REIMAGINING LAW AND JUSTICE

LAW, HUMANITIES AND THE COVID CRISIS

Edited by
Carl F. Stychin

UNIVERSITY OF LONDON PRESS

Law, Humanities and the COVID Crisis

Reimagining Law and Justice

Today, societies face urgent questions about the meaning of justice, whether that takes the form of racial, sexual, economic, environmental, reparative, intergenerational, interspecies or social justice. The *Reimagining Law and Justice* series, published in association with the Institute of Advanced Legal Studies, is an exciting interdisciplinary and open access intervention in these key issues, challenges and debates in legal studies. The books in the series focus squarely on reimagining that age-old search for an understanding of the relationship between law and justice through interrogating the crucial challenges of our times.

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Introduction

Carl F. Stychin

Background

As I write this introduction, it has been just over two years since we became aware of the existence of COVID-19, which was followed by a growing realization of the extraordinary impact it would have on all of us. Throughout the pandemic – but particularly in the early phase – the scale of the legal response to the disease would have been previously unimaginable. Whether through 'stay at home' orders, the closing of businesses and schools, the furlough scheme, the moratorium on housing evictions, the curtailment of public procurement requirements or the development of online courts, every aspect of society was forced to adapt. Moreover, the process of law making itself changed as the accountability of governments to legislatures around the world was severely curtailed because of the emergency. In the midst of these dramatic developments, and as the first wave of the pandemic ravaged the United Kingdom under national lockdown, my colleagues and I at the Institute of Advanced Legal Studies (IALS) sought to respond with a range of online events designed to document this new reality.

As part of that response to this new body of pandemic law, throughout the 2020–21 academic year it was my privilege to host a series of remote seminars featuring researchers who had responded to a call for papers on the broad topic of 'Law and Humanities in a Pandemic'. This theme was designed to recognize the location of IALS within the School of Advanced Study of the University of London. The School's aim is to promote and facilitate academic research in the humanities. Within the School, we have been keen to stress the important role of the humanities in making sense

of COVID-19. We also wanted to emphasize the importance of law as being centre stage within the humanities. The result was a wide-ranging and fascinating monthly series of seminars which attracted a worldwide audience as we moved through various stages of the pandemic. The seminars remain accessible on the Institute's website and we believe that they form an important part of the historical record of our time (see IALS 2022).

Following on from the seminar series, the participants were invited to submit written versions of their papers for publication. The result is this edited collection, which foregrounds those papers from the series which most directly engage with the relationship between law, the humanities and the COVID-19 crisis. In addition, those papers which are more directly focused on public policy developments have been published as special sections in the IALS open access journal *Amicus Curiae*, entitled 'Law, Public Policy and the Covid Crisis' (Stychin 2021, 2022). Taken together, these resources provide an important intervention in our understanding of the ongoing changes wrought by the pandemic.

The scholarly landscape

The chapters in this volume can be positioned within the existing research in three complementary dimensions. Their uniqueness lies in the way in which our contributors have produced work which sits at this intersection of law, the humanities and the pandemic. As a consequence, this book advances the scholarship in several important respects.

Law and Coronavirus

First, this collection can be located within a rapidly developing body of scholarship which has sought to understand the legal landscape of COVID-19. An early contribution to this literature, from an American perspective, underscored the huge range of legal fields upon which the response to the virus has had an impact. In *Law in the Time of COVID-19*, academics from Columbia Law School documented the impact of COVID-19 on such diverse fields as prisoners' rights, elections law, the justice system, environmental law, the right to privacy, bankruptcy law, corporate transactions and contactless payments (Pistor 2020).[1] Such work is of the utmost practical importance in order to map the widespread and rapid legal changes which have resulted from the pandemic.

Further, the impact of governments' responses to the pandemic on 'justice' itself has been subjected to detailed analysis and critique by a number

of commentators. For example, in *Justice Matters: Essays from the Pandemic*, the focus is on the relationship between the public health crisis and the wider issues of social justice which have been laid bare by the pandemic. As stated in the Preface to that collection:

> as the pandemic gathered pace, we started to see much more clearly that those in food poverty, from BAME backgrounds, in poor housing, insecure employment, the homeless, the elderly and the disabled were the worst affected. The virus exposed the underlying structural health, race and class inequality in British society (Brennan et al. 2020).

The contributors to that volume highlighted the wide range of ways in which the pandemic (and, more importantly, the responses to it) has not only reflected but also exacerbated those social injustices. Whether it be in the fields of immigration, housing, welfare, discrimination or youth justice – to name only a few – COVID-19 has demonstrated that the UK government's oft-repeated claim that the pandemic does not discriminate is far from the reality experienced by people generally, both domestically and internationally.

Those uneven and unequal ways in which the pandemic has operated are also the focus of *Pandemic Legalities* (Cowan and Mumford 2021). In this important book, the analysis is organized around two key concepts: justice and the social context. Crucially, the pandemic is not seen in isolation, but rather is placed within the broader context of the many years of the deliberate UK government policy of austerity which preceded it. As the editors argue in their introduction:

> the COVID-19 pandemic has impacted on all areas of law, and the impact has been experienced disproportionately along the lines of race and poverty … demonstrating the ways that the responses to the pandemic have often exaggerated and made apparent the issues which were already in place, often submerged or obscured (Cowan and Mumford 2021, 6).

No less important than these analyses of substantive legal responses to the pandemic has been critique of how the pandemic has shaped the law-making process in the UK and elsewhere. In this regard, the pandemic has demonstrated the continuing relevance of the fundamental question 'what is law?' within the context of executive rule making and the curtailment of legislative oversight. This concern has been articulated most forcefully by the former president of the Supreme Court of the United Kingdom, Baroness Hale of Richmond. She argues that the Coronavirus Fund Act (2020) provided the Treasury with massive spending power, which was combined with

sweeping powers granted to the government through the Coronavirus Act (2020). Baroness Hale's central argument is that regulations enacted under the legislation contained 'draconian powers for the police and some others to enforce the lockdown' (Baroness Hale of Richmond 2020, 5). However, they also caused confusion for the general public regarding the relationship between law and guidance, particularly through the concept of 'reasonable excuse'. Although Baroness Hale recognizes that this surrender of control may have been 'inevitable', she also emphasizes the need for the restoration of parliamentary oversight in order to 'get back to a properly functioning Constitution as soon as we possibly can' (5).

While the draconian character of the restrictions on freedom has been a source of concern for many – as being emblematic of an increasingly authoritarian state – an alternative interpretation of the laws of Coronavirus has been put forward by Kirton-Darling, Carr and Varnava (2020). They dispute the claim that the regulations amounted to a 'power grab by an overbearing executive determined to outlaw freedoms' (2020, S303–4). Rather, their argument is that the law of the pandemic is best understood in terms of Bevir's concept of the 'stateless state'. Specifically, the state can be conceptualized as 'inherently made up of different and competing actors inspired by different beliefs and traditions' (Bevir 2022, 8). For Kirton-Darling, Carr and Varnava, a close reading through the lens of the 'stateless state' reveals COVID-19 law to be a site of 'contestations and complexities' (2020, S304) with 'competing narratives and rationalities' (S306). Thus, for example, by virtue of s 55 and Schedule 25 of the Coronavirus Act (2020), remote court hearings are made publicly accessible for the first time. Similarly, in the context of social care, legislation emphasized the role of 'values and principles' (S313), as well as professional discretion and 'local knowledge' (S314). In this way, an understanding of legal interventions during the pandemic becomes more complex and nuanced.

Law and the humanities

This collection can also be located within the broad field of scholarship that explores the relationship between law and the humanities. As an approach to the study of law, this field began with a focus on literature, and it has now become a burgeoning area of inquiry. Its boundaries are deliberately blurry. Thus, it includes the study of law *in* literature, as well as law *as* literature, and, finally, the relationship between law *and* literature in terms of methods for the analysis of texts. In recent years, the field has expanded beyond literature to include interdisciplinary approaches drawn from all disciplines within the humanities. The result is a growing

number of key handbooks (see, e.g., Sarat, Anderson and Frank 2009; Stern, Del Mar and Meyler 2020) and journals (such as the *Yale Journal of Law & the Humanities*; *Law, Culture and the Humanities*; and *Law and Humanities*) devoted to the subject.

In the series on which this volume is based, the relationship between law and the humanities was kept deliberately open-ended, leaving it to the participants to interpret the theme as they saw fit. Nevertheless, a definite sensibility pervades the field of law and humanities, and this book is no exception. The impetus for the turn to the humanities by lawyers can be understood in part as a response to the historical dominance of law as a supposedly scientific study and, more recently, in reaction to the centrality of economic analysis. In this way, the humanities can provide 'a salutary counter-hegemonic effect' for lawyers (Sarat, Anderson and Frank 2009, 6). Thus, the humanities become an important means for making sense of the world – which encompasses the legal world – 'including relations between those practices of making and the values that may be at stake in such practices and their relations to each other' (Stern, Del Mar and Meyler 2020, xxii). In this way, the conjunction of law and the humanities has the potential to shed new and important light on issues of ethics, politics, power, inequality and oppression. It can provide 'certain attitudes and sensitivities' (xxii) to help us to understand the legal world we inhabit. As a method of inquiry, as Stern, Del Mar and Meyler (xxiii) suggest, 'there is, then, a rich reflexivity at the heart of the humanities. Such reflexivity offers vital reminders of the contingency and arbitrariness of even our most prized concepts and methods.'

However, the turn to the humanities for lawyers also includes challenges and limitations, which have been widely recognized in cautionary notes within the scholarship. First, interdisciplinary approaches to legal analysis always carry within them the threat of the colonization of those other disciplines by even the most well-meaning legal scholars. After all, as Balkin and Levinson recognized, the tradition of the humanities which has always been central to legal analysis is that of *rhetoric*. Inevitably, then, there is a constant danger that 'law is truly the Procrustean bed. It welcomes visiting disciplines to serve its own ends, and then cuts or stretches their work to fit law's normative template' (Balkin and Levinson 2006, 178). As a consequence, care needs to be taken to avoid the programmatic use of disciplinary knowledge as simply another set of lawyerly tools. For example, Desmond Manderson (2011, 108) is deeply sceptical of the capacity 'to find in literature the truth and the salvation of law'. Yet like law, literature – and, indeed, the humanities more generally – can come to be understood 'not as an object or a closure but instead as a process, an experience, and an opening' (108).

As a consequence, the disciplines of the humanities need themselves to be kept open as subjects for interrogation and deconstruction. The

humanities – like law, the social sciences and the 'natural' sciences – are 'modern disciplinary configurations of knowledge' and form 'an entire matrix of material, social and political reality' (Sarat, Anderson and Frank 2009, 14). That is, the humanities are necessarily embedded within systems of power, through which 'others' are created. In short, the relationship between law and the humanities must be understood as dynamic, unstable and continually open to questioning.

Thus, the premise of this volume is that the humanities provide crucial insights, questions and openings into making sense of our legal world rather than providing straightforward answers to legal problems. As Stern, Del Mar and Meyler (2020, xxiv) advocate, and as the contributors to this collection demonstrate, the goal in exploring these relations lies not so much in the final resolution of a problem through a rhetorical flourish, but in posing 'new, otherwise unasked questions about the techniques, premises and processes that makes these various legalities accepted and disputed'. In the context of the enormous new range of legalities produced by the COVID-19 pandemic, that task would seem all the more pressing. In this world, our understanding of law – more than ever – cannot afford to 'maintain an aloof discreteness from the taint of external influence' (Raffield and Watt 2007, v).

The pandemic and the humanities

It is hardly surprising that the COVID-19 pandemic has seen science – and scientists – taking centre stage in public discourse. For politicians and policy makers, the scientist as expert became a standard feature of the backdrop of regular press conferences, providing a ready justification for any and all decisions. Perhaps equally unsurprising, as the pandemic has continued through its various phases, is that criticism of science and of scientists – from a variety of points of view – has intensified. As a result, politicians increasingly have shifted to emphasize their own roles as decision makers informed by scientific modelling rather than as simply 'followers' of wherever the science might lead.

But what has also featured throughout the pandemic has been appeals to the importance of knowledge production beyond the 'natural' sciences: from the social sciences, the arts and the humanities. Scholars and practitioners in these fields have highlighted the centrality of these areas of inquiry for understanding the radical changes to everyday life which the pandemic has produced, and the ways in which COVID-19 has laid bare the inequalities and vulnerabilities which were already present. Whether it be literature, history, critical theory, the classics – to name only a few of the

disciplines – the insights which can be drawn from the humanities prove invaluable for contextualizing our reality:

> As the impacts of public health measures ripple through societies, languages and cultures, thinking critically about our reaction to SARS-CoV-2 is as important as new scientific findings about the virus. The humanities can contribute to a deeper understanding of the entrenched mentalities and social dynamics that have informed society's response to this crisis. And by encouraging us to turn a mirror on our own selves, they prompt us to question whether we are the rational individuals that we aspire to be, and whether we are sufficiently equipped, as a society, to solve our problems (Elsner and Rampton 2020).

This turn to the humanities – rather than providing univocal answers to the crisis – can raise questions and provide new insights into, for example, the collapse of the public/private divide through lockdown; the closing of national borders; the distribution of vaccines internationally; vaccine hesitancy and distrust of scientific knowledge; and controversies over the use of face masks. For example, the compilation of a 'Humanities Coronavirus Syllabus' by Altschuler and Dillon (2020) provides an invaluable resource of materials – drawn from literature, history, philosophy, religion, art history, film and television – which predate the COVID-19 pandemic, as well as new publications produced in the time of COVID-19. As the Syllabus demonstrates, the concerns which have come to dominate have long formed the subject matter for writers, artists and scholars across the humanities.

As well as a means of helping us to make sense of the pandemic, strong arguments have been raised for the importance of the humanities in explicitly informing public policy responses to COVID-19. For example, the British Academy has provided a detailed research review which was specifically organized in terms of the policy areas of '(i) knowledge, skills and employment; (ii) communities, culture and empowerment; and (iii) health and well-being' (Shah 2021). Topics included digital infrastructure, community resilience and social infrastructure. Similarly, a plea has been made by Smith (2020) that the UK government's Scientific Advisory Group for Emergencies (SAGE) 'needs to hear from the humanities' because of the insights which it can provide in terms of morality, culture and narrative, all of which are central to policy making. Looking ahead, then, our understanding of the pandemic and how society responded to it will be a tale that goes well beyond 'the science'. Rather, 'it will be the immensely complex story of how this disease intersected with our social behaviour, how we chose to respond as individuals and families, communities and politicians, nations and global agencies' (Smith 2021).

At the same time, this embrace of the humanities in order to understand the pandemic should not be uncritical. In this respect, the salutary argument of Douzinas (2009) should be kept firmly in view. As he reasons, despite the normative claim of the appeal to 'humanity' (and, by extension, the humanities as subject), 'humanity has acted as a strategy for ontological separation, distribution and classification' (63). In other words, 'becoming human is possible only against this impenetrable inhuman background' (66). In the context of the pandemic, the danger of reproducing this separation and 'othering' is ever present and palpable. Thus, just as the humanities interrogate the pandemic, so too it becomes vital that we approach the humanities themselves in a spirit of critique, interrogation, questioning and reflexivity.

Outline of contents

The contributions to this collection sit at the intersection of the three scholarly currents outlined above: legal responses to the pandemic; law and the humanities; and the engagement of the humanities with COVID-19. Each chapter provides important insights into these dynamics and together they provide a unique and timely contribution to a rapidly developing literature.

The book begins with three chapters that explore the relationship between health, economy and commodification. Dimitrios Kivotidis adopts a Marxist perspective in examining how legal responses to the pandemic have been overdetermined by politico-economic content. As a consequence, while executive law making is framed as temporary and emergency in nature, its content serves broader needs of the system of capitalism. The tensions between health and economy are elaborated further by David Seymour. His argument, which deploys theories of commodification, is that the space between the market and the state comes to be occupied by conspiracy theories in response to laws made to control the pandemic. His chapter draws on a critical conception of the humanities while, at the same time, retaining a faith in their ultimate objective. The economic aspect is also central to the contribution by Marc Trabsky. His focus is on the technology of death registration processes. Trabsky posits that the language of economization underpins the systems of registration, which in turn are informed by neoliberal rationalities for the governance of mortality.

The focus of the collection then shifts to historical analysis in a chapter by Mark De Vitis and David Carter. Their subject is the 'Spanish' influenza pandemic of 1918 to 1919 in Australia. Specifically, they examine the role of compulsory face masks in that period. This little-known historical precedent offers valuable insights into the way in which masks are subject to interpretation in official discourse and public opinion today. The experience

of public health measures is also the subject of David Gurnham's intervention, but his attention is on contemporary commentary – both academic and political – on the UK government's legal restrictions on movement. His analysis of responses to lockdown is informed by pandemic poetry and art. This has significance for our wider understanding of metaphors of imprisonment and containment in law and the humanities.

Imprisonment is also central to the contribution by Harison Citrawan and Sabrina Nadilla. Their focus is on shifting penal discourse in Indonesia during the pandemic. They argue that this has amounted to a reinvention of biopolitical knowledge regarding incarceration, which has focused on the vulnerability of the incarcerated. Citrawan and Nadilla adopt a Foucauldian perspective to argue that this shift needs to be understood as part of the ongoing process of managing a population. A very different perspective on confinement is provided by Renisa Mawani and Mikki Stelder. Their subject is passenger vessels on the sea during COVID-19, which quickly became a site of multiple legalities, raising issues of international law and national sovereignty. But their analysis underscores that these questions cannot be approached simply in terms of positive law. Rather, the contrasting ways in which cruise ships, refugees and exploited crew members have been viewed and treated is informed by the wider forces of imperialism, colonialism, racism and capitalism.

The impact of COVID-19 and legal responses to it have also had a disproportionate impact in terms of gender. Kim Barker and Olga Jurasz examine this gendered dimension of the pandemic and how law has been particularly restrictive of women's rights and online activism. In this contribution, they consider the backlash felt by activists as well as the gendered responses of politicians. The chapter by Nicole Busby and Grace James complements this analysis. The authors investigate how responses to the pandemic, as well as plans for recovery, uncover deeply entrenched and problematic assumptions regarding working families and gendered roles. They argue that this results from the predominance of the paradigm of the autonomous, liberal legal subject. As a corrective, they turn to vulnerability theory, and their chapter underscores the importance of an activist state in building resilience.

The theme of alternative imaginings of a future 'beyond' the pandemic is also taken up by Jill Marshall. She interrogates how the forced confinement of the pandemic allows us to explore the connections between law, space and objects. Drawing upon literary texts, Marshall argues that COVID-19 makes particularly visible the interconnectedness of global coexistence, which has potential application through feminist jurisprudence for reimagining International Human Rights Law. The reimagination of our legal future is also developed by Valerio Nitrato Izzo. His chapter explores the role played by pandemics and disasters in law, literature and other

forms of art. Nitrato Izzo's aim is to use these sites of catastrophe as an opportunity to rethink and to reimagine how we live collectively. Finally, the theme of reimagination through recovery is taken up in the Brazilian context by Frederic R. Kellogg, George Browne Rego and Pedro Spíndola B. Alves. They look back to recent Brazilian history and the government of Fernando Cardoso as exemplifying how the philosophy of John Dewey can be a fruitful model for recovery. This is contrasted against the disastrous response to the pandemic displayed by the current government of Jair Bolsonaro, which has left Brazil in such a perilous state.

