[24]

The primary way in which the law has contributed to the naturalization of political and social hierarchy is, ironically, through erasing its own tracks. For example, courts in the late nineteenth and early twentieth century regularly claimed that the subordination of women and people of African descent was the result of "natural differences," ignoring the role of law and state action in facilitating or mandating differential treatment.[25] Later, after the discrediting of racial and sexual science, courts accepted parallel arguments that group inequalities and disparities were the result not of politics but individual preferences, or "cultural" differences originating in the

23. The law, of course, is not solely responsible for the production of classes and economic institutions and practices. Legal rules are in constant dialogue with social conventions and norms in the production of economic relations. Note that here again ClassCrits departs from the vulgar Marxist position that, as Robert Gordon puts it, "all law is pig law:" that is, that law is nothing but a tool of the powerful and reflects only the interests of elites. *See* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L.REV. 57, 93 (1984).

24. Desautels-Stein et al., *supra* note 9, at 652.

25. *See, e.g.*, Muller v. Oregon, 208 U.S. 412 (1908); Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

groups themselves.[26] Whether reliant on an explicit narrative of inferiority, or simply a story of "difference," the law took the position that disparities were not political. As the ClassCrits mission statement puts it, "legal concepts like 'freedom of contract' and 'racial identity'. . . help us imagine market dynamics to function beyond the purview of politics."[27]

An important way in which group inequalities and disparities are now portrayed in law as natural and normal is by reference to a supposedly coercion- and discrimination-free "market." As ClassCrit Martha Mahoney has pointed out, for example, courts examining housing discrimination cases have erased the roles of violence, prejudice, and legalized discrimination in shaping housing markets, instead assuming that segregation accomplished by means of "market forces" is a product of free choice rather than unlawful coercion.[28] The assumption that market forces are untainted by discrimination rests, in part, on the general assumption that market relations are inherently free, voluntary, and outside of politics – the position emphatically rejected by ClassCrits.[29] As Justin Desautels-Stein puts it, "the choice between free markets and interventionist states is a chimerical choice – the only actual choice is between different sets of rules, rules that are inevitably laden with political meaning and distributive consequences."[30] Both market governance and state governance are underwritten by law. Yet this fact is constantly obscured. One result is that, as Cass Sunstein has shown, constitutional action meant to foster social equality is persistently seen as "political," "interventionist" and "coercive."[31] The other result is the creation of what Lisa Iglesias calls the "anti-political economy," a fantasy about the political neutrality and freedom of market institutions.[32]

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26. *See, e.g.*, Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) (speculating that for some unknown reason people of African descent choose not to pursue construction jobs); EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (1988) (claiming that women do not choose high-paying jobs); *see also* JOAN C. WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2001) (deconstructing, painstakingly, the notion that women "choose" working in the home over working for wages).

27. Desautels-Stein et al., *supra* note 9, at 652.

28. *See* Martha R. Mahoney, *Whiteness and Remedy: Under-Ruling Civil Rights in* Walker v. City of Mesquite, 85 CORNELL L. REV. 1309 (2000).

29. *See supra* Part II.A.

30. Desautels-Stein, *supra* note 12, at 396.

31. *See* CASS SUNSTEIN, THE PARTIAL CONSTITUTION (1993) (discussing equal protection jurisprudence and its unexamined assumptions as to what constitutes the proper "baseline" for establishing state action).

32. *See* Elizabeth M. Iglesias, *Institutionalizing Economic Justice: A LatCrit Perspective on the Imperatives of Linking the Reconstruction of "Community" to the Transformation of Legal Structures that Institutionalize the Depoliticization and Fragmentation of Labor/Community Solidarity*, 2 U. PA. J. LAB. & EMP. L. 773, 781 n.21 (2000).

As Karl Polanyi noted, legal adherence to the anti-political economy fosters complacency about injustices that are facilitated through market relations and institutions – both the persistence of race and gender subordination through "market forces," and flaws in market institutions themselves.[33] For example, economist Joseph Stiglitz argues that a structural flaw in our capitalist democracy is the tendency toward "rent-seeking" – the attempt by economically powerful agents to use their economic power in the political system to bend substantive rules and institutional processes in their favor.[34] The belief in an anti-political economy obscures recognition of this structural flaw and hinders the development of, for example, stronger antitrust rules to counter the tendency for economic inequality to produce political inequality.[35]

