# 1NC---Darty---Round 1

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### 1NC---T

T USFG

#### Interpretation: topical affs must fiat the United States Federal Government substantially strengthens collective bargaining rights for workers in the United States.

#### "Federal Government" means the national government, not the states or localities

Thomson 7 [Alex Thomson, A Glossary of US Politics and Government, 2007, p.72]

federal government The term used to refer to the central, national government of the United States, based primarily in Washington DC. The federal government differs from the fifty state governments in that it has a national jurisdiction, and it governs in separate policy areas from those of the states.

#### Collective bargaining rights permit joining a union and requires employers to recognize it and bargain in good faith.

Robertson 2 [Robert E. Robertson, Director, Education, Workforce and Income Security Issues at the Government Accountability Office, Charles A Jeszeck, Assistant Director, Nancy Peters, Analyst in Charge; Kara Kramer, Analyst; and Tom Beall, Paula Bonin, Mark Ramage, and Joan Vogel. September 2002 “Collective Bargaining Rights Information on the Number of Workers with and without Bargaining Rights” https://www.gao.gov/assets/gao-02-835.pdf]

As Congress reviews the extent that American workers have bargaining rights, you asked us to determine and assess (1) how many workers have statutory collective bargaining rights2

[Footnote 2] For this report, we consider statutes as providing “collective bargaining rights” if they not only permit individuals to join together and form unions, but also require employers to recognize employee organizations and to “bargain in good faith.” Note that having collective bargaining rights does not necessarily imply the exercise of those rights through union membership or other forms of collective action. Although not statutes, in several instances we included workers who received rights through gubernatorial executive orders.

in the current civilian U.S. workforce, (2) the types and numbers of workers without such rights, (3) how the extent of collective bargaining rights among the workforce may have changed during the past 40 years and (4) the potential impact of two recent Supreme Court decisions—the Kentucky River and Hoffman Plastic cases3 —on the types and numbers of workers without collective bargaining rights.

#### Vote Negative.

#### 1. Competitive equity. Debate is a game where argument selection is driven by competitive incentives---abandoning a topical stasis creates a moral hazard to avoid controversial positions and denies a predictable role for the negative. Competitive equity is a prerequisite to any pedagogical value of debate AND is the only impact solvable by the ballot. High-level debates are lost on the margins, so the threshold for an impact is low.

#### 2. Clash. It’s an external impact to argument engagement. If they are right that debates can shape our subjectivity, those shifts are more likely to occur through rigorous contestation over the course of the season. Centering CBRs is crucial for dialogue because it’s grounded in a textual reading of the resolution---ensuring a limit on potential affirmatives and guaranteed negative ground. Clash is an impact to every debate AND helps break down dogma, create better advocates, and refine arguments---which turns the case.

#### TVA: The United States federal government should strengthen collective bargaining rights by recognizing the work of transition as protected labor under the National Labor Relations Act.

#### Wages for transition facilitate debates about the necessity of union organizing to achieve the communization of gender. That creates debates about maladjustment, disability, and every core component of the 1AC.

Giles 19 [Josie, British writer, singer, and poet, winner of the Arthur C. Clarke Award for their novel Deep Wheel Orcadia., “Wages for Transition”, 12-16-2019, <https://hjosephinegiles.medium.com/wages-for-transition-dce2b246b9b7>]

Trans Strike

What are the forms of class struggle which the demand for wages for transition can engage? Surely, as a fragmented, unrecognised labour force, we are the archetypal invisibilised precariat resistant to so-called traditional labour organising, resistant to the single-workplace union and the paid compromise-hawking negotiator. But, of course, it is the precarious who have least to lose, who are most resistant to incorporation into the mechanisms of capital, whose wildcat power remakes the condition of labour as such. Trans people thus require full participation in one big union, and in the process of scaling to the general strike there is much we can do.

We sabotage our workplaces, writing lines of code into the back-ends of social media monopolies through which genderfuck hackers may enter and pirate the compromising data of oil-share millionaires. We steal from our bosses, running thousands of copies of transfeminist zines off our zero hours teaching assistant printer budgets. We perform atomic strikes, entering our refusing, non-passing bodies into contested activist space and forcing our comrades’ confrontation with the gender normativity that constitutes their temporary solidarity. We work gender to rule, slashing shoplifted lipstick across our mouths and dunking our fingers in two quid bottles of toxic varnish: Am I pretty now? We communise our industries, wringing what we can from the limited strategies of the co-operative, the collective, the union bargain, pouring the resources we win into the full fight. We love one another, forging new kin in and against the furnace of the family, collectivising the rearing of our beyond-biological children into the next battalion of revolutionary struggle: may they destroy us, and you.

The work of wages for transition has already begun. With this call we recognise the labour already underway and the labour to come in stating and unstating, tangling and untangling the possibilities of liveable trans lives. Yes, we demand immediate payment from the state for the ongoing work of being trans: this is the first and least of our demands. Wages for transition is every moment when trans people seize and share resources, when collective responsibility is taken for the reproduction of trans life, when transition is communised.

When we commit armed robbery to fund our surgeries, that is wages for transition. When drag performers unionise, that is wages for transition. When we distribute grey market hormones at gender reveal parties, that is wages for transition. When we take sick pay to lie at home in bed crying and watching make-up tutorials, that is wages for transition. When we organise for collective healthcare, that is wages for transition. When we hold down a job until our surgery date just so we may take the three months of paid leave and then quit immediately afterwards, that is wages for transition, and we demand such payment for all trans people irrespective of employment status. When we seize the estates of the European ruling class and deliver them to international Indigenous hands, that is wages for transition. When we collectivise solidarity funds, that is wages for transition. When we buy every book ever published by trans women of colour to our university libraries, that is wages for transition. When we mug the rich to pay for wheelchairs, that is wages for transition. When we build a house where any trans person may live, that is wages for transition. Wherever trans people are organising together to redistribute resources, they are undertaking the ongoing communisation of gender, and we now demand wages for the work of transition, so that transitions can escalate until work itself is no more.

## OFF

### 1NC---K

Lawyering K

#### Legal engagement and lawyering are crucial for dismantling the structures that propagate gender-based violences and normativities. The foundational exclusion of the law is exactly why legal engagement is key.

Arkles et al. 10 [Gabriel Arkles is Senior Counsel at Transgender Legal Defense and Education Fund. Previously, he was Senior Staff Attorney at the ACLU LGBT & HIV Project. Gehi, Pooja – Executive Director of the National Lawyers Guild. For over eight years, she worked as a Staff Attorney and Director of Immigrant Justice at the Sylvia Rivera Law Project (SRLP), and Redfield, Elana (2010) "The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change," Seattle Journal for Social Justice: Vol. 8: Iss. 2, Article 7. Available at: https://digitalcommons.law.seattleu.edu/sjsj/vol8/iss2/7, JKS]

We are at a critical moment in the movement for social justice for transgender (trans) communities and particularly for thinking critically about the role of lawyers in that movement. A decade ago, almost no institutionalized legal advocacy around trans issues existed. Mainstream lesbian, gay, bisexual, and transgender (LGb“T”)2 legal rights organizations almost entirely excluded transgender people and issues, and no transgenderspecific legal organizations existed. Now, there are several transgender specific legal organizations including the Sylvia Rivera Law Project (SRLP); the Transgender Law Center; the Transgender, Gender Variant, and Intersex (TGI) Justice Project; the Transgender Legal Defense and Education Fund; Massachusetts Transgender Legal Advocates; the Imprenta Transgender Law Project; and the Transformative Justice Law Project of Illinois. Additionally, mainstream LGb“T” organizations have begun to engage in more litigation on behalf of transgender individuals. The authors of this article are three attorneys who work at SRLP3 in the areas of direct services, impact litigation, policy reform, and public education.

In our work at SRLP, the question of how best to use our privilege and skills as lawyers to help improve our clients’ health, safety, and life chances4 without reinforcing systems and structures that hurt and disempower our clients has constantly challenged us. We often find ourselves in disagreement with larger LGb“T” legal organizations when answering these questions. In particular, we have faced conflict when trying to bring the experiences and leadership of low-income trans people of color to the table to set the agenda for the movement.

Underlying much of this conflict is a question about the role of legal advocacy in empowering transgender and gender-nonconforming people who are low income and/or people of color. Broadly speaking, almost all national LGb“T” legal advocacy since its inception in the 1970s has focused on attaining “formal legal equality” in legislation and court decisions, particularly in the areas of sodomy laws and gay marriage.5 The common framing is that gay people are just like everybody else—they deserve the same rights and entitlements as straight people.6 This approach reinforces the idea that the entitlements of capitalism and democracy (such as privacy, property, independence, the pursuit of wealth, and formal marriage), as they exist in our current neoliberal economic system, are the things that we all (including gay and lesbian people) want, and that these entitlements benefit us more than any other goals we might otherwise pursue.7 Furthermore, this thinking assumes or implies that homophobia, transphobia, violence, and premature death of trans and queer8 people would be mitigated by the (hetero) normalization of gay identity within the narrative of consumerism, privacy, national security, and safety that the law embodies and protects.9

However, this same system of government results in countless forms of injustice. An alarmingly disproportionate number of African American, Native American, and Latin@ people are incarcerated as a result of the exponential expansion of prisons since the 1980s and “tough on crime” initiatives, such as the War on Drugs and the War on Poverty, which criminalize poverty and scapegoat communities of color.10 Our private healthcare system is unaffordable and profit centered, and our public healthcare system fails to provide basic healthcare to those enrolled,11 particularly transgender people seeking access to gender-affirming care.12

Increased gentrification of our cities results in the displacement of low income communities through eviction, foreclosure, and increased policing.13 Immigrant communities are racialized and scapegoated as terrorists and freeloaders.14 Structural barriers, such as criminalization and incarceration, lack of identification, and transphobia in families and schools, make access to education functionally inaccessible.15 Transgender and gender nonconforming low-income communities and communities of color are increasingly unable to obtain shelter, jobs, public benefits, safety, or survival.16

These experiences directly impact the communities we serve. We believe these circumstances are foundational and essential to our legal system, rather than incidental to it.17 Capitalism and American democracy operate on a presumption of scarcity:18 if resources or the benefits of society are scarce, then they must be conferred upon some and denied to others. Thus, law privileges the “deserving” and oppresses the “undeserving.”19 Whiteness, maleness, richness, greediness for wealth, Christianity, nondisabled bodies, heterosexuality, and gender normativity are some of the values privileged by American laws and social policies, and people with the most privilege have the most power in determining future laws and policies. A legal strategy that merely extends existing rights and values to include gays, lesbians, bisexual people, and transgender people without looking at the racism, classism, ableism, homophobia, transphobia, xenophobia, and corruption that maintain capitalism will only protect the structures of empire that oppress poor people and people of color.

Conversely, our analysis centers on the idea that the structures that result in decreased life chances for members of our communities, and for all people of color, poor people, trans people, queer people, and people with disabilities, are deeply rooted in and inextricably linked with the legal system as we know it. If the problems faced by our communities are rooted in and enforced by the legal system, then meaningful change would have to come from outside of it. As such, we believe in a theory of change based in mass mobilization of communities, rather than elite (strictly legal) strategies. This belief comes from an understanding that significant change for those on the bottom has never been granted from those on top. We believe that the most significant, lasting, and sustainable way to make change is through community organizing that mobilizes those persons directly impacted. Nonetheless, we believe there are many important ways for lawyers to support social movements.

SRLP has long participated in spaces such as roundtables, conferences, and law school symposia, where lawyers may identify, discuss, adopt, and pursue various strategies for advancing the rights of queer and trans people. However, all too often, these spaces exclude nonlawyers20 from participation and these spaces recreate the very forms of oppression we must dismantle to achieve social justice. This article explores the problems these exclusions cause.

As transgender legal work continues to develop and grow, we believe it is crucial to consider what lessons we can learn from lawyer participation in other social movements. In particular, we examine the ways in which lawyers may intentionally or unintentionally consolidate power in social movements and undermine the potential for systemic change and social justice. Applying these considerations to transgender legal advocacy, we offer alternative frameworks that permit lawyers to participate in and support social movements without replicating structures of oppression. These frameworks are rooted in the creation of spaces of collaboration, with community-organizing principles at their heart.

First, we discuss the history of lawyer-only spaces in the LGb“T” movement and explore our own participation, or lack of participation, in three particular spaces: the Lavender Law Conference, the LGBT Litigators’ Roundtable, and the Transgender Roundtable. We offer examples of our experiences, hopes, and concerns in these spaces.

We then seek to situate these experiences in a broader context, by looking at some of the roles lawyers have played in other social justice movements. We will identify some patterns of public interest lawyers working in social movements and the limits they impose on those movements. We end this section with a discussion of the ways in which lawyers have (often negatively) impacted the agenda and outcomes of the LGb“T” movement.

Next, we explore alternative ideas for how lawyers may participate in social movements. We begin by discussing a framework for social change, with a focus on community-organizing principles. Then, using an “empowerment” lawyering model for public interest lawyers, we discuss the ways in which lawyers can take leadership from, and support the goals of, community-organizing projects, particularly in the context of trans liberation.

Last, we discuss three examples of agenda-setting by the most impacted communities—the campaign to end trans discrimination at New York City’s Human Resource Administration, the prison-abolitionist work of the Transforming Justice Alliance, and the People’s Movement Assemblies of Project South—as means for setting movement goals. We explain the ways that lawyers have participated in those projects, and argue that these models can guide us as legal advocates toward supporting a truly radical movement for transgender liberation.

#### This thesis extends to trans engagement in labor law, which the aff foregoes.

Grafstein 24 [Grafstein, Julia F. (2024) "The "Burden of Blame": Coalition-Building In the Transgender Movement from the 1970s through the 1990s," Swarthmore Undergraduate History Journal: 5 (2), 29-70. 10.24968/ 2693-244X.5.2.2 https://works.swarthmore.edu/suhj/vol5/iss2/2, JKS]

Education became central to trans activists’ crusades against employment discrimination. The International Foundation for Gender Education (IFGE) published a 1992 guidebook for employers of trans people titled “Why Is S/He Doing This To Us?” This handbook addressed what it meant to be transgender and common questions posed by employers about trans people, such as “What do we do about the bathroom issue?” The International Conference on Transgender Law and Employment Policy (ICTLEP) praised IFGE’s handbook, claiming “it’s no wonder that many employers have opted to discharge the employee rather than try to reinvent the wheel, a wheel they don’t even understand.” Employers gained practical advice from this book, which enabled them to find solutions to problems many employers claimed to have because they employed trans people. ICTLEP published a sister book to IFGE’s called “What Is S/He Doing?” that was aimed at helping other employees understand the transgender identity and become more sympathetic. ICTLEP argued that “through education and cooperation a transsexual [sic] stands a better chance of retaining her job than trying to win it back through litigation.” When these preemptive strategies did not work, psychologist and transgender support specialist Gianna Eveling Israel encouraged trans people to file a complaint with their State’s Labor Discrimination Agency and bring a discrimination suit against the company if they had “the emotional, legal, and financial resources.” Transgender activists concentrated on education as the first avenue for resolving issues, publishing many handbooks for trans people and people who employed or worked with trans people in order to prevent discrimination.