Concluding thoughts

Taken together, these chapters provide vital insights into the times in which we find ourselves, and they chart hopeful new directions for the future. The authors underscore the central role played by law and legal discourse during the pandemic. They also demonstrate that understanding law's response to COVID-19 requires a broader intellectual horizon, which can be found in the humanities. Thus, this volume provides an important record of the times as well as a road map, not only for future research but also for remaking the world we share.

Notes

1. A similar compilation which demonstrates the plethora and diversity of legal areas which have been shaped by COVID-19 has been assembled by the Dickson Poon School of Law (n.d.).

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Chapter 1

Public interest or social need? Reflections on the pandemic, technology and the law

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Introduction

Writing in the aftermath of the 1848 European-wide revolts, Juan Donoso Cortés, one of the counter-revolutionaries whose ideas greatly influenced the thought of Carl Schmitt, developed a theory of dictatorship. In this he compared the life of society to human life, arguing that both the human body and society may be invaded by forces, which in the case of the human body are called illnesses. In the case of society, when these invading forces are concentrated in political associations, 'the resisting forces concentrate themselves into the hands of one man' (Cortés 2000, 47). He was not the first to use this metaphor (Kantorowicz 1998; Esposito 2011) and certainly not the last to invoke this exemplary form of emergency law to defend the *salus populi*.

The Roman principle *salus populi suprema lex* lies at the heart of emergency law requiring the state to protect the health and promote the welfare of the people. In terms of the Coronavirus pandemic, the 'illness' is not metaphorical. The pandemic threatens the *salus populi*, i.e. the health of the people, in a literal sense. Consequently, the measures to protect public health necessarily assume a generality and urgency which cannot be contested. Nevertheless, several critical voices have been raised against these measures. This is partly because the pandemic affects the *salus populi* in more than one way: it affects not just the health aspect of *salus* but also the welfare aspect of it.

This antithesis between health and welfare – protection of health and protection of the economy – has been central in framing different countries' responses to the pandemic. Of course, what measures promote the welfare of the people is a controversial matter and certainly open to interpretation, determined by the class standpoint of the interpreter. It is, for instance, highly controversial to invoke the *salus populi* in order to combat a social uprising for decent working and living conditions. It is equally controversial to invoke the 'public interest' – a manifestation of the *salus populi* – to introduce measures intended to 'save the economy' by worsening the working and living conditions of the majority of the population.

Nevertheless, as we shall see, in the context of the pandemic the exceptional form of the law of necessity contributes to the perception of measures as being 'necessary', 'non-negotiable', 'technical' and certainly as promoting the 'common good of the social whole'. The legal formalist[1] view of the measures tends to accept their legality and constitutionality because of their temporariness, as well as their technocratic legitimacy. It is widely accepted that the measures are a technical, scientific response to both the public health and economic consequences of the pandemic. This narrative of neutrality and temporariness is based on a positivist understanding of technology, science and the notion of the common good.

The goal of this chapter is to unearth the partiality and class orientation of the measures taken to deal with the pandemic, which are hidden behind the invocation of the 'public interest'. To this end it will examine some of these measures through the prism of a series of contradictions. We will begin with the legal formalist perception of these measures which approached them based on the contradiction between public interest and fundamental rights. The first section will focus on this debate as it developed in Greece, because the existence of a codified constitution and the use of an emergency form of legislation brought this contradiction to the forefront of the debate with greater intensity. The next sections will focus on specific aspects of the measures' content. In particular, measures addressing the economic consequences of the pandemic, as well as specific technical measures such as teleworking and digital surveillance, will be examined in order to show that the contradiction between health and economy determines the scientific response to the pandemic. On this basis, the view that these measures are temporary and technical – that they unequivocally promote the public interest based on the advice of experts – will be contested.

The final section will examine the contradiction between partiality of interest and absoluteness of social need. The former will be approached as a contradiction in terms and will be measured against the latter. 'General interest', a central concept in emergency legislation, provides a justification for the expansion of practices that rely on technological development,

such as teleworking and telemedicine, on the occasion of the pandemic. Nevertheless, a close analysis of these practices reveals the partiality of economic incentives and profit making as the constant and underlying cause for their expansion. The absolute and universal character of social need, determined by the level of development of productive forces, thus can form the basis for a comprehensive critique of the unity of form and content of the bourgeois state and law's response to the pandemic.

Fundamental rights and public interest

The existence of a written, codified constitution in Greece means that any law can be tested by the courts for its accordance with the Constitution. In the context of the pandemic, this resulted in an extensive and fruitful debate about the possible interference by legislative measures taken to deal with the pandemic with fundamental rights enshrined in the Constitution, as well as the proportionality of those measures. The response to the pandemic has for the most part assumed the legal form of 'acts of legislative content'. This is a form of emergency law that the executive branch of government may enact in times of crisis, based on article 44(1) of the Greek Constitution. Using this mechanism of 'fast-track' legislating, the Greek government implemented policies of social distancing and lockdown, which included restriction of movement, closure of borders to all non-EU citizens, closure of educational institutions, businesses and public spaces and the prohibition of gatherings. In particular, restriction of movement was enacted through the common ministerial decision (i.e. a form of delegated legislation) of 22 March with reference to the act of legislative content of 20 March.

Arguably, several fundamental rights enshrined in the Greek Constitution are engaged by such measures: freedom of movement (article 5(3)), economic freedom (article 5(1)), freedom of assembly (article 11), freedom to unionize (article 23) and religious freedom (article 13). The legitimate aim that is pursued by the provisional limitation of these rights is the right to health. This right appears in the Constitution both as an individual right (article 5(5)) and as a social right (article 21(3)). The common ministerial decision providing for the restriction of movement invoked the interpretative clause of article 5, according to which the general prohibition of individual administrative measures that restricted the right to free movement found in article 5(4) did not preclude the imposition of measures necessary for the protection of public health. Therefore, public health is arguably recognized by the Constitution and the courts as one of the major components of the public interest.

The debate among Greek constitutionalists has focused on the contradiction between fundamental rights (free movement, free development of personality,

privacy, religious freedom, economic freedom, freedom of assembly) and general interest concretized in the protection of public health (Fotiadou 2020; Vlachopoulos 2020). This has also been expressed as a contradiction between liberty and security, concretized into an opposition between free movement and the security of others (Christou 2020). The majority of thinkers agree that these rights are qualified rights whose temporary limitation can be justified for reasons of public health (Vlachopoulos 2020; Karavokyris 2020b), despite deviating from the normal operation of the rule of law (Kontiadis 2020). Certainly, worries are expressed about the far-reaching nature of these measures, especially regarding the restriction of movement. The danger of a 'constitutional mithridatism', which would normalize the idea of suspending fundamental rights so as to protect higher goods, is identified (Vlachopoulos 2020). This imposes a requirement that the measures are only temporary, to be lifted as soon as the threat of the virus passes and never to be used again in dealing with any other 'enemy' (Vlachopoulos 2020; Alivizatos 2020b).

Any worries expressed over the implications of the measures are neutralized by the recognition of their urgent and self-evident character. It is interesting to note that certain thinkers invoke the factual situation to point to the self-evident suitability of the measures: 'the legal argument is inevitably mediated, not to say absolutely determined, by the real facts, the overwhelming *scientific data* on the coronavirus … and their pragmatological correlation with the *temporary* restrictions on rights' (Karavokyris 2020a, emphasis in the original). It is, therefore, assumed that all citizens are able to recognize the importance of these measures and accept their legitimacy to the extent that they are necessary to protect the 'existential principles of life, health, security' (Kontiadis 2020).

Some thinkers go even further and celebrate the fact that this crisis has unequivocally put scientists and technocrats at the forefront of decision making: 'experts have the final say'. This is viewed as a 'victory of reason over populism' (Alivizatos 2020a). The argument draws a sharp contrast between the response to the COVID-19 crisis, where prime ministers are flanked by experts of epidemiology who seem to be dictating the measures, and the response to the financial crisis of 2008, where the technocratic expertise of institutions that cannot be held to account (like the International Monetary Fund or the European Central Bank) was contested on grounds of legitimacy. An implication of the COVID-19 crisis, it can be argued, will be the reopening of the discussion of 'technocracy versus representation', this time with a shift in the balance of forces. The technocratic legitimacy of the measures derives from their scientific authority, which attests to their technical – rather than political – character. This view is strongly influenced by a positivist understanding of science and technology which sees them as neutral and purified from politics.[2]

The recognition of the technocratic legitimacy of the measures is coupled with praise for the decisionist nature of the political response to the COVID-19 crisis. This praise is not restricted to the Greek prime minister, who was 'daring where, in theoretically more advanced countries, his counterparts hesitated', but extends to a celebration of the emergency institution of 'acts of legislative content' (Alivizatos 2020b). Combining technocratic expertise and decisionist apparatuses, the state also serves a pedagogical function, giving every citizen a 'lesson of ethico-political behaviour' (Karavokyris 2020b).

We conclude that, according to the dominant legal formalist view, the measures are proportionate to their legitimate aim because of their temporary and scientific character. In parallel, their scientific content and technocratic form contribute to their self-evident and non-negotiable status. The unassailable universality of the measures is based on scientific objectivity and neutrality, which, coupled with their temporariness, leaves no doubt as to their proportionality and constitutionality.

Nevertheless, legal formalists are neither unanimous nor unequivocal in accepting the measures as a whole. In this context, a critical approach based on the principle of proportionality has been developed. According to this view, measures that involve the restriction of fundamental rights, such as the freedom of movement, fail the test of proportionality, in particular the test of suitability. The argument is as follows: if a general restriction of movement is appropriate, suitable and necessary to combat the pandemic, why has the government not proceeded with more suitable measures, such as the requisition of private clinics, the commandeering of productive units to redirect their production to health material and equipment, and the setting up of additional intensive care units? After all, these measures would be directly related to the fight against Coronavirus (Kaidatzis, Kessopoulos and Kouroundis 2020). Further measures could be added to this list, such as the contravention of the patent protection afforded by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) through the use of compulsory licences and the parallel import of medicines.

The appropriateness and suitability of a general restriction on movement ultimately depends on the adoption of a series of parallel measures which are equally necessary, including measures that restrict economic freedom and private property, especially when the exercise of these rights assumes an 'anti-social character' (Kaidatzis, Kessopoulos and Kouroundis 2020). The predicament of the COVID-19 pandemic highlights that the exercise of fundamental rights may assume an anti-social character under specific circumstances: for instance, unrestricted movement may endanger public health. If the exercise of social and workers' rights (such as the right to unionize and to freedom of assembly) can be construed as anti-social, this is even more so with

regard to unrestricted economic freedom, which takes the form of profiteering on medical apparel and protective equipment, or the non-participation of the private health sector in the national effort to tackle the pandemic.

This is a carefully developed critical argument within the positivist discussion of the measures. In fact, it lays the groundwork for a critique of the Coronavirus crisis legislation from a social needs perspective. In doing so it also constitutes a missed opportunity to unearth the real anti-social character of private property and economic freedom. The protection of private property is a structural characteristic of the bourgeois state, which predominantly operates in order to ensure the reproduction of capitalist social relations, central among which is the private ownership of the means of production (Althusser 2014). As a result, any measure that restricts the latter constitutes a prohibitive parameter in the socio-political equation, similar to a division by zero in mathematics.

Public health and economy

The last point in the previous section is crucial for grasping the determinant role of relations of production regarding the form and content of the Coronavirus emergency legislation. The socioeconomic and class-oriented content is most evident in measures that deal with the economic consequences of the pandemic. At the time of writing, it is undeniable that an economic crisis is developing. Economic forecasts predict a contraction of 3–5 per cent of global GDP, which is worse than the recession of 2008 (Roberts 2020b). JPMorgan economists predict that the pandemic could cost the world at least $5.5 trillion in lost output over the next two years (Roberts 2020a). The economic consequences of the pandemic are already affecting millions of people who have lost their jobs and have struggled to satisfy their most basic needs for months.

Furthermore, it has been strongly argued and effectively shown that the pandemic acted as a catalyst for a capitalist crisis that was bound to arrive. Several countries among the G20 nations, and Japan among the G7, were already in recession, while the Eurozone and the UK were close (Roberts 2020d). The Coronavirus pandemic has been characterized as 'the straw that broke the camel's back' (Mavroudeas 2020). The pre-existing problems of declining capitalist profitability and over-accumulation of capital – that is, the accumulation of excess capital that could not be sufficiently profitably invested (Carchedi and Roberts 2018) – had already set the scene for the eruption of a new crisis. Characteristically, the industrial sector – that is, the heart of productive activities – was already in recession long before the pandemic broke out (Mavroudeas 2020).

The above points confirm that the contradiction between public health measures and their economic consequences derives from the nature of the capitalist system. Capitalist social relations set the absolute limits on the scientific, legal and political response to the pandemic. For example, it has been argued that a capitalist economy can stand a smaller period of stoppage compared to a socialist economy. The reason for this is that capitalist enterprises operate for profit, or else they have no reason to exist, whereas a socialist economy can survive without achieving surplus (profits) by simply covering production costs (Mavroudeas 2020). As a result, the limits to the capitalist response to the pandemic are set, on the one hand, by the depletion of public health systems following decades of underfunding and privatization, and on the other by the economic effects of the lockdowns which result in unemployment, hyper-inflation and economic depression (Roberts 2020b).

A careful look at the measures addressing the economic impact of the pandemic reveals their class orientation and casts doubt as to their technical and temporary character. At first glance it seems that the economic burden of dealing with the crisis is placed on the capitalist state, which subsidizes private businesses that close or work under severely limited capacity. Thus, the state covers most of the wage costs of these businesses through various labour allowances (such as the furlough scheme in Britain). It has been calculated that on a global scale governments have announced 'fiscal stimulus' packages of around 4 per cent of GDP and another 5 per cent of GDP in credit and loan guarantees to the capitalist sector, which is more than double the amount of the fiscal bailouts in the last financial crisis (Roberts 2020c).

The stimulus package for the US economy is characteristic of this. On 27 March 2020 the US president signed into law the Coronavirus Aid, Relief, and Economic Security (CARES) Act after it passed through both chambers of Congress. The relief package introduced by the CARES Act amounts to $2 trillion and includes: direct financial assistance to individuals and families; aid to small businesses; loans for distressed companies; and additional funding for unemployment insurance benefits. In Europe, Council Regulation 2020/672 established the instrument for temporary Support to mitigate Unemployment Risks in an Emergency (SURE) in order to provide financial assistance of up to one hundred billion Euros in the form of loans from the EU to affected Member States to address sudden increases in public expenditure for the preservation of employment. The Greek government has made use of this mechanism in order to establish the SYNERGASIA programme, according to which private sector employers who join the programme can reduce the weekly working time of their employees by up to 50 per cent without amending their employment contracts. These companies are entitled to

financial support amounting to 60 per cent of the employees' net salaries as long as they remain underemployed.[3]

These and other similar packages have been praised (Hutton 2020) as restoring Keynesianism to its proper place. It appeared that the lessons learned from the 2008 crisis had prepared the way for the triumphant return of Keynesian economics. A more careful look, however, reveals both the class orientation of the measures and their ineffectiveness in dealing with the root causes of capitalist contradictions. First of all, these measures have been around for at least a hundred years and are modelled on the German Kurzarbeit scheme to tackle unemployment and save capitalism from its contradictions. Such packages pave the way for more permanent forms of state support for private companies in the name of combating unemployment. They address the intensification of capitalist contradictions, on the one hand, by helping to sustain a level of consumption necessary for capitalist production and, on the other, by preventing popular unrest. Additionally, it has been argued that these measures in reality 'socialize' the burden in the sense that other social classes, apart from the capitalists, share it (usually disproportionately) through taxation (Mavroudeas 2020). Contrariwise, the benefits of such packages are not shared equally. More than two-thirds of the US package went outright to cash payments and loans to businesses that may not be repaid, whereas just one-third will be used to help the millions of workers and self-employed to survive through cash handouts and tax deferrals (Roberts 2020c).

However, this temporary return to Keynesianism, which seems to vindicate the advocates of Modern Monetary Theory,[4] is hardly sufficient to save capitalism from its contradictions. The reason for this is that it ignores the social structure of capitalism, where production and investment is made in the anticipation of profit and not in order to meet social needs. Satisfaction of needs (i.e. the use-value aspect of a commodity) is only a means to make profit (through the process of valorization). As a consequence, the rate of profit, as well as the existence of conditions that guarantee a high rate of profit, is crucial. On the one hand, this indicates that investment of capital does not depend primarily on whether the government has provided enough 'effective demand' (Roberts 2020a). Reluctance to invest is not a result of absence of effective demand but of low expected profitability. It follows that much of the fiscal package will probably end up 'either not being spent but hoarded, or invested not in employees and production, but in unproductive financial assets' (Roberts 2020a). This partly explains why stock markets bounced back as soon as central banks pumped in cash and free loans.

The problem is that the tendency of the rate of profit to fall inheres in the capitalist mode of production due to its contradictory nature (Marx

1991, 317–38). Arguably, this is the main factor that leads to recurring crises of production and investment (Carchedi and Roberts 2018; Roberts 2015). As identified by Marx, the law of profitability is based on both the law of value, according to which only labour creates value, and the law of accumulation, according to which the means of production will rise to drive up the productivity of labour and to dominate over labour. These laws create a contradiction between rising productivity of labour and falling profitability for capital, which leads to recurring crises that devalue capital and thus partly restore the rate of profit. However, there are other factors at play in the capitalist mode of production which may counteract the tendency of the rate of profit to fall. Central among these are the intensification of labour exploitation, the existence of a surplus population and the reduction of wages below their value (Marx 1991, 339–48).

In the context of the Coronavirus pandemic, it is too early to say whether the 'pandemic slump will create conditions where capital values are so devalued by bankruptcies, closures and layoffs that the weak capitalist companies will be liquidated and more successful technologically advanced companies will take over in an environment of higher profitability' (Roberts 2020a). On the contrary, it is not too early to identify that capitalist states have already initiated the process of facilitating conditions of profitability by enabling the intensified exploitation of labour, answering in this manner the question of 'who pays for the crisis'. The capitalist struggle for a profitable way out of the crisis goes through direct wage reductions and further deregulation of labour law to promote more flexible forms of employment (teleworking, subcontracting, piecework). It also goes through a sustained attack on social and political rights, with which bourgeois states are experimenting (Mavroudeas 2020).

Technology and political economy

We will now focus on one of these developments which perfectly captures the above needs of capital and therefore raises doubts as to whether it will remain a temporary by-product of the pandemic. We are referring to the practice of teleworking, the rise in which has been one of the main effects of the pandemic, with a resulting increase in measures of containment designed to address it. Teleworking refers to work that takes place anywhere and at any time (at home, on public transport, during rest or leisure breaks, etc.). A result of technological developments (Internet, hardware and software) which have made it possible, the practice of teleworking enables the employer, through the off-duty use of digital means of communication, to place the employee in a state of permanent availability.

In Greece, one of the first acts of legislative content (11 March) introduced to tackle the pandemic enabled the unilateral imposition of teleworking by the employer. This measure was presented as self-evident and was indeed celebrated initially by social media culture. It should be noted that teleworking has been one of the measures promoting further flexibility of the labour market strongly advocated by the European Union. According to the Commission, further flexibility, achieved through measures like teleworking, would 'increase female participation in the labour market', as well as 'give workers more opportunities and choice to balance their professional and care responsibilities' (EU Commission 2017). It has to be noted, though, that flexibility is only nominally aimed at countering unemployment. In reality, the goal is the reduction of labour costs through the intensified exploitation of a wider labour force. Part-time and temporary working arrangements, as well as teleworking, favour the inclusion of previously excluded elements in the workforce, so that the abundance of supply reduces the cost of labour.