Finally, the belief in an anti-political economy helps stifle any move toward establishing substantive economic rights on a constitutional level. As Julie Nice and others have argued, existing constitutional law leaves poor people as a class unprotected; the possibility that the poor are at a systematic political disadvantage similar to the plight of "discrete and insular" identity groups has never gained a majority in the Supreme Court.[36] Rather, when the

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Karl Polyani described the anti-political economy in the late 1940s:

> Vision was limited by the market which "fragmentated" life into the producers sector that ended when his product reached the market, and the sector of the consumer for whom all goods sprang from the market. The one derived his income "freely" from the market, the other spent it "freely" there. Society as a whole remained invisible. The power of the state was of no account, since the less its power, the smoother the market mechanism would function. Neither voters, nor owners, neither producers, nor consumers could be held responsible for such brutal restrictions of freedom as were involved in the occurrence of unemployment and destitution. Any decent individual could imagine himself free from all responsibility for acts of compulsion on the part of a state which he, personally, rejected; or for economic suffering in society from which he, personally, had not benefited.

KARL POLANYI, THE GREAT TRANSFORMATION 266 (1944) (second Beacon ed. 2001). This shell game gets even more complicated when we take into account the law's role in constituting and justifying social relations that are ostensibly outside the law. For a classic exposure of these moves, see, for example, Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (exploring how the public-private split operates ideologically to make "the market" seem sometimes "private" (when contrasted with "the state") and sometimes "public" (when contrasted with "the family")).

33. POLYANI, *supra* note 32.

34. *See* JOSEPH STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE 39-40 (2012) (describing rent-seeking as activities that produce income "not as a reward to creating wealth but by grabbing a larger share of the wealth that would otherwise have been produced without their effort.").

35. *See, e.g.*, Joseph Stiglitz, *Inequality is Not Inevitable*, N.Y. TIMES (June 27, 2014), http://opinionator.blogs.nytimes.com/author/joseph-e-stiglitz/.

36. *See* Julie A. Nice, *Equal Protection's Antinomies and the Promise of a Co-Constitutive Approach*, 85 CORNELL L. REV. 1392 (2000); Julie A. Nice, *Whither the Canaries: On the Exclusion of Poor People from Equal Constitutional Protection*, 60 DRAKE L. REV. 1023 (2012); Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, and*

Supreme Court has considered the problem of poor people's ability to exercise constitutionally-protected rights, it commonly finds no constitutional problem in distributing the exercise of rights based on ability to pay.[37]

III. PRECARITY AND THE LAW

A keyword in ClassCrits scholarship is "neoliberalism," which Mahmud, Mutua, and Valdes define as "a reorganization of capitalism where hegemony of finance capital displaces Keynesian welfare."[38] The ClassCrits VII conference contributed to the ongoing project of examining the relationship between neoliberalism and the law by marking an important set of anniversaries. In the Call for Papers, the organizers noted that 2014 was the 50th anniversary of the enactment of the Civil Rights Act of 1964, President Johnson's declaration of a "War on Poverty," and the establishment of the first Neighborhood Legal Services Program pilot in Washington, D.C.[39]

Dialogic Default, 35 FORDHAM URB. L.J. 629 (2008); *cf.* Michele Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality*, 2014 UTAH L. REV. 389 (analyzing U.S. Supreme Court jurisprudence applying rational basis review to class-based distinctions and discussing how those decisions aggravate economic inequality).

37. *See, e.g.*, Harris v. McRae, 448 U.S. 297 (1980). The narrow exception here is the right to access justice. In an important series of cases, the Supreme Court has held that poor people who are charged with a crime must be provided with a lawyer. *See* Gideon v. Wainwright, 372 U.S. 335 (1963). However, advocates and scholars have argued that *Gideon*'s promise has proved hollow, since there is no constitutional mandate that states adequately fund public defender services and no easy way to litigate on an individual level the problem of inadequate access to justice. *See* Gabriel J. Chin, *Race and the Disappointing Right to Counsel,* 122 YALE L.J. 2236 (2013); Beth Colgan, *Paying for Gideon*, 99 IOWA L. REV. 1929 (2014); Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219 (2010).