The intense discrimination trans people experienced, in employment and other areas, facilitated a need for a discourse within the trans community on how to navigate it. Transgender activist Phyllis Frye noticed the difficulties many trans people had finding employment and otherwise engaging with the law and the medical community and also recognized the knowledge gap that everyday trans folk had, which led her to found the International Conference on Transgender Law and Employment Policy in 1991. The International Conference on Transgender Law and Employment Policy was the first conference centered around how the law applied to trans people and how it could be used for progressive change. The event grew out of Frye’s frustration with transgender legal issues being excluded from gay and lesbian legal organizations and conferences, and she sought to find a way to educate people on transgender issues as well as to create a forum for discussing and researching said issues. The conference addressed housing, employment, health, anti-discrimination, and criminal and family law as they applied to trans people. Over fifty people attended the first conference. Over time, the conferences grew in size and expanded the range of topics they covered, notably adding sections on female-to-male trans people, trans people of color, and trans people who were not going to get an operation. The conference spawned It’s Time America, a prominent transgender activist organization with chapters across the country. The sixth annual conference in 1997 was the last, but the conference had already succeeded in affecting great change by fostering relationships with other organizations and creating political momentum in the transgender community.

#### Lawyering is infinitely more solvent than ‘sitting with maladjustment.’ The aff embraces a privileged academic thought experiment while they distance themselves from the most vulnerable.

Dangaran 25 [D. Dangaran – Assistant Professor of Law, University of Hawai'i at Manoa Richardson School of Law; Co-Chair, National Trans Bar Association; Harvard Law School, J.D., 2020; Yale University, B.A., Anthropology, 2015. "Bending Gender: Disability Justice, Abolitionist Queer Theory, and ADA Claims for Gender Dysphoria." Dukeminier Awards: Best Sexual Orientation and Gender Identity Law Review, 24, 2025, pp. 43-76. HeinOnline, JKS]

4. The Role of the Courts. Finally, Lewis verbalized a distrust of the role courts might play in securing the rights of trans people. For Lewis, it did not matter if the Fourth Circuit case currently supplies favorable precedent; the courts, systemically, would never be the forum wherein we would achieve true liberation, so these are small, temporary gains.

I disagree. I think the courts do have some role to play in advancing justice. Spade highlights "that most of the successful legal claims for trans equality have come through strategic use of the medical model of transsexuality." But Spade cautions that the legal trans rights struggle "has been dominated by judicial decisions which would not recognize gender transition at all, and would not allow gender change no matter what medical evidence was presented." So Lewis and Spade would agree that putting our faith in judicial institutions is short sighted.

But I don't think the trans rights movement should stop there. Litigation is necessary for meeting the immediate medical needs of some of the most vulnerable people within our communities, including those in prison. An absolutist approach that (1) casts the entire legal profession as simply not radical enough to create the ultimate change we are seeking in a long-term liberatory queer trans revolution and therefore (2) dismisses any intervention we can make in the meantime neglects our actual, individual wins and erases our collective power in the movement for trans liberation.

The work Lewis and I do is path-dependent, and I am far from content with the current conceptualization of GD in DSM-5, even if it has greatly improved since the 1990s. But if we want to contend with the hegemony of the heterosexist and cissexist social welfare system and the extremely punitive criminal justice system, then we cannot simply fold. As I think about how we can be pragmatic about our role in supporting trans people who are suffering under state control, while facing the reality of the current legal landscape, I cannot fathom outright rejecting the ADA as a mechanism for positive change. Lawyers face an uphill battle for securing incarcerated trans people's medical needs through Eighth Amendment and ADA claims alike. And when the ADA standards are easier to meet than other potential constitutional claims, refusing to raise these arguments would be to the serious detriment of our clients.

CONCLUSION

The APA ended the pathologization of trans gender identities. The ADA has not been modernized to align with this shift, so federal courts have determined whether GD is a qualifying disability. The courts overwhelmingly say it is. Even as I hold the counterarguments raised by my colleagues in this movement, I ultimately believe people with GD ought to allow ourselves to embrace the ADA. I think this is the call of the Disability Justice movement. Trans people already are part of the wonderfully diverse disabled community changing and growing together, moving forward.

We are far from our Disability Justice future that embraces total self- determination for all. For that precise reason, we are far from a world in which medical and legal involvement in trans lives is unnecessary. We must make our tools work for our communities because we want to preserve our trans lives and livelihoods. I plan to continue to do that for my clients for years to come.

#### The aff asks you to ‘bear the weight of beautiful things’ – but does not materially build anything for trans sick women who desire a livable future. Their ambivalence on ‘medical protocol’ proves their method is antithetical to a legal strategy that centers on medical civil rights.

Dangaran 25 [D. Dangaran – Assistant Professor of Law, University of Hawai'i at Manoa Richardson School of Law; Co-Chair, National Trans Bar Association; Harvard Law School, J.D., 2020; Yale University, B.A., Anthropology, 2015. "Bending Gender: Disability Justice, Abolitionist Queer Theory, and ADA Claims for Gender Dysphoria." Dukeminier Awards: Best Sexual Orientation and Gender Identity Law Review, 24, 2025, pp. 43-76. HeinOnline, JKS]

I am grateful that I had such a visceral reaction to GIDAANT. I will never forget feeling that dysphoric response to reading about my specific type of gender identity disorder-no-longer. For the most part, I am not barred from participating equally, and, importantly, I rarely need to navigate state-imposed barriers to my gender expression. But in moments when my conditions-anxiety, PTSD, ADHD, and even occasional GD-prevent me from participating equally, I can usually ask for support from my coworkers or my peers. I can access clothing and hygiene products that affirm my gender. In these ways, I can accommodate my GD needs. I feel my heart racing and my palms getting sweaty at that realization. I am living with disabilities, and am reasonably accommodated, for the most part. That self-realization is truly all the Disability Justice movement asks us to work toward accepting.

Disability is a social construct. Like any construct, it can be bent and remade. What might it mean for a trans person who might not meet DSM-5's criteria of GD to claim being disabled? What would it look like for them to find "brilliance and pride" in that identity, as they might their trans identity?'

With the ADA, disability advocates set a solid floor for disability rights. Despite the ADA's exclusions of gender identity disorders, the ADA provided me with a paradigm shift for considering what accessibility for people with GD might entail. So the ADA may spark conversations for us to have in community-in loving struggle and tearful long nights and awkward pauses. For refusing to "delimit understandings of 'disability' to physical and cognitive difference" just "might constitute an act of resistance."

We know our ideal world is "not yet here." Nevertheless, might "we at least begin to contemplate a world in which ... 'normalcy' exists along . .. a continuum we understand as liminal and in which we work to become comfortable with that liminality, perhaps even to celebrate it rather than attempting to regulate and 'manage' difference"? How can we dismantle the institutions we're struggling to survive in while also building something beautiful and worthy of holding on to? Who has the spoons to do all of that?'

Some answers might lie in the urgent necessity to take care of our community members experiencing preventable harm in state and federal custody. Through my work, I have learned that in prison, people with GD are highly regulated because of their differences. They struggle to access necessary medical care, they are subject to daily forms of gender-based violence including harassment and assault, and they are housed in torturous conditions that exacerbate their mental health conditions. "Prisons are spaces where people get disabled, or more disabled."

So I use all available tools-including ADA claims-on behalf of those who are currently "more disabled" because of oppressive systems. As a prison litigator, I'm learning that "[t]he harshness of prison life disables people," and that "[d]isability is also a byproduct of the correctional system's obsessive infatuation with security and control." My clients diagnosed with GD have experienced those disabling effects and have not shied away from ADA claims whatsoever. On the contrary, they encourage me to raise ADA claims in their demand letters and legal filings, and they file ADA administrative grievances, which are sometimes an alternative to the traditional administrative remedy procedure.

So where do we go from here? We must learn from our comrades in the Disability Justice movement. They tell us that "[i]t's radical to imagine that the future is disabled" and that "our power is the strongest when we employ a diversity of tactics on our own terms-tactics that build our strengths, that strike where the enemy is weak or has a gap." In my work, the "enemy" is the carceral state that refuses to let trans people live safely and express their gender while in state or federal custody.

Even as we fight using our disabled terms, we must remember that we are simultaneously "thinking and worlding from outside of our present governing system of meaning." We must "analyze [our] commitments to traditional symbolics of Western gender," including the thought that we are not disabled. We must bend gender and break the rules. We must release "gender non-binary" and reclaim ourfaerie, embrace our bakla.

I think trans people-especially trans lawyers and advocates-will need to radically change our collective self-image to embrace a Disability Justice future. This change can happen if we organize around universal accommodations, which means embracing that we are all living with disabilities in some way and that the words we ascribe to those disabilities are entirely socially constructed. In the prison context, that means people would access what they need in order to stay safe before hopefully returning to society.

There should be nothing to fear regarding our own nuanced identities; we can expand on our fully-fledged self-conceptions far away from the biomedical realm. But we don our legalese medical "drag" and navigate these systems, code-switching, as we always have, when we receive the call. We follow in the footsteps of our ancestors-Black and indigenous queer and trans people, particularly-who have done this for decades.

If we are serious about working toward a better future, then we ought to wield the ADA as a tool for trans justice. The ADA helps get us to "a world where trans people could access life-sustaining healthcare without coverage bans or discriminatory and dehumanizing providers due to legal advocacy and enforcement," such that "they would not face as many impossible choices- choices like going without healthcare at the expense of their physical and mental well-being, or seeking care by risking life, limb, and criminal sanction." Until we reach that world, we need to convince the state to fulfill our rights using their rules, as we know what we need best. So let's organize and train advocates to play by those rules and, even if "temporarily ... [,] beat [the master] at his own game." Isn't that what movement lawyers are for?

#### Vote neg for rebellious lawyering—a queering of the law which uses its legal language against itself in order to make trans sick life livable.

Arkles et al. 10 [Gabriel Arkles is Senior Counsel at Transgender Legal Defense and Education Fund. Previously, he was Senior Staff Attorney at the ACLU LGBT & HIV Project. Gehi, Pooja – Executive Director of the National Lawyers Guild. For over eight years, she worked as a Staff Attorney and Director of Immigrant Justice at the Sylvia Rivera Law Project (SRLP), and Redfield, Elana (2010) "The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change," Seattle Journal for Social Justice: Vol. 8: Iss. 2, Article 7. Available at: https://digitalcommons.law.seattleu.edu/sjsj/vol8/iss2/7, JKS]

III. RETHINKING THE ROLES OF LAWYERS IN THE MOVEMENT FOR TRANS LIBERATION

While agenda-setting by lawyers can lead to the replication of patterns of elitism and the reinforcement of systems of oppression, we do believe that legal work is a necessary and critical way to support movements for social justice. We must recognize the limitations of the legal system and learn to use that to the advantage of the oppressed. If lawyers are going to support work that dismantles oppressive structures, we must radically rethink the roles we can play in building and supporting these movements and acknowledge that our own individual interests or even livelihood may conflict with doing radical and transformative work.

A. Community Organizing for Social Justice When we use the term community organizing or organizing, we refer to the activities of organizations engaging in base-building and leadership development of communities directly impacted by one or more social problems and conducting direct action issue campaigns intended to make positive change related to the problem(s). In this article, we discuss community organizing in the context of progressive social change, but community-organizing strategies can also be used for conservative ends.

Community organizing is a powerful means to make social change. A basic premise of organizing is that inappropriate imbalances of power in society are a central component of social injustice. In order to have social justice, power relationships must shift. In Organizing for Social Change: Midwest Academy Manual for Activists (hereinafter, “the Manual”),163 the authors list three principles of community organizing:164 (1) winning real, immediate, concrete improvements in people’s lives; (2) giving people a sense of their own power; and (3) altering the relations of power.

Before any of these principles can be achieved it is necessary to have leadership by the people impacted by social problems.166 As Rinku Sen points out: [E]ven allies working in solidarity with affected groups cannot rival the clarity and power of the people who have the most to gain and the least to lose . . . organizations composed of people whose lives will change when a new policy is instituted tend to set goals that are harder to reach, to compromise less, and to stick out a fight longer.

She also notes that, “[I]f we are to make policy proposals that are grounded in reality and would make a difference either in peoples’ lives or in the debate, then we have to be in touch with the people who are at the center of such policies.”

We believe community organizing has the potential to make fundamental social change that law reform strategies or “movements” led by lawyers cannot achieve on their own. However, community organizing is not always just and effective. Community-organizing groups are not immune to any number of problems that can impact other organizations, including internal oppressive dynamics. In fact, some strains of white, male-dominated community organizing have been widely criticized as perpetuating racism and sexism.169 Nonetheless, models of community organizing, particularly as revised by women of color and other leaders from marginalized groups, have much greater potential to address fundamental imbalances of power than law reform strategies. They also have a remarkable record of successes.

Tools from community organizers can help show where other strategies can fit into a framework for social change. The authors of the Manual, for example, describe various strategies for addressing social issues and illustrate how each of them may, at least to some extent, be effective.170 They then plot out various forms of making social change on a continuum in terms of their positioning with regard to existing social power relationships. They place direct services at the end of the spectrum that is most accepting of existing power relationships and community organizing at the end of the spectrum that most challenges existing power relationships. Advocacy organizations are listed in the middle, closer to community organizing than direct services.

The Four Pillars of Social Justice Infrastructure model, a tool of the Miami Workers Center, is somewhat more nuanced than the Manual.174 According to this model, four “pillars” are the key to transformative social justice.175 They are (1) the pillar of service, which addresses community needs and stabilizes community members’ lives; (2) the pillar of policy, which changes policies and institutions and achieves concrete gains with benchmarks for progress; (3) the pillar of consciousness, which alters public opinion and shifts political parameters through media advocacy and popular education; and (4) the pillar of power, which achieves autonomous community power through base-building and leadership development.176 According to the Miami Workers Center, all of these pillars are essential in making social change, but the pillar of power is most crucial in the struggle to win true liberation for all oppressed communities.