Consequently, teleworking as a very flexible form of employment has been a constant demand of various groups of industrialists. Since October 2017 the Hellenic Federation of Enterprises (SEV) has expressed its views on the future of employment after the Memorandum, in a Special Report (SEV 2017). There it identified that further flexibility of working relations and the spread of atypical forms of employment (such as teleworking, crowdwork, zero-hours contracts, short-term contracts, on demand work, mini jobs, portfolio work, voucher-based work) is a *conditio sine qua non* for the ability of Greek enterprises to compete in the global environment. It is not surprising that industrialists see teleworking as an essential precondition for their competitiveness. A necessary characteristic of teleworking is the destabilization of two fundamental protective regulatory components of labour law: the dualisms of workplace–residence and working time–leisure time. The liquidation of these dualisms results in a space–time destabilization of work (Travlos-Tzanetatos 2019). This is an essential mechanism for the intensification of exploitation, as working time increases to overtake leisure time once work is carried out from the employee's home, with employees finding themselves in a state of permanent availability for work.

Teleworking reveals itself as a mode of intensifying labour exploitation and therefore increasing capital's potential to generate profits. The additional benefits of teleworking for capital include the reduction of operational costs and more importantly the taming of industrial action. Working from home precludes physical interaction between employees and raises significant obstacles to common articulation of demands, workplace organization and the collective struggle for common interests. We can add to these the detrimental effects on the psychosomatic health and safety of workers in the form of work-related stress, burnout syndrome, musculoskeletal disorders,

and visual and mental fatigue due to the osmosis between working time and leisure time (Tavares 2017; Montreuil and Lippel 2003; Messenger et al. 2017; Vargas Llave et al. 2020). On this basis it is safe to argue that the practice of teleworking benefits the employer at the expense of employees' health.

We arrive at the conclusion that a constant need for capital is reflected in the emergency legislation. The pandemic acted as a catalyst for the widespread application of teleworking as part of the policy of social distancing, but the justification for this practice extends beyond dealing with the pandemic if one takes into account various reports and studies conducted by capitalist groups and bourgeois political institutions. Intensified exploitation is a central factor counteracting the tendential fall of the rate of profit. The 2008 crisis facilitated the introduction of flexibility, namely aggressive policies of labour deregulation, in order to intensify exploitation as a profitable way out for capitalism. The Coronavirus crisis legislation continues along the same path.

Let us now turn to the last issue examined in this section, which casts doubt on the temporariness and socio-political neutrality of measures. This concerns the exponential growth of digital surveillance during the pandemic, such as through test and trace smartphone applications, data collection, data mining and algorithms predicting trends of disease spread. These and other technologies have been hailed as powerful allies in the battle against COVID-19 (Kritikos 2020; Goldsmith and Keane Woods 2020). At the same time, several objections have been raised and critiques have been put forward regarding the use of digital surveillance technologies, mostly from the standpoint of privacy and data protection (Sanders and Belli 2020; Burt 2020). Such critiques capture in its immediate form the core contradiction between technological development and the social context within which it takes place. However, it is important to move beyond the issue of privacy, which is a rather restrictive means of critiquing the growth of digital surveillance (Fuchs 2012, 35; Andrejevic 2013, 73).

In Greece, the government, through an act of legislative content (article 29 of Act 30.03.2020), proceeded with the establishment of a National COVID-19 Patient Registry for the purpose of improving the efficiency of epidemiological study. The data collected include the name, age, gender and health status of each patient, which is obviously sufficient to create a profile with potential legal effects (within the meaning of article 22 of Regulation 2016/679 on General Data Protection Regulation (GDPR)). An argument for the necessity of such a measure can be sustained, considering the need for a rapid and coordinated analysis of data to deal with the spread of a pandemic. However, the law goes beyond this and raises questions as to the socially necessary and beneficial nature of this measure. Paragraph 10 of article 29 invokes article 24 of Act 4624/2019, which implemented the GDPR

in the Greek legal order, and provides for the processing of the Registry data for purposes 'other than those they were collected for'. Although the same paragraph prohibits the processing of such data by 'insurance companies and banks', it is extremely problematic as it contradicts Guideline 3/2020 of the European Data Protection Board, which allows for the processing of health data only for the purposes of scientific research. It should be noted, though, that the most controversial case of personal data processing, with serious implications on the operation of modern democratic institutions, involved a company (Cambridge Analytica) which acquired such data in 2016 with the excuse of conducting research (Moore 2018, 55–71).

The pandemic has provided big corporations that engage in digital surveillance with the opportunity to solidify their position and erase the impressions from past incidents of malicious practice, such as the Cambridge Analytica affair. Facebook's CEO has characterized the 'ability to gather and share data for good' as a 'new superpower' the world can use to combat the pandemic (Zuckerberg 2020). Before the pandemic, the US National Security Commission on Artificial Intelligence (NSCAI) was calling for public–private partnerships in mass surveillance and data collection in order to make use of this 'superpower' in the global digital competition with China (NSCAI 2020). The chairman of this commission, who also happens to be Google's CEO, will also be heading another commission 'to reimagine New York state's post-COVID reality, with an emphasis on permanently integrating technology into every aspect of civic life' (Klein 2020). It comes as no surprise, therefore, that measures which respond to constant demands of these digital corporations are actually endorsed on the occasion of the pandemic. For instance, both the UK and US governments have contracted with data-mining private companies – such as Palantir, the founder and investor of which was US President Donald Trump's earliest Silicon Valley supporter – in order to consolidate government databases and build protective computer models.

These developments have been characterized as a 'Screen New Deal' and as 'a coherent pandemic shock doctrine' by Naomi Klein (2020). The pandemic is used as an opportunity for big corporations to rush into being a future of exploitation and surveillance: a future that

> claims to be run on 'artificial intelligence', but is actually held together by tens of millions of anonymous workers tucked away in warehouses, data centres, content-moderation mills, electronic sweatshops, lithium mines, industrial farms, meat-processing plants and prisons, where they are left unprotected from disease and hyper-exploitation … a future in which our every move, our every word, our every relationship is trackable, traceable and data-mineable by unprecedented collaborations between government and tech giants' (Klein 2020).

One does not need projections of a dystopian future to grasp the socio-politically partial nature of developments in this field. It suffices to appreciate the importance of data for digital capitalist corporations. There have been various analyses which explore this issue. Shoshana Zuboff (2019, 8) has argued that 'surveillance capitalism unilaterally claims human experience as free raw material for translation into behavioural data'. Data are declared as a 'proprietary behavioural surplus' by surveillance capitalists and are fed into the means of production of this new economic order, that is the advanced manufacturing processes known as 'machine intelligence' (8, 95–6). The result of this process is 'prediction products', which 'anticipate what you will do now, soon, and later' and 'are traded in a new kind of marketplace for behavioural predictions' called 'behavioural futures markets' (8). Through the extraction and selling of behavioural data surveillance, capitalists are increasingly intervening 'in the state of play in order to nudge, coax, tune, and herd behaviour toward profitable outcomes' (8).

The enormous benefits of digital surveillance for the processes of capitalist production and circulation, as well as for the profitability of capital, have been highlighted by Marxist analyses. Such critiques move beyond the one-sidedness of arguments rooted in privacy invasion. It is argued that the concept of privacy 'does not do justice to the productive character of consumer surveillance', whereby consumers are asked to pay for surplus extracted from their own work (Andrejevic 2012, 73). The focus thus needs to shift to political economy. Data are generated by platform usage and thus platform users create value, as their labour is objectified in 'ad-space commodities' (Fuchs 2016, 53–4). In its turn, targeted advertising revolutionizes the processes of circulation and realization of surplus value. Digital platforms and new media are crucial for the articulation of the consumptional capacity of individuals. The new digital information and communication technologies reproduce a social being whose capacities develop in line with the requirements of circulation (Manzerolle and Kjøsen 2016, 169). Last but not least, by radically increasing the velocity of capital and consequently decreasing the time of circulation, data extraction enabled by new media platforms has an impact on capital's profitability. Because the sum and mass of surplus value created within a period is negatively determined by the velocity of capital, the faster capital moves through the sphere of circulation, the more surplus value will be created and validated (159).

Therefore, it can be argued that digital surveillance results from developing contradictions inherent in the capitalist mode of production, such as the contradiction between production and consumption and the tendency of the rate of profit to fall (Kivotidis 2020). The measures taken in this field during the pandemic correspond to such structural contradictions and exacerbate already existing trends (e.g. public–private partnerships, data

concentration, data mining) while promoting well-established demands. In fact, the value of digital surveillance has now come to be recognized by bourgeois governments and international political institutions, such as the European Union. In a Communication to the European Parliament and the Council just before the COVID-19 outbreak, the European Commission set out 'A European strategy for data', recognizing the importance of data for the economy and society. According to the Commission, 'data will reshape the way we produce, consume and live'. The challenges identified by the Commission for the EU to realize its potential in the data economy include the use of public sector information by businesses, the sharing and use of privately held data by other companies, the use of privately held data by government authorities and the sharing of data between public authorities (EU Commission 2020).

We conclude that the pandemic acts as a catalyst not just for the capitalist crisis but also for the introduction of measures to deal with its consequences. Determined by the capitalist relations of production, these measures aim to increase capital's profitability by meeting long-standing demands of major capitalist corporations. This point is of great importance as it stands in sharp opposition to the dominant positivist perception of measures as temporary and technical. We saw above that the temporariness and apparent socio-political neutrality of the measures have been overemphasized by legal theory in order to downplay their expansive, political and class character. There are two problems with this narrative. First, there is the fact that emergency legislation tends to become permanent, especially in the context of dealing with an economic crisis (Kivotidis 2018). Furthermore, invoking scientific neutrality in order to justify the measures as unequivocally promoting the common good and public interest disregards the fact that the development of science and technology does not take place in a vacuum, but is instead embedded in a system of social relations. In this context their operation is never neutral but always determined by politico-economic considerations. Let us now examine the role played by the notion of public interest in this context.

Public interest and social need

The emergency form of the Coronavirus crisis legislation obfuscates the partially social content of the above measures under the cloak of public interest. This form of decision-making tends to depoliticize any process of decision making and, as such, constitutes an integral aspect of bourgeois legal ideology (Balibar 1977). The questions of how an economy should run or how to respond to a crisis are pre-eminently political. Emergency

responses appear as 'technical' or 'natural', and definitely as not allowing for alternatives. In the context of the Coronavirus pandemic, the absence of political debate obscures the socio-political context which sets the parameters for the response. The role of capitalism in rendering public health systems incapacitated through decades of underfunding and privatization is ignored. Additionally, the role of capitalism in the origins of the virus's spread, through the destruction of regional environmental complexity that keeps virulent pathogen population growth in check (Wallace et al. 2020), is not discussed.

The measures are presented as technical and their adoption as self-evident. Dealing with the pandemic, and especially its economic consequences, should not be subject to public deliberation but should be left to experts and scientists because it requires a high degree of specialization and technical knowledge. The fact that a large number of measures are based on technological developments strengthens this narrative. These measures are presented as self-evident, whereas other measures that might be more suitable or might hold to account those who have profited from the privatization of health care are not discussed. Social containment is self-evident, as is 'working from home'. It is self-evident to continue working in warehouses or factories without asking if it is socially necessary that they continue operating. The need for pay reductions, furlough schemes and changes in working conditions are assumed to be self-evident because they are necessary to keep the 'economy' going. The question is: for whom are these measures necessary? It follows from the above analysis that they are not necessary for everyone. Some social strata benefit more than others. For some, not only are there no benefits, but these measures also usher in conditions of intensified exploitation and inevitable immiserization.

The above analysis confirms our hypothesis that some of these 'exceptional' measures are here to stay and exposes their class character as opposed to the narrative of neutrality and 'common good'. At the same time, it highlights the role of relations of production in how productive forces are socially utilized.[5] For instance, technological development makes it possible to work from home or to process personal data for specific social purposes. The pandemic acted as a catalyst for both of these developments. Nevertheless, the decisive motivation is profit. Of course, the technological development that makes teleworking possible also provides the possibility for jobs to increase by reducing socially necessary working time while maintaining a stable wage regime (Travlos-Tzanetatos 2019, 115). Similarly, regarding the processing of personal data, this could potentially contribute to the effective satisfaction and cultivation of social needs through their immediate identification. However, within capitalism these developments lead to technological unemployment, intensification

of exploitation and degradation of the living standard of workers. This is the central contradiction. It should be noted, however, that, contrary to technophobic, neo-Luddite views, neither digitization nor general technological development by itself results in unemployment and increased exploitation. On the contrary, it is the relations of production that determine how productive forces are put into operation: in order to meet social needs or to increase capitalist profitability.

Moreover, relations of production ultimately determine the impossibility of a general interest in class societies. The fundamental and irreducible contradiction in capitalism between capital and labour entails the impossibility of simultaneously promoting the interests of the two opposing classes. Capital and labour as conditions of the capitalist mode of production are by definition opposite. Whatever one gains, the other necessarily loses. Each pole has an interest in increasing its share to the detriment of the other. The very concept of interest expresses this opposition and renders the term 'general interest' *contradictio in terminis*. In the context of the pandemic, the relations of production determine the class character and, consequently, the social partiality of the measures, which is obscured behind the abstract universality of 'general interest'. Measures to tackle the pandemic, and in particular its economic consequences, prioritize the interests of capital, as opposed to the social needs of health protection, protection against unemployment, and decent living and working conditions. A comprehensive evaluation and critique of the measures taken by bourgeois governments globally to deal with the pandemic presupposes an elaboration of the concept of social needs.

Contrary to the notion of interest, the concept of need refers to something absolute. Needs are not weighted like interests or rights. Being 'absolute' means that the inability to satisfy any need necessarily affects the ability to satisfy the totality of needs. For example, the need for health protection is inextricably linked to the need for housing and food, but also for leisure, exercise, and so on. Dealing with the consequences of a pandemic in a capitalist society, however, necessarily entails a conflict between health and the economy, as well as a hierarchy of needs. This is due to the fact that satisfaction of social needs is not an end in itself in capitalism (Heller 2004, 49). On the contrary, the goal of capitalist production is the valorization of capital, whereas the satisfaction of social needs (on the market) is only a means towards this end. As Marx (1991, 253) put it: 'the expansion or contraction of production are determined by … profit and the proportion of this profit to the employed capital, thus by a definite rate of profit, rather than the relation of production to social needs, i.e. to the needs to socially developed human beings'. Capitalist society reverses the relationship between means and ends.

The immediate consequence of this reversal is the prioritization of certain needs over others. Since not every social need can be met, those that constitute existential conditions of the capitalist system are prioritized. In the case of the Coronavirus pandemic, it can be argued that the system's need for expanded reproduction of capital, as mediated by the need for profit, has determined the form that health protection takes. Privatization and underfunding, combined with intensified exploitation of health workers as manifestations of the system's existential need for profit, continue to determine the political response to the pandemic. Here, then, we can locate the absolute inability to balance, in capitalism, the need for health protection with the need for social welfare. In capitalist societies this balancing exercise translates into measures such as the suspension of employment contracts,[6] the suspension of the employers' obligation to declare any change or modification of the employees' working hours,[7] the suppression of democratic and trade union freedoms[8] and the unilateral shift to atypical forms of employment.[9] Employers have taken advantage of these measures to proceed with an avalanche of dismissals, unilateral imposition of unpaid leave and compulsory leave. On their part, the employees acquiesce to these 'necessary' measures with the Damoclean sword of unemployment hanging over their heads.

By contrast, from a social needs perspective, the need for protection from the virus as well as from the economic consequences of the pandemic would translate into measures such as: immediate and complete support of public health systems through recruitment of necessary medical and nursing staff and requisition of private units; provision of the necessary infrastructure to deal with the pandemic; necessary health and safety measures for all workers; absolute protection against redundancies and deregulation of employment relations; ensuring full pay for workers, even in industries that shut down; measures to support employees, such as additional paid leave for as long as is required to care for children or sick relatives; and prohibition of unilateral enforcement of unpaid leave by employers.

The opposition between health and economy can only be overcome in a socioeconomic system that recognizes the absoluteness of social needs and does not weigh them against each other. This is the only system, the guiding principle of which is the all-round development of human personality, that would allow the reorganization and redirection of production, as well as the utilization of all productive forces, including human labour-power, to deal with a health crisis. The absoluteness of social needs highlights the contradictions of the capitalist mode of production because it demands a direct attack on private property (through measures such as the requisition of private clinics or the breaking of drug patents), thereby contradicting its existential basis.

Conclusion

This chapter has examined several aspects of the legal response to the pandemic through the prism of a series of contradictions, such as between public interest and fundamental rights; health and economy; technology and political economy; and public interest and social needs. Legal positivism tends to view the measures as temporary and scientific, and as promoting the common good. They are therefore seen as legal and proportionate to the legitimate aim of protecting public health. On the contrary, a close review of the politico-economic content of prima facie technical measures, such as teleworking or data concentration and analysis, casts doubt on this narrative.

Instead we saw that the scientific response to the pandemic is in the last instance determined by politico-economic considerations, as prima facie technical measures in reality satisfy long-standing demands of specific social strata. The discovery of the partiality of economic incentives, and that profit making is the constant and underlying cause for the adoption and dissemination of such measures, sheds light on the ideological role of the notion of public interest which is invoked in order to depoliticize the response to Coronavirus and other crises. The chapter concluded with the adoption of a social needs perspective which is necessary in order to critically evaluate the measures taken to promote the *salus populi* in a capitalist society, as well as to imagine a society where the protection of public health can always be compatible with the promotion of social welfare.

Notes

1. The term 'legal formalism' is used here in a broad sense to indicate theoretical approaches to law as a closed system, which, even when they identify possible contradictions within the system itself, fail to engage with the socio-political and institutional contradictions that might influence the latter.

2. See, for instance, Hans Kelsen, one of the architects of legal positivism, whose conception of (legal) science is purified from the ambiguity of political concepts, which are amenable to distortions determined by political expediencies (Kelsen 1967, 71–191).

3. Article 31 paragraphs 2 and 3 of Act 4690/2020.

4. According to this theory, policies of fiscal spending funded by central bank money and running up budget deficits and public debt could take the economy towards full employment and sustain it (Roberts 2019).

5. This is a well-established point in Marxist analyses of technological development in capitalism. Such analyses point towards the contradiction between productive forces (ie instruments of production, machinery, technological development, scientific research, etc.) and relations of production (eg ownership of the means of production, wage relation, etc.). For instance, Karl Marx refers to the 'economic paradox' of machinery in capitalism, which, despite being 'the most powerful instrument for reducing labour-time' in the context of capitalist social relations, 'suffers a dialectical inversion and becomes the most unfailing means for turning the whole lifetime of the worker and his family into labour-time at capital's disposal for its own valorization' (Marx 1976, 532). We argue that this contradiction is key to grasping how politico-economic considerations determine the scientific response to the pandemic.

6. Act of Legislative Content 20.03.20, article 11(2).

7. Act of Legislative Content 11.03.20, article 4(1).

8. Act of Legislative Content 20.03.20, article 68(2).

9. Act of Legislative Content 11.03.20, article 4(2).

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Chapter 2

COVID, commodification and conspiracism

David Seymour*

After six months it is surely time to relax the rules so that individuals can take more personal responsibility and make more of their own decisions about the risks they are prepared to run.

