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## Chapter 1

### Lives That Slide Out of View

“Vivas to those who have fail’d” Walt Whitman, *Song of Myself* (1885).

*Lives that Slide out of View* concerns the origins and fates of Critical Legal Studies (CLS).<sup>1</sup> Against the usual conventions, the book presents CLS as a philosophy of activism, located on a particular fault line that runs through American radical culture from the new left<sup>2</sup> to the welfare rights movement. The central argument is that the politics of the movement are

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<sup>1</sup> Thus, we are very much concerned with a way of re-thinking CLS, its location and cultural legacies. CLS is perhaps best conceived of as a left leaning grouping of scholars based in university law schools. Standard accounts of CLS trace one line of inheritance back to American Legal Realism and the historical context of the New Deal, but this does tend to obscure the relationship between the new left and CLS. Although the first Conference on Critical Legal Studies at the University of Wisconsin did not take place until 1977, CLS was rooted in the radical politics of the 1960 (Duxbury, 1985, p.432). CLS scholars tended to see law as political; claims to legal autonomy and neutrality effectively concealed law’s role in social control and the ideological construction of private property, the market and bourgeois order. This thesis took a slightly different form in arguments about legal indeterminacy. Not only could legal doctrine be considered fractured and ambiguous, law itself could never be properly delineated from politics. Our main concern in this footnote is not to define CLS, but to look at a particular theme in the history of the movement. The conventional account of CLS presents it as prone to splits that began with the creation of a distinct group of feminist critical legal scholars. Feminist critical legal thinking has its roots in feminist streams organised at a 1983 conference on CLS, but its proper origins can be traced to a specifically feminist CLS conference in 1985. Critical legal feminism “began in reaction to a radical and mostly, but not exclusively, male vision of an alternative conception of society” (Menkel-Meadow, 1988, p.63). Feminist scholars were keen to develop their position against ‘classic’ CLS. For instance, Menkel-Meadow argued that the feminist approach is committed to the “experiential point of view” as seen from the perspective of the “oppressed, dominated, and devalued” (Menkel-Meadow, 1988, p.63). The next significant split came in the late 1980s. Critical Race Theory’s founding moment can probably be traced to its first conference in 1989. Scholars of colour reacted to the “white patriarchy” who ran “the movement” (Goldfarb, 1992, p.685). White feminism was also a target of critique. CRT can thus be seen as a ‘critique of the critique.’ Consider Williams’ celebrated criticisms of CLS. She castigated ‘classical’ CLS as stemming from the “the white left’s” inability to know what it means to be black. Critical Race Theorists wanted to “look to one’s own” (Cooke, 1989). This argument itself breaks down into two positions: one which sought to build black consciousness, and one whose energies went into identifying the interests and ‘essence’ of racist oppression. However, in the mid-1990s, CRT was itself subjected to a “fracturing” by LatCrit (Frug, 1992, p.1051). LatCrit subjected CRT to critique- in particular its focus on discrimination as a “black white binary” as a way of understanding discrimination and marginalisation (Gines, 2013). LatCrit’s own “inward turn” further questioned “subdivision within outsider groups that at one time saw themselves as unitary” (Delgado, 1993, p. 753). LatCrit scholarship is also marked by a distinct turn to Queer Theory in order to understand the homophobia of Latino cultures (Valdes 1997). Histories of CLS, CRT and LatCrit can be found in R. West (1986); Dalton (1987); Delgado (1987); Matsuda (1987); Goldfarb (1992) and Hernández-Truyol et al (2006). Bauman presents a slightly different approach. Not only has “the story of the critical legal studies movement’s genesis and growth...not yet been definitively told” (Bauman, 2002, p.4) but “the place of the Movement” has been downplayed (Bauman, 1988, p.352). We would thus follow Bauman and take issue with Cornel West’s positioning of CLS. West accused CLS of parting company with “nonacademic prophetic and progressive organized efforts to transform American culture and society” (C. West, 1988, p.270). He argues that CLS required a turn to Gramsci and a movement away from Foucault. This is certainly a compelling approach. However, the genealogy presented in this book suggests a different cultural location of CLS. Whilst we touch upon certain themes that might resonate with West’s notion of the prophetic, this concept is not used to organise the argument of *Lives That Slide Out of View*. There is, nevertheless, an ongoing dialogue (explicit or implicit) with Cornel West that runs through its pages, particularly around the relationship of critical legal thought to liberalism and West’s reading of Unger. The engagement with Dewey owes a debt to West (1989); as does the reading of Marx and the Marxist tradition and the orientation to existentialism (C. West, 1991).

<sup>2</sup> We will concentrate on Students for a Democratic Society [SDS]. Whilst the SDS was not entirely synonymous with the new left, it was arguably the most influential. See chapter 2 for a more extended discussion of the SDS and the new left.

essential if we want to grasp a peculiar continuation of CLS, tentatively called critical legal theory.<sup>3</sup> If there is such a thing as critical legal theory then it might be seen as a political and philosophical engagement with the constitutive social divisions that articulate market capitalism.

For the purposes of our argument we will follow the various ‘splits’ in the American critical legal tradition between feminism, Critical Race Theory and LatCrit- but we want to suggest that mainstream accounts of CLS misunderstand the fundamental continuity of critical legal thought. Indeed, it is now necessary to read the critical tradition in reverse from the perspective of LatCrit and ClassCrit.<sup>4</sup> To this end, we will also follow the boundary that exists between critical legal thinking and its nearest cousin or neighbour, progressive constitutionalism.<sup>5</sup> For example, we can hear the dim echoes of street protests in Michelman’s sophisticated moral philosophy. The critical legal tradition and progressive constitutionalism share a fundamental concern with poverty. Poverty is the leading edge of a movement of thought that holds together engagements with welfare rights, democracy and activism.

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<sup>3</sup> The movement was a term used by those involved in the SDS, the NWRO and Critical Legal Studies as a way of identifying themselves. The fact that this term extends from new left and anti-poverty activism to CLS suggests the peculiar kind of genealogy that this book sets out to study. However, this is not meant to suggest that there was any real continuity between these different groupings, other than passionate modes of self-identification. Critical legal theory is not as recognised a term as Critical Legal Studies. Chapter 10 attempts to sketch out how critical legal theory might be understood.

<sup>4</sup> ClassCrit can be traced back to workshops held at the University of Buffalo in 2007. A grouping of scholars drawing on the legacies of CLS and CRT, the ClassCrits also have ongoing associations with LatCrit. Thus, ClassCrit can be seen as one of the mediating ‘points’ between critical legal traditions of thought, and a key site for creative thinking on Marx. For a general overview of ClassCrit, see M. Grahn-Farley (2008), Mutua (2008), Kessler (2008), M. Mutua (2008) and Mahoney (2009).

<sup>5</sup> Although the concept of progressive constitutionalism is somewhat disputed, there is sufficient agreement to make it a useful term – if only to catch a certain mood in constitutional scholarship. As a general, catch all definition, Lipkin offers the idea that progressive approaches to the constitution seek “to improve the chances of authentic self-definitions for all Americans” through “interventions in both private and public affairs that neither liberals nor conservatives would be happy to countenance” (Lipkin, 1999, p. v). In keeping with at least some of the arguments presented in this book, progressive constitutionalism communicates with legacies of new left thought. Perhaps West’s view of progressive constitutionalism resonates most clearly with the values that can be associated with the new left. She asserts that: “[p]rogressivism is... a particular moral and political response to the sadness of lesser lives” that have been “unnecessarily diminished by economic, psychic and physical insecurity in the midst of a society or world that offers plenty” (R. West, 1999, p. 1). Progressive constitutionalism, as a “moral response to suffering” draws its energy from “collective action” and is aimed at “ameliorating the suffering that is consequent to private maldistributions of wealth and security” (R. West, 1999, p.3). Thus, the “normative antiauthoritarian aspirations” that characterise at least one of the anima of progressive constitutionalism could be traced back to the new left (Cohen and Alberstein, 2011, p.1086). At the same time, the progressive fear of “backlash” and distrust of the supreme court might also suggest that the concept of progressive constitutionalism is itself a critical response to the militancy of the movement (Spindelman, 2011, p.1116). Progressive constitutionalism is a broad church. Some scholars associated with progressive constitutionalism distance their work from any links with the new left. For instance, Tushnet’s nuanced version of progressive constitutionalism shares with scholars like Robin West the concern with “racial justice” and forwarding “public policies aimed at improving the material conditions of those suffering “severe deprivation” (Tushnet, 2011, p. 1074). However, Tushnet also argues that progressive constitutionalism need not be egalitarian, provided it takes seriously the question of how “severe material deprivation” can be reduced as far as possible (Tushnet, 2011, pp.1075-1076). We will follow these concerns throughout the book. We will bracket Michelman’s work under the general rubric of progressive constitutionalism, even though he is somewhat critical of the term. This approach is justified in terms of our argument as it indicates the complex legacies at play in Michelman’s constitutionalism. It is also worth pointing out that our argument does not assert that the NWRO must be seen as central to either progressive, popular or democratic constitutionalism. Our point is merely that these currents of scholarship carry forward certain memories of the movement, repressed or otherwise.