In their estimation, our movements suffer when the pillar of power is forgotten and/or not supported by the other pillars, or when the pillars are seen as separate and independent, rather than as interconnected, indispensable aspects of the whole infrastructure that is necessary to build a just society.178 Organizations with whom we work are generally dedicated solely to providing services, changing policies, or providing public education. Unfortunately, each of these endeavors exists separate from one another and perhaps most notably, separate from community organizing. In SRLP’s vision of change, this separation is part of maintaining structural capitalism that seeks to maintain imbalances of power in our society. Without incorporating the pillar of power, service provision, policy change, and public education can never move towards real social justice.

B. Lawyering for Empowerment

In the past few decades, a number of alternative theories have emerged that help lawyers find a place in social movements that do not replicate oppression.180 Some of the most well-known iterations of this theme are “empowerment lawyering,” “rebellious lawyering,” and “community lawyering.”181 These perspectives share skepticism of the efficacy of impact litigation and traditional direct services for improving the conditions faced by poor clients and communities of color, because they do not and cannot effectively address the roots of these forms of oppression.182 Rather, these alternative visions of lawyering center on the empowerment of community members and organizations, the elimination of the potential for dependency on lawyers and the legal system, and the collaboration between lawyers and directly impacted communities in priority setting.183

Of the many models of alternative lawyering with the goal of social justice, we will focus on the idea of “lawyering for empowerment,” generally. The goal of empowerment lawyering is to enable a group of people to gain control of the forces that affect their lives.184 Therefore, the goal of empowerment lawyering for low-income transgender people of color is to support these communities in confronting the economic and social policies that limit their life chances.

Rather than merely representing poor people in court and increasing access to services, the role of the community or empowerment lawyer involves: organizing, community education, media outreach, petition drives, public demonstrations, lobbying, and shaming campaigns . . . [I]ndividuals and members of community-based organizations actively work alongside organizers and lawyers in the day-to-day strategic planning of their case or campaign. Proposed solutions— litigation or non-litigation based—are informed by the clients’ knowledge and experience of the issue.185

A classic example of the complex role of empowerment within the legal agenda setting is the question of whether to take cases that have low chances of success. The traditional approach would suggest not taking the case, or settling for limited outcomes that may not meet the client’s expectations. However, when our goals shift to empowerment, our strategies change as well. If we understand that the legal system is incapable of providing a truly favorable outcome for low-income transgender clients and transgender clients of color, then winning and losing cases takes on different meanings.

For example, a transgender client may choose to bring a lawsuit against prison staff who sexually assaulted her, despite limited chance of success because of the “blue wall of silence,” her perceived limited credibility as a prisoner, barriers to recovery from the Prison Litigation Reform Act, and restrictions on supervisory liability in §1983 cases. Even realizing the litigation outcome will probably be unfavorable to her, she may still develop leadership skills by rallying a broader community of people impacted by similar issues. Additionally, she may use the knowledge and energy gained through the lawsuit to change policy. If our goal is to familiarize our client with the law, to provide an opportunity for the client and/or community organizers to educate the public about the issues, to help our client assess the limitations of the legal system on their own, or to play a role in a larger organizing strategy, then taking cases with little chance of achieving a legal remedy can be a useful strategy.

Lawyering for empowerment means not relying solely on legal expertise for decisionmaking. It means recognizing the limitations of the legal system, and using our knowledge and expertise to help disenfranchised communities take leadership. If community organizing is the path to social justice and “organizing is about people taking a role in determining their own future and improving the quality of life not only for themselves but for everyone,” then “the primary goal [of empowerment lawyering] is building up the community.”

C. Sharing Information and Building Leadership

A key to meaningful participation in social justice movements is access to information. Lawyers are in an especially good position to help transfer knowledge, skills, and information to disenfranchised communities—the legal system is maintained by and predicated on arcane knowledge that lacks relevance in most contexts but takes on supreme significance in courts, politics, and regulatory agencies. It is a system intentionally obscure to the uninitiated; therefore the lawyer has the opportunity to expose the workings of the system to those who seek to destroy it, dismantle it, reconfigure it, and re-envision it.

As Quigley points out, the ignorance of the client enriches the lawyer’s power position, and thus the transfer of the power from the lawyer to the client necessitates a sharing of information.187 Rather than simply performing the tasks that laws require, a lawyer has the option to teach and to collaborate with clients so that they can bring power and voice back to their communities and perhaps fight against the system, become politicized, and take leadership. “This demands that the lawyer undo the secret wrappings of the legal system and share the essence of legal advocacy— doing so lessens the mystical power of the lawyer, and, in practice, enriches the advocate in the sharing and developing of rightful power.”188

Lawyers have many opportunities to share knowledge and skills as a form of leadership development. This sharing can be accomplished, for example, through highly collaborative legal representation, through community clinics, through skill-shares, or through policy or campaign meetings where the lawyer explains what they know about the existing structures and fills in gaps and questions raised by activists about the workings of legal systems

D. Helping to Meet Survival Needs

SRLP sees our work as building legal services and policy change that directly supports the pillar of power.189 Maintaining an awareness of the limitations and pitfalls of traditional legal services, we strive to provide services in a larger context and with an approach that can help support libratory work.190 For this reason we provide direct legal services but also work toward leadership development in our communities and a deep level of support for our community-organizing allies.

Our approach in this regard is to make sure our community members access and obtain all of the benefits to which they are entitled under the law, and to protect our community members as much as possible from the criminalization, discrimination, and harassment they face when attempting to live their lives. While we do not believe that the root causes keeping our clients in poverty and poor health can be addressed in this way, we also believe that our clients experience the most severe impact from state policies and practices and need and that they deserve support to survive them.191 Until our communities are truly empowered and our systems are fundamentally changed to increase life chances and health for transgender people who are low-income and people of color, our communities are going to continue to have to navigate government agencies and organizations to survive.

Therefore, we provide direct services with two goals in mind: helping our communities survive and helping our communities organize. Toward the first end, we represent people in name-change hearings, public benefits “fair hearings,” and immigration proceedings; we advocate with state and local agencies, criminal courts, homeless shelters, and prisons; and we litigate cases when doing so is consistent with our values and the values and interests of our clients. Toward the second end, we strive to provide direct services in a way that helps stabilize lives, build political analysis, and share knowledge, while connecting clients and community members with organizing projects that address their concerns and interests.

E. Supporting Community Organizations

In order to shift power to the experts at the intersections of oppression, we must be willing to take leadership from those with the most at stake. Lawyers can play important roles in supporting community-organizing projects, as long as we are careful to support their work in the ways that they identify as helpful, rather than slip into a role where we begin telling (or “advising”) organizations what they should or should not do to achieve social justice, or speaking for the organization to the media or public.192

Quigley points out that litigation can be appropriate when it is defensive.193 The need for defensive legal action can arise in a number of contexts, such as when police or immigration raids target the organization’s leaders or when a landlord seeks to evict the organization from its offices. In these cases, lawyers can serve an incredibly important and appropriate role in defending the organization against attacks on its ability to function and achieve its social justice goals.195 Transactional work representing organizations may also be helpful and appropriate.196 The Manual, for example, cautions organizers against getting lawyers involved in campaigns, but encourages organizers to seek professional advice about organizational legal and financial matters.197

Lawyers can also appropriately support affirmative campaigns of community-organizing projects, which is another area where SRLP is active. For example, community organizers often seek legal support for direct actions. Lawyers and other legal workers can play key support roles as legal observers and/or on-call criminal defense attorneys, in order to provide back up should police attack and/or arrest participants in the action. Lawyers can also help share information about legal systems that will be directly useful in the campaign. We can also provide community members who access our services with a direct link to community-organizing projects. At SRLP, we strive to offer this resource to community members in a variety of ways, such as referring them to become active participants in a campaign, encouraging them to come to a meeting to hear about fighting back against injustices that affect them, or offering them the opportunity to fill out a survey or sign a petition.

While a considerably more delicate role, in some cases community organizations may ask attorneys to attend meetings with targets in positions of power, such as agency administrators, corporate executives, and/or elected officials, without taking a major role in the negotiations with them. The goal may simply be to use the lawyer’s presence, privilege, and consistent, even conspicuous, deference to community members to promote their leadership in the eyes of the target. Another goal may be for the lawyer to respond to certain topics should they arise, such as to rebut a target’s claim that the community’s demand is a “legal impossibility,” and otherwise remain silent and observe. These forms of lawyer participation, as long as they are supportive and collaborative, rather than monopolizing and domineering, can also help promote social justice.

#### Rebellious lawyering is deeply connected to histories of trans coalition-building and subversive legalism to access care.

Grafstein 24 [Grafstein, Julia F. (2024) "The "Burden of Blame": Coalition-Building In the Transgender Movement from the 1970s through the 1990s," Swarthmore Undergraduate History Journal: 5 (2), 29-70. 10.24968/ 2693-244X.5.2.2 https://works.swarthmore.edu/suhj/vol5/iss2/2, JKS]

Trans activists did more than articulate these core beliefs. Throughout the 1970s and 1980s, they launched lawsuits and published advice in legal guidebooks to make accessing genderaffirming care easier. The influx of lawsuits and the emergence of published advice also marked a new era of strategies trans activists employed to reach the goals of the trans movement and create a trans community. In February 1978, the Minneapolis Supreme Court ruled that the state’s Department of Public Welfare could not categorically exclude gender-affirming surgery from Medicaid. In 1977, the Federal District Court in Georgia made a similar ruling. In the 1980 handbook, Legal Aspects of Transsexualism, influential transgender activist Joanna Clark listed six court decisions that required states to fund gender affirmation surgery through Medicaid, including the Georgia and Minneapolis cases. Thus, states were becoming more amenable to funding gender-affirming care, which trans activists capitalized on to encourage trans people to take advantage of the new routes to care. Clark claimed that the majority of private health insurance companies did not provide coverage for preoperative evaluation, gender affirmation surgery, or hospital costs, but, like the EEF, encouraged patients to utilize the loophole in Medicaid, which did not explicitly exclude gender affirming care from its covered health services. Clark also stressed that benefits were often denied if the procedure was not medically necessary. Many private companies used the Harry Benjamin International Gender Dysphoria Association standards of care to judge whether the applicant’s surgery was medically necessary. Because the surgeries and related care were so expensive and trans people experienced brutal employment discrimination, many trans people relied on health insurance to fund their gender-affirming care. Activist organizations’ legal guidebooks were imperative aids for trans people who desired to obtain insurance coverage for gender-affirming care. These legal guidebooks were integral in educating trans people about how to best finance gender-affirming care, as they detailed loopholes and tips that fewer people would have known about otherwise. They were an effective way to disseminate information to a large network of people. Navigating such distinctly trans issues required the help of other trans people, thus illustrating how imperative intra-community relationships were not only in informing other trans people, but also in educating medical professionals about the plight of trans people and how they were affected by their interactions with and the prejudices of those in the medical establishment.

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#### The ballot as payment for the aff’s labor reifies a market metaphor ideology – causes alienation and perpetuates structural violence

Thorpe 25 [M. Elizabeth, PhD in Communication (Rhetoric and Public Affairs) from Texas A&M University, assistant professor and chair of the rhetoric department at SUNY Brockport. “A Marxist critique of the metaphor of the marketplace,” Communication and Democracy 59, no. 1 (2025) NL] \*edited for ableist language

For the last century, the metaphor of the marketplace of ideas has dominated free speech theory. But this metaphor is both undemocratic and hegemonic. Marketplace-based defenses of free speech commodify speech. Speech, according to this metaphor, is valuable for what it can be traded for – influence in the marketplace of ideas. However, good speech cannot respond to bad speech if it is devalued in the marketplace because of the speaker’s position within the marketplace. This project explores the metaphor of the marketplace of ideas and argues that it must be rejected because of its commodification of speech. If identity is property, as Cindy Griffin argues, then the marketplace perpetuates a system in which speakers are robbed, not of the objects of their work, but of their very being. I argue that the marketplace metaphor commodifies speech, and is therefore, dangerous to democracy. Drawing on a Marxist understanding of reification shows how the marketplace metaphor is ultimately alienating and renders certain speech by certain speakers less valuable.

In 1919 in Abrams v. United States, some members of the Supreme Court posited that truth could be tested in a marketplace.1 This somewhat Platonic understanding of truth would haunt legal reasoning for years to come. Later, in Whitney v California (1927), Louis Brandeis wrote that the remedy to bad speech should be more speech, not enforced silence. For decades this was the orthodox free speech position on how to respond to “bad speech.”2 Finally, in 1953 in United States v. Rumely, William O. Douglas penned that speech competes for people’s minds in the marketplace of ideas. These separate statements have created a cohesive line of thought on free speech in the United States: good and bad speech compete in an equally accessible marketplace for the attention of the audience, and good speech is recognizable as such because it will win purchase in this marketplace of ideas.3

Despite the hegemonic power of this line of thought, a growing number of scholars reject this First Amendment orthodoxy. The notion that the solution to bad speech is good speech or that there is an equal place for such speech to compete has come under heightened scrutiny from critical legal scholars, feminist scholars, and critical race theorists.45 This has become a particularly important and relevant conversation in recent years as there has been a resurgence in racist, sexist, and homophobic speech, what many would consider hate speech, in the public.6 Certainly, there has never been a time when hate speech wasn’t a problem, but backlash to so called “political correctness,” “wokeness,” perceived progressive gains, or restrictions on speech have made controversial, offensive speech a more common and central issue in public discourse. As hate groups have become more open and mainstream in response to the US-American political climate, there has been a vociferous debate on what counts as free speech, who has it, and when its limitations should apply. When Elon Musk bought Twitter (now X), he claimed it would be a bastion of free speech, though free speech according to the First Amendment is a matter of what the state allows.7 The First Amendment guarantees that the government will not abridge one’s speech, so Musk’s insistence that corporate spaces should not abridge speech isn’t so much a matter of free speech as it is a business decision. The issue of “cancel culture” has also plagued scholars and disciples of free speech. Some argue that cancel culture is a threat to free speech, while others argue that it is simply accountability for those who stray outside of societal norms.8

There are a number of critiques of the marketplace metaphor in speech theory. For example, Cindy Griffin argues that identity is property, and the marketplace perpetuates a system in which speakers are not robbed of the objects of their work but starved of their very being.9 Her position is that alienation is caused by the hierarchy present in discourse and is harmful to marginalized people because identity is at the heart of exchanges and production. This is germane to the marketplace metaphor because what is being traded in the marketplace is not physical work, but speech; even though speech is not a physical product, the marketplace metaphor treats it as such.