The generation of the Second World War had been prepared to risk life to preserve freedom. This generation is ready to risk freedom to preserve life.

Former Australian Prime Minister Tony Abbott
(*The Guardian*, 1 September 2020)

'If No 10 proposes tighter restrictions straight after Christmas, those cabinet ministers with freedom-loving instincts – who gave us all so much hope last week – must speak out', said one member of the Covid Recovery Group of Tory MPs. 'In any future leadership contest, we will all remember how they acted this week. We need real, gutsy, freedom-loving Conservatives to rescue us from this madness.'

(*The Guardian*, 25 December 2021)

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Introduction

This chapter examines lockdown as governments' response to the Coronavirus pandemic, the market's response to lockdown and how and why this latter response is often articulated through conspiracy theories. As we will see, the market response to lockdown brings to light long-existing contradictions and tensions that are inherent in the modern nation-state. For reasons that will become clear, the nature of *commodification* forms the centrepiece of my analysis.

The chapter begins with a brief discussion of the nature of the state's[1] response to the pandemic with emphasis on the periods of lockdown. It then moves on to examine the response to that response. This latter discussion is framed within a pre-existing tension, if not conflict, between the market and the state. It is from this tension that the 'space' for conspiracism around the issue of lockdown and other measures comes to the fore.

In looking at these questions, I draw on a critical conception of 'the humanities'. If, for present purposes, we understand 'the humanities' as 'championing and promoting [studies that] are about humanity itself: humanity past and present alike, together with whatever thoughts, concerns and hopes about human futures that those studies provoke' (MacCulloch 2018), we cannot but acknowledge that not only have the humanities and their 'hopes' fallen short, but, as history has shown us, they have also been implicated, willingly or unwillingly, in humanity's darkest chapters, so that 'instead of entering into a truly human condition', we continue to run the risk of 'sinking into a new kind of barbarism' (Adorno and Horkheimer 1947/1969, xi). However, our loss of innocence should not mean a rejection *in toto* of the humanities' underpinning norms and values. It is for this reason that this chapter draws on works that, taken together, offer a critique of the humanities while retaining faith in their ultimate objective of the betterment of humanity and the world of which it is a part. Indeed, it seems to me that, if anything, in the face of everything, it is of the utmost importance to insist on the relevance of their 'concerns and hopes' for the present moment.

Drawing on this critical tradition, I deploy Hegel's (1827/2017) concept of 'subjectivism', Marx's (1867/1995) concept of commodification and Adorno and Horkheimer's notion of *mimesis* (1947/1969). I make use of these theories to show that the conspiracism that has arisen around COVID-19, although in many ways novel, draws on and reveals inherent unresolved contradictions and tensions that are embedded within the nation-state itself, but which the recent pandemic has brought to the surface.

Responses to COVID-19: lockdown and the market

The almost immediate and universal response to the COVID-19 pandemic was what came to be known as *lockdown*. The purpose of lockdown was quite straightforward. Its aim was to limit as much as possible any social contact outside domestic settings in order to halt the spread of the virus. The UK and devolved governments' announcement of lockdown was accompanied by a series of emergency measures and decrees to ensure its effectiveness.[2]

Despite some important exceptions, lockdown brought with it the (temporary) suspension of the normal operations of the market along with the (temporary) suspension of associated legal rights. Places of production, distribution and consumption were closed and individual private rights, such as freedom of movement, freedom of assembly and others, were likewise severely curtailed.

Although deemed necessary to contain the virus, lockdown – along with the suspension of the market – was fraught with difficulties. There is little doubt that, for the vast majority of people, the loss of opportunity to work meant a real threat of or actual loss of business, employment and income leading to potential losses of housing, health care and other basic life amenities. These threats were especially strong in countries where state support was inadequate or non-existent, or where the refusal of the state to intervene was grounded in ideology. The immediacy of this threat was felt particularly by the self-employed and/or owners of small businesses. Moreover, alongside these material concerns were the less visible or less tangible but very real harms relating to mental health and domestic abuse, and those relating to the hiatus of children's education and socializing.

The conflict between the market and the state

The conflict between the imperatives of lockdown and those of the market can be reframed in the language of a conflict between the individual and the collective, or the particular and the universal. On the one hand, lockdown emphasizes the collective interests of the nation-state (as expressed through public law and the public health of the population as a whole); on the other hand, the market's conception of the 'public good' frames it as an aggregation of individual interests and private rights.

However, the point here is that while the pandemic has highlighted this conflict between the market and the state, it has been present in the modern nation-state from its inception. Although born at the same moment, the

necessary relation between the two has always been fraught with tension. It may not be too strong to argue that one of the core political debates of the last two centuries has centred around the legitimacy or otherwise of the state's intervention in the workings of the market. In recent times, since at least the late 1970s, it has been the major ideological fault-line in many nation-states across the globe. It is within this longer history that we can begin to understand the conspiracism that has arisen specifically in the context of the Coronavirus pandemic.

In many ways, this view of the matter is grounded within the natural law-based liberal conception of political philosophy (Fine 1984/2002). This school of thought reduces the state function to little more than the protection of the freedoms of the market and the legal rights of the owners of private property. From this point of view can be traced the belief that the COVID-19 interventions of the state that obstruct the market's free operations (lockdown, mask mandates, social distancing, vaccination passports, etc.) are not only an illegitimate overreach but also an improper restriction of innate and 'natural' freedoms. It is this notion of the relationship between market and state that, as we will see, both underpins and is radicalized within the ideology of the free market, which gives rise to the belief that the only moment of freedom exists *within the market*. It is from this perspective, moreover, that any other moments of freedom that *do* exist (i.e. outside the market, such as civil society and the state) are inverted and reappear as threats of unfreedom.

To understand this inversion and the conspiracy theories to which it gives rise, it is necessary to briefly trace, at least in broad outline, the critique of this orthodox liberal or natural law understanding of the nature of the body politic. In this regard I will refer to the political philosophy of Hegel, Marx's political economy and Adorno and Horkheimer's critical theory. I begin first, however, with the meaning of conspiracism or conspiracy theory that informs this chapter.

Conspiracism and the ideology of the free market

Although much has been written about the meaning of 'conspiracy theory', my own interpretation of it draws on Hannah Arendt's concept of 'ideology' (Arendt 2004, 593–617). At the heart of Arendt's conception of ideology is her view that it tells us *nothing* of *substance* about that upon which the ideology claims to shed light. For example, in the context of antisemitism it tells us absolutely nothing meaningful about actually existing Jewish people, but rather tells us everything about the 'idea' of the Jews which antisemitism contains. As Arendt explains, ideology is the *unfolding* of the

idea into which reality is manipulated, falsified and distorted so as to fit into the initial image.

However, in this chapter I am not focusing on the connections made by conspiracy theory between COVID-19 and antisemitism (although, unsurprisingly, there are many examples of such links), but rather on understanding the connection between conspiracy thinking, COVID-19 and the *ideology of the free market*. I argue that looking at COVID-19 through the prism of this ideology allows us to make sense of, or at least identify, the origins of contemporary COVID-related conspiracy theory. Thus, just as antisemitism is the unfolding of the *idea* of 'the Jew', so too, in the present context, are conspiracy theories relating to the *state* the unfolding of the negative idea of 'the state' that, again, distorts and denies the messiness of reality.

At the heart of this ideology is the idea, noted above, that the only moment of 'freedom' in the contemporary world is to be found in and through the market. It is this freedom that is institutionalized through the many freedoms associated with the free market, including, perhaps before all else, freedom of the exchange of private property and of contract. It is the contract and the freedom of exchange and associated rights that encapsulate the innate freedoms comprising a society of individual private property holders, which seemingly allow for the uncoerced actions of individuals to act in their own self-interest without let or hindrance. It is to these issues that we will now turn in more detail.

Subjectivity and subjectivism

In the context of this chapter, it is noteworthy that in offering an early challenge to the traditional natural law theories of state and market, Hegel appears to have recognized an essential aspect of the ideology of the free market – what he conceptualizes as *subjectivism*.

In *Elements of the Philosophy of Right*, Hegel recognized the market and the private rights associated with it (i.e. rights to the free ownership and exchange of private property) as one *moment* of freedom in the modern body politic, but not the *only* moment. Thus, whereas traditional political philosophy saw the market as the realm of freedom and the state's role as little more than a facilitator of the market and the guardian of (natural) private rights and private property, Hegel saw the state as a related but distinct *moment* of freedom in itself – that rights are not the only moment of freedom in the system of right. While the state contains the rights of the market within itself, it does not exhaust the existence of a person's freedom in their life within the body politic as a whole. In other words, the free market ideology is unable to recognize any other aspects of freedom beyond that of the market.

In a more specific challenge to a free market ideology, Hegel is clear that although the protection of private property and associated rights are included within the wider ambit of the state, they should not be regarded as sacrosanct or supreme as against other moments of freedom, such as the life of the citizen. Indeed, he recognizes that in certain 'extreme situations where the requirements of personal survival come into collision with the rights of property, the latter may be subsumed to the "right of necessity"' (Fine 2001, 52). Hegel's thinking on this point is directly applicable to the contestation between the market, state, freedom and COVID-19:

> Life as the totality of ends, has a right in opposition to [the rights of private property]. If, for example, it can be preserved by stealing a loaf of bread, this certainly constitutes an infringement of someone's property, but it would be wrong to regard such an action as common theft. If someone whose life is in danger were not allowed to take measures to save himself, he would be destined to forfeit all his rights, and since he would be deprived of life, his entire freedom would be negated. There are certainly many prerequisites for the preservation of life, and if we look into the future, we must concern ourselves with such details. But the only thing that is necessary is to live *now*; the future is not absolute, and it remains exposed to contingency. Consequently, only the necessity of the immediate present can justify a wrong action, because its omission would involve committing a wrong – indeed, the ultimate wrong, namely the total negation of the existence of freedom … *no one should be sacrificed completely for the sake of right* (Hegel 1827/2017, 127A, quoted in Fine 2001, 52; emphasis added).

Hegel's view is not that the state can ride roughshod over the rights of private property, but that there are occasions when other concerns (i.e. the health and life of the citizenry, both as individuals and as a collective) take priority. The point is that, unlike the ideologists of the free market, the relationship between the market and the state does not turn on a conflict between freedom and unfreedom respectively, but rather between different spheres of freedom: between the rights of private property and the right or freedom present within the realm of the state. Ultimately, to borrow Hannah Arendt's famous aphorism, this is the fundamental freedom, or the right to have rights (Arendt 2004, 277).

Yet even at the time he wrote these words in 1824, Hegel was more than aware of the *tension* that exists between market and state and of the dangers of what happens when the market is treated as the sole repository of freedom. As we will see, it is this aspect of his thought that has a great bearing on the connection between the market, COVID-19 and conspiracism.

Hegel not only acknowledged the error in prioritizing any one 'moment' of right over others (be it rights and/or the state), but he also recognized the danger in *idealizing one realm over the other*, which could lead to a situation in which the latter realm would come to be 'viewed as instances of illegitimate power' (Fine 2001, 31). It is in this context that Hegel discusses his concept of subjectivity and *subjectivism* which, in many ways, can be seen as foreshadowing free market ideology's content.

For Hegel, modern subjectivity and its relationship to private property is to be welcomed. It is, he notes, the first time in history that a person is free to decide what to produce, when to produce and what to exchange. It is this freedom that separates the modern person from the slave of the past, a past that cannot return without the destruction of rights and right.[3] However, as much as Hegel 'embraces the right *of subjective freedom* as the supreme achievement of the present age' (Fine 2001, 34), he also recognizes its opposition to *subjectivism*, which 'fetishizes' this subject. In short, *subjectivism* 'converts [the subject] into the absolute and fixes on this moment in its "difference from and opposition to the universal"' (PR.124R, quoted in Fine 2001, 34).

For Hegel, just as individual ownership of private property captures an instance or moment of contemporary freedom within the body politic, *subjectivism* fetishizes it *as if it were the only moment of freedom in toto*. Fine spells out the consequence of this error:

> For Hegel, the distinction between subjectivity and *subjectivism* (or the fetishism of the subject) is crucial. If the former is the greatest achievement of the modern age, the latter constitutes its characteristic pathology. The subject becomes 'like God'. It presents its will as absolute. It demands worship. What starts life as a principle of critical thought becomes in the course of its own development a new source of superstition (Fine 2001, 34).

If it is the case that, from a legal perspective, subjectivism poses a threat to the entire system of right (freedom) in the name of a distorted and abstract subjectivity, its full negative potential reaches its destructive boiling point when articulated through the language of 'morality'.[4] In a foreshadowing of Nietzsche's concept of *ressentiment* (Nietzsche 1887/1990; Seymour 2005), this potential catastrophe arises from a notion of morality in which the only judge of 'good and evil' is one's own (individual) conscience seemingly detached from – and in opposition to – other sources of moral value, such as ethics. Morality, in other words, becomes a *negative* freedom that, in turn, threatens to negate freedom itself. If an inward and seemingly autonomous morality sets the standard for what is moral or not, then anything deemed *immoral* from this individual and subjectivist viewpoint is correspondingly

evaluated as contrary, hostile and a threat. It is, therefore, from subjectivist morality that the world of freedom is most at risk:

> The danger arises by … elevating negative freedom [morality] to 'supreme status'. Self-determination becomes 'sheer restless activity which cannot yet arrive at something *that is*. (PR.108A). 'What is' is, therefore, devalued against 'what ought to be' and appears worthless, fit only for destruction (Fine 2001, 38).

It is this concept of *subjectivism* that we can see at play at the heart of the ideology of the free market and its opposition to the state through the way it distorts and manipulates reality to fit it into its worldview. Subjectivism, both politically and morally, cannot but perceive the state as anything other than hostile and a danger to its own narrow conception of freedom. Thus, in the case of COVID-19, the temporary suspension of the market and associated private rights comes to be interpreted as part of a clandestine attempt by the state to destroy the freedom of the subject. Moreover, if Hegel notes the *legal* aspects of the potential danger to right wrought by *subjectivism*, it is Marx who traverses the same development, but from the perspective of political economy and the nature of commodification that lies at its heart.

COVID-19, the market and commodification

In this section we will discuss the *content* of Hegel's concepts of subjectivity and subjectivism as it appears within the ideology of the free market. The main themes here are the ways in which both the subject and their private rights are determined by the nature of commodification which, in turn, leads to the commodification of the subject. It is a consequence of this development that modern, market subjectivity adapts to, and takes on, the characteristic of a commodity itself.

The prism of the ideology of the free market helps us to understand the market's response to the virus, most notably its *normalization*. Normalization is also part of the attempt to remake COVID-19 in the market's own image. In so doing, it seeks to take the sting out of the uniqueness of the virus and so downplay its catastrophic potential for causing mass harms and deaths. Correspondingly, it downplays the need to interfere with the market's normal operations. The essence of this attempt has been to transform COVID-19 into a *commodity*.

Following Marx, all we need to know about a commodity at this stage in the discussion is that it is an article of private property that is capable of exchange through the market (Marx 1867/1995, 13–93) What defines something as a commodity is less its actual existence as a particular article (its

use-value) but rather its ability to be exchanged (its exchange-value). From the point of view of the market, all that matters is the exchange-value behind which the use-value of the thing disappears. It is only as a result of this process that unlike things can be made alike and become capable of exchange. For example, whether something is a chair or a washing machine, all that is relevant is that it can be exchanged for something else, a necessity if it is to take its place in the market. By presenting the virus as a commodity, therefore, not only does COVID-19 become 'just' one more product capable of exchange with another, but, as a species of private property, it is also deemed a matter of 'individual freedom' whether one chooses it over a host of other equally available 'goods'.

This intimate economic connection between the market and commodification is reflected in the nature of their associated rights. Just as the commodity *abstracts* and reifies exchange-value at the expense of use-value, so analogously do the legal rights of private property *abstract* the juridical person (the rights holder) from the flesh-and-blood, socially situated individual along with all their specific or particular characteristics. As with the commodity, so, too, the abstract nature of associative legal rights allows the unalike to become alike, and so all, as owners of commodities, enter the realm of exchange, which is the market.

Since it is also as owners of private property and determiners of its exchange that market-related rights come into existence, it is no surprise that the 'choice' to choose COVID-19, free of outside interference, is framed in the language of *private legal rights*. It is a consequence of this way of thinking that a seemingly unbreachable link is made between COVID-19, the market and rights.

At first sight it may seem strange that COVID-19 should be treated as a commodity, as something that an individual could and, indeed, should be able to exchange for anything else (including their (and others') health and life). The first observation on this point is that in many countries, most notably the USA and to a lesser extent the UK, health and health care are already considered as much a commodity as any other service (i.e. in the USA health care can be part of the employment contract), and in both countries this has become one of the most controversial fault lines of the past few years.

However, and this is the second observation, from the perspective of the ideology of the free market, the notion that one can alienate (own and exchange) one's health or virus as a species of private property is not as far-fetched as it may appear. After all, the notion that one has property in one's body is far from novel. Indeed, for many, private ownership of the body is the hallmark of freedom and the essence of the modern, emancipated individual (Stychin 1998). Hegel makes this point when he notes that the ability to own private property in oneself is an inherent, if not fundamental aspect

of what it means to be a *person* rather than a *thing*. Personality, or more specifically *legal personality* (the rights-bearing individual), is the hallmark of the modern age.[5]

It is to be noted in this context that although a person's body can be freely alienated, it can never be completely owned in its totality. It is this point that underpins Marx's distinction between his concept of *labour* and *labour-power*, with the former equating to slavery (nothing of the person remains, including their will, after their labour has been extracted) and the latter pointing to the ability of a person to sell their labour-power for X hours a day at X wages, while still retaining ownership of themselves.

It is this view of private property as ownership over one's body that has a direct bearing on the commodification of both health in general and COVID-19 in particular. It opens the potential that a person can, like their labour-power, treat their health as their own private property and so alienate and exchange it through the market. It means further that COVID-19 could become just one more good to be exchanged according to private preference; or, as the Australian Prime Minister phrased it:

> After six months [of lockdown], it is surely time to relax the rules so that individuals can take more personal responsibility and make more of their own decisions about the risks they are prepared to take (Wintour 2020).

From the perspective of the free market ideology, the core of this attempt at commodifying COVID-19 is to make it amenable to contract-based exchange. This point is evident in the many attempts to find equivalences between the virus and other products. For example, the idea arose that COVID-19 was 'just like' the common cold, the flu or SARS. Similar equations underpinned claims that since people die of all kinds of illnesses and diseases, it would make no difference if they were to die from COVID-19. In other words, as with the nature of commodities in general, COVID-19's exchange-value (gained through being placed on the market) is *abstracted* from its content (or use-value) so that the latter disappears from sight. Once the virus is robbed of its content, so the ideology continues; just as those other illnesses and outbreaks did not necessitate the suspension of the market and associated rights, neither does COVID-19.

More callous were the claims of equivalence that extended to the exchange of COVID-19 with human lives. Included within this category of thinking was the view that, for the sake of the market, it was both necessary and expedient to exchange the lives of the elderly or 'the weak' for those of the young and 'the strong'. Perhaps the clearest example of this train of thought was the statements of the Texas Lieutenant Governor Dan Patrick:

> Let's get back to the living … Those of us who are 70-plus, we'll take care of ourselves, but don't sacrifice the country. [After saying that he was not living in fear of COVID-19, he continued] What I'm living in fear of is what's happening to this country. No one reached out to me and said, 'As a senior citizen, are you willing to take a chance on your survival in exchange for keeping the America that all Americans love for your children and grandchildren?' … *If that's the exchange, I'm all in!* (Knodel 2020, emphasis added).