The book's argument is organized around three key terms: alienation, praxis and ethics. Activism is understood through this network of themes. Our approach to alienation takes its basic orientating points from Marx.<sup>6</sup> In crudest summary: to understand poverty it is necessary to grasp alienation. Alienation, and the closely related term reification, have largely disappeared from contemporary legal critique. One objective of *Lives that Slide out of View* is to re-open debate around these ideas.

Alienation must be located within a particular critique of American monopoly capitalism. In distinction to the forms of mechanised mass production that defined classical capitalism, decent wages and expanding consumer markets are essential to cycles of production/consumption in monopoly capitalism. Thus the new problematic of alienation is that of the worker as consumer in a post scarcity society.<sup>7</sup> Baran and Sweezy provided the

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<sup>6</sup> In the discussion that follows, we make a distinction between Marx's understanding of a capitalist mode of production and a more precise understanding of American capitalism as monopoly capitalism. A capitalist mode of production operates to specific and immanent logics. From a historical perspective, we are concerned with a process that can be dated to the sixteenth century and the creation of 'a world-embracing commerce and a world-embracing market' (Marx, 1975, p.247). From a more technical and economic sense, the process of self valorization is peculiar to capitalism. This is itself a complex idea, but can be simply put as follows. The capitalist does not seek to make a profit on a single transaction but to realise the "restless never-ending process of profit-making alone" (Marx, 1975, p.254). The capitalist throws his money into circulation, in the hope that it will be endlessly augmented. Capital itself thus appears to be "an independent substance, endowed with a motion of its own, passing through a life-process of its own, in which money and commodities are mere forms which it assumes and casts off in turn" (Marx, 1975, p.251). This is clearly an inadequate description of Marx's understanding of capital. However, in very general outline it traces the fundamental relationship between a capitalist mode of production and alienated labour. A capitalist mode of production "subordinates human needs to the profit motive." This has certain economic effects: 'trigger[ing] crises and contradictions' that, in turn, 'limit the scope for the reproduction of capital' (Saad-Filho and Fine, 2004, p.89). Capitalism articulates a form of human being defined by a capitalist mode of production. This analysis is based on a reading of *The 1844 Manuscripts*. The concept of alienation comes out of a reflection on the social degradation of a world reduced to a form of economics: "the devaluation of the world of men is in direct proportion to the increasing values of the world of things" (Marx, 1977, p. 68). In most general terms, the worker is alienated from the product of his/her labour (as something produced for someone else); alienated from the process of production, or from work itself- and- as a "deduction" from these first two features of the phenomenon, alienated from species being. This is the most central part of the theory of alienation we want to carry forward. Species being addresses problem of meaning, or, more specifically, human meaning. See, below in footnote 8. In general, our argument follows Mészáros, Sayers and Ollman to the extent that it sees alienation as a theme that runs through Marx's work. Whilst its presence in *Capital* is not as pronounced as certain earlier texts, this does not mean that the concept is absent in Marx's mature critique of political economy- or even in the work of those, such as Baran and Sweezy, who develop a more contemporary understanding of monopoly capitalism (Mészáros, 2005).

<sup>7</sup> The concept of monopoly capital was important to the new left as it appeared to identify the nature of the massive surplus of wealth created by American capitalism in the post war period: "always too much never too little" (Baran and Sweezy, 1966, p.114). The "engine "that produce[d] [the] surplus are "giant corporations"- no longer under the control of single families but a managerial elite (Baran and Sweezy, 1966, p. 58). The monopolistic tendencies of giant corporations prevent markets operating rationally. The key concern is thus the "generation and absorption" of corporate profits" (Baran and Sweezy, 1966, p. 77). Provided that corporations can divide up the market to their own satisfaction, the surplus they generate from their activities can continue to grow (Baran and Sweezy, 1966, p. 77). However, the "contradiction" in monopoly capitalism is that whilst it produces "ever greater surpluses" it "fails to provide the consumption and investment outlets" that would "absorb" the surpluses and allow the economic system to continue functioning. This leads to various pathologies such as unemployment and business failure (Baran and Sweezy, 1966, p. 114). The state has a central role in ensuring that the economy serves the interests of powerful economic actors. Baran and Sweezy's discussion of the changing form of the American state in the period of the New Deal suggest that government spending was a way of dealing with the crisis of the Great Depression. Despite the liberal argument that "inadequate surplus absorption could be solved by...increased government spending for welfare purposes", the

basic forms of the critique of consumerism: the more one consumed, the more one sought satisfaction through further consumption (Baran and Sweezy 1964). Alienation is thus linked with a network of phenomena around the numbing loss of meaning in an administered society. Consumerism also conceals the racism and sexual division of labour that define a particular social structure of waged and unwaged work. Drawing on Baran and Sweezy, and compressing a great deal of analysis of poverty and class, new left theorists argued that – despite their ethnic diversity- “the poor were united by deprivation or near-starvation levels of income” (Gilbert, Gottlieb and Tenney, 1967, pp. 116-7). Whilst the “unity” of the poor was somewhat overstated, the basic insight remains sound. We can follow this approach and see America’s quasi welfare state as central to the management of poverty. Welfare provides a mode of bureaucratic control that disciplines those unable to commodify their labour.

It is important to stress that this approach to poverty and alienation relates to the time and place studied in this book. A proper understanding of alienation and reification<sup>8</sup> has to be sensitive to the complex assemblages that articulate modes of production.<sup>9</sup> We thus draw on the work of Mészáros (1970), Ollman (1971) and Sayers (2011)—as it holds together the dialectical relationship of economics, society and culture.<sup>10</sup> Particularly useful in this respect is West’s understanding of Dewey as a major progressive philosopher (C. West 1987) – and the more general re-positioning of Marx as a philosopher rather than the dour ideologue of

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New Deal in fact failed as a “salvage operation.” It was only the war that dragged the country out of depression (Baran and Sweezy, 1966, pp.162-3).

<sup>8</sup>Recent scholarship has found in reification an understanding of a “stance” or an attitude of mind that can be understood as “empathetic engagement” or a “qualitative experience of interaction” (Honneth, 2008, pp 56, 57). We reify other people to the extent that we do not recognise them as human beings and, indeed, we suffer from reification to the extent that we forget or limit our own emotional responses to others. This re-orientation of the concept of reification stresses that it is necessary to re-read Lukács’Marxist understanding and also to observe the resonances between certain Heideggerian notions of care and Dewey’s arguments about experience. One important upshot of this argument is that it expands the meaning of reification beyond a narrow account of “the sphere of commodity exchange” and allows us to engage with a more sophisticated understanding of the interior effects of reification (Honneth, 2008, p.24).