38. Mahmud et al., *supra* note 4, at 377. The authors explain further:

> Two of neoliberalism's major and widely implemented policy recommendations have been deregulation of the market and privatization of government goods (e.g. research information) and services (e.g. education). These policy recommendations grow out of some of the basic precepts and ideas of neoclassical economics. These include a focus on the market and an entry point which understands the self-interested utility maximizing individual together with technology and society's resources as determining the supply and demand for goods and services. The wants, tastes and talents of the utility maximizing individual are treated as exogenous to the market. When the supply and demand created by these preferences and technology operate in a competitive market, free from social and other barriers, then the market process, neoclassicists theorize, is both self-regulating and optimizes social welfare through efficiently allocating scarce resources. A corollary of this framework is that a person's wealth or poverty is determined by his choice - to save, invest, or put his endowed resources, including his "hard" work, to productive use. The theory's primary policy recommendation is that government not intervene in the self-regulating market except in limited circumstances.

Id. at 411.

39. Martha McCluskey, *ClassCrits VII Poverty, Precarity, & Work: Struggle & Solidarity in an Era of Permanent(?) Crisis*, CLASSCRITS (OCT. 14, 2014), https://classcrits.wordpress.com/2014/10/14/register-now-for-classcrits-vii-at-uc-davis-nov-14-15-2014/#more-1205.

These legal and political initiatives now appear, in retrospect, as high-water marks of the American welfare state, projects that illustrate the distance between Great Society liberalism and contemporary neoliberalism. The seventh meeting of ClassCrits examined what remains in the ashes of these now-abandoned social initiatives: the dynamics of work, poverty, and resistance in a neoliberal age.

One of the new terms describing economic insecurity under neoliberalism is "precarity," which the organizers' Call for Papers defined as "the increasing vulnerability of workers, even those above the official poverty line, to disaster."[40] As the Call noted:

> Precarity has both economic and political roots. Its economic sources include the casualization of labor, low wages, persistently high unemployment rates, inadequate social safety nets, and constant vulnerability to personal financial catastrophes. Its political sources include the success of neoliberal ideology, upward redistribution of wealth, increasing polarization and dysfunction in Congress, and the dependence of both political parties on a steady stream of big money. Precarity is also not limited to the United States, but is reshaping space around the globe. While the aftermath of the housing bubble and subsequent foreclosures drain home values across America and strip equity disproportionately from minority neighborhoods, in developing-country "megacities," millions of slum-dwellers are displaced to make way for high-end residential and commercial real estate developments.[41]

The papers being published in this symposium issue examine multiple dimensions of precarity. Taking a wide view, the papers by Tayyab Mahmud and David Waggoner each sketch a version of the ClassCrits perspective that moves beyond the contemporary United States in space and time.[42] Mahmud begins his article by suggesting that the term "precarity" is misleadingly voguish: global capitalism produces precarity by its very nature, and the

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40. Guy Standing has called the "precariat" the "new dangerous class," defining it as consisting of people:

> [W]ho have minimal trust relationships with capital or the state . . . and [are] distinctive in class terms. It also has a peculiar *status* position, in not mapping neatly onto high-status professional or middle-status craft occupations. One way of putting it is that the precariat has 'truncated status'. . . its structure of 'social income' does not map neatly onto old notions of class or occupation.

GUY STANDING, THE PRECARIAT: THE NEW DANGEROUS CLASS 8 (2011); *see also* David Brooks, *The American Precariat*, N. Y. TIMES (Feb. 10, 2014), http://www.nytimes.com/2014/02/11/opinion/brooks-the-american-precariat.html?_r=0.

41. McCluskey, *supra* note 39.

42. *See* Tayyab Mahmud, *Precarious Existence and Capitalism: A Permanent State of Exception*, 44 SW. L. REV. 701 (2015); David Waggoner, *The Jurisprudence of White Supremacy*: Inter Caetara, Johnson v. M'Intosh *and* San Antonio Independent School District v. Rodriguez, 44 SW. L. REV. 751 (2015).

middle-class stability created by the post-World War II detente between labor and capital was an historical aberration.[43] Nevertheless, Mahmud then concedes that something is different today. In his view, capital's reliance on undocumented labor has produced a "hyper-precarity."[44] Unprotected by the state and subject to ever-improving methods of surveillance and discipline, undocumented workers experience "the absence of any time/life outside circuits of control and value-appropriation."[45]