It is at this juncture in the discussion that we come to the nub of the problem and that axis around which COVID-19, commodification and conspiracy theory turns. The exchange inherent in the commodification of COVID-19 means not only that the rights-bearing individuals exchange their health for the virus, but also that they take on the same characteristics as COVID-19 itself. As with COVID-19, the abstract rights-bearing individual is robbed of their content (i.e. the harmfulness of the virus and the person's health, if not life, respectively). In other words, just as COVID-19 is endlessly contagious and transmissible, so too is the individual who makes the exchange with COVID-19 a potential risk to all who come into contact with them; and so on and so forth. In other words, the nature of COVID-19 and the nature of the rights-bearing individual not only come to mimic one another, but, understood in this way, the commodification of the virus also means the *interchangeability* of COVID-19 and its 'owner'.

COVID-19, commodification and conspiracy theory

This notion of the interchangeability of COVID-19 and the rights bearer, and of the latter adopting (or having to adopt) the characteristics of the former, draws on one of the themes of the Frankfurt School of Critical Theory, most notably the writings of Adorno and Horkheimer (1947/1969).

In the discussion above I emphasized the connections between the market, commodities and private legal rights. Of course, these connections have long been recognized. However, it was Marx who offered the first sustained critique of these connections, first in his observation that private rights (what he termed the 'so-called rights of man') are but the rights of the owner of private property (Marx 1843/1992, 211–43), and secondly, drawing on this insight, in his later conception of 'commodity fetishism' (Marx 1867/1995, 42–51). Commodity fetishism points to the notion that the commodity appears as if it were an autonomous object, separate from those who have produced it. Inherent in this development is the idea that a commodity's *social* value – its exchange-value – appears as if it were a natural aspect of the commodity itself. As a consequence, not only is a commodity's

exchange-value *abstracted* from its use-value, but it is also abstracted from its creation, so that it appears as if it were an element of nature.

It is the combination of these two critiques – of the connection of the relationship between rights and private property and of the appearance of the social aspect of commodities as natural phenomena – that leads Marx to turn the pre-existing understandings of this relationship on its head. In contradistinction to traditional political economy as well as Hegel's critique of it, Marx argues that it is the ownership of private property that gives rise to private rights (and not the other way round), and secondly that it is the commodity (as exchange-value) that determines the nature of the exchange rather than the parties to that exchange. It is this latter observation that Marx summarizes by noting, somewhat ironically, that far from its owner taking the commodity to market, it is the commodity that takes its owner to market; or, in a more theoretical manner:

> The person exists for one another merely as representatives of, and, therefore, as owners of commodities ... that the characters who appear on the economic stage [i.e. the market] are but the *personifications of the economic relations that exist between them* ... What chiefly distinguishes a commodity from its owner is the fact that it looks upon every other commodity as but the form of appearance of its own value. A born leveller and a cynic, it is always ready to exchange not only soul, but body, with any and every other commodity, be the same more repulsive than Maritornes herself. The owner makes up for this lack in the commodity of a sense of the concrete, by his own five and more senses (Marx 1867/1995, 53).[6]

It was these ideas that Adorno and Horkheimer developed some half a century later when they critiqued and radicalized Marx's concept of commodity fetishism and commodification. Recognizing that commodification is the process whereby that which is unique and distinct is caught within the near universal realm of exchange, they argue that as a condition of entry into this realm uniqueness and distinctiveness have to be made amenable for their exchange with everything else. As a consequence, the specific or particular quality – in this case its inherent uniqueness which obstructs that exchange – has to be expunged. It is only when emptied of its particular substance and reformulated in strictly abstract, formalist and, therefore, universal terms that the object becomes a commodity and can take its place within the ubiquitous realm of exchange.

They argued further that the particular content that cannot be contained within the commodity, that is its expunged element, reappears as an unpredictable threat to the structure or system of commodification as a whole. Thus, while on the one hand the commodity's formal attributes

permit its inclusion within the realm of exchange, on the other hand its now expunged yet threatening particularities (its content and substance) are recast as nothing more than superstitious myth, having no place in an increasingly rationalized and commodified world. Rejected from the world, and because it cannot be recognized in its universal aspects, its particular content becomes excluded and taboo.

However, in a further deepening of Marx's thinking on the relationship between commodity owner (the rights-bearing subject) and commodity, Adorno and Horkheimer argued that Marx's inversion of the relationship between owner and commodity had been correspondingly reduced to that of *mimesis*, coming from the ancient Greek of 'mime' or mimicry. In short, their reference to *mimesis* points to the necessity that in the contemporary world in which commodification is universal, in order to survive socially, one must adopt the characteristics of the commodity itself. Therefore, to exist in a radically commodified world (as espoused by the ideology of the free market) requires the primacy of a person's *exchange-value* at the expense of their *use-value*. In other words, what counts for any entity, be it a washing machine, COVID-19 or a person, is not their *particular* attributes (that a washing machine washes clothes, that COVID-19 is a threat to health and life, that a person is elderly or young), but rather their *universal* aspect. As a 'person' is abstracted from their particularity, they can be exchanged for anything else or anyone else. As we have seen, it is precisely this result that is the commodification of COVID-19.

COVID-19 and conspiracism

This concept of *mimesis* – of adopting the characteristics of a commodity, including COVID-19, in order to survive – does not, in itself, account for its connection to conspiracy thinking. Rather, it serves as its precondition (Adorno and Horkheimer 1947/1969, 187–200).

As we have seen, Dan Patrick's exhortation to *sacrifice* oneself for America – an America that, in keeping with the ideology of the free market, encompasses the meaning of 'America' itself – chimes with Adorno and Horkheimer's point that the necessity of adopting the characteristics of commodities in general, and COVID-19 as a commodity in particular, entails a corresponding *personal* sacrifice. This sacrifice is of one's own 'use-value' or particularity (including one's own health). In short, it involves the sacrifice of one's own unique individuality along with any promise or hint of a better life or way of living.

This need for endless pressure to sacrifice and disavow one's own particular self cannot, Adorno and Horkheimer argue, come without a cost.

That which is sacrificed always runs the risk of an unwanted return. From the perspective of the subject, that aspect of oneself that has been sacrificed returns as a *threat*, not only to the subject but also to the social world in general. This threat is particularly troubling because it comprises a part of oneself (including the potential for a better life and, in this case, one's own life and health). It is for this reason that what has had to be disavowed takes on, from the view of the ideology of the free market, the character of a *taboo*. It is something that is strictly forbidden and which, therefore, has to be disowned and denied.

Adorno and Horkheimer argue that, in order to carry on living with these fundamental conflicts, the content of the taboo (the potential for a better, healthier life) is *projected* onto others as if it were the property of those others. Rather than accept that potential and desire as the subject's own longing, it is made taboo and projected onto what is perceived as a threatening 'other'. In the case of COVID-19 and its commodification, this 'other' is not only 'the state' in the sense of institutional responses to the virus through lockdown (which interrupts the process of commodification demanded by the ideology of the free market), but also the individual's own life as a member of the state, which is not exhausted by the 'freedom' of the market and the commodification it entails. In short, therefore, the state and its collective actions (no matter how limited) hint at a life beyond the market which, at the level of the individual, has to be expunged and denied, and upon which all manner of hostility, including that of a giant conspiracy, must be projected.

It is for these reasons, therefore, that the state becomes the target of both hostility and conspiracism. It is because, from the perspective of the ideology of the free market, it is the right or freedom inherent within the state, and which becomes visible in responses to the pandemic, that has to be disavowed, expunged and sacrificed. In other words, from the perspective of subjectivism and its associated rights, the state's attempts to limit harms and preserve life *at the expense of the market* appears as taboo, as something that is both forbidden and also destabilizing and threatening to the individual subject.

COVID-19, conspiracism and personification

The fact that this hostility takes the form of conspiracy theories is also inherent within the free market ideology. This accounts for its *personification*. The notion of *personification* results from the projection of the radical subjectivity and subjectivism inherent in the free market ideology *as if* the obscure and complex nature of social and political relations can be reduced

to – and understood as – the consequence of individuals. In other words, the image of the world created by the ideology of the free market is little more than a mirror of its own subjectivism. This projection therefore leads to the conspiracist idea that it can only be *someone*, *somewhere* who is responsible for the fate of the world and its inhabitants.

It is this projection of a distorted subjectivism onto a wider reality that is intimately connected to the free-market ideology that results in the personification that is itself an inherent element of conspiracy thinking. This accounts for the paradoxical belief that if something good happens, then it must be the result of individual effort and perseverance. However, if something bad happens, then, from the perspective of the ideology of the free market, it can only be the result of secret, malevolent powers emanating from some person or persons illegitimately and clandestinely interfering to derail the good outcome dictated by the promise of industriousness alone.

It is from this perspective, therefore, that the complexity of the state, both as an institution in its own right and in its relationship to the market, is reduced to a singular, unitary and independent entity standing in splendid isolation and populated by malign malcontents. Through this type of conspiracy thinking COVID-19 has brought to the fore – and has been captured and given life by – the ideology of the free market. Again, as noted above in the discussion of Arendt's meaning of ideology, these imaginings are not so much mere fantasies, but rather distortions and manipulations of real-life events, most noticeably lockdown and other instances of the state's response to the virus. This factor gives to state-targeted conspiracism an 'authenticity' in the eyes of its adherents that is lacking, for example, in the truly baseless fantasies that the virus is caused by 5G or that the vaccine injects a surveillance chip into people.[7]

For these reasons, COVID-19 has brought into relief and amplified several already existing 'theories' that draw on the conspiracism of subjectivism and personification to 'explain' lockdown and other state responses to the pandemic. One such manifestation is the belief that 'the state' has been hollowed out and has become the plaything of 'hostile' and 'alien' powers. As such, the state's *national interest* has been usurped by either 'foreign' interests or the interests of a particular group (national or otherwise). More often than not, the personification of these powers is captured through the language of *elites* or of one specific individual (Burrowes 2020). It is precisely for these reasons that conspiracism speaks of the illegitimate actions of 'the Global elite', the 'Cosmopolitan elite', 'the Rothschilds' or, simply, 'Bill Gates' or 'Soros'.

A similar phenomenon, and one that again pre-existed COVID-19 but has gained increasing currency, is the idea of the 'Deep State'. Slightly different from the previous version of state-targeted conspiracism, the 'Deep State'

alludes to the belief that state and other democratic institutions are but shams and empty vessels controlled by a surreptitious network of individuals who, like parasites, feed off and destroy the bodies in which they embed themselves. The commonality between both of these versions is the belief in the existence of a malevolent web of *individuals* that has either usurped or seeped into the state for no other reason than to undermine and destroy freedom.

Perhaps the clearest example of these phenomena is the notion that COVID-19 is a 'hoax'. It is believed that the 'purpose' of this hoax is that it allows 'the state' the opportunity and excuse to (finally) destroy individual freedom, understood in this context as the freedom of the owners of private property, the market and related rights. Associated with this conspiracist fantasy is the belief that the alleged 'myth' of COVID-19 serves to further and complete an inescapable state surveillance of the entire population. In its more extreme accounts, the vaccine is allocated a prime role because it allegedly includes a microchip of some description or other.

However, there has been a recent and more populist iteration of this type of conspiracism, even though it stops short of the notion of a 'hoax'. This was President Trump's claim that the clandestine operations of the Deep State included, inter alia, 'Big Pharma' and federal scientific advisers, various departments of state and the Democratic Party jointly and severally, which conspired to hold back the release of a vaccine that would deprive both 'the people' and their president of a second Trump term. In this account, lockdown and other state-sanctioned restrictions are only a foretaste of the damage 'the state', now in the hands of usurpers, is said to have in store for the fate of individual freedoms.

Conclusion

In this chapter I have identified a confluence of factors from the perspective of the ideology of the free market from which conspiracy theories relating to the conflict between lockdown and the market emerge. It is a world in which the rights-bearing individual, reduced to the status of a commodity, is understood solely by their relationship to the market. Coronavirus appears as simply one 'good' among others, where the meaning of private rights entails sacrifice. Any state attempt to ameliorate such sacrifice is treated as no more than the outcome of malevolent personal forces, the purpose of which is, in a final inversion, not treated as providing for improved health, but rather contains a threat to life itself.

Just as, in social terms, the pandemic, lockdown and related measures have made visible that which had been 'invisible' (inequality in housing,

the prevalence of domestic abuse, poverty, etc.), so too have they made visible a way of 'thinking' that is far from novel and which emerges from the very structure of the modern nation-state. However, what is relatively new is that the spokespeople for this anti-state conspiracism are not, as in the past, political and social outliers. Instead, they are embodiments of the state, such as Presidents Trump and Bolsonaro. Moreover, it is noteworthy that such opposition to the state's response to COVID-19 is not a rejection of the language of rights *in toto*, but is often articulated through the language of *private rights* as if they were the *only* expression of social and political freedom.

Notes

1. Although most countries in the world experienced as least some form of national lockdown in the face of the pandemic, this chapter concentrates primarily on the UK with reference also to the USA.

2. For a full list of the relevant legislation in England, see https://www.legislation.gov.uk/coronavirus.

3. Hegel did, of course, recognize the rise of inequality within the market and the pressure the market itself places on people that obstructs this aspect of freedom.

4. For Hegel, 'morality' is limited to an expression of individual subjectivity and is sharply distinguished from the language of (collective) ethics.

5. It is this notion of self-ownership that is key to Hegel's rejection of the legitimacy and legality of slavery, of the ability to own someone else's body. It is this aspect of personality that separates the present era from that of ancient Rome, in which concepts of ownership were defined against other people, or rather other *people* as property, who were deemed to lack an autonomous will themselves (i.e. slaves, women, children).

6. The notion of *personification* is discussed in more detail below.

7. Even though such beliefs are baseless in the sense understood here, they still conform to the subjectivism, personalization and paranoia discussed here: i.e. that such things can be traced to specific individuals, for example Bill Gates.

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Chapter 3

Counting the dead during a pandemic

Marc Trabsky

Introduction

The categorization of a COVID-19 death as an anomaly in media outlets and government briefings in 2020, well before COVID-19 became endemic, depicted the virus as an incongruous disruption in the habitual economy of life and death. COVID-19 deaths were represented as pathological, and differed from other causes of death during the pandemic, particularly through their quotidian announcement in official state-based tolls. Yet the implementation of vaccination regimes in 2021 sought to normalize COVID-19 deaths as an acceptable, if not inevitable, outcome of life for specific segments of a population. To this extent, to die of COVID-19 became comparable to those 'routine' deaths caused by the influenza virus each year. What is more, though, even 'excess mortality' was normalized in 2022, particularly by the World Health Organization, which estimated at that point that approximately 15 million people had died during the global pandemic. The international organization included in their global toll for the first time those 'killed directly or *indirectly*' by the pandemic, such as deaths caused by barriers to screening, diagnosing and treating other medical conditions, the overwhelming of health services or individuals avoiding or failing to receive health care (Davis 2022). COVID-19 deaths, then, like deaths caused by other communicable diseases, appeared in 2022 'no longer something that suddenly swooped down on life – as in an epidemic. Death was now something permanent, something that slips into life, perpetually gnaws at it, diminishes it and weakens it' (Foucault 2003b, 244).

This chapter examines how technologies for counting the dead during a pandemic economize relations between life and death. It builds upon my previous writings on COVID-19, which analysed how the technology of death registration during the pandemic 'depended on the creation of a new universal nomenclature for ascertaining causation, which excluded various circumstances of a person's life in order to stabilize SARS-CoV-2 as a normative category for classification' (Trabsky 2022a, 544).[1] I argued that the classification of a COVID-19 death was inextricable from making an evaluative judgement about what is a 'normal' mortality rate for any given population. The focal point of this chapter is different insofar as I explore how technologies for counting the dead during a pandemic are conditioned upon a multiplicity of cost–benefit calculations. While bureaucratic accounting practices are routinely harnessed by governments in the management of fluctuations in mortality trends, during a pandemic these institutional practices often demonstrate the extent to which the statistical laws of mortality are subject to economic rationality.

This chapter aims to account for how the economization of death pervades the statistical laws of mortality, but also what the effects of economic rationality are for understanding how governments count the dead in the twenty-first century. It examines enumeration technologies from the perspective of law and the humanities, and draws from literature on both governmentality, particularly the writings of Michel Foucault and Ian Hacking, and the field of political economy, through the work of Wendy Brown. It contends that administrative procedures for recording an individual death, classifying its cause, enumerating it in a table and calculating probabilities of the risk of dying from a virus are interwoven with discourses of economic rationality. The chapter suggests that only by approaching the statistical laws of mortality from a humanities perspective is it possible to witness how practices of counting the dead economize relations between life and death.

The statistical laws of mortality

Michel Foucault's account of the governance of plagues in the early modern period provides a cautionary tale of how power can be exercised in the time of a pandemic. The 'great confinement' of everyday life, which was designed to eradicate the plague from the town, involved closing borders, spatial partitioning, isolating infected houses, enforcing stay-at-home orders, and instituting a hierarchy of intendants, syndics and guards who kept watch over all movements inside and outside the town. In contrast to the banishment of lepers in the Middle Ages, the quarantining of the sick,

the fumigation of infested premises and the confiscation of the dead after nightfall established a positive model for exercising power during a plague. Communications between different households were not simply forbidden, they were vigorously surveyed when a family member left their house once a week to purchase essential goods. Techniques of observation relied upon acts of permanent registration and depended on practices for recording the 'visual examinations' of intendants, syndics and guards, particularly insofar as they could enumerate the recent dead in bills of mortality. The plague was a 'marvellous moment' of disciplinary power, Foucault writes in *Abnormal*; it was 'the political dream of an exhaustive, unobstructed power that is completely transparent to its object and exercised to the full' (Foucault 2003a, 47).

The continuities between the governance of plagues in the sixteenth to eighteenth centuries and the administrative management of a global pandemic in the twenty-first century are uncanny. COVID-19 was declared a global pandemic by the World Health Organization on 11 March 2020. The public health response to COVID-19 initially involved extensive interventions into everyday life, such as curfews, lockdowns, border closures, quarantine orders, mandatory testing and other social distancing restrictions, which, akin to the legislative measures instituted in plague towns, maximized the vitality of populations while also *allowing* people to die (Trabsky 2022a, 543). The economization of hospital resources was nothing new for medical institutions in the twenty-first century, but revealed the extent to which governments calculate the economic costs of '*foster*[ing] life or *disallow*[ing] it to the point of death' (Foucault 1998, 138). The COVID-19 pandemic confirmed, much like the epidemics that preceded it, that because 'death is power's limit, the moment that escapes it', as Foucault emphasizes, 'the procedures of power have not ceased to turn away from death' (Foucault 1998, 138).

Yet this model of the plague is not the endpoint of the tale that Foucault narrates of how power can be exercised in the time of a pandemic. In *Security, Territory, Population*, a lecture series at the Collège de France that followed *Abnormal* by a couple of years, Foucault extrapolates from his description of the management of plagues, singling out the smallpox epidemics that ravaged much of the world during the eighteenth and nineteenth centuries. The notable difference with smallpox was the widespread distribution of a vaccine by the end of the nineteenth century and the eradication of the disease in the mid-twentieth century. Foucault describes the emergence of vaccination regimes as transformative in how communicable diseases could be managed by governments. Vaccination became an apparatus of securitization of the population – indeed, a population, as opposed to a city or town, became a target of administrative intervention – but one that was conceptualized according to a 'calculus of probabilities' (Foucault 2004, 59).