Richard Parker writes that jurists have displayed a particular penchant for the metaphor of the marketplace, despite it having been heavily criticized in legal and communication literature.10 Parker reviews such critiques but does not explore the alienating effect of the marketplace metaphor. In what follows then, I contribute to these critiques by arguing that one cause of this problem in speech theory is that marketplace-based defenses of free speech commodify speech. Speech, according to this metaphor, is valuable for what it can be traded for – influence in the marketplace of ideas. However, good speech cannot respond to bad speech if it is devalued in the marketplace because the speaker’s position is devalued within the marketplace. Using a Marxist understanding of reification, I argue that the marketplace metaphor is ultimately alienating through its perpetuation of hierarchies, and it therefore limits those that are already marginalized by rendering their speech less valuable.

In order to develop this argument, this essay explores alienation, commodification, and free speech, the connections between these concepts and reification, the hegemonic nature of the marketplace of ideas metaphor, and finally the role of truth in the metaphor and legal jurisprudence. Ultimately, I argue that the marketplace metaphor does not allow for the “truth” or the “best speech” to be selected by rational buyers in an equal marketplace, so much as the marketplace forces people to experience alienation because of the commodification of their speech.

The marketplace metaphor is not just a stylistic token. According to Parker:If by no other standard, the objective measurement of frequency of usage alone justifies its [the marketplace metaphor’s] inclusion among the most influential metaphors in First Amendment analysis. In its early version, the phrase “free trade in ideas” appears 21 times in Supreme Court decisions, and in 114 federal and state cases total, since 1919. “Market place of ideas” (two words) and “marketplace of ideas” (one word) appear 69 times in Supreme Court decisions, and in 972 federal and state cases total. Thus, the metaphor is cited in its variants 1,086 times.11

The marketplace metaphor redefines discursive reality, which may have been more akin to Habermas’ ideal public sphere or an arena in which the least important or powerful ideas got equal footing, as Mill desired, but we have replaced this with a marketplace that has become hegemonic.12

In addition to the critiques above, I also argue that the marketplace does not allow for good speech to respond to bad speech because speakers are not equal in the marketplace. Speakers who would add “good speech” to the market may speak from a place of marginalization, so their speech automatically cannot be traded for as much influence. John Stuart Mill, the classic liberal theorist, wrote that if all of mankind were in agreement, minus one, we would not be justified in silencing that one, and silencing a discussion is an assumption of infallibility.13 Unfortunately, much of his advice was swallowed up in neo-liberal metaphors like the marketplace where, instead of thinking we can never silence one opinion, we allow opinions to be silenced if others are deemed more suitable, and if the majority settles on an idea then all others would fall to the wayside. The perfidious marketplace metaphor engulfed Mill’s guidance which was meant to be a great equalizer but, in reality, just strengthened systemic biases. The marketplace metaphor is a bastardization of Mill’s theory because it silences that speech that does not find footing in the marketplace, whereas Mill argued we are not justified in silencing any. Mill described a situation in which all ideas could be shared and vetted, but he did not describe a situation in which some ideas would be silenced because they could not find purchase in a metaphorical marketplace. Mill did not commodify speech in that way. Speech was valuable to Mill regardless of the influence it bought.

Mill’s position has often been used as an argument for defending hate speech, and I do not intend to take that position head on. However, I would like to re-frame Mill so that his position is not necessarily a defense of the worst speech possible, but a justification for defending the speech of the marginalized. Mill did argue that none should be silenced. But, by removing Mill’s argument from market terms, those who have less in terms of “resources” that the market would depend on have equal access to public discourse. So, in this sense Mill can be a double-edged sword. There are certainly those who have used his liberal theories to argue for the protection of bad speech. But if we remove him from an economic metaphor his framework provides a paradigm in which marginalized people have access to public speech.

It might be tempting to dismiss critiques of the marketplace metaphor as academic navel-gazing or the kind of theoretical legal discussion that constitutional scholars have, but that ultimately does not affect the everyday public. But this cavalier attitude ignores the constitutive nature of the law and judicial opinion. James Boyd White explains that the law is a branch of rhetoric – it is persuasion. Specifically, it is constitutive rhetoric, “for through its forms of language and of life the law constitutes a world of meaning and action: it creates a set of actors and speakers and offers them possibilities for meaningful speech and action that would not otherwise exist; in so doing it establishes and maintains a community, defined by its practices of language.”14 The language of the law helps construct our notions of citizenship. In White’s Justice as Translation, he describes what he sees as the connection between language and life, and language and identity, as reciprocal. He claims that “each of us is partly made by our language, which gives us the categories in which we perceive the world and which form our motives; be we are not simply that, for we are users and makers of our language, too; and in remaking our language we contribute to the remaking of our characters and lives, for good or for ill.”15 He further explains that this process of remaking is a collective process because language itself is socially constructed, creating a cyclical and indivisible relationship. Because of this continual pull and push within the language and identity relationship, both identity and language are always in flux. White’s protégé, L. H. LaRue addresses the narrative in his discussion of constitutive rhetoric as well, but LaRue’s work on legal rhetoric gives examples of specific narratives that feed into the larger narratives that define identity.

LaRue continues White’s ideas and expands them beyond White’s study of constitutional law to the process of judicial review. LaRue’s basic thesis is that the Supreme Court weaves narratives. The law as we understand it is based on fact to a certain extent, but even more so on the stories that the Court tells. He takes White’s notion of constitutive law and very specifically applies it to Court opinions. He is very adamant that, when he writes Constitutional Law as Fiction, he does not mean “fiction” in a derogatory or false sense. He echoes Tim O’Brien’s description of truth from his Vietnam novel The Things They Carried. That which is true may or may not be extrapolated from that which is factual. A fictive narrative can be just as true as any list of factual observations. As LaRue puts it, the ratio of fact to fiction is not necessarily the same as the ratio of truth to falsehood.16

LaRue challenges his readers to ask themselves, “What story is told in an opinion?” Opinions like that from the Dredd Scott decision tell a specific narrative about ownership of property and person and the rights of particular groups of people. And, as LaRue rightly points out, when a narrative becomes a part of the law it becomes a part of who we are as US-Americans.

LaRue points out that the Court seems to be aware of this story of identity they are weaving. He points to a 1920 case, Missouri v. Holland, in which Justice Holmes clearly lays out the connection between the Court, identity, and law: When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they [the words] have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough from them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.17

In other words, the Court recognizes that, as they interpret the law, they are both responding to and creating the way in which the United States is defined. The language of the Court and its decisions are an important part of the United States developing identity. A nation, like any living thing, changes and grows, and the opinion of the court is both a record and a catalyst in our evolution.

So, on the one hand, the Court writes and speaks for other legal professionals. It provides the tools for those in the legal field to build their cases and understand the law. But the law, and judicial opinion is included under that umbrella, is not just some theoretical text for the elites. It is a constitutive text that builds identity. In that sense, the words and metaphors that the Court uses are extremely important to the “ordinary” public. Our national identity is fashioned by them. Marx wrote extensively about commodification, and scholars in linguistics and anthropology have connected his thinking on commodification to language. According to Marnie Halborow, One of Marx’s unique discoveries was that generalised commodity exchange in capitalism embodies relationship between people as well as things, but that the commodity form obscures this. Two hundred years on from his birth, as capitalism has aged, his analysis has grown more relevant as commodities saturate social life in new and unexpected ways.

In sociolinguistics and linguistic anthropology, language is described as a commodity, an economic resource with a market value.18 Describing language as a commodity links language more concretely to political economy.19 Language commodification is said to occur in different situations. Languages themselves (e.g., English, Chinese) became commodities with value on the global market, language learning materials are packaged commodities for the educational market, language repertoires in niche sectors such as tourism acquire a commodity value on the labor market, and pre-scripted phone language used in call- centers are a form of commodotized language for work.20

This is all to say that the marketplace metaphor not only commodifies our speech, but in a Marxist paradigm, understanding language as a part of the political economy helps us see [understand] agents in relation to each other. Our language is a resource that is valued not just because of the meaning that is made in discourse, but because of the resources our identity brings to it. Griffin’s analysis of identity as property highlights the way identity is not just an intangible, but it adds or subtracts value to a commodity we are being asked to trade on in an “open” market.

Alienation and commodification: Two key elements of a Marxist critique

Marx described commodification as turning inalienable or gifted things into commodities or objects for sale.21 This is often described in terms of labor but, by applying this idea to the marketplace metaphor, one can see how it creates an environment in which speech is commodified. In the marketplace metaphor, speakers are workers or laborers and they are producing speech. The creation of commodities does not have to lead to alienation as it can be highly satisfying to pour one’s subjectivity into a product and gain enjoyment from the fact that another, in turn, gains enjoyment from that product or craft. However, in capitalism, workers are exploited insofar as the worker does not work to create something to sell to a real person; instead, the proletariat works in order to live. The worker is thus alienated from their product because they no longer own that product, which now belongs to the capitalist. In the marketplace metaphor, similarly, speakers are alienated from their very speech. Because speech is how we establish identity, build meaning, and maintain relationships, becoming alienated from those things is existentially disruptive.

A commodity is anything intended for exchange.22 A marketplace is a space in which goods are exchanged – an area for commercial dealings. By establishing a discourse in which speech is traded, it becomes commodified. The question at hand is, what is speech traded for? According to Justice Douglas, speech is traded for attention or people’s minds.23 This is a strange exchange because the value of people’s attention is not immediately clear. But the implication is that if one has people’s attention or people’s minds, one has influence. When speakers have people’s minds, they can show that their speech is the “best” speech in this metaphorical marketplace, and then they can barter for power. Thus, the marketplace is a place where speech is traded for influence and power. People’s minds are not just their fleeting thoughts. Their attention in this metaphor equals their money, their vote, or their allegiance. So, there is a double reification in this metaphor. Speech is a commodity which can be traded on the marketplace for people’s minds. That is the currency for which speech is bartered. So, there is a further sense of alienation, both from our speech and from our own consciousness. The marketplace metaphor estranges us from ourselves in both tenor and vehicle.

Laborers produce products and are then confronted by them as something alien – as a power independent of the producer. It is here, Marx argues, where “realization is its objectification. In the conditions dealt with by the political economy this realization of labor appears as loss of reality for the workers; . . . So much does labor’s realization appear as loss of reality that the worker loses reality to the point of starving to death.”24 In other words, the work of a speaker, their speech, becomes alienated from the speaker. The speech is reified.

Humanity’s estranged labor, in turn, estranges us from our own bodies. An immediate consequence of the fact that we are estranged from the product of our labor is estrangement from person to person.25 When we commodify speech and think of it as a reified thing, or a product of labor to be traded, we risk alienating ourselves from each other and from ourselves as individuals. Speech, then, should not be valued for any kind of influence one can barter it for or some value one can assess it for, as a marketplace metaphor implies.

#### That facilitates a biopolitical control of identity which denies the value of the aff’s labor and epistemically continues violence. Decommodification is preferable.

La Berge 15 [Leigh Claire La Berge, professor of English at Borough of Manhattan Community College. “Wages against Artwork: The Social Practice of Decommodification,” South Atlantic Quarterly 114, no. 3 (2015) NL] \*edited for gendered language

I want to investigate the problem of artistic labor and aesthetic value in an entrepreneurial age through Woolard’s practice. Michel Foucault’s (2008: 234) original and now oft-cited assertion “man has [people have] become an entrepreneur of himself [themselves]” makes a claim on the epistemological and ontological status of human labor today. Unlike the proletarianized worker of yore, the one who sells her labor power under pain of starvation or homelessness, who is organized by the “double freedom” of capital’s commodification of land and labor, the entrepreneur chooses freely when to buy and sell. Andrew Dilts (2011: 136) summarizes the discursive transition from worker to entrepreneur: [T]he theory shifts . . . from commodity production and exchange, instead centering its analysis on labor as an activity chosen from amongst substitutes . . . [that] leads to a second shift, the subsequent re-categorization of wages as income. Finally, this re-categorization allows for an analysis to focus on income streams as dependent on specific attributes of particular bodies [enabling a] radical shift in the understanding of homo oeconomicus from . . . “partner of exchange” to . . . “entrepreneur of himself.”

From labor-power owner to human-capital investor, from wage earner to capital-gains recipient, from worker to entrepreneur, these are the ideological stakes of Foucault’s description of our age, prescient in identifying discourses but ambivalent about their effectivities. Theoretically, it is not contentious to claim that Foucault moves us away from the commodity form and the abstract labor power that is its ur-content. That is, in some sense, the point. But an older tradition of commodity aesthetics exists that we must also move away from when we shift away from the commodity form. What are the aesthetics of the artist as entrepreneur as opposed to the “artist as producer” (Benjamin 1998) or the “artist as ethnographer” (Foster 1996)? How does the artist as entrepreneur offer a chance for a possible critique of the critical theoretical and social forms of our economic moment in a manner similar to the one in which commodity art framed the commodity form?

The romantic depiction of the artist as an individual does have a certain entrepreneurial aura to it. I am interested in highlighting the theoretical additions and subtractions that occur when art as commodity and artist as producer are reframed: “art wage” becomes future return on investment, and artist as producer becomes artist as entrepreneur. The move requires two conceptual transpositions, both tied to the status of labor. First, we must have arrived at the end of labor in a discursive sense. The artist no longer views herself as a worker, but as an investor in herself who protects her brand, itself an aestheticized capture of possible future value given present representation (see La Berge 2015: chap. 1). Foucault (2008: 225) says as much with respect to discourse: the entrepreneurial subject has a “conception of capital-ability which, according to diverse variables, receives a certain income that is a wage, an income-wage, so that the worker himself appears as a sort of enterprise for himself.” Second, we must have arrived at the limit of a certain material labor process. Here we find the argument that the real subsumption of labor to capital has superseded its formal subsumption. Antonio Negri describes this process as a moment in which “labour under capital has reached its irreversible completion, culminating in the quashing of any temporal externalities to capital’s process of valorisation. . . . [it includes a] subjection of labour to the continual renewal and transformation of the capitalist mode of production, as underpinning all forms of social activity” (quoted in Polhill 2008). Negri here makes reference to the familiar trope of “no more outside,” but I am more interested throughout this essay in how the referent to what constitutes labor itself has undergone a dramatic shift—what I will refer to as “the end of labor.”4 Within the autonomist tradition, the end of labor signals the move toward the biopolitical.