<sup>9</sup> A problem bedeviling the study of alienation has been the translation of the original terms used by Hegel and Marx. *Entfremdung* has been translated as estrangement but also carries the specific sense of alienation. In *The 1844 Manuscripts* Marx argues that under the social conditions of a capitalist mode of production, one is alienated from *Gattungswesen*, “species-essence” or species being. Rather than offer an elaborate argument about this term, we will suggest that it can be associated with ‘being with’ (explained presently). This does not make *Gattungswesen* an understanding of a human essence, for reasons given in the text of this book. ‘Being with’ as *Gattungswesen* is our being with each other: our social being. A second issue is the relationship of alienation to reification. This relationship will be explained in greater detail in the text. However, the following preliminary observations might be useful. *Verdinglichung* can be translated as ‘thingifying’ or turning something into a thing. Bringing these terms together, we get at the general idea that reification/ alienation are parts of a complex that can be understood as a failure to find oneself in the world. In alienation one’s response to the world (and sense of self) has become reified- frozen out- no longer a process or a becoming; no longer experience in a meaningful sense. To get at this idea we need to look at what the word experience actually means. The root of the word is ‘per’: “to lead, pass over” which in turn can be linked to *peritus*- “tested”- even a reflexivity- the sense of testing the self- and perhaps into *perius*- peril- putting something at stake; risk, anxiety and living dangerously. It would seem, then, that the process of experience, of putting in question, of becoming an activist, is an opening of one’s self to experience and personal change. In very brief overview, our argument links together the notion of species being with an account of social recognition and ‘being with.’ Admittedly, this conjunction of terms is somewhat problematic- but it allows the critique of political economy to be linked to an account of social being and a notion of ethics and praxis.

<sup>10</sup> The contemporary reconstruction of Marx’s theory of alienation has the notion of system (or assemblage) at its core. This is perhaps one of the fundamental ideas behind Mészáros’ ground-breaking defence of the rigour of Marx’s theory of alienation, see Mészáros (2005).

failed state socialism (C. West 1991). It is important to appreciate the inherent complexity of alienation: one must study genealogies, intersections, combinations and mediations.<sup>11</sup>

The most basic terms for understanding alienation are thus a concept of capitalist economy and a notion of consciousness.<sup>12</sup> Consciousness is created and sustained in the dialectic of social recognition. Grasping consciousness will take us to terms that are definitional of socially recognised selves. Alienation describes the subtle way in which selves are constituted; inner and outer, body and soul folded together in the creation of a self-conscious thinking substance. As we will see, Du Bois' understanding of race is of great relevance in defining a color line that runs through American culture and determines forms of racialized consciousness. Du Bois' approach is based on a Hegelian insight: we are how others see us. Black philosophers have taken this theme very seriously and have shown how ideas of character and personality provide a structure for the study of alienation. These concerns run through our engagement with James Baldwin's midnight fiction.<sup>13</sup> They also connect with our reading of Unger and intersectional analysis. In most basic outline, character is a manifestation of self- a complex bound up with notions of action and social recognition; an insight most succinctly articulated by Marcel Proust: "our social personality is the creation of other people's thoughts" - a sentiment with which Ellison's invisible man might also agree (Unger, 1976, p.146). Bridging between Baldwin and Unger we will also suggest that recognition is a major component of Dewey's social ethics.<sup>14</sup> In other words, if we accept that

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<sup>11</sup> This study of intersections and combinations is a form of genealogy. Rather than engage in a complex attempt to mediate the relationships between two seemingly antagonist traditions of social and political thinking, we will merely suggest one possible (and useful) point of agreement between Foucauldian or Nietzschean genealogy and studies in the spirit of Marx/ Hegel. Arguably both traditions are interested in the historical study of the forces that seize hold of phenomena. Depending on the play of forces, certain themes disappear or become obscured only to re-appear in a different configuration at a different historical juncture. As a form of critical history, genealogy brackets any notion of an ultimate telos. In terms of our arguments below, it should be clearly that our borrowings from Marx and Hegel do not require a closed history or a unified historical subject (Mészáros, 2005).

<sup>12</sup>As it would further complicate our thesis, these ideas are not developed through psychoanalysis. However, it is worth noting that psychoanalysis was important for new left thinking on alienation. For instance, in *Eros and Civilisation*, Marcuse drew on Fromm's work to provide an account of "socio-psychological phenomena" or "... processes of active and passive adjustment of the instinctual apparatus to the socio-economic situation" (Marcuse, 1955, p. 241). The individual is trained to fit into society, to accept its codes and values as legitimate. Psychoanalysis finds this process playing itself out in the psyche- through the harnessing of primarily libidinal forces to what Marcuse called "economically structured relationships of domination and subordination" (Marcuse, 1955, p. 242). Social tensions manifest themselves as the level of individual psychic dis-function; outer antagonisms become inner antagonisms. In *The Sane Society*, Fromm engaged explicitly with alienation in terms that resonate with ideas developed in this book. Alienation is a "mode of experience", where a person becomes lost or "estranged" from him (or her) self" (Fromm 1955, p. 120.) These ideas are also important to Castoriadis' treatment of alienation (although Castoriadis plays down the role of instincts). Like Marcuse, Castoriadis sees the unconscious as a social phenomenon: the internalization of an imaginary that defines both "reality and desire" for the subject. Alienation is "instituted" in this imaginary construction of reality. Psychoanalysis seeks to restore the "autonomy" of the subject- or- rather- to provide a form of "self-regulation" where the subject comes to understand the "construction" of the real (Castoriadis, 2005, p.103). Much more work would be necessary to provide a proper psychoanalytic understanding of alienation that could make the most of the different traditions of psychoanalytic thought (in particular the Lacanian elements of Castoriadis' philosophy and their relationship to those of Marcuse). This demanding feat is not attempted in *Lives that Slide Out of View*.

<sup>13</sup> These themes are informed by black existentialism. Gordon's (2014) understanding of "double consciousness", drawn from the work of Du Bois, is central to the argument of this book. Cornel West's work is compelling because it reads between black existentialism and other traditions of thought. Gines' (2011) approach to intersectionality also feeds into the general approach to this term. See, in particular, chapter 10.

<sup>14</sup> For William James "identity is only a loosely constructed thing"- something that exists "on the whole"- and which rests on the basis that whatever one is thinking, one is always aware of "my self" and "my personal

these themes underlie both black and white radical thought (and LatCrit, which seeks to break out of this binary) we can begin to appreciate how different critical traditions have communicated with each other. Moreover, we can engage with the granular substratum of a particular mode of radical thought- with all its different nuances, tension and over-determinations.

Alienation is immanent to consciousness. One might posit a necessary alienation that is actually the condition of thought, the social form of consciousness that is bound up with the realisation of the self. Necessary alienation can be opposed to bad alienation. The latter term describes frozen or reified forms of consciousness that hold in place modes of recognition. These modes of recognition are themselves embedded in hegemonic ideologies structured by a capitalist mode of production. In the terms suggested above, hegemonic social and economic forms define pseudo realities that limit the creative human desire to transcend the limits of specific contexts. The critique of alienation proceeds dialectically to the extent that one can untangle one's consciousness from the forms that it has assumed.<sup>15</sup>

Philosophies of alienation are also accounts of praxis. Praxis overlaps with its nearest English cognate, practice, but rendering practice as praxis stresses that our concern is with particular forms of self-conscious practice that contest the terms of social recognition. This is a somewhat general definition, precisely because the contestation of social recognition must be studied in context. The development of these themes in the Marxist tradition has tended towards essentialism. For instance, from the perspective of Lukács' *History and Class Consciousness* (1923), the proletariat are capable of becoming the subjects of history and destroying an alienating social, economic and political reality through the collective realisation of their own political agency as a class. Our understanding of praxis is much more modest.<sup>16</sup> As we argue below, it actually parts company with classical Marxism. A proper

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experience." Self for James is thus "duplex"- partly knowing and known; grammatically the "I" and the "me." However, the I which knows is neither "an aggregate" nor "an unchanging metaphysical entity like the Soul, or...transcendental ego"- existing "out of time" (James, 1910, pp. 215-6). Such an approach is not unique to James. For example, in the work of Cooley the self is no more than what is "designated" by the first person singular and "something known to experience" (Cooley, 1902, p. 136). Cooley also talks of the "social self" or the "looking glass self." Just as we have a visual sense of the self from looking in the mirror (a sense associated with feelings that the mirror reflects 'my attributes'), the social self is the sense of what "I" seem to be in "another's mind." The looking glass self thus has three essential attributes: our imagination of how we appear to the other; our imagination of the other's judgement and "some sort of feeling" that can range from "pride" to "mortification." The worst thing for the social self is to "lack the support of the other." Closed in on itself, the "I" becomes "unhealthy"- loses its "vigour and plasticity" and becomes reified (Cooley, 1902, p. 155-7).