David Waggoner makes a similarly sweeping argument, exploring law's alliance with white supremacy in the New World. Waggoner notes that white supremacy has been a feature of jurisprudence in the territory now called the United States before it was even the United States.[46] Waggoner begins with the series of papal decrees that became entrenched in the law of nations as the Doctrine of Discovery.[47] Memorialized by Chief Justice Marshall in *Johnson v. M'Intosh* and by other Anglo-European colonizing nations as well, the Doctrine of Discovery functioned to restrict indigenous people from obtaining full title to real property, directing wealth to white settlers.[48] Shifting forward to the twentieth century, Waggoner argues that the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez* represents the apotheosis of white supremacy: "Whereas *M'Intosh* concerned the rights of Indians to land, *Rodriguez* concerned the rights of the descendants of Indians to education, the quality of which turned precisely on the value of land, land which had been appropriated from the ancestors of the *Rodriguez* plaintiffs."[49]

The papers by Athena Mutua and Leo Martinez focus on the present day, and explore the public narratives that justify deepening precarity to any who might otherwise be tempted to resist the next turn of the screw.[50] Mutua argues that neoclassical economic theory is one of several "feel-good ideas for elites."[51] She surveys the state of corporate America following the Great Recession of 2008, and observes that elites have fully recovered from the economic shock and are well into another "boom," enthusiastically pursuing

43. Mahmud, *supra* note 42.

44. *Id*.

45. *Id*. at 72.

46. Waggoner, *supra* note 42.

47. *Id*.

48. Robert J. Miller, *The International Law of Colonialism: A Comparative Analysis*, 15 LEW. & CLARK L. REV. 847 (2012).

49. Waggoner, *supra* note 42, at 8.

50. *See* Athena D. Mutua, *Framing Elite Consensus, Ideology and Theory & A ClassCrits Response*, 44 SW. L. REV. 637 (2015); Leo Martinez, *A More Perfect Union: The Danger of Conflating Progress and Equality*, 44 SW. L. REV. 729 (2015).

51. Mutua, *supra* note 50, at 4.

a policy agenda of more deficit reduction and containment of social welfare costs. Ordinary workers, meanwhile, languish in deepening precarity as slow-moving but dangerous crises such as neglected physical infrastructure, pollution, and global climate change continue unabated.[52] Mutua then summarizes the neoclassical economics story that justifies the corporate policy agenda, and presents a point-by-point refutation drawn from ClassCrit theory.[53] She concludes: "Neoclassical and neoliberal thought and practice give aid and comfort to elites and provide support for the structures and practices that perpetuate their material well-being at the expense of the vast majority of the world's people."[54] She urges fellow ClassCrit scholars to begin disseminating their counter-messages in plain form and in a variety of venues, in order to counter the narcotizing effects of neoliberal ideology.[55]

Leo Martinez argues that the contemporary jurisprudence of the U.S. Supreme Court, too, functions as a "feel-good" story for elites.[56] Reviewing four recent Supreme Court decisions alongside a speech by President Obama on the theme of moving toward a "more perfect union," Martinez argues that these powerful actors in the federal judiciary and executive branches have converged on a story justifying complacency with the civil rights status quo.[57] As he argues, "The cases seem to conclude, without a shred of empirical support, that all is rosy when it comes to racial harmony and sexual equality in this country."[58] Looking more closely, Martinez identifies some assumptions that ground this rosy view, such as the view that "progress toward equality *is* equality,"[59] and that further attempts to address inequality are not only unnecessary but themselves unconstitutional, as in the Court's decisions in *Schuette* and *Shelby Cnty. v. Holder*. Like Mutua, Martinez begs to differ. Introducing statistics about persistent racial disparities, Martinez urges elites to seek more public investment in equal education and to create the conditions for a "critical mass" of people of color in education and in the workplace.[60]

These four papers concentrate on diagnosis, the hallmark of the critical legal tradition. The fifth paper in this symposium, by Elizabeth Carter, turns to the normative question: What should we do? Carter's proposed solution,

52. *Id*.
53. *Id*.
54. *Id*.
55. *Id*.
56. Martinez, *supra* note 50.
57. *Id*.
58. *Id*. at 3.
59. *Id*. at 4.
60. *Id*.