At the end of an age of labor, then, we arrive at the age of enterprise, and the laborer is transformed into an entrepreneur—an entrepreneur foremost of the biopolitical terrain of her own subjectivity. To think through the aesthetics of the move from labor to enterprise, we need to remember that the material and the discursive comprise different levels of mediation and that moving between them reshapes our own bearing on the aesthetic. My attention to the history and integrity of discrete categories from divergent theoretical traditions is meant to highlight the genealogical possibilities of continuity and rupture. What aesthetic approaches to the status of labor as commodity can we locate at the end of labor, after labor, and how does this problem intersect with commodity-art? I want to suggest that a logic and an aesthetic of decommodification is required in order to continue our conversation about how aesthetics and value are co-constituted in contemporary arts practices. Decommodification is a term that has been deployed in a political science context—used most influentially by Gösta Epsing-Andersen (1990) to discuss varying levels of welfare assistance to citizens in Western democracies. My borrowing of the term takes its basic conceit—the circumscription of commodified labor—and attempts to translate it into an aesthetic term compatible with the artistic practices of our entrepreneurial age.

Decommodification, I argue, has always been the silent partner of not only commodity aesthetics but also capital itself. In an age of the real subsumption of labor to capital, one cannot locate a new, uncommodified ground of that long hoped for “outside.” Rather, one must take objects, processes, anxieties out of circulation, making them available once again for the generation of a different value, and provide a model for doing so. Unlike Immanuel Kant’s non-teleological insistence of the aesthetic as such, the category of the decommodified that I introduce here has a purpose. But the “purpose” of this decommodified aesthetic is to “repurpose” by depurposing in the realm of labor, and this effect will ultimately reveal contemporary dimensions of time, space, and scale. Indeed, decommodification is the ideal economic pair to what Shannon Jackson (2011) has called social practice’s emphasis on “de-autonomizing” the work of art and what Ted Purves (2005) has simply called an aesthetics of “generosity” in his well-titled book What We Want Is Free.

## Case

### 1NC---Solvency

#### Vote NEG on Presumption:

#### 1---Materiality: The 1AC only names instances of violence through material discourse but offers no material strategies to resolve them. Words may be material, but not in the way they claim. The material force of language comes from law, policy, and medical discourse—not a 1AC in Hanover. The ballot doesn’t change diagnostic criteria, treatment protocols, or the institutions that pathologize trans sick women.

#### 2---Insulation: Their Awkward-Rich card is entirely about academia and the way Trans Studies needs to incorporate Disability Studies and maladjustment. But debate is structurally outside of the fields their scholars exist in. That means voting aff has no spillover into those fields – and you should care about this because it’s an argument THEY MADE in the 1AC.

#### This also applies to their Thom and Peters evidence. It’s hyper-specific to one book and is broadly about literary fiction – not debate or communication.

#### 3---Inherency: their articles about literary fiction, Trans Studies, and Disability studies have all been published and prove these scholars are already in conversation with each other. They haven’t introduced any ‘debate key’ arguments, so you should assume these academic fields will continue to evolve with or without the affirmative.

#### 4---No advocacy or method: if you can’t explain what the aff does and how it’s a meaningful departure from the status quo, you shouldn’t fill in the blanks for them when the 2AC rolls around because it proves the 1AC is insufficient on its own.

### 1NC---Labor Debates Good

#### Nothing about our understanding of, or relationship to, labor law is fixed – but understanding the intricacies and matrices of oppression are essential to reconceptualize a counter-hegemonic labor law.

Máximo et al 20 [Flávia Souza Máximo Pereira, Assistant Professor of Labor Procedural Law and Social Security Law, Coordinator of the Research Group Ressaber – Studies in Decolonial Knowledge, and Coordinator of the Extension Project Female Ombudsman, at the Federal University of Ouro Preto (UFOP), Researcher of the Labor and Resistance Group at Federal University of Minas Gerais (UFMG), Brazil, PhD in Labor Law jointly held by UFMG and the Università degli Studi di Roma Tor Vergata; and Pedro Augusto Gravatá **Nicoli**, Professor at the Law School and co-coordinator of Diverso UFMG – Legal Center for Sexual and Gender Diversity at UMFG, Brazil, former visiting professor in the Department of Gender, Sexuality and Feminist Studies at Duke University, PhD, Master's and Bachelor's degrees in Law, UFMG; “Os segredos epistêmicos do direito do trabalho,” 2020, Revista Brasileira de Políticas Públicas, 10(2), pp.512-536, DOI 10.5102/rbpp.v10i2.6765, **\*machine translated from Portuguese (Brazil) to English by Google Translate**]

Abstract

This article seeks to uncover the epistemic secrets of labor law. Through interdisciplinary, speculative theoretical research linked to dissenting epistemological fields, it demonstrates how the processes of understanding the foundations and categories of labor law are, in themselves, permeated by power. Power that is expressed in the form of coloniality, racism, sexism, and LGBTphobia. Not as external phenomena, but as constitutive elements of this knowledge. This demonstration of the epistemic nature of the matrices of oppression in the constitution of the labor-legal categories themselves constitutes its original contribution. The article brings together the counter-hegemonic theorizing of these subaltern fields and the elements of protected employment in Brazil, on four fronts. In the field of decolonial theories, legal subordination in the definition of the employment relationship will be discussed in its coloniality. In feminisms, in two times: onerousness, reread from the structuring universes of theories of social reproduction and domestic work, and non-eventuality relocated from feminist knowledge of care and its complexification of temporalities in the plural. In dimensions of contemporary radical black thought, criticism is made of personhood, especially through the lens of Afro-pessimism. And in the tensions of queer theory, the standardization of human bodies as the basic place of the idea of ​​a physical person is problematized. In each of the pairings, the results are new questions, which destabilize the legal-labor categories, by addressing the concern for the unveiling of secrets. In the end, it is concluded that there is a necessary expansion of the legal intelligibilities of the topics addressed and paths are indicated for another theory of knowledge of labor law.

Keywords: Labor law. Epistemologies. Coloniality. Race. Gender. Sexuality.

To cross the desert of the world with you

To face the terror of death together

To see the truth to lose our fear

I walked beside your steps

For you I left my kingdom, my secret

My quick night, my silence (...)

Outside in the veilless light of the harsh day

Without the mirrors I saw that I was naked

And the open space was called time

That is why with your gestures you clothed me

And I learned to live in the full wind

To cross the desert of the world with you

Sophia de Mello Breyner Andresen1

1 Introduction: telling secrets

This article wants to tell secrets. We want, as in the verses of Sophia de Mello Breyner, for labor law to leave its kingdom for a moment. We want, with it, to face the terror of death, the light of the harsh day and cross the desert of the world. The secrets we want to tell, in truth, seem secret to us. To you, reader, they may not even be. But for us, from what we know about this field, they are presented in this way. As interdictions, as mysteries. These secrets will be told in legal-theoretical approaches that aim, through the speculative method, to demarcate ways to review the order of things in labor law. It is, in truth, a set of provocations, which stirs up what jurists, even in the field of criticism, insist on hiding. Interpellations that raise suspicion, without mincing words, based on strong concerns. That see and accuse the colonial, racial, gender and sexualized foundations of modern labor and social regulation.

As a fact, the existence of racism, sexism and LGBTphobia in the worlds of (de)regulated work is perhaps not much of a secret anymore. But there is something beyond that, a factual description of oppression. The secrets we want to talk about are, in fact, not just factual. They have always been more than that. They are epistemic secrets. Secrets that, in fact, keep coloniality, race, gender and sexuality in the ways of producing, being and knowing labor law. They are not just secondary or external phenomena. They are constitutive of these ways. They are in the foundations. And they are expressed in the categories. This is the main thesis of our study: the theoretical demonstration of an even deeper nature, of an epistemic order, of these matrices of oppression in the conception of labor-legal categories thought of based on a homogeneous and progressively abstracted place in the law. It is a first answer to an ambitious question: how and why do labor-legal categories still hide the place of enunciation of their modes of production, of thinking and rethinking, of concrete operation in concrete lives?

Breaking with these mysteries opens the doors to a re-elaboration of the very thinking of the foundations of labor law. Giving form to discomforts that, because they are so great and so deeply buried in the modes of understanding of the labor-legal field, necessarily put us on the path of a theory of knowledge on other bases. They provoke a legal sphere that, itself, is the offspring of insurgency. But that does not for this reason (or perhaps exactly for this reason) can stop permanently metabolizing its contradictions. Of taking part in this exhumation of buried secrets.

We will construct this inconfident legal matrix essentially by raising questions. These are questions raised by the juxtaposition of the foundations of modern labor law (and the ways of thinking about them), deepened in the employment relationship, and of dissident epistemic fields. In radical revisits made with the light and shadow of decolonial contributions, feminisms in their many expressions, contemporary black theories (especially Afro-pessimism) and queer criticism.

Telling secrets, we know, is always risky. The great risk of the movement proposed here is that it distorts what it wants to reveal. To this end, an introductory note that survives unscathed after the revelation of secrets: labor law, in the field of legal relations, is one of the greatest achievements of the subalterns of the modern world. Not for all, not homogeneously, not triumphantly, but it is nonetheless a very important social achievement. And this achievement is constantly threatened. For many decades, it is true, but especially now. In addition, labor law, as we will see in the following pages, has also contributed to the establishment of racism, colonialism, sexism and LGBTphobia in many ways. And, therefore, it should be criticized without nostalgia, romanticization or attachment.

But, note: its contemporary destruction is not related to this criticism. It is being destroyed to serve ostensibly placed economic interests, which constitute a series of, from a scientific point of view, lies. The lie that labor protection is expensive, that it impedes development, economic growth and job creation. That labor law, after all, protects too much. There is abundant scientific proof that all of this is a lie 2. **[FOOTNOTE 2]** 2 For example: BLS. Bureau of Labor Statistics. USA. International Comparisons of Hourly Compensation Costs in Manufacturing. 2012. Available at: https://www.bls.gov/fls/ichcc.pdf. Accessed on: April 16, 2020; CESIT, Center for Trade Union Studies and Labor Economics. Critical contribution to labor reform. Campinas: Unicamp, 2017; DEAKIN, Simon. The contribution of labor law to economic development & growth. Cambridge: University of Cambridge, 2016. **[\FOOTNOTE 2]**

When we reveal what we see as the epistemic secrets of labor law here, then, in a certain way, we are also defending it. We want for it a destiny radically opposite to the one that is being drawn up at the present time. A destiny that exposes and faces the difficulties that secrets have imposed on it. The simple destruction of regulated, typical and protected employment, as has happened, is nothing more than a deepening of coloniality, racism, sexism and LGBTphobia. It is the bodies marked by these elements that suffer the effects of precariousness in work first and most strongly. Destroying labor rights would be to bury its epistemic secrets even more deeply.

Methodologically, the article presented here is the result of extensive and interdisciplinary legal research. It promotes pairings of counter-hegemonic epistemological fields and elements that the literature usually understands as structural to labor law, in the employment relationship in its concept and elements. Thus, decolonial theoretical contributions, contemporary black thought, feminisms and queer theory lead the research to its findings. In all these fields, the text will attempt to bring introductory elements and situate their main debates. Given the certainty of the impossibility of doing so adequately for such broad debates, it will indicate, in a footnote, one or two introductory readings to each of these vast theoretical fields, as contributions for further study.

Based on the approaches, which take as a starting point the concept and elements of standard employment in Brazil (according to articles 2 and 3 of the Consolidation of Labor Laws), the findings of this article deviate somewhat from the rule of the most conservative methodological schools. This is because they are, in themselves, research questions. And it is quite possible that they are not exactly new. If we consider the struggle of subordinates to speak3, they may have already been asked. But they are only being heard by the labor law academy now, in view of its spaces of privilege. All of this makes this article the result of exploratory research, which engages in the formulation of questions angled in a different way, in an expansion of intelligibilities that may prospectively affect the labor law field. It is, surely, and in short, a text of theoretical, critical, interdisciplinary and speculative research, which offers as a result the expansion of knowledge in the field.

In this article, we will take a theoretical step. We will examine, driven by questioning, how the most central elements of the conceptual architecture of the standard employment relationship have unspoken epistemological affiliations, which are reproduced within the limits of legal thinking about these elements. How their abstract conceptual affirmation will specifically affect certain spaces, people and bodies. And how an interpellation based on questions that destabilize these epistemic affiliations is essential for the process of recreating labor law. All of this in a movement of simultaneity, similar to that which Chandra Mohanty4 sees for Southern feminism in the face of hegemonic feminism: destabilizing and deconstructing, in order to create and construct.

This exercise of revelation/destabilization/reconstruction will be carried out, in a relatively concise manner, in four dissident fields, which will be brought closer to the faces of what is the epicenter of the modern architecture of labor law: the standard employment relationship, in its five factual-legal elements introduced in arts. 2nd and 3rd of the Consolidation of Labor Laws. The proposed pairings are as follows: (i) in the field of decolonial theories, legal subordination in the definition of the employment relationship in its coloniality; (ii) in feminisms, in two times: onerousness, reread from the structuring universes of theories of social reproduction and domestic work, and non-eventuality relocated based on feminist knowledge of care and its complexification of temporalities in the plural; (iii) in dimensions of contemporary radical black thought, a critique of personhood, especially through the lens of Afro-pessimism; (iv) in the tensions of queer theory, the standardization of human bodies as the basic place of the idea of ​​a physical person. Each of these epistemic fields would have much to ask and say about the ways in which each of the elements of employment were thought of. The approaches we propose are justified by the centrality of the themes in the agendas of reflection and struggle of these fields.

Having concluded the methodological moment, which presents itself in a “safe” way, we confess: this article intends to offer uncertain questions. They are risky, precarious and, above all, without many answers. These are the questions that concern us now. But they are not really “ours”. Firstly, because they were not produced by us alone. They arise from many interactions, in different planes of space-time5. Secondly, because we do not want to claim ownership of these ideas. They are a future. For us, the exploration of this article bets on this gesture of going further, knowing the risks. In another future. Take these questions. Tell us other secrets. Advance around, in the same line, against them. Perhaps they will serve to update the critique and help us to think about labor-legal thinking itself in a different way.