<sup>15</sup> Although we will not use the Hegelian term Spirit (for reasons outlined below) the presentation of the problem of social consciousness in *The Phenomenology of Spirit* provides the basic terms for our argument. Spirit can be understood as consciousness that, mediated by self-consciousness, underlies any individual act. Spirit is, then, a form of self-reflexivity which creates the self as a fold in thought where "I" appear to myself. Spirit is no more than the "plurality of distinct consciousnesses definitely existing" or the way in which reflexivity is a social phenomenon (Hegel, 1967, para 447). To put this slightly differently: self-reflexivity is both "for itself", as it recognises itself in the rational acts of others and "in itself" to the extent that this recognition is a form of self-consciousness. Hegel argues that the social world is constituted by consciousnesses relating to each other through their common productions. Marx elaborates this point, and argues at length in *The Paris Manuscripts* that any proper critique of Hegel requires an engagement with political economy. As Marx himself affirms: "[w]ithin the framework of speculation Hegel ... makes distinctions that really grasp the vital point." (Marx, 1977, p. 665). It should thus be clear, even if only in outline, how Marx's account of alienation both borrows from Hegel's terms and locates them in a new context: a critique of political economy.

<sup>16</sup> An account of praxis does not require a 'theory of history', absolute knowledge or a smooth dialectical circuit. If praxis is always a doing, then the theory that informs it is best thought of as clarification of the terms in which things are done. This approach borrows from Gramsci, Castoriadis and Cornel West. Praxis is understood as the reciprocal involvement of thought and action in particular historical contexts. A particularly influential

account of praxis should eschew readymade concepts. Praxis is best conceived as an ongoing work in progress, an infinite conversation.<sup>17</sup>

New left praxis can be traced back to forms of community organising and the politics of the civil rights struggle. We will be particularly concerned with the activism of the NWRO and the links between the new left and this late offshoot of the civil rights movement. In reconstructing the transport of ideas between activists from the SDS and anti-poverty militants we will argue that (at least for the former), John Dewey's understanding of creative democracy was a major point of reference. Dewey's engagement with themes around social recognition and alienation can be traced further back to the influence of Hegel on his work (and also his desire to develop a social ethics; a project that brings together Dewey and Jane Addams' philosophy of activism). The understanding of alienation and praxis put forward by this book thus borrows from a line of thought that moves from Hegel to Marx, through Arendt and (in its American manifestation) to Dewey. It is worth stressing at this stage that ideas of alienation and praxis are not linked to a vulgar operation of dialectics. Rather than an immanent pattern working to an inevitable conclusion, dialectics describes thought struggling with itself; or, perhaps more precisely, thought grasping itself through reflection on social action. At this level there is an overlap between Dewey's pragmatism, dialectics and contemporary understandings of intersectionality.

*Lives that Slide out of View* does not seek to provide an elaborate philosophical defense of this thesis. Rather, our approach is based on the observation that certain philosophies overlap and can be *used* in similar ways. This argument takes us to the concept of intersectionality and to understandings of Critical Race Theory (CRT), feminism and LatCrit. Intersectionality is rooted in "the social movement politics of the 1960s and 1970s" (Collins, 2012, p. 443). It has a fundamentally dialectical organisation, focused on ideas of double-ness, hybridity and combination (without resolution). Our understanding of intersectionality relates back to the dialectical description of consciousness. Class, gender and race are fundamental to the positioning of selves within a socio-economic order. However, class, gender and race are open to creative re-appropriation that resist and redefine dominant norms. As Agnes Heller has pointed out "[i]t is not obligatory for every person to receive the world" in the way that it is given (Heller, 1984, p.19).

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statement of these themes, important for social movement theory, and for critical legal theory in general, is that of Laclau and Mouffe (2001). *Lives that Slide Out of View* departs from this text. Although our arguments follow a line that passes through Mouffe and Laclau, they connect with currents of thought that were not part of Laclau and Mouffe's project. *Lives that Slide Out of View* does not offer a 'model' of radical democratic practice. Theory, in this sense used in this book, is "the always uncertain attempt to realise the project of clarifying the world" (Castoriadis, 2005, p. 74). To elaborate this argument in detail would require extensive discussion of themes central to the philosophical tradition. Whilst we cannot provide anything like a detailed engagement with understandings of *techne*, *episteme*, *phronesis* and praxis inherited from Aristotle, we can suggest one important concern: different ways of acting have their own ways of working out how to achieve the goals they seek. The carpenter and the geometer have their own ways of going about things. It is not that we are compelled to a choice between "geometry and chaos" (Castoriadis, 2005, p. 72). This does not mean that one cannot have a general account of praxis. It means that a general account of praxis is fairly useless when it comes down to doing something rather than writing or thinking about it abstractly.

<sup>17</sup> In this respect Bernstein's arguments are an important influence; particularly on the relationship between Marx, Dewey and Hegel. However, Bernstein's position is mediated by an engagement with Gillian Rose. This encounter produces a different understanding of the line of thought coming out of Hegel and Marx. For Rose, dialectical philosophy does not result in coherence and redemption. It is the agonistic form of a kind of thought that attempts to grasp "the absolute"- or- the inter-relationship of different, but interlocking levels of social reality (Rose, 1981). In Rose's later work, ethics is related to the difficulty of remaining in this broken middle.



Our understanding of praxis moves through this engagement with intersectionality to open onto an encounter with an idea of ethics. How do these ideas fit together? Praxis creates, in a hesitant way, the new. It does not simply reproduce a “pre-established order”- a “stable, limited, dead artefact” (Castoriadis, 2005, p.77). A great deal could be said about this theme, but we want to concentrate on praxis as a work on the self. As will be explained later in the book, self carries the meaning of character or personality. Given the complexities of this theme, the following brief statement from Castoriadis will have to suffice. We are not concerned with the “absolute Self”- the “monad” that retains its core through “contact with others” (Castoriadis, 2005, p.77). Nor are we particularly concerned with Foucauldian notions of the work on the self. We are concerned with the self as the “active” agent that “constantly reorganises” itself throughout its experiences (Castoriadis 2002, p.106). Personality and self are therefore plastic; it is this plasticity that allows alienation to be instituted in the self, but also, for the self to realise its alienation.<sup>18</sup>

The ethical charge of the theory of alienation is based on the assumption that life, one’s values and the roles that one plays, are not givens. You can change. Arguably this concern was part of the ideologies of engagement animating new left groups and those working for civil rights. Certainly for the former, living differently tapped into notions of creative democracy (and earlier ideas of social ethics that stressed the importance of working with the poor as a way of coming to know the self and its limits). The theme that we want to concentrate on has been well described by Katz (1982): how does one ‘become’ a poverty lawyer- especially when, as Sylvia Law has pointed out, lawyers “have a dangerous capacity to disguise political choices as technical givens” (Law, 1984, p. 426). How a professional life becomes dedicated to a way of “being and living” is a major theme of this book (Law, 1984, p. 428).