This is not to say that the disciplinary powers developed in the governance of plague towns in the early modern period did not disappear with public health responses to the epidemics and pandemics that inundated the world in the nineteenth to twenty-first centuries. However, what appeared in the administration of regimes of vaccination, initially developed to combat the scourge of smallpox (*la petite vérole*) in the late eighteenth century, was the concept of a population that could be studied as a scientific object. In this arrangement of governmentality, a population was made sense of through the development of secular death registration procedures, classification systems for death causation, statistical tabulations of mortality rates and calculations of probabilities of life expectancy. Not only did these technologies delineate in law a boundary point between life and death, but they were also vital for how public health reformers determined what causes of death should be monitored at different levels of the population. They cohered in creating the idea, first cemented in the eighteenth century but enduring to this very day, that every population has a 'normal' rate of death.

The history of the secularization of death registration demonstrates a statistical regularity to mortality in the eighteenth and nineteenth centuries. It is no coincidence that mortality statistics gained popularity at the same time that death became an object of registration. Statistics first emerged as a technology for organizing knowledge of the state in the seventeenth century, but by the nineteenth century governments were drowning in an inundation of numbers – the enumeration of illness, households, welfare, taxes, suicides and crime – that revealed a regularity to life and death. Ian Hacking writes of statistics as the 'taming of chance' (1990), a set of laws, rules or norms for governing probabilities of phenomena. He presents mortality statistics as a definitive example of the erosion of determinism and the organization of chance according to classification systems. John Graunt, who published *Natural and Political Observations Mentioned in a Following Index, and made upon the Bills of Mortality* in 1662, pioneered the art of statistical analysis. He collated weekly counts of the dead in London and categorized them according to cause, age and sex in order to identify mortality trends. He was the first to 'show that death is not governed by random strokes of fate but rather by stable and quantifiable patterns' (Bayatrizi 2009, 612). However much Graunt insisted that his analyses were objective descriptions of the reality of death, the substitution of a quantifiable fact for the caprices of fate exposes the extent to which he actively constructed this reality. Early statistical laws of mortality were rudimentary, but they classified death causation according to a set of agreed probabilities that could be enumerated in a table. Despite the difficulties of ascertaining every cause of death, for Graunt and others in the seventeenth century, 'to die of anything except causes on the official list … [was] illegal, for example, to die of old age' (Hacking 1991, 183).

While Graunt pursued statistical analysis as a pastime, and his writings were routinely ignored by sovereigns, by the late nineteenth century mortality statistics became indispensable tools for determining the wealth, health and strength of populations. Not only were they fastidiously collated through death registration systems, but legions of statisticians were employed by governments to make sense of the oscillating rhythms of life and death. The diverse range of 'official lists' that circulated throughout the West in the seventeenth century were superseded in the nineteenth century by a universal nomenclature, authored by Jacques Bertillon and appropriately titled the *Bertillon Classification of Causes of Death*. The lawfulness of death registration, which depended on a commonly defined classification system, became of immense statistical value for both state and non-state institutions, and particularly for the new disciplines of public health, epidemiology and demography. Statistical analyses of records of the dead were harnessed by a panoply of institutions to define the shape of a population, monitor its variations and fluctuations, predict patterns of dying, highlight risk factors, and ultimately intervene in the conditions of life to manipulate the 'average' life expectancy of segments of a population.

The secularization of death registration in the nineteenth century was thus integral to statistical laws of mortality because it made possible the institutional practice of extrapolating death from individual human beings and arranging it in a table in an enumerated form. Registration drained death of all its phenomena, abstracted it as a number and weaved its laws into the seams of the population. In recording an individual death, discovering its underlying cause, classifying it according to universal nomenclature and mapping it against mortality trends, governments could construct the 'naturalness' of a population. Statisticians could tame the chance of death; that is, they could calculate the risk of death in a population, for instance, that could be derived from a pandemic, and according to the science of epidemiology, attempt to 'change the laws under which the population would evolve' (Hacking 1991, 188). Populations have long lived under elaborate laws of classification, Hacking reminds us, such as the laws of death registration and classification systems for death causation, which both shape a calculus of probabilities of dying. I suggest that the calculation of risk of death as a technology of governmentality emerged alongside the problematization of life in the eighteenth and nineteenth centuries. The 'quantification [of death] as a rate that could be measured and monitored was indispensable to how governments invested in life to the point where individuals were *allowed* to perish' (Trabsky 2022a, 547).

The economization of quantification

Foucault's lectures on 'Governmentality', delivered at the Collège de France in 1978, introduce another facet of the exercise of power in the West in the eighteenth and nineteenth centuries. 'The word "economy", which in the sixteenth century signified a form of government, comes in the eighteenth century to designate a level of reality, a field of intervention through a series of complex processes that I regard as absolutely fundamental to our history' (Foucault 1991, 93). The concept of economy was expanded in the eighteenth century from its limited designation of the activities of households to a more extensive description of the problem of circulation of people, goods and things. The new art of government that emerged in this era involved managing relations between the living and the dead, or, more precisely, entailed the development of technologies for controlling different aspects of those relations at the level of the population, such as the extent to which human capital circulates in an economy of life and death. As I discussed above, what was central to the government of populations in the eighteenth and nineteenth centuries was mortality statistics, which were supported by technologies of death registration. However, statistical data was also crucial to techniques of economization. Without establishing institutions whose purpose was to collate statistics, and to normalize the regularities of life and death, the expansion of the notion of economy in the government of populations and the economic rationalization of markets would have been unmanageable.

The extension of economic rationality into 'domains which are not exclusively or not primarily economic' (2008, 323) would for Foucault be emblematic of neoliberalism in the twentieth century. Wendy Brown expands upon Foucault's writings on the concept of economy by noting that '[w]idespread economization of heretofore noneconomic domains, activities, and subjects' does not necessarily denote the 'marketization or monetization of them' (Brown 2015, 31–2). Indeed, the uniqueness of neoliberalism is how it economizes all spheres of human activity. Neoliberal rationality is irreducible to the monetization of life, the accumulation of capital through market exchange or the privatization of public goods. It is rather a 'governing rationality' that frames and measures every aspect of life and death by 'economic terms and metrics, even when those spheres are not directly monetized' (Brown 2015, 10). What this ultimately means is that a condition of possibility of human life – what Foucault calls '*homo oeconomicus*' – is a historically specific form of economic rationality which extols, for example, human beings to privilege future benefits over immediate gains and thereby optimize the economic value of time (Trabsky 2022b, 104).

If neoliberal rationality is a useful paradigm for understanding the governance of life in the twenty-first century, it is because it constructs the state and individuals on the model of corporate firms and self-investing, future-oriented entrepreneurs, who participate in an economy of human capital by competing against each other. 'Economization is a model for the conduct of government, but also a model for the government of the self, where both persons and states transform society into a market and themselves into market actors' (Trabsky 2022b, 104–5). The *homo oeconomicus* that I mentioned above becomes a market actor that 'takes its shape [everywhere] as human capital seeking to strengthen its competitive positioning and appreciate its value, rather than as a figure of exchange or interests' (Brown 2015, 33). Brown builds upon Koray Çaliskan and Michel Callon's (2009, 370) performative concept of economization, which they utilize to describe 'behaviours, organizations, institutions and, more generally, the objects in a particular society … as "economic"', to account for how the figure of *homo oeconomicus* extends into areas of life that were once thought of as not exclusively or primarily economic.

Eve Darian-Smith (2021, 62) has recently explored the idea that governments have cultivated 'economies of death' during COVID-19, particularly when they *allow* 'disposable people' to die to open up the economy. While she emphasizes that death has always acquired a quantum of value for capitalism, Darian-Smith misrecognizes how the language of economization is more diffuse during the pandemic than calls for 'profit over people' or that 'business is suffering'. The basis for this misrecognition is the irreducible equation of value to money or utility to profit. Economies of death do not simply facilitate the monetization or marketization of death; they frame and measure death in economic terms. Dying *in*, rather than *for*, the economy connotes how death is always already subject to a *raison d'être* of neoliberalism, such as the replacement of exchange with competition, the substitution of labour with human capital and the augmentation of socioeconomic inequality, which in turn renders death as economically valuable in itself. In this extension of techniques of economization into an area of life that was once thought of as not exclusively economic, the dying and the dead circulate in the economy as 'human capital'. Indeed, I contend that the dead never stop circulating as capital, whether in the recycling of human remains, as a figure in a mortality rate or as an absence that brings together a nation, which is a more accurate description of how COVID-19 has transformed and augmented extant economies of death.

Darian-Smith builds her argument about COVID-19 economies of death from Fatmir Haskaj's analysis of the 'necroeconomy'. Although Haskaj accounts for how death has become a source of value due to 'neoliberalism's tendency to marketize all aspects of human activity' (Haskaj 2018, 1149), the

focus of his article is on how killings due to war, genocide, poverty, starvation and global warming create necroeconomies. Yet the problem with conceptualizing death as a negative of biopolitics – which is also what Darian-Smith does in the context of COVID-19 – is that it misses how all deaths, whether sudden or expected, unnatural or ordinary, violent or accidental, are normalized as *allowable* by the state. In other words, necroeconomies are not exclusive of biopower and death is not the negation of biopolitics, because the institutional routinization of mortality, and the normalizing technologies that take care of those deaths – an array of administrative, medical, legal, fiscal and social practices that integrate the dead into the worlds of the living – are immanent within techniques of economization. Even though Haskaj admits that a normal amount of death in a population circulates in economies of human capital, his primary focus is on the killing of populations and on the dead as 'victims' of capitalism, rather than those individuals or segments of the population, which in the course of the everyday, are allowed to perish.[2] This schema of necroeconomy is unable to account for how neoliberal rationality transforms the governance of mortality during a pandemic.

The language of economization suffuses relations between life and death during COVID-19 through a range of legal technologies, such as practices for registering a death, classifying its cause, enumerating it in a table and calculating probabilities of risk. The reification of a 'normal' death rate, which is represented as both a cause and effect of tracking 'excessive mortality' during a pandemic, involves the use of mortality statistics to tame the disorder of chance. However, the life or death of an individual during a pandemic is as dependent on chance as it is on governmental interventions that manage fluctuations in mortality trends. No matter whether these interventions are discussed by government officials or debated by epidemiologists, the economic transactions that arise here involve performing '*calculations* and *metrics*, via daily updates, nowcasts, forecasts … and through media stories of projections and mathematicians' (Rhodes and Lancaster 2020, 4). Or to put this differently, death is subject to statistical analysis: a quantification and computation that facilitates cost–benefit calculations. Throughout the pandemic governments have asked whether the minimization of COVID-19 death will result in a net increase or decrease of death for a given population, and what are the economic costs or benefits for how mortality statistics are 'normalized' within or across populations. 'To the extent possible, we had to calculate the number of lives saved by shutting down the world and compare it with the number imperilled by the shutdown' (Lévy 2020, 31). These questions, which underpin the collection and dissemination of mortality statistics during a pandemic, are not mere rhetorical flourishes. Rather, they reflect the degree to which technologies of registration and statistical laws of mortality economize relations between life and death.

The idea that governments make use of cost–benefit calculations when devising a public health response to a pandemic can be gleaned from the release of provisional mortality statistics by the Australian Bureau of Statistics for the period January 2020 to May 2021. Mortality rates for this period were compared to the expected number of deaths based on records from 2015 to 2019. The headline insight from the data was that there were an extra 3,475 deaths (6.3%) for the period January to May 2021 when compared to the baseline average death rate for 2015 to 2019.[3] Notably, the data do not include any deaths referred to coroners, which would include sudden, unnatural or violent deaths, such as suicides, accidents, deaths during or following a medical procedure or deaths in custody or care. The increase in deaths noted by the Australian Bureau of Statistics were not caused by COVID-19 – there were comparably few COVID-19 infections during this period – but rather due to cancer (6.0% higher), diabetes (9.2% higher), dementia (17.1% higher) and other respiratory diseases (5.8% higher). On the other hand, the death rate for pneumonia decreased by 21.9 per cent over the same period compared to the baseline average for 2015 to 2019 and no person died from influenza in Australia between July 2020 and May 2021.[4] Researchers have primarily ascribed the causes of the increase in the death rate to the effects of public health responses to the pandemic on time-sensitive care provided in emergency departments for cardiac and stroke conditions, barriers to screening, diagnosing and treating cancers, postponement of elective surgery and increases in post-operational complications due to the general avoidance of medical treatment and care.[5]

The dissemination of mortality statistics during COVID-19 reveals the extent to which death is inextricable from economic analysis in the twenty-first century. Since the beginning of the pandemic, deaths caused by the SARS-CoV-2 virus have been rationalized as an acceptable consequence of cost–benefit calculations routinely made by governments with respect to deaths caused by influenza, measles and other communicable diseases.[6] But more than this, dying from or with COVID-19 is not simply a cost that has to be acknowledged by governments; the dying are required to leverage their 'human capital', adopt a 'competitive positioning' and commit to 'value seeking' amid a landscape of scarcity. This may take place in medical institutions, where practitioners make harrowing decisions about how to rationalize medical resources to save one life over another,[7] and it also occurs in public forums, where epidemiologists, economists, journalists and researchers debate the merits of utilizing the concept of 'Quality Adjusted Life Year' to shape and evaluate a public health response to a global pandemic.[8] In both examples, life tables, which are created by the bureau of statistics to track mortality rates and the life expectancy of a population, inform the making of decisions about the economic value of death.

The economization of death is not unprecedented in the Global North, but the way it has intertwined with technologies for counting the dead during COVID-19 signals the extent to which economization has transformed the governance of mortality in the twenty-first century. This is different from the economization life, which has recently been subject to analysis in the social sciences. Katherine Kenny, for example, contends that the World Bank's DALY metric frames 'health as a form of human capital and … as a site of *investment*' (Kenny 2015, 11). The DALY metric was invented to quantify the 'global burden of disease' by calculating rates of death, disease and disability together, or rather 'mortality and morbidity in the same unit of analysis' (11). The amount of disease in the world could then be used to justify a particular public health initiative through the use of cost–benefit calculations. Kenny contends that 'the DALY metric figures life in distinctly *economic* terms … as a revenue stream the duration of which determines the potential return on investment in human capital' (12). In a similar vein, Michelle Murphy examines global health, family planning and development projects as practices that 'differentially value and govern life in terms of their ability to foster the macroeconomy of the nation-state, such as life's ability to contribute to the gross domestic product (GDP) of the nation' (Murphy 2017, 6). In her macrological analysis, Murphy focuses on how governments adopt calculative practices in categorizing 'lives worth living, lives worth not dying, lives worthy of investment, and lives not worth being born' (7). In focusing exclusively on the economization of life, both Kenny and Murphy characterize death as a failure of the entrepreneurial *homo oeconomicus* to invest in themselves, and thus neglect to examine how accounting practices, metrics and calculations of risk disaggregate death into data and circulate it in an economy of human capital.

What COVID-19 exposes, then, is that the economization of death is not simply the inverse of the economization of life. Mortality statistics shape the calculus of probabilities of the opportunity costs of pursuing a particular public health response or omitting to act sooner in the enforcement of laws that restrict social interactions. Counting the dead becomes a qualitative judgement about the value of a life lived well or the value of an untimely, premature death, which exacerbates economic inequalities and disproportionately impacts marginalized communities, immigrants and people of colour. For Stefania Milan (2020, 3), this judgement is a 'blind spot' of public health responses obsessed with 'quantification and categorization'. The economization of death shows wilful blindness towards how COVID-19 differentially impacts on communities that were already economically disadvantaged by requiring the dying to adopt a competitive positioning and the dead to circulate as statistics in an economy of human capital.

Conclusions: the pandemic of the unvaccinated

Technologies for counting the dead demonstrate how economic rationality is woven through cost–benefit calculations during a pandemic. However, calculating practices are not simply models for the conduct of government; they are also techniques for the government of self, which will lead to differential experiences of dying. In calculating the risks of death during a pandemic, individuals must fashion themselves as entrepreneurial, self-investing *homo oeconomicus*, and they do so in a way that demonstrates how economic rationality is inextricable from the governance of mortality. While nascent at the beginning of the pandemic and expressed in the first year by adopting techniques for self-assessing one's risk of contracting Coronavirus, by the second year the *homo oeconomicus* of COVID-19 has effusively emerged, cajoled by governments to not only assess whether it is useful to self-administer a rapid antigen test or abandon testing all together, but importantly also to weigh the risks of refusing or consenting to vaccination.[9] It is also likely that the calculation of risk of death must be made periodically, given indications that multiple booster shots may be necessary to maintain a degree of immunity to severe illness from COVID-19 (Knott 2021).

What I am suggesting here is that the subjective assessment of an individual's risk of death (and by extension the risk of death to others) and its affirmation by governments is inextricable from a neoliberal rationality that has subjugated all spheres of human activity to economic terms. The individual can of course make a decision about whether to test for Coronavirus, wear a mask or vaccinate themselves, but only by performing the role of *homo oeconomicus*: 'an intensely constructed and governed bit of human capital tasked with improving and leveraging its competitive positioning and with enhancing its (monetary and nonmonetary) portfolio value across all of its endeavors and venues' (Brown 2015, 10). Whether this performance consists of theorizing the economic consequences of increasing or decreasing the risks of exposure, transmission, hospitalization or death from COVID-19 for oneself, for another or for the state, the practice of such cost–benefit calculations reifies the future value of the individual's life and death. To put this differently, I contend that decision-making regarding testing, masking or vaccination is intertwined with techniques of economization, value seeking and competitive positioning. Individuals are fashioning themselves during the pandemic as *homo oeconomicus*, and they are assessing their capacity to make decisions about living and dying by reference to an economic rationality constituted as 'sophisticated common sense, a reality principle remaking institutions and human beings everywhere it settles, nestles, and gains affirmation' (Brown 2015, 35).

This chapter has examined how technologies for counting the dead during COVID-19 have economized relations between life and death. They have done so to the extent that governments make decisions based on counting to *allow* individuals to perish, and individuals perform calculations of risk with the aid of mortality statistics to position themselves as 'human capital' in an economy of rationalization of resources. It is important to recognize how the language of economization suffuses these relations and how technologies of counting – registering a death, mortality statistics and cost–benefit calculations – permeate public health responses to a global pandemic. Qualitative judgements about the economic value of a life and a death underpin decision making in medical institutions – the rationalization of medical resources in emergency departments – and at the level of government – the development of policies and enforcement of laws that involve cost–benefit calculations about the amount of life and death that can be tolerated by a population. But these judgements also operate at the level of the self, and it is thus necessary to examine how practices for counting the dead will lead to differential experiences of dying during the pandemic. In calculating risks of dying during a pandemic, individuals must fashion themselves as *homo oeconomicus*, and they do so in a way that demonstrates how economic rationality is inextricable from the governance of mortality in the twenty-first century.

Notes

1. This chapter takes parts from and builds upon previous writings on COVID-19 (Trabsky 2022a) and the economization of death in the twenty-first century (Trabsky 2022b).