2 Decolonial theories and legal subordination in subalternity: the (non-)standard employment relationship

The first proposed approach, we will see, will reach the uncomfortable conclusion that subordinate employment, a typical category of labor law, is marked by coloniality. It is thought of from this perspective. And, with this, the question will be: how to decolonize labor law? The starting point, or the backdrop, however, is much more general: the formal end of the organization of the colonial world did not put an end to the expression of the powers that constituted this arrangement in the past and that continue to constitute the arrangements of the present.

The theoretical set of decolonial studies6, with its many nuances, variations and disputes, is based on this common assumption. Of a certain crossing in time and space of colonial power. This occurs on multiple levels, ranging from economic to political and legal power, from social relations to scientific and academic knowledge, from experiences and norms of sexuality and gender to the racial division of the world. This dissenting and growing field of studies and social praxis has been denouncing and opposing the dynamics, functioning and permanence of these modern/colonial forms of power. Questioning and reopening concepts, institutions, practices, ways of being and living, to reveal how much of what is considered objective or neutral, natural or timeless, is impregnated with, constituted by what can be called coloniality7. Geopolitically referenced patterns of power that sustain the institution of what is understood as modernity, being its necessary counterpart, in relationships that are projected, reinvented, in time and space up to the present.

Our entry is the approximation between labor law and decolonial knowledge, precisely because of the centrality that the Modernity/Coloniality Group grants to Latin America in this debate. The group, formed in the late 1990s, is made up of Latin American intellectuals from various universities in the Americas. “The collective carried out a fundamental epistemological movement for the critical and utopian renewal of the social sciences in Latin America in the 21st century: the radicalization of the postcolonial argument on the continent through the notion of a ‘decolonial turn’”8.

The theoretical and empirical developments of this matrix in terms of labor relations and legal regulation also justify this choice. They also allow for an exercise in the body-politics of knowledge9, given that we are Brazilian researchers and experience this labor reality. This theoretical field will help us understand, or at least ask ourselves, how the employment relationship (and legal subordination, its central element) is imbued with coloniality.

For Aníbal Quijano10, coloniality is this complex mode of permanence of the power structures of colonial modernity in each field of social existence. Permanence that occurs, for the author, above all through the creation of the geopolitical category of race by the colonizer. A category that is also strongly related to the world of work. A systematic racial division was imposed on it: “Indians” were confined to the structure of servitude, especially in Latin American countries colonized by the Spanish, and “blacks” were enslaved. The Spanish and the Portuguese, as the dominant white race, could receive salaries, be independent merchants, artisans and farmers. Only white nobles could occupy the middle and high positions in the colonial administration, civil or military11.

From there, Quijano12 specifically elaborates the idea of ​​a coloniality of labor control: “the control of a specific form of work could at the same time be the control of a specific group of dominated people”. Also from this same matrix, which superimposes racialized labor controls, we can derive a coloniality of labor13, a coloniality of law14 and, at the intersection, a coloniality of labor regulation15.

We will arrive at these concepts through their material expression, evoking their everydayness. A simple example, from our lives, which is certainly reproduced in some way around yours, dear reader. In front of the main entrance to the campus of the Federal University of Minas Gerais, in Pampulha, Belo Horizonte, where we studied a few years ago, there are always some black women selling cakes, snacks, coffee, drinks, in Styrofoam boxes placed on the ground. Early in the morning, students, university employees, outsourced workers, people who work at the gas station across the street, people passing by on their way to work, in short, a huge number of people buy from these women. And this scene is everyday in the cities of the so-called global South. And also in the outskirts of the metropolises of the North.

What street food vendors do en masse, repeatedly, in proportions that are not reflected in global statistics and institutional categories of labor treatment, is fundamental in many ways. Firstly, because this is the life lived by a huge universe of people, for whom the world of work is this world. But it is also fundamental to the production model. For the circulation of goods produced on a large scale.

In our mundane example, the preparations involve: wheat flour, eggs, chicken, Minas Gerais cheese, ham, soybean oil, cans of Coca-Cola, small bottles of local guarana, coffee powder, sugar, napkins, running water, cooking gas, electricity. Large-scale intensive agricultural crops, industrialized products from multinationals, public services with tariffs, local raw materials, embodied know-how. All of this at the same time. And in the form of providing cheap food in a public place, full of working-class people coming and going. And students at a public university.

The direct and indirect ties of this form of work are very dense. And deeply marked by coloniality. This is because the position in the social geography that this worker occupies is defined by a specific relationship, perceived socially and institutionally in its own way. And there are many forms of work that follow the same logic. Most workers around the world work in similar conditions. Precarious, vulnerable, informal are variations in the adjective that, depending on the context, have more precise meanings, but which all refer to these universes. In the eyes of the legal-labor categories, which are the ones that interest us most directly here, all of this is “non-typical” work. This is because subordination, which is the most important legal and factual element for the characterization of regulated employment in the world, would not appear in its “typical” form. There is no legal state in which an individual employee accepts the power of a defined employer regarding the way in which he or she performs his or her work.

The labor lawyer trained in the classical lines of protective humanism might be quick to retort: ​​“but this is indeed subordinate labor. It should be understood as employment and protected. It would be enough to identify the employer and that would be it”. This manifestation of an almost legal-protective instinct, although important for a strategy to demand labor rights, does not help us understand the complexity of this scene. If it were that simple, the statistical data would not account for the massive prevalence of these so-called atypical and invisible forms of work, especially in the area of ​​self-employment, in social reproduction and in the entanglements of informality.

This is where the coloniality of subordination in labor law is revealed. Legal subordination, in its conceptual history in Europe, starts from the observation of a concrete condition of socioeconomic, material subordination. In the path of conceptual decantation, it moves towards abstraction in order to accommodate the maximum possible number of workers in the concept. It is not just technical, it is not just economic; subordination becomes legal, as any labor manual will teach us. It is this general and abstract legal state through which the employee undertakes to accept the employer's orders regarding the ways in which he or she should perform his or her work. This process of becoming abstract is, in fact, fundamental in legal technique, so that various situations can be broadly classified within the concept. A logical access door is consolidated, in a structurally simple syllogism: once the factual elements that indicate subordination are present, the abstract legal category is applied and the protections are extended.

But what we must remember here, along the lines of a geopolitics of knowledge, is that this is a conceptual itinerary produced in a time and place: in Europe at the turn of the 19th to the 20th century. There, typicality is referenced in a bilateral relationship that is contractual, in the Anglo-Saxon and Latin European matrix, or of status, in the Germanic matrix. But it always occurs between employee and employer, in which power is expressed in such a concentrated way that the operation of abstraction of a state of legal subordination can be operated. In other words, a category, historically very relevant, is forged in light of this socially common relationship in those urban, European, industrialized spaces of the time. It is a legal category that brings with it the social struggle for it, as is evident. Subordination as an operative concept in law, in this sense, is a legal achievement of a struggle. But of a localized social struggle.

And much was and continues to be left out. The universalization of the category of legally subordinate labor is an invention, like many other universalist inventions of modernity. It leaves out many subordinate forms of work, which were and still are today widely distributed in the social fabric in the key of the coloniality of power. But also of a coloniality that expresses itself specifically in racialized labor and in gender16. These relationships prevail in the poorest countries of the global South, in the form of self-employment17. And, generally speaking, they are carried out by specific bodies, in terms of race (black) and gender (women).

Therefore, “free” and subordinate labor, which represents the core of labor protection, was and continues to be a legal construction based on and intended for a specific worker subject. Labor standards have color, class, are gendered, and have a determined origin. 18 We can even state that, in the process of importing theories of legal subordination, without recognizing the place of enunciation and without the proper decolonial translation of knowledge, the connection between labor law theory and its place of applicability in Latin America is radically fractured. 19 After all, the most oppressed subjects in labor relations are the least protected by labor law.

From a decolonial perspective, subordination in Latin America shows its contradictions. It reveals its legal and Eurocentric abstraction, imported in an epistemic and social project imposed on Latin American reality. And its concrete social expression situates it as an instrument that is also implicated in the coloniality of power, knowledge and being, which feeds and maintains the subordination of bodies in the South.

This is precisely why, even if a job is legally subordinated and protected, this status is not sufficient to undo the underlying condition of subordination arising from coloniality.20 Labor law is implicated here in an enormously complex mechanism of power. At the same time that it protects and positions itself as an instrument of social struggles, it can help to create, legitimize and maintain such circuits of inequality. Such inequalities also remain and grow from within: legal absorption in the employment relationship does not equate to social protection for these subjects.

The maintenance of wage inequality within the framework of regulated employment is proof of this. Black women, even when formalized, continue to earn systematically less.21 Likewise, the gendered and racialized distribution of precarious employment statutes in labor law is evidence, as they break with the fiction of a closed typicality. Fixed-term, zero-hour, intermittent, part-time, hourly, day labor, in old and new forms, have always been socially distributed according to social power keys such as gender and race. Social power in coloniality.

However, even so, the majority of Latin American workers still aim to achieve legal subordination as a privileged place of subjection in contemporary capitalism22. For such subordinate subjects, legal subordination is still a horizon, a chimera, since theirs are the cheapest and most disposable bodies under all labor parameters.

Therefore, in short, legal coloniality is expressed in typical labor law, in the legally subordinate employment relationship, in at least three structuring dimensions: (i) by the subordinate margins: in unprotected work, essentially constituted on the border of self-employment and unpaid reproductive work; (ii) by legalized precariousness: in the precarious typicality of labor protections in the global South, which includes both systematically practiced labor frauds (pejotização, for example), legally tolerated and reinforced frauds (outsourcing, for example), legally constituted inequalities (regulation of domestic employment) and total legal exclusions (non-regulation of domestic day laborers); (iii) by the implosion of the protective core: in the constant destructive force of what is protected, of the formal, by the loss of rights and the proliferation of more precarious hiring statutes, redistributed in the light of social markers of difference.

In this third form, in fact, the complexity of the coloniality of the legal regulation of labor is outlined. Protected employment is not the result of legal coloniality just because it leaves many people out, with a hegemonic definition of the epistemic subject of labor law. Those who are within the core of protection are also challenged by the same colonial forces. Coloniality knows no formal legal limits. It is always trying to expand. Destroying protected employment, social rights, and existing labor protections is also one of its dimensions.

That is why contemporary legal subordination turns into a trench. The defense of typical, legally subordinated employment, as a basic category of understanding and operation of labor law, appears as a resistance strategy in this power struggle23. So do the expansive conceptual inflections of subordination24. All of this, it seems to us, is part of the counterfires against coloniality and its daily dynamics. In countries of the global South, the sociopolitical defense of inclusion through employment has historically been a key element in the fight against coloniality.

However, there are major disagreements in the field of labor criticism. Feminist literature, in particular, points out, even more vigorously, the problems of standard employment in the face of social reproduction work. We will return to this topic shortly, but let us anticipate the criticism consolidated in the position of Leah Vosko25. Vosko understands that, as long as the typicality of standard employment is maintained, within what she sees as “employment-centrism”, what we will always do is what gives the name to her most famous book: “managing the margins”. The protection of what is today a huge universe of precarious forms of work will necessarily involve, for her, a review of standard employment, legally subordinated, as a basic category.

This thus marks the ground for other ways of thinking about labor law. In the field of criticism, those who have been content with legal subordination have failed to reveal the assumptions on which it is based. Those who simply want to critically dismantle protected employment are also wrong. Both positions fail to understand it in its ambiguity in the power struggles within the framework of coloniality. Thus the questions remain: what and who does legal subordination serve? Is it time to decolonize it? And how? Is it possible to think of a labor law that takes to heart the dynamics of what is not typical subordinate labor? How can epistemologically plural legal thought contribute to this? Although these are very difficult questions, and reflecting on subordinate employment at a time when it is itself under threat makes it even more difficult, the process of decoloniality is not a mere detail that can be left for later.

3 “Time is money”? Feminisms and time-values ​​in social reproduction and care

No. For women, time has not been money. Challenging the aphorism of dubious origin that represents a caricature of the capitalist mode of production of life and sociability is something that feminisms have done in many ways. In the relationship between work, time and value, political economies (both classical and critical) have historically left out social reproduction and care. Or they have read them as something secondary. Socio-legal theories have reinforced common sense: it is even possible to admit that the work of social reproduction generates economic value, but it is not fully considered legally. Nor is it systematically remunerated.

Much of what constitutes these feminine universes of work in social reproduction and care is transmuted into something else. In affection, in magic, in love, in obligation, naturalization, in candor, in instinct, in destiny, in a thousand expectations and social, moral and religious roles that try to hide the strength of these times and values ​​for the production and sustenance of life and the economy.

Our text enters this dispute of concealment and visibility by bringing together the dimensions of standard employment related to time and value and feminist critiques of social reproduction and care. To demonstrate that what labor law understands as time and value is something exclusively mercantile and still thought of in a structurally sexist way.

This is a complex approach. The transversality of feminist reflection and practices, in the plural, is the entire world26. The richness and rigor of feminist production in various fields is directly proportional to the complexity of the position of gender in social relations, always intertwined with other markers, such as race. Bringing together such distinct things as black, queer, liberal, decolonial, lesbian, Marxist and radical feminisms in a synchronic and simplistic way would be a disservice to understanding what drives these fields. Even the feminisms we will discuss more directly, those of social reproduction and care theories, have important contrasts in the face of a shared phenomenon. Even if we believe in epistemological bridges (LAO-MONTES; BUGGS, 2014) in these fields of dissent, we would not be able to account for their complex construction here (or perhaps ever). Despite this, such universes of complexity are transformed into something common for our brief reflection here: time-values. This does not mean that the impact of this will be the same on the lives of all women.

The academic production of feminisms has already been substantially confronting the reflection of the values ​​and times of social reproduction27 and care28, also in their articulations with race29. We will not ask any particularly new questions, in fact. From social criticism in general, through feminist legal criticism, to feminist criticism in labor law30, these questions have been widely developed.

Our entry into the debate here perhaps formats the issues in a different way. By associating them with the understanding of the elements of standard employment. Specifically by illuminating the ways in which onerousness and non-eventuality are constituted and thought of, and end in two sexist inflections: either they legitimize and cover up what is a systematic theft of women's time; or they make their valuation and measurement simplistic. In both ways, labor regulation has contributed to the devaluation of social reproduction and care, with the adoption of androcentric measurement parameters. In a sexist labor law, care time is either disregarded as work time or flattened and transformed into something linear. And its value, likewise, is simply not recognized and not remunerated or reduced to the logic of monetary measurement.