The work on the self requires us to study a somewhat complicated relationship between ‘middle class’ radicals and those with whom they worked: the problem of the “white ally.” It is important to stress that praxis is not based on some idea of ‘middle class’ leadership. A recurrent theme in philosophies of praxis, from Gramsci to Freire, is that praxis does not come out of teaching or the effect of gifted leaders or philosophers on the masses. Praxis is

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<sup>18</sup> A brief study of the etymologies of self, personality and character suggests interesting points of overlap between different but related concepts. The common sense meaning of all these terms relate to what is distinctive of an individual- but- going deeper reveals some intriguing mysteries. Personality can be traced back to Greek words meaning *prosopon* or mask. Congruent Latin words relate to *persum* (hand or face) and *per se una*, or self-containing. There is also a relationship with *per-sonare*: to sound through. This complex of meaning suggests something ‘put on’ that allows one to play a public role; a mask through which the actor’s voice can be heard. The Latin sense of ‘self-containing’ is a little strange in this context. If the general sense is one of *persona* or of a dramatic mask, then presumably what is ‘self-contained’ is the actor playing a role. To be self-contained, then, is already to be double (Allport, 1937). Pushing this further, the idea of personality suggests a doubleness that is the public form of something that talks through a *persona*. The mask as a public face through which one talks is thus the way in which the actor appears to others. The face is thus not so much the otherness of the other, but way in which one becomes visible (even if there is something behind the role or the public face that is held back). Character comes from an entirely different etymology that can be traced back to the sense of scratching, marking or scraping. Character and personality can be linked together to the extent that they describe a defining trait; even if this trait is plastic and capable of change. Self, has a third line of derivation. Its earliest sense is that of a pronoun. At root, then, it is a grammatical term. Character and personality exist in and through language and reflection. We cannot pursue the philosophical or psychological meaning of these terms in any great detail. Indeed, we can but allude to the Hegelian subject and the ego or subject of psychoanalysis. Our working thesis is that all these words offer different insights into the forms of embodied social reflexivity that define us as thinking and acting beings.

found in communal endeavour (Gramsci, 2005, pp 333-343; Freire. 2017, pp 35-43). Reconstructing the myriad conversations and encounters between activists and poverty lawyers is impossible; the documents and texts used in the pages to come are mere proxies for countless intense, passionate meetings in streets, offices or on demonstrations, occupations and picket lines. Perhaps some talked about Marx, Ellul and Marcuse; undoubtedly others didn't. However, it is indeed interesting that one of the most important statements of a philosophy of praxis stresses that one's "personality" comes out of the "ensemble" of social relations into which one enters (Gramsci, 2005, p.352-3). You are who you hang out with.

In the terms developed in *Lives that Slide out of View*, the ensemble of social relations that create and re-create one's personality (one's self and sense of values) is described as a form of 'being with.' 'Being with' (*mitdasein*) is a term developed in Heidegger's *Being and Time* (1962). Contemporary understandings of *mitdaesin* can be traced to the influential philosophy of Jean-Luc Nancy, and the beginnings of a kind of 'left Heideggarianism.'<sup>19</sup> Identifying broadly with this 'tradition', *Lives that Slide out of View* offers a creative appropriation of 'being with', reading the term through references to Martin Buber, Louis Wolcher, Ed Sparer and William Stringfellow. In short, 'being-with' is used to describe the open-ended work on the self that is occasioned when one does things with others.<sup>20</sup> *Lives that Slide out of View*

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<sup>19</sup> In brutal summary, Martin Buber's work mediates between that of Hegel and Heidegger and provides one possible way forward for 'left Heideggarianism.' For the relationship between Buber and Hegel, see Hudson (2010) and Williams (2000). More precisely, Buber's I-thou relationship can be seen as a critical elaboration of Hegel's dialectic of recognition; and as a particularly interesting appropriation of Heidegger's world of "the they" where, one might say, passion is replaced with the statistics, gossip, common sense and the management of information (Heidegger, 1962, p. 165). These themes are developed throughout this book. The jumping off point is Heidegger's notion that the "information" which "comes in the night" is "nothing" (Heidegger, 1962, p.318). For Buber the encounter with the other cannot be understood as an exchange of information. In the they world there are no secrets worth knowing; the encounter places the secret in circulation (Buber, 1937, p.5). It is also worth noting at this point that there is no real engagement with Levinas in *Lives That Slide Out of View*. For Levinas' position on Buber, see Bernasconi and Wood (2002). There is only a brief discussion of Levinas in chapter 9 of *Lives That Slide Out of View*. Any proper defence of this position would have to stage an encounter between alterity, and a notion of negative dialectics. Suffice to say that the understanding of the dialectic of recognition presented in this book does not lead to a community of same-ness and ethics remains in the trauma of the self's relationship to the other. Developing this point in any detail would require an engagement with Levinas' reading of Hegel, see Bernasconi and Critchley (1991). And a turn to the idea of negative dialectics in the work of Gillian Rose. Moscow, Athens and Jerusalem. Whilst there is a sophisticated critical, legal literature on Levinas, there does not appear to have been a great deal of scholarship on the relationship between Levinas and Buber. But, see Wolcher (2016) and (2005). Essential works for understanding Levinas' impact on critical legal theory are Douzinas (2000), Wolcher (2003), Diamantides (2006), Manderson (2007) and Stone (2016).

<sup>20</sup> Being with- or *Mitdasein*- is an idea taken from Heidegger's *Being and Time* (1962) and elaborated by John-Luc Nancy (2000) and others. Within the terms of this book, 'being with' is linked to an understanding of ethics. This can be elaborated as follows. *Mitdasein* tells us something about *Dasein*. *Dasein* is untranslatable, but means something like 'being there.' *Dasein* tells us something about our social life. The "who" of *Dasein* is established through the way that *Dasein* lives. *Dasein*'s "who" can be defined by asserting that *Dasein* is "in every case I myself." However, the "who" takes us towards the problematic of the others amongst whom *Dasein* lives; an issue inseparable from sense, meaning and language. The "who" of *Dasein* is the "primordial" fact that being is always being with others. Primordial, in this context, describes the fundamental structure of being: a being with, or even a being between others. There is at least some relation between this notion of being with and the account of social recognition: we are because we are with others. This understanding enables others to appear as a matter of concern to *Dasein*, and, arguably, allows some notion of ethics to be appropriated from *Being and Time*. This argument is set out in more length in Gearey (2012, pp20-21 and 150-167). It does not presuppose a true or authentic self (even though we use the latter term): only an anxiety that one can resist, or, attempt to articulate as some kind of ethical relationship in the sense of attempting to justify one course of action

does not seek to give a full theoretical defence of this term; rather it sets out a provisional analysis of how ‘being with’ might be used; in particular, a valence of ‘being with’ that will be called ‘working with.’ The argument will take us to a certain understanding of the “white ally.” In summary the problematic of the “white ally” comes out of the politics of new left activism. Our critical approach takes us to questions of anxiety that re-frame the issues thrown up by the analysis of “the white ally.” We will argue that these anxieties are associated with the call of conscience<sup>21</sup> and a practice of successful failure that informs the sensibility of the radical lawyer.<sup>22</sup>

This range of references- this play of different themes and philosophical methods may seem somewhat idiosyncratic, but eclecticism is part of the legacy of the new left. In comparison to the somewhat austere modes of contemporary critical theory, the new left were happy to mix Marx with Dewey, Buber with Heidegger, Marcuse with Ellul; existentialism with phenomenology and Marxism.<sup>23</sup> But why return to this moment? The answer is that contemporary theory has lost sight of its inheritance from the new left. A related problem is the presentation of certain false choices between post modernism (and identity politics; bad)

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rather than another. An action is authentic if it appears to the deliberating self that it is the best way of dealing with the demands of one’s ‘being with.’

<sup>21</sup> This understanding is drawn from *Being and Time*, and there is a clear sense in which this analysis links with themes in understandings of alienation. Crudely, in the everyday world of the they, *Dasein* (or “us” to the extent that we question our Being) flees from itself, or fails to grasp itself. *Dasein* is anxious, and turns away from being in the world. Anxiety, as something in the world, has an enveloping quality, it is both “there” and “nowhere”; and this peculiar quality means that the world itself is that which *Dasein* is anxious about: perhaps it is the worldhood of the world that is the cause of anxiety; not so much “this” or “that” but the world in its entirety. Indeed, when anxiety dies down, one reflects that it was “really nothing” – but this “nothing” is the world itself (Heidegger, 1962, p.232). Anxiety discloses the world as world. But, although anxiety reveals the world, it also allows the world to slip away, and as such, produces a kind of singling out of anxious *Dasein*, which becomes “thrown back” on itself and can no longer fall away: “Anxiety individualises *Dasein* for its ownmost Being –in- the world.” If *Dasein* is to understand or interpret this experience, then, it must seek to “project” itself into its own possibilities. So, the most essential revelation of anxiety for *Dasein* is its own “being possible” (Heidegger, 1962, p.232). *Dasein* is confronted with the need for “choosing itself and taking hold of itself” This is described as a movement away from the public and the they, into the “uncanniness” which also exists as a possible mode of being.