tellingly, does not depend on convincing elites to care about the precariat; she accepts the fact that the political and economic conditions of fifty years ago that made projects like the War on Poverty and robust neighborhood Legal Services possible are gone. Instead, Carter urges poor communities to seize hold of existing (and rapidly evolving) legal tools to construct alternative economies for and with themselves.[61] Demonstrating that poor people are largely shut out of the benefits of our money-driven political economy, she argues that "low-income communities can become productive through non-monetary means, such as bartering, service-exchange, gift-giving, and a mutual credit-clearing system."[62] Two concepts from the critical theoretical tradition – the concept of rebellious lawyering,[63] and the emerging concept of the sharing economy – may serve as basic tools for creating the legal infrastructure for these alternative economies, Carter suggests.[64] At the same time, the history of intentional communities provides a number of tools available to poor people through which they can promote their own flourishing. Carter argues that through a strategic, critical alliance between poor communities and rebellious lawyers, "community planning is an effective tool for supporting an alternative economy among low-income communities where planners are trained to be visionaries and work with communities members to plan, design, mobilize, and aggressively advocate for new places to live, work, and play."[65]

Carter's paper signals an important new direction for ClassCrits scholarship – and perhaps, as well, signals an important distinction between ClassCrits and some of its "outcrit" antecedents. Each new wave of critical legal theory is typically criticized for its failure to offer a positive program, and one reason for the scholarly failure is typically political: critical legal theorists tend to write from political "exile," well to the left of the mainstream, lamenting the lack of political will to accomplish their agenda.[66]

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61. Elizabeth L. Carter, *Community Planning, Sharing Law and the Creation of Intentional Communities: Promoting Alternative Economies and Economic Self-Sufficiency Among Low-Income Communities*, 44 SW. L. REV. 671 (2015).

62. *Id*. at 2.

63. This term was invented by Gerald López. *See* GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992).

64. *See* Carter, *supra* note 61, at 2.

65. *Id*. at 68.

66. *Cf*. William E. Forbath, *The New Deal Constitution In Exile*, DUKE L.J. 165, 165 (2001) (attributing the phrase to Justice Douglas Ginsburg and noting, "For Ginsburg, the Supreme Court's embrace of the New Deal revolution cast the old Constitution into exile, its memory 'kept alive by a few scholars who labor on in the hope of a restoration, a second coming of the Constitution of liberty.'").

Although a public economic justice agenda requires the cooperation of elite state actors, a private economic justice agenda does not. The tools of "private" law can be used to create innovative relationships and institutions that further the ends of democracy, equality, and liberty. Other scholars and advocates have also begun these explorations.[67] As the great public accomplishments of the civil rights movement and the Great Society continue to dwindle in the rear view mirror, the availability of private law to build new economic relationships in the cracks of the old may be an increasingly important resource for ClassCrits advocacy.

IV. CONCLUSION

ClassCrits scholars hope to get students, and ultimately the next generation of American lawyers, to see that the political and the economic are not two different realms subject to wholly different rules of governance. Rather, they are intimately intertwined with one another, and both are created and maintained by law. Several of the papers in this Symposium pursue this pedagogical agenda, continuing to point out that the emperor has no clothes. Meanwhile, Elizabeth Carter's paper in this Symposium illustrates a second, companion project, the pursuit of economic justice. Carter's proposals open up new possibilities for the pursuit of economic justice outside of elite-driven spaces. Both these projects, in turn, anticipate a third, and even more ambitious, initiative that awaits the bold: to develop a new discipline of law and political economy, a discipline that would take as its central problem not the allocation of scarce resources, as does neoclassical economics, but rather the development of structures and institutions that promote the flourishing of life on earth. This project, if realized, would constitute the opposite of "precarity": true security and positive freedom.

67. Examples include Jenny Kassan & Janelle Orsi, *The Legal Landscape of the Sharing Economy*, 27 J. ENVTL. L. & LITIG. 1 (2012) (arguing for the construction of an alternative, "post-jobs," "post-Wall Street" economy through tools such as cooperatives); Laura M. Padilla, *Single-Parent Latinas on the Margin: Seeking a Room with a View, Meals, and Built in Community*, 13 WIS. WOMEN'S L.J. 179, 206-20 (1998) (arguing for co-housing as a tool for building economic security and family stability for disenfranchised Latina single mothers); Angela Mae Kupenda, *Two Parents Are Better Than None: Whether Two Single, African American Adults—Who Are Not in a Traditional Marriage or a Romantic or Sexual Relationship With Each Other—Should Be Allowed to Jointly Adopt and Co-Parent African American Children*, 35 U. LOUISVILLE J. FAM. L. 703 (1997); and Martha E. Ertman, *Marriage as a Trade: Bridging the Public/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 123-24 (2001) (suggesting that the LLC business model could be used to structure nontraditional intimate relationships).