2. 'But the abandonment of "life" … does not sufficiently cover the resonance of a global economic system that produces regimes that cannibalize their own population as vessels for a "quantum of value". To abandon life is simply to ignore it, or to exclude segments of the population from any share of the social product. This is certainly one tendency under neoliberalism, the tendency toward undoing of the welfare state and assault upon the poor. But exclusion alone … is but one side of the process that also directly and deliberately instrumentalizes human life and human death' (Haskaj 2018, 1155). Haskaj represents the necroeconomy as exclusive of biopower by conceptualizing the dead as 'victims' of the accumulation of capital. It is unclear whether the dead manifest as victims because they are stripped of their humanity or are reduced to a commodity. I contend that the dead continue to work after death, and as such the reduction of their status to victimhood does not account for how the living continue to form productive relations with the dead.

3. Australian Bureau of Statistics (n.d.). On fewer elderly deaths in Australia in 2020, see Dana McCauley (2020). See also Caitlin Cassidy (2020).

4. This phenomenon took place across the Southern Hemisphere in 2020: Michael Safi (2020).

5. On avoiding urgent medical care during lockdown, see Ashleigh McMillan and Marissa Calligeros (2020), Nadia Daly (2020), Melissa Cunningham (2020), Melissa Cunningham and Dana McCauley (2020).

6. Consider the significance of when the prime minister of Australia compared the governmental management of COVID-19 to that of influenza: Nick Bonyhady (2021). And the counter-argument to his claim: Aisha Dow and Rachel Clun (2021).

7. On the rationing of medical resources in Italy, see Bevan Shields (2020) and Andrea Vogt and Erica Di Blasi (2020). For Australia, see Ruby Cornish (2020) and Kate Aubusson (2020).

8. There are numerous examples of this debate taking place throughout the world during 2020 and 2021. See, for example, Alan Collins and Adam Cox (2020), Chris Uhlmann (2020), Chip Le Grand (2020), Cathy Mihalopoulos, Martin Hensher and Catherine Bennett (2020), Liam Mannix (2020), Robert Bezimienny (2021).

9. On calculation of risks of death from vaccination, see Liam Mannix and Lisa Visentin (2021). To map this calculation on a global level, consider Stephanie Nebehay and Douglas Busvine (2021).

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Chapter 4

The law and the limits of the dressed body: masking regulation and the 1918–19 influenza pandemic in Australia

Mark De Vitis and David J. Carter

Introduction

The 'Spanish' influenza pandemic was a global outbreak of illness that the World Health Organization has called 'exceptional, the most deadly disease event in human history' (Ryan 2008, 24). Originating not in Spain but, in all likelihood, in the state of Kansas in the USA, the influenza came to be named after the country whose media first reported its threat (Johnson 2006; Trilla, Trilla and Daer 2008, 668–73).

While knowledge of the outbreak initially remained tightly controlled to maintain the war effort, the influenza itself spread rapidly, carried to Europe by mobilized American troops in April 1918. It eventually affected communities across the globe, transmitted by those returning from the First World War. Four years of brutal war provided the perfect environmental and social conditions for magnifying the virulence of the influenza, greatly extending the suffering it brought (Shanks et al. 2010; Taubenberger and Morens 2006). Unprecedented numbers of people in transit and people gathering to celebrate the end of the war, as well as factors such as poor nutrition, anxiety, depression and physical stress all aligned to shape a pandemic that was responsible for the deaths of tens of millions worldwide (Blackwell 2007, 26).

Though the influenza pandemic's reach was global, its impacts varied greatly from location to location. The Australian experience of the pandemic was particularly unique (Arrowsmith 2007; Bashford 2003; McQueen

1976; Taksa 1994). Australia suffered a single long outbreak of influenza (Arrowsmith 2007, 23; Curson and McCracken 2006, 114–15) rather than the waves that are recognized as having occurred elsewhere (Director General of Public Health 1920; Johnson and Mueller 2002, 107).[1] Moreover, the impact was immense. An estimated two million Australians were infected out of a population of just over five million, with approximately 36 per cent of the population of metropolitan Sydney infected during the first half of 1919 alone (Department of Public Health, New South Wales 1919, 152–3). This rate of infection was higher than international averages of 25–30 per cent (Curson and McCracken 2006, 103; Johnson and Mueller 2002, 114). It should also be acknowledged that Australia's Indigenous communities were severely and disproportionately afflicted by the pandemic, with mortality rates approaching 50 per cent across some groups (Briscoe 1996, 196; Cleland 1928, 195–200). In total, at least 14,500 people died from influenza in under a year in Australia. This impact was considerable and eyewitness accounts indicated that there were so many horse-drawn hearses lining the streets of Sydney that 'there was almost a procession' (Mashford 1998, 10).

For what remains the most lethal single event in modern history, the attention historians across the globe give to the influenza pandemic is limited, leaving it widely described as ignored or forgotten (Davis 2011; Davis, Stephenson and Flowers 2011; Flecknoe 2020; Honigsbaum 2016, 2018; Hume 2000; Killingray and Phillips 2003; Phillips 2004). This neglect particularly affects accounts of the pandemic's impact in Australia, which lacks a body of scholarly work such as those in the United Kingdom, USA or Spain (Brown 2019; Davis 2013; Pal 2019).[2] This is all the more surprising given the pandemic's effect on Australia and its unique natural history in the country (Hobbins, McWhinney and Wishart 2019).

Recent research has argued that the root of this neglect lies in Australia's legacy of nationalist and federalist orientations, which were particularly strong during the first decades of the Australian Federation (Youde 2017), a period which coincided with the influenza outbreak. The fact that the influenza pandemic generated one of the first – and very public and heated – disagreements between the recently federated Australian states, and between state and commonwealth governments, supports this interpretation and perhaps explains the pandemic's relative invisibility in the literature. The pandemic was no great triumph for the Federation, nor was the ability of the various branches of government – state and federal – to work together to effectively navigate the citizens they represented through a pandemic.

One result of the absence of the 1918–19 pandemic in the literature is that our collective memory of the event lacks the necessary detail and robustness demanded of it. As we explain below, the history of the influenza

pandemic is central to Australia's contemporary pandemic planning and preparedness. Yet we still require a well-developed historical scholarship on the pandemic and especially a clear vision of how influenza affected the everyday lives of Australian communities, and how this in turn influenced efforts to control the spread of influenza. Neither responses to the outbreak nor the reception of the medical and government advice the public received, nor indeed the regulations that were forced upon citizens, have been studied in critical depth.

To begin to rectify this gap, we present a new history of the 1918–19 influenza pandemic in Australia, focusing particularly on the lived experience of the pandemic and its governance as a way of considering its implications for present and future pandemic events. In this chapter we examine in particular New South Wales – the state which suffered the greatest losses – and its capital, Sydney (New South Wales Parliament 1920, Section V, Part I, 153). We engage a methodology of overlaying personal accounts from different source types with government and institutional records to generate a nuanced understanding of the relationship between state responses and the social and lived aspects of the pandemic, and how their intersection affected regulation and compliance.[3]

In this attempt to map parallel histories of regulatory and government responses alongside lived experiences of the influenza pandemic, we focus on what contemporary newspaper reports from across the country described as 'the most talked of development in connection with the epidemic': the compulsory wearing of face masks (*Daily Mercury* 1919; *Northern Herald* 1919; *Observer* 1919; *Sydney Morning Herald* 1919a, 8; *Townsville Daily Bulletin* 1919; *West Australian* 1919). No critical study of the mask has yet been undertaken in relation to the 1918–19 influenza pandemic, despite its central role as both regulatory device and cultural object. Drawing on a variety of legal, governmental and cultural sources, we pursue this critical line of inquiry to demonstrate how both formal and informal efforts to regulate the progress of the virus through masking regulation continually required negotiation with existing social and cultural practices. Established conventions – particularly those of dressing and fashion – mediated responses to regulation, the events and impacts of the influenza, and its representation and articulation.

Examining regulation through humanities-based materials and approaches, broadly located within the fields of design and material culture, presents an opportunity to understand how those who find themselves subject to the jurisdiction of medicine and law give practical effect to the demands of those powers. It also renders visible how those powers come to exercise jurisdiction over the bodies and practices of individuals through efforts which utilize or intersect with design and material cultures.

Interdisciplinary thinking, such as that which guides our research, is a means of being attentive to the relationship between the law, our theory of how it comes to exercise its jurisdiction and its actual impacts on the world by tracing a material history. This results in the complication of histories of regulation, claims regarding its operation and the way both are narrated. In turn, this complexity demonstrates the deeply embedded nature of regulation in a multitude of contexts, and the tensions surrounding its role, usage and effectiveness.

To examine the relationship between regulation and culture, and how they coexist, inform and define one another, we first establish the scholarly reception of the influenza pandemic, with a focus particularly upon Australia. We follow this with a contextualization of the introduction of compulsory masking in New South Wales as the pandemic spread in 1918–19. In this way, we intend to demonstrate how responses to masking regulation intersected with wider efforts to control the outbreak, presenting regulation from the perspective of those who encountered it and thus as a series of interrelated experiences, rather than as distinct acts. Then we develop an account of the reception of imposed mask wearing and the behaviours that ensued, highlighting how the reality of masking regulation deviated from the detailed protocols that were established in government and medical decrees – largely disseminated through the popular press. Our research ultimately reveals that despite consistent educational, medical, policing and political efforts by the state and other actors, masking regulation generated inconsistent responses. To account for this, we conclude by examining the lived, embodied experience of compulsory mask use (or misuse). Our archival research leads us to the notion that attitudes and practices directed towards compulsory influenza mask wearing were configured physically and culturally, as an embodied or lived experience of environment and culture. This process was determined by the reality of the mask itself, an object applied to the body that was subject to 'informal' regulation by its wearers. Thus, mask wearing intersected with established attitudes and behaviours, rather than serving solely as an ideological or psychological position adopted towards a regulatory act of law making, or through medical arguments that were put forth in accounts of the pandemic generated as part of the regulatory effort. To be attentive to these experiences offers an opportunity to better understand how regulation can be more effective in ensuring its aims and outcomes.

The history of the influenza pandemic: masking, governance and lived experience

The history of the 1918–19 influenza pandemic is central to contemporary pandemic planning regimes (Jester, Uyeki and Jernigan 2018; Taubenberger, Hultin and Morens 2007). Australia's current pandemic model and planning regime directly draw from this history, which acts as the model for what to expect epidemiologically, socially and otherwise in the event of a new pandemic, such as COVID-19 (Communicable Diseases Network Australia and New Zealand and Influenza Pandemic Planning Committee 1999; Department of Health 2014). Given the use to which the history of the pandemic is put, the availability of high-quality historical evidence to support research and preparation for pandemic events like COVID-19 is essential (Pan et al. 2020; Pavia 2019; Roberts and Tehrani 2020; Saunders-Hastings and Krewski 2016). This means that the history of the influenza pandemic and how we tell it –in all its aspects – is hugely significant in our present and foreseeable future (Blackwell 2007). A deeper understanding of the various aspects of the 1918–19 influenza outbreak can provide models to prevent and respond to new pandemics or infectious disease threats (Caley, Philp and McCracken 2008), including the identification of social, cultural, legal and other factors that might temper or, alternatively, potentiate the impact of any such threat (Matthews n.d.).

For us, it is therefore most urgent to uncover and understand the lived experiences of those who suffered through the influenza pandemic in Australia. In particular, we are interested in understanding the lived experience of the various regulatory efforts constructed to govern the pandemic. Living with COVID-19 has demonstrated how vital it is to understand this aspect. COVID-19 presents regular opportunities to observe the complex intersection between institutional and governmental responses to pandemics and our daily lives. It renders visible the infinite number of ways in which governance meets and shapes well-being and health, as well as behavioural, psychological and emotional responses. It is at these junctures that the fundamental shape of a pandemic is forged. In Australia, for example, the federal government's lethargy across the first eighteen months of the COVID-19 pandemic with regard to vaccination has fostered the development of attitudinal postures and associated behaviours in the community that have – likely inadvertently – resulted in significant virus outbreaks (BBC News 2021). While our experiences of living through a pandemic may be new to us today, a history of the lived experience of pandemic may help locate how the juncture of such pandemic governance, inclusive of regulations such as compulsory masking, has the potential to influence other monumental events, such as COVID-19, and their aftermaths.

Unfortunately, we lack a well-developed, critical scholarship on Australian aspects of the influenza pandemic,[4] especially with regard to the lived experience of pandemic governance efforts. The Australian scholarship that does exist on the topic is heavily oriented towards medical and institutional perspectives, and is focused on the disciplinary and governmental efforts mounted in response to the pandemic. This body of scholarship tends to present this history through the lens of the major transitions of the time, namely the end of the First World War and the first real test of quarantine and related powers with which the commonwealth government had recently been vested (Hyslop 1995, 1997; McQueen 1976). Other accounts originate in medicine and the medical sciences, centring on organized medical services and responses or epidemiological aspects of the pandemic (Camm 1984). Some scholarship does examine more intimate experiences of the Australian influenza pandemic; however, these studies are few in number and either feature examinations of lived experience as secondary to the development of a theoretical position (Taksa 1994) or do not interpret the accounts they uncover (Arnold 2020; Boynton-Bricknell and Richardson 2020; Mashford 1998; Rice 2018; Spinney 2017; Wengert 2018). Thankfully, we have the benefit of scholarship on the history of Australian public health practice at the time, which provides a valuable contextualization of the use of quarantine and isolation powers in response to the influenza pandemic (Bashford 2003). Whilst this work is essential to understanding the broader character of Australia's public health practice and for contextualizing state practice in this era, the history of the 1918–19 influenza pandemic has thus far received only passing treatment.

This gap in the scholarship is all the more stark in the face of the overwhelming amount of primary material available to researchers, particularly from the popular press. The importance of newspapers was officially acknowledged during the influenza pandemic itself, as the 'public press' was invaluable as a channel through which critical information concerning influenza was disseminated (Department of Public Health, New South Wales 1919, 150), partially as a result of state health departments' failure to effectively coordinate their efforts. Government directives, as well as diverse opinions which examined practical and ethical questions, were regularly printed. Newspapers were also the place where dissent or deviation from government regulations and advice played out (Arrowsmith 2007, 56; Curson 2015, 15). Information often had to be communicated to a large number of people – even displaced people – and newspapers were the most accessible technology for doing so. For instance, many people were stranded in Victoria after the border closed between it and South Australia, so complete instructions on how to return to South Australia, including quarantine requirements, were delivered through newspapers (*Normal* 1919, 5). As

these major events played out before a general public, it is no wonder that the influenza pandemic completely held public attention and newspapers became the principal forum to capture the concern, fear and uncertainty it generated (Curson 2015, 15). Newspapers also captured divided opinions that affected the population, particularly concerning masking, including those of medical professionals and those who wished to express opinions on their influenza experience in other jurisdictions. This began in newspapers even before influenza arrived in Australia (Arrowsmith 2007, 56). The general divergence of views was driven by the concrete lack of knowledge about the disease, approaches to its treatment and responses to its presence. In essence, newspapers provide a diverse and comprehensive body of materials related to the influenza pandemic.

The lack of detailed scholarly analysis of the lived experience of influenza regulation has led to the categorization of pandemic governance and public responses as a well-worn binary of order and hysteria (Curson 2015, 84–6). This model provides a picture of the wider governance of the threat and response to it as far more clear-cut, and potentially more well ordered, disciplined and well regulated, than the research presented in this chapter demonstrates. Our research has uncovered a greater variety and complexity of responses represented as either a picture of well-ordered influenza governance or of general fear and panic. Such mischaracterization of the pandemic experience elides the complexities of its governance and fails to express the truth of the lived situation. It thus provides a false model upon which to base expectations regarding the governance of current and future pandemic events, such as COVID-19, and a false impression of our own past.

To offer an expanded understanding of how efforts to govern the influenza pandemic were met and experienced in daily life, we focus on mandatory masking in particular. On 30 January 1919 the New South Wales state government ordered the people of Cumberland County (wider Sydney) to wear face masks. Masks were required in all public spheres, though with some modifications to accommodate certain activities (Davidson 1919, 593, 594). The regulation was briefly repealed on 15 March, when it seemed the threat from influenza was passing, but was soon reinstated on 24 March, when influenza cases began to spike. This second regulation required face masks in spaces such as lifts, shops, workrooms, auctions and on public transport – or anywhere that groups of people gathered in close proximity. Masks were still being worn in these spaces in late July 1919, meaning that Sydney was subject to some form of compulsory masking regulation for an extended period.[5]

In developing a new history of masking, we invest in first-hand accounts which chronicle the lived experience of masking regulation, presenting diverse views on its impacts. Amid the richness and variety of the available

primary material, one dominant theme is prominent: wearing a mask generated physical responses and actions. Covering part of the face with an influenza mask seems to have reinforced the centrality of the body within efforts to govern the pandemic. Not only was influenza itself defined through its impact on bodies, but so too were measures put in place to protect them, masking being the first among them. As in the age of COVID-19, where masks generate a series of implications for our bodies, the primary sources on the experience of masking during the 1918–19 influenza pandemic are saturated with commentary that frames masking regulation in bodily terms. These range from the most effective ways to accommodate facial hair while masking, to the impact of the mask on those with serious respiratory complications. The pervasiveness of this theme of masking and evidence of its reception in particularly corporeal terms drives our approach to studying the lived experience of pandemic governance. Among other things, it prompts us to consider the mask through discourses related to the application of objects to the body: that is, as an act of dressing.

Masks are for us, then, not only a technical object of public health regulation or what we today term 'personal protective equipment'. Rather, they are, both in 1919 and now, an act of dressing, a practice of preparing the body for the public realm, the imposition, use, misuse and circulation of which provide a way of examining the 1918–19 influenza pandemic as played out at the most intimate scale: upon individual bodies with the potential to influence the pandemic's progress. As such, masks and mask wearing become a material emblem of the diverse and complex experiences of influenza and its governance, a material object and associated series of practices born of the influenza pandemic.[6]

A 'most exalted infectivity': the arrival of influenza in Australia

A major contextual event for the influenza pandemic's emergence was, of course, the First World War. The virus travelled across the Atlantic with mobilized troops, reaching its peak intensity in Europe between July 1918 and February 1919 (McQueen 1976; *War Diary Medical Section 11Q AIF Depots in United Kingdom* 1919, Appendix). By July 1918 Australian quarantine officials had acknowledged the rapidly spreading influenza. With the first vessels carrying infected troops arriving in Australia in October of that year, a maritime quarantine was established.

This maritime quarantine was a signal feature of the Australian government's response to influenza (Cumpston 1919), and its consequences likely affected the other regulatory efforts which followed. Under the quarantine

arrangements, every vessel that wished to dock at an Australian port had to undergo a seven-day quarantine from that point. J. H. L. Cumpston (1919, iii), the pioneering Director of the Commonwealth Quarantine Service and architect of the maritime quarantine, described the influenza strain as presenting an 'intense virulence and most exalted infectivity', and credited the establishment of maritime quarantine lines with delaying the spread of the early stages of the pandemic amongst the general Australian population. Regardless of its successes, the practical weight of enforcing the maritime quarantine placed a significant strain on the relatively new Commonwealth Quarantine Service. The result was that the unprecedented scale of the operation generated such complexities, tensions and failures that this, the first formal regulatory effort in the face of influenza, started to break down in highly visible ways.[7] Multiple large-scale quarantine breaches occurred, each well documented in the press. So many arose that they were characterized as 'constant' by the Secretary of the Department of Defence (Knowles 1919, 115). The first major resistance occurred together with the introduction of the compulsory masking regulation and involved approximately 900 troops from the ship *Argyllshire*, who on 1 February 1919 crossed quarantine lines at North Head Quarantine Station in Sydney. The troops were met by police and military authorities. Following negotiations, the insurgents were required to mask, and were marched through the city of Sydney to the Sydney Cricket Ground (*Sydney Mail* 1919), where they undertook three days of quarantine. The official response to such defiance of quarantine efforts was firm, with the Secretary of the Department of Defence labelling quarantine breaches a form of mutiny. The Commandant of the Fifth Military District (Sydney) even ordered that if 'the guard cannot find any other means of preventing these men from breaking quarantine that they should use their rifles even to the extent of inflicting serious bodily harm or killing some member of the Australian Imperial Force while trying to break out' (Knowles 1919).