<sup>22</sup> Admittedly, this runs the Heideggerian notion of being with into the Hegelian notion of *sittlichkeit*. In outline, the argument works in the following way. In *The Phenomenology of Spirit*, ethics is bound up with *sittlichkeit*. *Sittlichkeit* can be realised only when individual consciousness is united with all other consciousnesses and thus finds its own reality reflected back to itself, to the extent that it is possible to say “I see them as myself, myself as them” (Hegel, 1967, p. 378). This is the “realm” of the “Social Order (Hegel, 1967, p. 375); or, the “essential substance of individuals in their independent reality” realised most completely in the “life of a nation” (Hegel, 1967, p. 376). In the nation, the individual feels at home because the community has been produced through the “actions of [citizens].” Common life is expressed through the “laws” of the community (Hegel, 1967, p.377). Law is not experienced as something up and against which the individual finds himself. The laws give “expression” to the part of the individual in the social whole. The whole problem of ethics, for the critical legal traditions, is that this coherence of self, nation and law does not take place. Ethics become de-coupled from conventional norms- especially if these norms serve to deny being to certain groups within the national community. Thus, in a problematic inherited from the new left: self-understanding comes through activism in the cause of egalitarian politics. Our development of this problematic appropriates themes from Buber and Heidegger to articulate an ethics of encounters with others.

<sup>23</sup> Within the context of the new left, Ellul’s ideas fed into a wider sense of “social and spiritual alienation” that was articulated in terms of a Christian existentialism (Rossinow, 1994, p. 319). Rossinow puts it well: “[e]xistentialism gave a name to feelings of meaninglessness and incoherence that some young white people sought to assuage, and that name was alienation. Christian existentialism searched for ways of replacing alienation with feelings of wholeness, authenticity and community” (Rossinow, 1994, p. 330). Existentialism stressed the need for action, especially if action was risky and came out of a crisis of personal belief. Action was precisely the way in which one tested oneself and affirmed one’s faith.

and transcendental historical materialism (something like class politics; Marx and Lenin; good). This distinction is not sustainable. Perhaps the problems of contemporary theory have also come from the jettisoning of existentialism (or what is taken to be existentialism). This has made it difficult to understand why people act; and, indeed, how action is the communal making of the self. This is why themes drawn from contemporary black existentialist philosophy are so important for the thesis of this book.<sup>24</sup> Black existentialism inherits at least one of the spirits of the new left. So, CLS (and indeed critical legal theory, if such a thing exists) should perhaps be understood as essentially *bricolage*. *Lives that Slide out of View*, then, is at an exercise in a way of thinking; a rhythm, an anxious amalgam of joyous despair.

Before we embark on these arguments, it is worth a definition of poverty. Poverty is a mobile concept. The definition of a term relates to the forces that seize it at any given time. Our concern is thus with the mutations of a definition over a period stretching roughly from the early 1960s to the present day.<sup>25</sup> We do not pretend to trace these mutations in great detail but we do try to follow the shifting political and economic circumstances in which the term is understood.

### Poverty and Activism

Moving from a discussion of philosophy to an engagement with poverty and political activism is only strange if one sees philosophy as primarily an academic concern. Quite to the contrary, questions of poverty and activism can only be understood if framed through philosophy. It is, though, necessary to engage with the historical context of anti-poverty

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<sup>24</sup> Consider, for instance, Gordon's notion of the situation at this point. The situation is the sense in which one is confronted by an "question" or "an inquiry" that raises a compelling matter of concern; a serious provocation of one's "being in the world" (Gordon, 1997, p.3). The readings of Heidegger and Buber are particularly influenced by Gordon's understanding of the situation.

<sup>25</sup> The measurement of poverty is a complex and developing field of study. This footnote only gives some basic references. An important starting point is Michael Harrington's estimation that there were between 40-50 million living at "levels" below "those necessary for human decency" (Harrington, 1962, p. 4). Harrington was rather vague about the poverty line, arguing that it was "somewhere between \$3,000 and \$3,500 a year for an urban family of four" (Harrington, 1962, p. 4). Dwight MacDonald's *New Yorker* review criticized Harrington's "impressionistic" use of statistics whilst praising the "moral" elements of his argument (MacDonald, 1963). MacDonald's point was that Harrington rightly identified the way in which manipulation of statistics could be used to conceal the reality of poverty, an argument similar to Rainwater's understanding of the techniques used to neutralize responses to human suffering (Rainwater, 1967). Mollie Orshansky, whose work developed the poverty thresholds used for government research, offered a similar reflection on poverty statistics: "unlike some other calculations, those relating to poverty have no intrinsic value of their own" (Orshansky, 1967, p. 28). Harrington's book certainly gave a sense of the scale of the problem and refuted Galbraith's influential argument that poverty had more or less disappeared in the United States and existed only in isolated "pockets" or individual cases of personal misfortune or incapacity (Galbraith, 1958, p.62). Harrington also provided some sense of the composition of the population living in poverty- drawing attention to the rural and urban unemployed, the relationship between poverty and old age and the scale of black poverty. We get a slightly different sense of the statistics from the 1962 report of the Conference on Economic Progress (CEP), a think tank committed to furthering public spending for economic growth. The CEP report estimated that in 1960 there were 77 million people living below the poverty line, which it set at between \$4000 for a family of any size, and \$3000 for an individual (Joint Economic Committee, 1959). Clearly, the extent and depth of poverty depends on how one defines the poverty line. From 1964, the official poverty level has been set by the Department of Agriculture (West, 1981, pp.41-2). In 1964 this gave \$3, 220 a year for the minimum income of a family of four. On these figures 34 million people were below the poverty line. Researchers for the NWRO argued that the Department of Agriculture figure for the poverty line was too low, as the median income was \$7,500. The NWRO made use of figures based on publications from the US Bureau of Labor Statistics (BLS). The BLS lower standard budget referenced the annual cost of living and was used to produce the figure of \$4,000 as the minimum income for a family of four to "live in dignity, meeting all its basic needs."

activism. Our point, for the moment is not so much poverty lawyering (this is examined in the next two chapters) but grass roots organising around poverty and welfare. We will return to these issues in more detail in chapter 5, but, for the moment it is necessary to sketch out a general overview of the work of the NWRO and CWRO.

The later phases of the civil rights struggle were significant in articulating a politics of poverty. Before his assassination, Martin Luther King had urged the Southern Christian Leadership Conference to turn their attention to organising around economic justice. As the successes in achieving formal rights for African Americans did not appear to have made significant changes in their living standards, a movement for economic justice and poverty appeared to make sense. The Economic Bill of Rights gave shape to these arguments, and the mass protest camp in Washington lent it an organisational and social form. Despite the dispersal of Resurrection City, and the refusal of Congress to take up the Bill, the campaign did show that it was possible to sustain an alliance of poor people's movements (Jackson, 2007, pp. 245-329; Mantler, 2013, pp. 90-186).

How can we conceive of the political agency of the poor? Oscar Lewis noted that whilst Marxists like Castro and Fanon grasped the revolutionary potential of the lumpen proletariat, his own studies suggested that "radical ideology amongst [those of] low income" could not be taken for granted (Lewis, 1969, p.195). This issue relates to a central theme in new left thought: "the [driving] issue [for] the development of a radical movement [was] the forging of a new identity" (Frost 2001, p.110). However, even those organisations like the NWRO who saw themselves as poor people's movements were aware that the term carried a sense of stigma that did not well serve purposes of political mobilisation. Certainly anti-poverty organisers found that those groups that they thought could be identified as poor were held together (and divided) by rival forms of identification around ethnicity, language or locality. Whatever interests people shared by virtue of their poverty were often not enough to produce viable long term modes of political identification. For instance, the NWRO showed that it could organise black women on AFDC (Aid to Families with Dependent Children), but it was much less successful in appealing to unemployed or poor men.