Our first approach is, then, by rereading the synallagmatic element of the standard employment relationship, its onerousness. This approach is made in light of social reproduction theories, of a more materialist nature, directly or indirectly linked to Marxist feminism. To get there, let us recall how the most basic concept of onerousness in labor law is almost a factual-legal step-by-step: work that is objectively remunerated will be onerous. But if it is not factually remunerated, it will continue to be onerous if there is what the literature understands as the subjective dimension of onerousness, which is an intention to provide compensation.

For social reproduction activities, feminist studies, as we said, are abundant in demonstrating how a huge volume of unpaid work is performed by women. We are not talking here about externalized domestic work, contracted to women, generally black, at low wages. For this, onerousness is not formally contested in law. What seems to us is that even for unpaid work, in the home itself, there is a complex counter-performance that is inherent to this logic.

Gender roles assume positions of power from which material and immaterial tasks in domestic environments (washing, cooking, caring, creating, producing life, reproducing society) are distributed. Women do not undertake this work simply because they want to. They may even express desires in this direction. But there is a structural element that draws them into this space, which operates on a plane distinct from individual will and subjective perceptions. Unpaid reproductive work, in light of this literature, seems to us to be structurally counter-beneficial. And it retains this characteristic even if affection, a sense of responsibility, love, or any other feeling is present.

But here, once again, labor law insists on hiding its gendered foundations. It continues to operate in a sexist manner to say that, unless we are faced with hired domestic work, externalized, transformed into a commodity (that is, racially commodified and precariously regulated domestic employment), there would be no counter-beneficial intention in the typical arrangements of social reproduction. It would be a graceful job, driven by something else, that would make it different. Today's legal practice (and not 10, 20 or 30 years ago, but today) confirms this way of thinking repeatedly. A case tried in 2019 by the Labor Court of Minas Gerais is a good example of this understanding based on legal practices.

A story well known to all: a woman apparently took care of her older brother, who was sick, accompanying him as a caregiver, day and night, until his death. She informally received monthly amounts close to a minimum wage from his estate, as supposed financial assistance. Then, when he died, she filed a labor lawsuit, given the years she spent (pardon the obvious) working. Some dispute probably arose over the division of assets. In any case, in this case, the worker is claiming from the estate some unpaid remuneration, recognition of an employment relationship and the corresponding labor rights.

The sister-caregiver had her request rejected in the first and second instances, based on the same grounds. In the first instance, the judge, a man, stated: “it is common for an elderly and sick person to be welcomed and supported by family members (siblings) without the intention of an employment relationship”31. In the second instance, the judge, also a man, expanded: “the presumption prevails (...) that the help provided to the sibling was a result of the kinship relationship between the parties, of an affective and collaborative nature”32.

The most far-reaching labor manuals all go in the same direction, of naturalizing this lack of onerousness. Mauricio Godinho Delgado33, for example, mentions in a simple way: “this is what happens with the situation of the wife or partner in relation to the husband or partner, in view of the domestic work: here the onerousness of domestic employment is not accepted”. And it is not only Mauricio who does this. It is in practically all manuals in the area.

When the so-called scientific body of labor law thinks theoretically and puts into motion in judicial practice an onerousness in these terms, a signal goes off. The epistemological dissent of the theorists of social reproduction is still a strong dissent. The state of affairs of legal thinking remains sexist. But what to do? Is it possible to think of a legal response that makes this reading more complex? The issue has been made visible through tactical strategies such as “wages for domestic work” since the 1970s34. And specific labor law criticism, in its categorical approach, has already demonstrated that this is a political provocation of utmost importance, but that the way in which standard employment conceives its structure of onerousness (and subordination) would make it an inadequate category to deal with unpaid reproductive work35.

The question that remains is: how to make labor law care? How can we think about normativity based on the valorization of the lives of those who work in social reproduction without being paid? Not that the answer should be a binary, direct change, such as recognizing the employment relationship and extending rights. This is, without a doubt, a central strategy for hired and paid domestic work. The historical struggle, still ongoing, for labor rights for black and poor domestic workers in Brazil and around the world confirms this36.

However, for women responsible for social reproduction in their own families, the answer will probably not be the same. Their social and labor protection is a different issue. But it is no less urgent for that. In any case, the naturalness with which the clichés of devaluing social reproduction as work transformed into a duty of affection are repeated today around us hides problematic epistemic affiliations that must be exposed radically. Denaturalized.

Another side of the same coin reveals that it is not just about value, but how this value is expressed in time. And labor law is well aware of the centrality and complexity of time. So much so that the factual-legal element of time, the non-eventuality, is almost a cognitive challenge. Baroque legal theories are added to outline a habituality that is a tendency not only temporal, but also of connection between the individual, their work, who receives the fruits of this work and how all this occurs in time. And labor time is also thought of in a sexist way.

Labor law, by using the dichotomy between free time and productive work time as an epistemological basis, causes reflections to be limited by the boundaries that identify economic time with mercantile time. Its analyses of temporal organization and control come from modern capitalist production, with characteristics of a typically masculine homogeneity in production times.

This modern dichotomy disregards something that is central to women's time at work: the subjective dimension. The imposition of the mercantile concept of time in the home space makes the subjective dimension of time invisible, which may not result in a concrete activity, but requires a continuous mental state and permanent energy from women37. This is a dimension of time that is intangible to the parameters of economic and labor measurement based on masculinized experiences of production. This subjective dimension incorporates layers of time that plan life, represent anxieties and desires, manifested by mental burdens of the present and future, in a future of endless doing38. This subjective dimension of time is not reachable by the androcentric criteria adopted by the modern matrix of labor law, since it deals with labor activities constituted by the continuous non-quantitative spectrum, which do not generate a direct and tangible material result39.

Here, the epistemologies of care challenge labor law because care activities are more than just occasional. They are permanent. Not only in terms of clock hours, those supposedly linear and measurable, or calendar days, months and years, but in terms of a state of subjective mobilization for care. A mother of small children who suffers when she leaves for work; a grandmother who “watches” over her grandchildren so that the mother can work; a daughter with elderly, sick parents; a woman with her partner undergoing medical treatment; a domestic worker who, living in a slum, leaves her teenage children at home; they all know that the time of care is not so linear.

That is why, in this article, times are put in the plural. Not to sound poetic or pretty. But because they are temporalities. A nanny who leaves her children at home to care for other, wealthier, white children, leads her life in different temporal planes. There is a sense of interimness, of provisionality in the time measured in typical work. Generated by a state of non-disconnection with this other place of care, of the care of hers. The time of concern, of anticipating needs, of the anguish of absence, of attempts to care from a distance, all these times are implied in care. And they are all far from being occasional. They are the antithesis of eventuality.

In other words, those who care find themselves permanently crossed by the times of care. Which sometimes expand, sometimes retract, sometimes call immediately, sometimes dissipate a little, to soon return. But they are always there. This condition overflows, exceeds even the most temporally stable theories of non-eventuality, such as continuity. It is not that work is only continuous. It is permanent. It is omnipresent. And, considering the centrality that this work has in the constitution of individuals and sociability, of the material production of life and relationships, there should be no hesitation: these are times that deserve the broadest legal protection.

For the protection of this time, labor law, as it stands, is inadequate. Regina Vieira40 demonstrates this, in line with other legal criticisms based on feminist epistemologies. Regina demonstrates how the conception of time in labor law is entirely masculine, in the structuring of working hours that disregard care activities. In dialogue with feminist criticism in labor law, she proposes that, at the very least, labor standards consider this dimension, incorporating it into the idea and structure of working hours, in order to enable a model of “public responsibility for care and the promotion of gender equality”41.

But what will this model be? What to do with the dual challenge of care? How to make it visible, value it and control its time, on the one hand, and deal with the impossibility of measuring time linearly and value monetarily, on the other? How to think based on the experience of permanence, of subjective mobilization, that care projects into the lifespan of caregivers? What to do, in labor law terms, with the fact that for women care is more than occasional work, it is almost permanent? Should this have any relevance for labor law? In line with labor feminist criticism, the answers seem to necessarily have to involve controlling the time spent not providing care. Working hours radically rethought, reduced, accompanied by legal and institutional strategies to make care time visible and its egalitarian redistribution in terms of gender and race.

4 A dehumanized personality: black fungibility and necropolitics

Personality, for labor law, is the expression of the recognition of individuality, of the unique character of the person who works in an employment relationship. It is, in the classical understanding, a non-fungibility of the person. In Latin jargon, intuitu personae. Something personal, or very personal, in the seal of a singular character of each person and of the equally singular trust that constitutes the relationships established by them. Here the labor adjective is so much, so emphatic, that it almost seems to want to hide something. A humanity that has to reaffirm itself a thousand times perhaps hides its opposite.

In modern social relationships (including labor relations), supposedly free, for certain people perhaps there is not this same non-fungibility. This simultaneous recognition of a general universality as a person and of a singularity in contractual, personal trust. Because, perhaps, there has not been a homogeneous production of this human, not even in the abstract. This is what some contemporary theories based on African diasporas42 radically expose.

Our entry point into the questioning of labor law and the supposed personal nature of its relations is the theoretical framework of what can be called Afro-pessimism, as well as some intersections with feminism and other strands of black thought. Here, it is also worth noting that there is an enormous plurality of ways of understanding43 blackness and Afrocentrism, which makes a unitary vision of black thought something profoundly inadequate44. Our choice to engage in dialogue with Afro-pessimism comes from the radical nature of its central propositions, which reject the points of relief traditionally offered by theories, even if critical. Afro-pessimists are emphatic: in this world, as it was produced, with these categories, there is no possible solution. This is because “irreconcilable regimes of violence create a structural antagonism between humans and blacks”45. These regimes are so specific that they do not allow for analogies with other subordinate positions, since the human is constituted, as we will see, from a fundamentally anti-black matrix.

We propose to think from this universe through five linked concepts. Perhaps too quickly, given that they are social and philosophical concepts much more complex than the brief excerpt of them that we will present here. But this evocation of them seems to us, in the end, to provoke something important in the legal-labor categories. These are the concepts: social death, the ontological condition of black men and women, non-being as the foundation of being, fungibility and necropolitics. This conceptual itinerary demonstrates that, for black men and women, the personality of employment is perhaps the contemporary legal form of its opposite in category and substance.

We start from the structural continuities pointed out by Afro-pessimist thought between modern slavery and our time. Not as remnants after a triumphant abolition, a jubilee, but as the result of institutional and social metamorphoses that maintain certain fundamental conditions in force. Hence the importance of reflecting on slavery in its structural relationship with labor law. Slavery, for Orlando Patterson46, is linked to the idea of ​​social death, and unfolds in three dimensions: “slavery is the permanent and violent domination of uprooted and generally dishonored people”. Exposure to violence, uprooting (or denial of genealogical origins) and general dishonor are the existential conditions of slavery. Contrary to what is often reproduced in historical literature, it is not unfree labor that defines modern slavery. This forced labor is a correlated phenomenon, historically carried out and very important, but not indispensable for what, for Patterson, is a condition of another order.

Here, space is opened for the second concept, linked to the first: that of an ontological condition of blackness. Frank B. Wilderson III47, in dialogue with Patterson, will say that “the Slave is not a worker, but an anti-Human, a position in the face of which Humanity establishes, maintains and renews its coherence, its bodily integrity”. Slavery assumes the plane of being, producing this ontological condition of non-humanity.

In Brazilian thought, and through other theoretical paths, of Foucaultian origin (and not necessarily aligned with American Afro-pessimism), Sueli Carneiro48 also arrives at a similar conclusion. That of non-being as the foundation of being. Sueli says: “in the case of blackness, its irreducibility consists in its displacement to an alterity that institutes it as the dimension of the non-being of the human”.

A careful understanding of this process is essential to perceive the role of legal-labor categories in the denial of humanity to black men and women in a new arrangement. After the formal abolition of slavery, much of what was materially expressed was repositioned, but the constitutive elements of this ontological distinction remained very strongly present. The contemporary (re)constitution of the non-being, of the process of recreating this non-human, has a different legal form. It will involve the formal, universalized recognition of the being as a person. The affirmation, now generalized, of legal personality, that is, of the capacity of beings to establish relationships based on will and trust. None of this, however, will necessarily modify in a structural and ontological way the condition underlying the concept of human, produced in history in opposition to the black condition.

This is where the concept of fungibility, developed by Saidiya Hartman49, helps us understand how the issue goes through and survives the changing winds. To take another step towards a labor-legal critique, it is necessary to note, with Hartman, that we are not only in the register of political economy, of the economic values ​​associated with work, but in the domain of a libidinal economy that always positions the black body in a way that, for it, is fungible. Hartman50 says, in such a cutting way that it justifies the longer direct quote:

The relationship between pleasure and slave ownership, both figuratively and literally, can be explained in part by the fungibility of the slave — that is, the joy made possible by virtue of the endemic substitutability and exchangeability of the commodity — and by the extensive capacities in external objects and people. In other words, the fungibility of the commodity makes the captive body an abstract and empty vessel, vulnerable to the projection of the feelings, ideas, desires and values ​​of others; and, as property, the dispossessed body of the enslaved is the substitute for the master's body, since it guarantees their disembodied universality and acts as a sign of their power and dominion.

In other words, the fungibility of black men and women, based on their constitution as non-human, makes them an open and mutable vessel for the desires and powers of others. The body is bought, sold, rented, exchanged as a commodity, from an economic perspective. But that's not all. There is an operation of a libidinal nature, which involves the desires and pleasures of non-blacks, projected onto these existences. And this dimension has been solemnly disregarded by legal literature.

But what does this have to do with legal-labor personhood? Doesn't it mean exactly the opposite, a non-fungibility of those who work? This is where a crack opens up in the operational dimension of the legal concept, when related to the racialized universe of social relations. Personality, it seems to us, gives a new legal form in labor relations to the black fungibility that Hartman speaks of. And it does so by formally denying fungibility. The labor relationship begins to be seen as one that is founded on specific trust in a person. This personal character, in the case of black people, must be thought of in the context of a property of slaves that is no longer legally admitted. But that does not mean a break with the elements based on which, as we have seen, Patterson51 defines slavery. The non-fungibility of the black person, translated into personality, is presented as a simulacrum: it is announced as an element of a labor relationship because the purchase and sale of these bodies is no longer legally admitted. But, structurally, it is confused with the claim to ownership of black flesh. A dehumanization that also generates an immediate disposability of these objectified bodies when necessary.

In other words, economic operations take on a new form, without materially breaking with this typical attribute of merchandise associated with the black body. Necessity drives work and the economic power of hiring and firing operates within this structural panorama. And the libidinal flow, of projection of desires, expectations, and wishes of the former master, now employer, also remains structurally guaranteed.