Whatever the wisdom of using poverty as a political identifier, poverty has to be understood in the context of the restructuring of labour markets and the organisation of employment around divisions between gender and race. The operation of the welfare state is itself a significant factor in determining how these forces play themselves out. The interplay between these factors will be examined in chapter 5, but some salient points can be outlined by means of an introduction.<sup>26</sup> Ideologies of work and gender play a significant role. Scholars have drawn attention to the shifts in understandings of motherhood and work that went on throughout the middle part of the twentieth century. The terms of the Social Security Act of 1935 that related to AFDC were originally based on the 'right' of women not to seek

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<sup>26</sup> Although black women made up the majority of rank and file members of the NWRO, and some of the leadership, in percentage terms, the ethnic breakdown of those groups in poverty showed that black women were not the majority. That willingness of black women to organise and take part in social protest has been explained by different ethnic understandings of femininity; but the influences of the civil rights movement must also be taken into account. Commentators have suggested that whilst white women tended to remain somewhat isolated and to see poverty as a matter of personal shame, black women were much more willing to take part in political action. Organisers frequently attested to the importance of the social networks that women had created. Such networks not only provided social support but were useful for mobilising welfare mothers. The greater willingness of black women to engage in social protest may also be explained by broader ideologies of black power. Certainly, there was cooperation between the NWRO and local branches of the Black Panthers.

employment and to remain at home and look after their children. As women entered into the labour force in increasing numbers in the 1960 and 70s, it became harder to sustain this distinction between waged work and state benefits. Concerns around the sexual morality of welfare mothers and the ‘failure’ of the black family also fed into the sense in which AFDC provisions appeared to be responsible for the growth of welfare rolls and the social problems that were thought to stem from female headed households. Scholars of poverty stress that work incentives pressured women to find precarious “low paying dead end jobs” and largely ignored issues of child care and training (West, 1981, p. 88).

A point of agreement between NWRO leader George Wiley, Frances Fox Piven and Richard Cloward was that dependency on welfare was a result of economic pressures. Asserting that all women should have the choice to work or to look after their families, NWRO activists saw that the real problem was to do with the paucity of jobs and the inadequate training provisions under the WIN (Work Incentive) programmes. However, NWRO ideologues did not believe that women on AFDC would become “economically mobile” even though the evidence suggested strong motivation and the desire to work (West, 1981, p. 89). Beulah Sanders, chair of the NWRO in the early 1970s, stressed the difficult situation that women were put into: working in low income jobs and paying for childcare. Hence, the only viable solution was a “right to life” or a minimum income guaranteed by the state. Minimum income arguments were supported by redefining the very idea of work. Even though it was unwaged, child care was work- as important and meaningful as waged employment. As Johnnie Tillmon put it: “women’s work is real work”- a right to minimum income would effectively be “wages for housework”- the productive task of “child raising and housekeeping” (West, 1981, p. 91). We will return to these points in chapter 5.

### **The Chicana Welfare Rights Organization**

The CWRO is somewhat side lined in histories of the welfare rights movement.<sup>27</sup> The movement was a response to particular patterns of stigmatisation and discrimination visited upon Chicana welfare mothers. A brief review of the literature on poverty amongst Latino/a communities suggests that there were distinct historical and cultural patterns that defined the cultural, legal and social experiences of these groups, and fed into the experiences of the CWRO. There was a growing sense of the need for political and communal organisation that

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<sup>27</sup> See Bermúdez (2014); Mantler (2013) and Garcia (2014). The CWRO needs to be understood in the context of the Chicano movement more generally. The Chicano movement can be seen as animated by energies similar to the black civil rights struggle. It had distinct regional foci. In California, efforts were made by figures such as Ceasear Chevaz and Dolores Huerta to organise farm workers into a trade union. In New Mexico, Reies Lopez Tijerina agitated for land grants. Out of the Crusade for Justice, a civil rights organisation based in Denver, Rudolfo ‘Corky’ Gonzalez emerged as a main mover in Chicano student organisation and the militancy that fed into the East Los Angeles high school ‘blow outs.’ Another central feature of the Chicano movement was the formation of the *La Raza Unida*, active in Texas, California and Colorado. Inspired by black nationalism, this political party enjoyed considerable success between 1970-8, contesting municipal and gubernatorial elections and developing alongside its electoral campaigns, grass roots movements and an increasingly revolutionary ideology. In the later phase of its operations, *La Raza Unida* made much of the notion of *Aztlán* – a semi mythic notion of a homeland stretching between Mexico and Texas-and- for some- the justification for a new nation: *República del Norte*.

would deal with problems of discrimination and marginalisation suffered by Mexican American and other Latino/a communities throughout the United States.<sup>28</sup>

Latino/a poverty is bound up with patterns of immigration from the Caribbean, Southern and Central America. It is arguably the case that immigration tends to be seen from the perspective of white immigration from Europe (Moran, 1997). Whilst white immigrants were ‘invited’ to live and work in the United States, and expected to commit to its cultural norms, Latin immigration was different: for instance, in the first years between 1940 and 1950, the majority of Mexicans who came to America did so as either “temporary contract workers” or “without documents” (Moran, 1997, pp. 117-8). Lacking the correct documents for citizenship, immigrants existed in a twilight world of informal work and limited opportunities. Despite relatively high levels of work force participation, employment opportunities were concentrated in low waged, precarious jobs (Reyes, 2004, pp. 42-3).

These are, of course, snapshots of broad historical patterns. Experiences of Latino/a poverty are culturally differentiated. For example, the welcome shown to Cuban refugees in the 1960s contrasts with the hostility shown to those from Guatemala or San Salvador in the 1980s- and later- that of Mexicans in the 1990s (Iglesias and Valdes, 1998, p.29). Latino/a cultures are also further articulated around “hetero patriarchal” norms that condition and affect ways in which poverty is experienced and perceived (Iglesias and Valdes, 1998, p. 31). Thus, it would be wrong to homogenise Latino/a experiences of poverty and to ignore the role that class, as well as race, gender and sexual orientation play in the construction of particular experiences of poverty (Iglesias and Valdes 1998; Hernandez 2000). Echoing Harrington, Latinos/as are “forgotten Americans” whose status as “outsiders” within the polity is, at least in part, defined by their poverty (Johnson, 1997, p.135).<sup>29</sup>

To study the Chicano/Chicana Movement is to examine a particular form of Latino/a radicalism. The Chicano/a community sees itself as an indigenous people of North America. The dispossession of *La Raza* from lands straddling what became the Mexican/US border, lends a specific quality to their politics, and, indeed, opened up cooperation between Chicano/a groups, and American Indian activists around poverty activism. Most notably black, Chicano/a and participants in the American Indian Movement (AIM) came together at the Alianza Conference in 1967, but failed to agree a coordinated programme of action (Mantler, 2013, p. 67). Some stressed that poverty was primarily related to jobs and income, others saw poverty in term of marginalised cultural heritage, land and fishing rights (Mantler, 2013, p. 87). Given limitations of space, we cannot pursue an analysis of AIM, and our engagement with Latino/a struggles is, of necessity, rather narrowly engaged with the

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<sup>28</sup> Certainly, from the perspective of the courts, cases such as *Hernandez v Texas* 347 U.S. 475 and *Mendez v Westminster* 161 F.2d 774; 1947 U.S. App showed that Mexican Americans could be protected from discrimination by the law.

<sup>29</sup> Census data from 2014 shows that Hispanic earnings remained well below the median. Other indicators of poverty and low waged work, such as receipt of welfare benefits, food stamps and poor health insurance, also suggest that Hispanic groups experience poverty with greater frequency than white groups – although black poverty remains most marked in recent national figures. Nearly a quarter of the Hispanic population of the United States are living in poverty (with evidence that this is in work poverty) with a strong correlation between poverty, disadvantage and those who were born outside the US. Hispanic women figure disproportionately in the statistics: they earn much less than white women, and much less than Hispanic men. See <http://www.pewhispanic.org/2016/04/19/statistical-portrait-of-hispanics-in-the-united-states/> and [https://www.jec.senate.gov/public/\\_cache/files/96c9cbb5-d206-4dd5-acca-955748e97fd1/jec-hispanic-report-final.pdf](https://www.jec.senate.gov/public/_cache/files/96c9cbb5-d206-4dd5-acca-955748e97fd1/jec-hispanic-report-final.pdf).

CWRO. The CWRO ultimately has to be seen as an expression of a particular form of political sensibility that- whilst sharing a great deal with black struggle, assumed its own forms and dynamic.<sup>30</sup>

## Overview of the Book

We now want to map the development of the book over the remaining 9 chapters.

Chapter 2 examines a number of intellectual traditions that were to influence lawyers involved in the war on poverty. One tradition that fed into later activism came out of the new left's adaptation of ideas whose origins can be found in the work of John Dewey and Jane Addams. At the heart of Dewey and Addams' work are profound ethical questions about how one acts and how one is orientated to the world. In following these issues through we will sketch out a more general understanding of the character of the radical lawyer at odds with the disconnection between professional work, politics and life. Tracing these themes forward from Dewey and Addams, we will be particularly interested in the ideology of Students for a Democratic Society (SDS) activists involved in Economic Research and Action Projects (ERAP) and at a later point with the work of activists involved in the war on poverty. From the former, we will see how important practices of participatory democracy were in community organising work. From the latter we will be particularly concerned with how those lawyers and organisers linked with Movement for Youth (MFY) in New York City understood their work. Activists concentrated on the everyday challenges of working with the poor; activities requiring self-examination and personal transformation.

There is, however, a difficult question to ask about the nature of this radicalism. To what extent could white activists understand the reality of lives lived in poverty? This is the leading edge in an argument that addresses the problem of the "white ally."

We will use the idea of the "white ally" (a term so contested that it must appear in quotation marks) to explain certain tensions in new left politics. Taking some orientating points from Marcuse's critique of the new left, we will suggest that Martin Buber's philosophy of the encounter, also influential in activist circles, offers a way forward; an engagement with the difficulties of working with others towards a shared goal. However, Buber's philosophy needs to be supplemented with themes from Fanon, Du Bois and Newton. The problem of alliance across the poverty line and the colour line (to say nothing of the gender line) moves towards our understanding of the broken middle, a term that will be introduced in this chapter but not developed properly until the end of the book. The notion of the broken middle will be used in chapters 9 and 10 to frame the sense of poverty law theory as a radical open-ness: a creative and anxious praxis that informs social justice projects and working with the poor.

Chapter 3 continues to trace the philosophies that fed into anti-poverty activism and extends the argument to the reception of these ideas by the Critical Legal Studies movement. The chapter begins with a recap of some key themes around SDS organising with particular reference to ERAP. The chapter follows these concerns into the work of Ed Sparer. Sparer drew on Hegel, Marx and Buber to provide one of the first consistent attempts to theorise a radical account of poverty law. Sparer also picked up on and developed themes relating to movement lawyering and ethical praxis. However, his ideas largely failed to enter into the mainstream of CLS. The end of the chapter is an exercise in reconstruction that reads back

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<sup>30</sup> Whilst the movement was briefly affiliated to the NWRO, and, indeed, both the NWRO, and Chicano/a activists (as well as Puerto Rican and American Indian groups) participated in the Poor Peoples' Campaign in 1968, a "rainbow alliance" was not forthcoming.



from later CRT scholarship and feminist accounts of alienation to sketch out a theory of social ethics that the crits failed to develop. This will be presented as an account of the consciousness of the poverty lawyer working with poor clients and open to social and personal transformation.

In chapter 4, we turn from the crits to progressive constitutional theory and examine another split in poverty law theory. The chapter begins with Michelman's analysis of the 14<sup>th</sup> Amendment and his adaptation of Rawls' moral philosophy to provide a theory of constitutional welfare rights. We then turn to study Michelman's re-working of his position around republicanism. The final parts of the chapter weigh up Michelman in the light of more recent radical constitutional scholarship.

Chapter 5 returns to the crits and examines that way that we can creatively respond to the legacy of NWRO and CWRO militancy. We will work with three key terms: the social reproduction of capital, reification and poverty. These terms are rooted in the insights of the ClassCrit 'turn to Marx' - a moment in which certain legacies of 1960's poverty activism re-enter contemporary critical thought. Linking Piven and Cloward's work with ideas of reification, the chapter argues that the NWRO can be understood as resting on a street philosophy of social recognition that rejects the reifying determinations of class, race and gender. We will read these themes into studies of Alicia Escalante, Johnnie Tillmon, Jeanette Washington and Beulah Sanders, leading figures in the welfare rights movement. Their work offers a principled and articulate response to the alienation and reification brought about by the social reproduction of capital. The chapter concludes with a final question: what did the NWRO mean for activist lawyers? Answering this question takes us to chapter 6.

In chapter 6, we engage with the work of William Stringfellow, and themes of vocation, conscience and freedom. These ideas are central to the fundamental problematic of the engaged lawyer involved in social struggles. We propose to follow Sparer's promptings and to open a dialogue between Buber and Stringfellow. This raises questions about Heidegger's influence. In Stringfellow's writing we can find the outline of an account of 'being with' or caring for the fate of the poor. We will see that Stringfellow's concept of 'being with' the poor is rooted in his Christian faith. However, whilst one can aid and sympathise with others, one cannot stand in the other's place. The question thematised by Stringfellow and performed through 'being with' is thus an assumption of responsibility from within radical freedom. One does not need to respond, to work with the poor or be alongside them. 'Being with' the poor is a path that is chosen as a vocation, a calling of conscience. To answer the call of conscience, one must be involved in the travails everyday life, even if the proximity to poverty occasions a certain anxiety about one's own commitment and motivation.

Elaborating this theme takes us to the new poverty law scholarship in chapter 7. Most critical accounts of the new poverty scholarship stress its concern with the power relationship between lawyer and client. There is something about the nature of poverty law that means the lawyer's relationship with his/her client is distinct from that of corporate, commercial or business relationships. As White has pointed out, the plaintiffs in celebrated welfare cases rarely met the lawyers that represented them once the depositions had been filed (White, 1987, p. 536). However, this problematic conceals another way in which the new poverty law can be understood. Our approach stresses the way in which the new poverty law scholarship can be read as inheriting and carrying forward an ethics of anxiety. In chapter 8, we will go on to show how the ethics of anxiety are bound up with a legacy of the new left

and CLS that cast a long shadow over law and activism in the decades between 1980 and 2017.

The final parts of chapter 8 argue that LatCrit is the inheritor of new left ideas on poverty, democracy and praxis. This is precisely why LatCrit offers such an important perspective on critical legal theory. Praxis is understood as a form of intellectual cooperation with “activists” and other “outside scholars” (Valdes, 2002, p. 102). But praxis is also an orientation to LatCrit’s own positioning in the critical legal tradition. LatCrit stresses that critical legal theory is a work in progress; a self-critical reworking of the jurisprudential tradition- as well as an investigation of its own identity. A long way from a form of identity politics, LatCrit eschews essentialisms and concentrates attention on the play of forces that define phenomena, and, indeed, can bring about social change. Sylvia Law put this it well: “legal doctrines” are changed only through “larger change in social organization and consciousness” (Law, 1984, p. 426). In bringing these themes together, we hope to suggest a somewhat different way in which we can understand the future of critical legal theory.

Chapters 9 and 10 seek to show how the concept of ‘being with’ the poor relates to the sensibility of the radical lawyer. To describe this radical open-ness we will make use of Rose’s ‘concept’ of the broken middle.

The work of the broken middle presupposes no final answers, fixed identities or final resolution of its informing tensions.

The broken middle of poverty law gives onto the anxious practice of critical legal theory.