That is why we say that personhood is the legal form of its material opposite for black workers. The body remains fungible. It was legally a thing. Now it is a person. It has changed place, without structurally changing its social position. It is now non-fungible as an object, formally a person for the law. But it remains fungible in social operations. And the law preserves devices that greatly facilitate this material and libidinal transit. In labor law, the ease of dismissal, for example, is one of them. Through it, the employer exercises his power over bodies and subjectivities. Structurally, a sovereignty is guaranteed that is not only material, but also of pleasures, in the projection of feelings, ideas, desires and values, in the manipulation of fear.

One note: it is true that the labor law system affects all workers, including non-blacks. However, the way in which these elements refer to black men and women in productive and social relations is specific. Specific worlds of work are recreated based on race. Thus, the place for black men and women in labor relations, to use an expression by Márcia Lima52, continues to be a place of dehumanization. And even of death. When we think in terms of scale, the densely racialized structuring of labor relations in the contemporary capitalist world reproduces what Achile Mbembe53 calls necropolitics.

The concept of necropolitics, the last of our forays into black thought, demonstrates how contemporary politics is based on the power to dictate who will live and who will die. Certain bodies are systematically subjected to worlds of death, which constitute a potential destiny normalized in social relations. If we transpose this to labor relations, we will see that the most extreme forms of illness, mutilation and death are still strongly racialized. Bodies that, on the scale of sociopolitical relations, are in these worlds of death. For these bodies, personhood is a mirage. They are radically fungible. They are discarded and others are put in their place.

And what should we do, then, with the realization that the protective apparatus of labor law, which aims to extend protections based on the idea of ​​a singular, non-fungible, human person, is viscerally constituted in a broader ontological regime of the non-humanity of black people?

#### Maximo continues....

Máximo et al 20 [Flávia Souza Máximo Pereira, Assistant Professor of Labor Procedural Law and Social Security Law, Coordinator of the Research Group Ressaber – Studies in Decolonial Knowledge, and Coordinator of the Extension Project Female Ombudsman, at the Federal University of Ouro Preto (UFOP), Researcher of the Labor and Resistance Group at Federal University of Minas Gerais (UFMG), Brazil, PhD in Labor Law jointly held by UFMG and the Università degli Studi di Roma Tor Vergata; and Pedro Augusto Gravatá **Nicoli**, Professor at the Law School and co-coordinator of Diverso UFMG – Legal Center for Sexual and Gender Diversity at UMFG, Brazil, former visiting professor in the Department of Gender, Sexuality and Feminist Studies at Duke University, PhD, Master's and Bachelor's degrees in Law, UFMG; “Os segredos epistêmicos do direito do trabalho,” 2020, Revista Brasileira de Políticas Públicas, 10(2), pp.512-536, DOI 10.5102/rbpp.v10i2.6765, **\*machine translated from Portuguese (Brazil) to English by Google Translate**]

Following the example of authors such as Judith Butler60, Paul Preciado61 and Theresa de Lauretis62 (who was the first, in fact, to use the term), bodies, existences, social experiences, sex, sexuality, gender, sociability, life, morality, in short, everything begins to be thought of from this place. And this place becomes, in theoretical developments, progressively more complex, in the intersection of racial, colonial, and geopolitical reflections, in a queer theory of color63 and Latino64, with strong developments also in Brazil65.

It is, in fact, a theoretical movement that takes criticism to new and very radical places. And, for this reason, it also generates a lot of reaction, due to the moral panic it provokes in conservatives. But, at the same time, it talks about very simple, direct and sensitive things. One of the most interesting concepts that has been worked on by contemporary queer theory is that of precariousness, dependence and the livability of lives66. The starting point here is the perception that certain lives are worth less socially. When, for example, we think about the lives of transvestites and transsexuals, this becomes very clear. They have a very low life expectancy. In Brazil, it is just over 30 years old. They are murdered en masse, socially exterminated. Brazil is the country that kills the most transvestites and transsexuals in the world67. And it is also certainly one of the countries that excludes them the most from work relationships.

This entry point for regulated employment, the physicality of the person, should perhaps be examined beyond what labor law offers us. Are we all physical persons, to the same extent? For black people, we have seen, perhaps the very condition of personhood is denied. For queer people, physicality is also in dispute. There are bodies that express themselves outside the standards of social intelligibility, marked by the expectation of gender and sexual behaviors. And labor relations tend to expel these bodies from broad circulation, reserving a specific place for them. Occupations demarcated for transvestites, trans people, effeminate gays, butch lesbians. With demarcations deeply etched by precariousness. Sex workers, criminalized, stigmatized, and always unprotected. Sectors such as the beauty and aesthetics industry are a laboratory for precarious hiring models (see, in Brazil, the law on partner salons, Law 13.352/2016, which gave shape to much of the expansion of precarious employment that occurred later). In the telemarketing sector, central to the propagation of the precarious outsourcing model, in which the person is comfortably hidden through exclusive access to the mechanized voice, rendering abject bodies invisible.

Entry into the standard employment universe, for people of dissident gender and sexuality, comes with the price of becoming the concrete physical person expected, beyond the generic formulation of the law. They have to be physically in a specific way, acting socially as “typical” men and women. Especially in the world of work, which overlaps and enhances the normative layers: gender and sexuality, in general, and the serious and closed world of work. At work, there is no room to be outside of what is expected, in binary expectations.

This conviction of normality, in one way or another, is shared by conservatives and critics, by humanists and those with “best intentions”. Ferguson68, in a fierce queer critique of critical lines, such as Marxism, states: “basing the fundamental conditions of history on heterosexual reproduction (...) has made the heteronormative subject the objective of liberal and radical practices”.

What seems to us, then, is that the normalization of the body, in the physical person, occurs in very sophisticated ways, in many spaces, physical, lived, theoretical, thought, regulated. And labor law is also involved in this. It plays a role in the normalization and production of the body of this working subject, transformed into the abstract category of the physical person.

Labor law, in fact, makes a double movement. First, it starts from the physical body of the person who works. It is there that the damages generated by work — fatigue, illness, mutilation, death — occur. And there, too, protections must be materialized. And to think about these protections in general, labor law abstracts the body to think about legal categories. And then returns to it, with its regimes of normativity (albeit of protection norms).

In this itinerary, the body is normalized. Even the sick body, the pregnant body, the aging body, the tired body, the mutilated body, all of this is normalized, within the regimes of heterosexuality, of cis-centering (that is, centered on bodies that are not trans). There are some bodies that are like discards in the process of producing the norm. There is no space for them. Queer bodies tend to be like this. They are bodies that resist this abstract turn in dissident physicalities, and remain concretely outside. They are too physical. They have, therefore, pre-determined destinies: either extreme precariousness (in expansion) or existential clandestinity, which excludes them from the operative categories of law.

Queerness helps us to see beyond the naturalized surface of things: what does it mean to say that the employment relationship presumes a physical person? Exclusion is not only the obviousness of legal entities (and the vile strategies of concealment, such as pejotização), animals or non-human forms. The physical person in labor law is the image of the white, European, non-disabled, heterocisnormative man of modernity. Queer people are not allowed in. If they are allowed in, they are made non-queer, hidden, sanitized for work. And what if the queer body does not want to work like that? It is ungrateful. After all, this is a “great opportunity” driven by the messianic force of employers in labor law69.

How can we think, then, of a labor law that, by standardizing physicality, truly protects it, in its variety, and does not normalize physical bodies for pre-defined places? Some indications: name, gender, rules of dress, behavior, physicality in everyday life, need to be radically queered. Open. And the precarious statutes reread in light of the concreteness of their effects. No precarious norms, under the messianic veneer, for people considered abject. No partner salons, no outsourcing.

The answer to these questions may project us into another future. A queer futurity, like the one drawn by Muñoz70, that knows itself to be present, physical and concrete, but refuses to reduce queerness to the here and now:

queerness is not yet here. Queerness is an ideality. In other words, we are not yet queer. We may never touch queerness, but we can feel it as the warm illumination of a horizon imbued with potentiality. We have never been queer, but queerness exists for us as an ideality that can be distilled from the past and used to imagine a future. The future is the domain of queerness. Queerness is a structuring and educated mode of desiring that allows us to see and feel beyond the quagmire of the present. Here and now is a prison... we must dream and realize new and better pleasures, other ways of being in the world and, ultimately, new worlds... Queer is essentially about the rejection of a here and now and the insistence on the potentiality of another world.

This journey into queer futurity allows for a detachment from the categorical binary extremes of modernity. Violent demarcations of territories of bodies, color, language, production and reproduction begin to be strained, to form a hybrid border-future crossroads, which is always a risk. Crossing this border “is at the same time jumping over an endless vertical wall and walking on a line drawn in the air”71. A risk that we wish to take, free, without secrets.

6 Ceci n’est pas une conclusion

That was the exercise. We told what seemed to us to be a secret. And, from that, the uncertainties remain. We see, at every step, at every point, how the elements that make up the legal category of employment in labor law have always had unconfessed epistemological affiliations. In other words, how they were conceived, thought about, and theorized from an epistemic and social place. A place that does not centrally consider the ways of experiencing the world and thinking that come from subjects from the global South, from women, from black people, from LGBTs (and, beyond this text, from people with disabilities, from indigenous peoples).

We then try to speculate other ways of thinking about these elements. We see them from the inside out. Or through the eyes of those who did not conceive of them and are affected by them. These are questions that only make sense if answered from this plural knowledge. That expands the critique. The usual answers are already given: it is in, it is out, it fits, it does not fit, it is employment, it is not employment, it is in the law, it is fraud, it is not fraud. All of this is already more or less known. It is not a secret. And, at this point, we are less interested in these ready-made answers. We want the “imagination of previously unimaginable futures” (BIDASECA; MENESES, 2018, p. 19). We want to think of other futures, distant from the univocal logic of modernity/coloniality, structurally racist and sexist.

We could summarize the points, try to rearticulate them and promise something. Fill the end with positivity. It is hoped that these other methods will provide relief from the dark and dystopian situation of labor relations and regulation. What we have been experiencing in labor regulation around the world has a very bitter taste. A bitter taste especially for poorer workers, black men and women, LGBT people, women, who will be systematically more and more subject to precarious arrangements. They are the preferred victims of intermittent work, outsourcing, deaths, accidents, habitual overtime, in short, of everything we know. They do not retire, they are subject to social risk. And they survive, although in many mortified ways, in this situation.

Our strategy, in formulating questions that attempt to reveal secrets, may expand the discomfort even further. And this article concludes with this. Sitting with the discomfort is essential, without promising relief or a simplified solution. The operational strategies around labor categories, in their legal values, continue to be important political and institutional trenches. But they should not serve as reductive pacifiers for our anxieties and concerns. Here, we offer discomfort. And the certainty that dealing with it theoretically, reopening the articulations that constitute the hegemonic way of conceiving and understanding labor regulation, constitutes an indispensable step towards a different critical thinking. A step that, we hope, will help labor law cross the desert of the world to “live in the open wind”, as Sophia (1962) says in the poem that opens this article. Which is where, after all, it was born to live.

### 1NC---AT: Heaney

#### Heaney’s analysis of the trans feminine allegory contains multiple inconsistencies.

Nesbitt 18 [Jennifer P. Nesbitt – Associate Prof of English @ Penn State—York, Book Review│The New Woman: Literary Modernism, Queer Theory, and the Trans Feminine Allegory by Emma Heaney, https://scalar.usc.edu/works/the-space-between-literature-and-culture-1914-1945/vol14\_2018\_heaney\_review\_nesbitt, JKS]

Heaney’s analysis of Ulysses highlights the interpretive richness of her model—a relatively simple observation mandates a rethinking of gender in literary analysis. In general, (re)readings of both literary and theoretical texts are tightly focused and convincing, if occasionally prolonged. Thus, the inconsistencies in Heaney’s chapter on Djuna Barnes stand out despite the solid work in a section on Matthew O’Connor, the trans feminine character in Nightwood. The Ryder section includes superficially explicated block quotations and some sloppily handled secondary source references. Explications of poems from The Book of Repulsive Women, notably “From Fifth Avenue Up” and “To a Cabaret Dancer,” rely on implied analysis rather than substantial engagement with language. The rushed feeling of this chapter seems an injustice to The New Woman and to an author Heaney admires.

By contrast, Heaney’s discussions of trans women’s life writing (chapter 4 and 6)—which Heaney defines broadly to include material presented in sexology texts, court transcripts, and more traditional published work—collect and analyze disparate material to show how the trans feminine allegory distorts our understanding of personal narratives. These narratives refute theoretical models: “Trans women had a variety of understandings of their bodies that often did not conform to the sexological metaphor of entrapment and desire for change” (154). Moreover, Heaney includes accounts that illustrate the imbrication of class and femininity in trans experience, racialize trans feminine experience, and assess trans femininity in narratives of colonization. In discussing the paucity of evidence, Heaney recounts the burning of the archives of Magnus Hirschfeld’s Institute for Sexual Science in 1933: perhaps “lost to history in a day” were many documents about trans feminine life (197). This destruction of records highlights the importance of preserving trans feminine testimony and participation in the feminist and Gay Rights movements, where a similar narrative of marginalization has ignited debates about who can speak safely for whom. (I’ve borrowed this phrasing from Jane Marcus’s Hearts of Darkness. See Evan Urquhart’s Slate October 13, 2017 column on two recent documentaries about activist Marsha P. Johnson). The resonance of these events with A Room of One’s Own affirms Heaney’s observation that erasure from history is a shared material condition for all those who live as women.

Accomplished as this study is, The New Woman reads sluggishly due to organizational and stylistic problems. In the introduction, Heaney understates her range by announcing that she will trace “an allegorical strain in British Modernism” (9, italics added); she applies her model to materials that range across the US, Europe, and beyond. Heaney might also have eased readers into her argument by presenting life writing first because the relatively straightforward analysis there supports the intricate deconstructive maneuvers Heaney later uses for literary and theoretical texts. Similarly, Heaney’s prose sometimes gets in her way, alternating between convoluted over-explication and redundant exposition. Elegance and economy is within Heaney’s range, but quotable lines like “woman has never been a cis category” (20) coexist with clunkers like “He [Joyce] offers an aesthetic and conceptual investigation of the way sensation produces gendered meaning that rhymes with trans feminine understandings of sex in the period that we’ll encounter in chapter 4” (71). The New Woman could have been shorter and more compelling with additional revision and editing.