Despite this intensification of the state's response, it took only three weeks until a further 150 men held in quarantine aboard the *Orsova* threatened to breach quarantine lines. The *Orsova* had been held in quarantine in response to a confirmed onboard influenza case, meaning that this breach of quarantine was particularly dangerous to the populace and threatened the containment which had been maintained by the use of maritime quarantine. Telegrams between the Premier of New South Wales and the Acting Prime Minister demonstrated the real public health risk of such a breach and the seriousness with which the New South Wales government took it. The Premier, facing this very real risk of quarantine breach, curtly reminded his Federal counterpart that the '[r]esponsibility of maintaining quarantine [was] clearly Federal', and threatened that '[n]evertheless if soldiers

attempt land in Sydney, State authorities will be obliged to arrest them' which 'may lead to conflict and to very serious consequences' (Letters received n.d., 25 February 1919). Following this message, the premier made formal application pursuant to s 119 of the Commonwealth Constitution for military aid to protect 'against the domestic violence involved in such a conflict', suggesting that instructions be sent to army and naval forces to 'take all necessary steps to prevent any such breach' (Letters received n.d., 25 February 1919). The response from the Commonwealth that night was that the 'Commandant Sydney ... instructed to employ every means to prevent men breaking quarantine' (Letters received n.d., 25 February 1919).

In response to this authorization, those attempting to break quarantine from the *Orsova* were met at the gates of the quarantine station by a 'strong guard', whereupon they were reported to have 'listened to reason' (*Daily Telegraph* 1919a) and returned to their accommodation. This is the first and only time that the Australian Defence Force was called out under constitutional provisions to render aid to civil authorities to quell civil unrest. This use of the Australian military has thus far not been acknowledged in the legal or legal-historical literature on the use of these constitutional powers (see for example Cahill and Cahill 2006, 10–13; Head 2001; 2008, 97; Moore 2005; Stephenson 2015).

News of the *Argyllshire* and *Orsova* incidents activated a strong civilian response regarding the treatment of returning soldiers in Australia's quarantine system. Criticism was raised regarding the arrangements made for the quarantine, while the soundness of the regulations was regularly examined in weighing the experience of war and pandemic against the necessity to stem the spread of influenza (*Sydney Morning Herald* 1919g). Community groups and the wider public roundly criticized the handling of quarantine regulation. Church leaders especially condemned the actions of the Commonwealth government with 'strong censure' in light of its refusal to allow clergy to minister to the infected and dying in quarantine, for instance, and engaged in acts of civil disobedience to force changes to the regulation (*Daily Telegraph* 1918a, 1918b; *Grafton Argus and Clarence River General Advertiser* 1918). This position was widely supported through opinion pieces published in major newspapers (*Sydney Morning Herald* 1918).

Given this picture, dissent regarding the establishment of regulations to govern the spread of influenza was in evidence from the earliest moment of their enactment. The contestation of and resistance to the maritime quarantine thus established a critical discourse in the face of regulatory efforts. These tensions were fed by breakdowns between the different levels of government, within the medical community and between medicine and government, all active nodes attempting to govern the outbreak. Conflict between the New South Wales and Victorian premiers, for example, was

particularly intense from the outset of the pandemic and continued throughout 1919 (Shaw 2020, 124). The acting premier of New South Wales voiced this anger to his Commonwealth and Victorian counterparts, writing urgent and forceful telegrams chastising Victoria's perceived mismanagement of limiting the influenza outbreak (Claims Committee – Colonial Secretary – Archival Bundle n.d.).[8] Medical experts engaged in similar infighting, and were in such disarray that McQueen recorded that 'support for nationalization of medicine ranged from *Punch* and the President of the 1920 Medical Congress, through the Australian Natives' Association and the *Freeman's Journal*' (McQueen 1976, 136; *Sun* 1919a). *The Bulletin* even asked, 'Should a doctor be hanged now and then?' (1919, 6).

In this context, formal public health orders were generated at a significant pace in New South Wales, regularly appearing in newspapers to inform the populace of the fast-moving developments. Successive areas of New South Wales were declared 'infected', whereupon quarantine and isolation zones were instituted within the state. Crossing into and out of these declared areas was prohibited. The state assumed management of hospitals, as well as proclaiming that all libraries, schools, churches, theatres, public halls and places of indoor entertainment be closed. Meetings for any purpose were also banned – including for religious and political purposes (Minute Paper for the Executive Council, 7 February 1919).[9] Temporary emergency hospitals were opened, while numerous depots for stockpiling and delivering aid were established across the state (Metropolitan Citizens' Influenza Administrative Committee 1920). This led, finally, to the announcement that all persons within the County of Cumberland, within ten miles of the Victorian border or on public transport were required to wear multi-layered gauze face masks with a penalty of up to £10 for transgressions (By-Law No. 532 1919).

'Gauze versus the microbe': compulsory face masks

The New South Wales Governor in Council made the initial proclamation of laws requiring compulsory masking on 30 January 1919. It required that a 'mask or covering of gauze or other suitable material sufficient to exclude the germs of the … infectious or contagious disease' be worn 'upon the face so as to completely cover the mouth and nose' (*Government Gazette of the State of New South Wales* 1919a). Advice typically suggested that the mask should cover the nose and mouth and fit tightly, sitting just below the eyes, and that it should be composed of a thickness equal to six layers of ordinary gauze (*Sun* 1919c, 7).

In full-page notices in major newspapers the following weekday, the premier of New South Wales enjoined the public to confront 'a danger greater

than war' that 'threatens the lives of all' (*Daily Telegraph* 1919c; *Sun* 1919b; *Sydney Morning Herald* 1919f). The language in these notices relied on the established rhetoric of war – both in terms of its martial language and reflection of discourse that had developed regarding the home front. In these notices, the state mobilized the success of existing efforts in the 'battle' against influenza to argue that 'the fight can be won'. This terminology was, however, confined to the proclamation's preamble. It thereafter gave way to the language of utilitarian calculus as the state appealed for the public to wear masks: specifically, the government 'insists that the many shall not be placed in danger for the few and that EVERYONE SHALL WEAR A MASK' (emphasis in original; Claims Committee – Colonial Secretary – Archival Bundle n.d.).

Just as resistance and non-compliance were a feature of maritime quarantine regulations, the potential for resistance to compulsory mask wearing was anticipated in this very first masking regulation proclamation: 'Those who are not [wearing a mask] are not showing their independence – they are only showing their indifference for the lives of others – for the lives of the women and the helpless little children who cannot help themselves' (Claims Committee – Colonial Secretary – Archival Bundle n.d.). An appeal replete with the rhetoric of duty and protection of the vulnerable was mobilized to construct non-compliance as a form of indifference to the lives of others. This was an appeal designed to enliven a sense of duty, flowing from the good character of the populace rather than self-interest. No sense of the potential effectiveness or otherwise of the mask as a technology to prevent transmission was engaged with in these announcements. Indeed, public messaging regarding the necessity and effectiveness of masking was made more strongly in such announcements than in internal government documents, where ambiguities around the effectiveness of masking were often present (Department of Public Health, New South Wales 1919).

From this moment, masks came to dominate headlines across the country because, in combination with inoculation, masks were now endorsed as the key measure in the regulation and control of the spread of influenza by the New South Wales State Government. Despite the firm rhetoric emanating from the state, debate regarding the mask and masking practices also began immediately. A wide variety of perspectives found their way into print, from opinion pieces firmly advocating for the adoption or rejection of masking, to the cataloguing of mask types, to the correct way to wear a mask and, through forms of journalistic 'fieldwork', reports on how masks were being worn in the public arena. All were reported in exceptionally close detail.

The debate became heated, especially regarding the effectiveness of the mask as a precaution against transmission. This was likely intensified by divisions in the medical community as to their effectiveness. Born of a

lack of any real knowledge about influenza, this was exacerbated by the divisions across governing bodies managing the response to the outbreak (Arrowsmith 2007). 'The wearing o' the mask. Is it merely a fad?' asked one newspaper headline (*Daily News* 1919; *The Age* 1919). Competing letters to the editor claimed that masks were either the *only* effective way to curb influenza's reach (*Herald* 1919) or, alternatively, a *wholly useless* undertaking (Bennson 1919).

At every level of medical and social discourse, the status of masks as a preventative measure was deliberated. Even public health organizations seemed to acknowledge the ambivalence regarding masks, though they tended to conclude in favour of masking (Department of Public Health, New South Wales 1919, 163; Director General of Public Health 1920). These divided opinions as to the effectiveness of the mask in combating influenza were not distributed neatly along demographic or professional lines, however. For instance, in the correspondence section of *The Medical Journal of Australia* one medical practitioner claimed that masks were more likely to cause infection than prevent it (McLeod 1919), while another claimed the opposite in a direct rebuttal in a later issue of the journal (Sadler 1919).

These 'pro' or 'anti' responses that played out during the outbreak are replicated by modern commentators who reproduce a series of binary oppositions in their own reading of the mask. This extends not only to views regarding the effectiveness/ineffectiveness of masking as a tool of transmission reduction, but also through a binary of compliance/non-compliance regarding the practices of those enjoined to wear a mask. Historian John Barry, author of the widely cited book *The Great Influenza*, stated, for example, that 'the masks actually didn't do any good whatsoever' (2005, 358–9), while others have supported masking as an effective barrier precaution (Bootsma and Ferguson 2007). This binary structure extends even to more subtle and interpretative scholarship, which adopts a positive/negative structure. The mask is approached either positively, as a tool of modern sanitization, or negatively, represented as a ghoulish reminder of the presence of death. Barry, in a more interpretative gesture, figured the mask as a material sign of the otherwise invisible influenza (2005, 315–16), arguing that masks turned cities into a 'grotesque carnival', making the horror of influenza more present (350). Conversely, others have presented the mask as facilitating a kind of transformation towards reason, making it a transformative device, much as classic anthropological discourse has treated ceremonial masking. Medical anthropologist Christos Lynteris, whose work concerns medical visual culture, rendered the mask during the 1910–11 Manchurian plague outbreak in this way. He charted how adoption of the mask helped citizens transform their very selves into rational, modern and hygienic beings who judiciously faced the coming of the virus (Lynteris 2018).

Eyewitness accounts recorded at the time of the influenza outbreak in Australia seemed to support each of these mask interpretation models. For instance, writing in *The Daily Observer* (1919) under the heading 'Touchy topics of the day', an unnamed journalist said:

> The slight inconvenience of wearing a gruesome looking mask, and the absurdity of the spectacle, are small considerations in comparison with the frightful risks of maintaining the individual's sense of dignity. The black spectre of death is hanging over Sydney to-day; the white mask indicates that everyone sees it.

A practical resolve was observed alongside the spectre of fear. Repeatedly, accounts asserted that people were masking following medical advice but ignoring divisions within the medical community. For example, *The Sydney Stock and Station Journal* (1919) opined: 'Some people there are, of course, who have no faith in the mask; but most people are giving the doctors the benefit of the doubt.'

Yet the archival research discussed in the next section of this chapter reveals that neither the models of fear, reason or, alternatively, of compliance or non-compliance fully encapsulate Sydneysiders' lived experience of regulated masking. Instead, it shows that factors beyond a public, highly visible and contested discourse also shaped responses to masking regulation (*Sydney Morning Herald* 1919e). One brief example demonstrates this well. On Tuesday, 4 February 1919, just days after the masking regulation had been proclaimed, the *Sydney Morning Herald* reported on a count undertaken in various parts of the city. In 15 minutes, 327 people were observed in one location with bare faces and 260 in another. Importantly, of those who were not masked, a dozen had no mask, whilst the rest had a mask with them but were simply not wearing it over their faces (*Sydney Morning Herald* 1919d). This eyewitness account reveals a situation where the simple question of whether people 'accepted' or 'rejected' the act of masking was not the sole consideration facing the population of Sydney. Instead of focusing on the binary of 'for or against', or 'fear or common sense', what is essential is that we understand why people made the seemingly inconsistent choices they did – to have a mask but to not wear it, for instance – and thereafter how their relationship with masks was formed.

'Surreptitious inhalations of atmosphere': dress and masking

The experience of residents in New South Wales living through masking regulation can be fruitfully located and understood in connection to discourses

of dress and fashion. This interpretation is supported by the layers of archival material, including media reports, official proclamations, government statements and various records generated by the Board of Health and other public health authorities, which provide access to the lived experience of masking regulation among the population of Sydney at the time. While colloquially *dress* and *fashion* may be used interchangeably, scholars typically refer to dressing as the broader act of applying objects or elements to the body, while fashion specifically relates to regimes of taste, design and style that have a strong temporal component.

The more fundamental of these discourses – dress – regularly features within accounts of mask wearing generated during the influenza pandemic. Such reports typically frame the mask in terms of embodied experience, that is one which foregrounds how the material object of the mask operates on and with the body. This generates a form of dialectic established between the social world a body inhabits, the act of masking and the particular experiences of an individual masked body (Entwistle 2000, 28–30). A typical account of masking from the time underlines the mask's reality as an item of embodied dress: 'After an hour or so there is an overwhelming sense of partial suffocation, a feeling of intense heat, and an almost uncontrollable yearning for surreptitious inhalations of atmosphere without the intervention of gauze' (*Sydney Morning Herald* 1919d).

Drawing from the phenomenology of Merleau-Ponty and Bourdieu, approaching such accounts of mask wearing as an embodied experience allows for a 'carnal sociology' (Crossley 1995), locating the adoption of the mask as a situated bodily practice where the body is not inert, but functions as a perceptive vehicle of being, indivisible from the self (Entwistle 2000, 29). Thus, the potential benefits of masking (both in terms of health outcomes and avoiding the penalties of non-compliance) are likely to be negotiated by the individual through the body and determined by the body, rather than being the sole result of adopting a fixed position within an ideological discourse. The breakdown of the dialectic between the body and its practices – in this instance wearing a face mask – occurs if a wearer is 'overwhelmed', as characterized in the passage quoted above from the *Sydney Morning Herald*, by physical discomfort, impracticality or some form of limitation.

When such a rupture occurs, it erodes the beliefs, intentions or volition of the wearer to comply with regulation, and is unable to withstand the wearer's embodied experience. The effectiveness of the masking regulation, then, was likely determined not simply by the wider context of the divisive nature of quarantine and regulation or arguments as to the mask's formal protective function, but also through the act of adoption. Even government documents advocating for the wearing of masks raised this multiplicity of

the experience of mask wearing as simultaneously potentially protective and limiting. One Department of Public Health report stated: 'Anyone who has ever tried to blow out a candle through a mask composed of three layers of surgical gauze will be convinced of the efficacy of the mask in preventing the passage of droplets or massive infecting particles' (Department of Public Health, New South Wales 1919, 163). Certainly, this report reveals the supposed value of the mask as a shield, but also exposes its impracticalities as an item of daily dress, particularly one composed of the recommended multiple layers of gauze – though mask type varied widely – and required to be worn for a six-month period through an Australian summer.

Understanding the lived experience of the wider governance of the pandemic requires moving beyond debates of the mask's effectiveness as a tool against the spread of influenza. Such accounts must also include real-world criteria, such as those raised and foregrounded by the discourses of dressing. As *The Cumberland Argus* (1919) observed:

> As the day wore on and the heat increased, men were to be seen everywhere wearing their masks on their foreheads or around their necks. Men and women who wore their masks religiously in the fresh and uncontaminated air of the streets took them off unconcernedly in stuffy railway carriages. 'They are too beastly hot.' Said they, 'and we can't get enough air through them' ... Some smokers wore masks fitted with a flap through which they stuck their pipes.

The inherent tension in this scenario – between environment, impulses, regulation and structured codes of conduct – connects with Bourdieu's writing on the body, which argues that the declaration of the body's limits is a factor in determining the range of possibilities within a lived environment (Craik 1993, 4–5). The reporting on the experiences of those living through the masking regulations repeatedly demonstrates the body's role in determining the possibilities and limitations of regulation.

Besides environmental concerns, bodies themselves could generate conditions that impacted compliance with the regulation, at least from the wearer's perspective. An account offered by a woman charged with failure to wear a mask on a tram on Sydney's Oxford Street noted that she was only able to wear her mask under her chin, for she was suffering from catarrh (a build-up of mucus in the airway) and presumably could not breathe effectively through the gauze if her mouth and nose remained covered. Regardless, she was charged with an offence (*Sydney Morning Herald* 1919c). Furthermore, adopting the mask in high-risk public spaces was impractical in other ways. It might limit the body's passage through essential social or cultural actions required to function in a particular space or context. A headline printed in *The Tweed Daily* on Friday, 31 January

1919 revealed as much without need for further explanation: 'Churchgoers to wear masks – Sermon in muffled tones – Possible elimination of hymn singing'. Additionally, particular groups of people experienced masks differently based on their physical realities; children found it difficult to wear masks, for example (Pearn 2020). Rather than a site where the irrational (not masked) self combats the rational (masked) self, or where compliance and non-compliance can be understood as absolute values instead of highly context-dependent choices, responses to masking were configured as physical lived experience through embodied practice. Wrapping the advised six layers of gauze around the lower half of the face produced a radically altered bodily experience, which was at times untenable. If dressing is a ubiquitous act of preparing the body for the social world (Kaiser 2013, 14), then regulations which connect with the dressing of the body must be configured through the experiences of the body as it inhabits the world (Jenss 2016, 7).

Even the dissemination of public safety information was influenced by the adoption of the mask. For example, at a public meeting that took place for the purpose of galvanizing efforts to combat influenza, this exchange occurred:

> Mr. Rankin ... endeavored to address the crowd through the mask, and created amusement in the effort. 'Can you understand what I say?' He asked a member of the audience ... 'No', came back the answer. Then Mr. Rankin abandoned the mask, and trusted to providence that he would escape any germs during the remainder of the evening (*The Newcastle Sun* 1919).

The 'useful but grotesque nosebag': fashion and masking

Beyond the embodied experiences of the mask – so present they could undermine even official attempts to provide information during the pandemic – additional factors generated the lived experience of masking regulation and the governance of the influenza pandemic. While discourses of dress enable us to understand the issues that masks raised for the bodies that wore them, fashion discourses attempt to resolve them. Fashion, as applied here, is the conscious and significant investment in the systematization of dress, often driven by a strong design principle, unifying approaches and objects into a recognizable scheme.

Fashion discourse was repeatedly present in first-hand accounts reporting on the masking regulation, appearing in two strands. In each, fashion discourse was both generated and mobilized: first, the notion that the mask

made the wearer starkly conspicuous, and second, that masks were 'ugly'. Advertisements for masks, for example, proclaimed that the proprietor's masks were 'Not so bad to wear as they look' (*National Advocate* 1919), or stated, 'This mask may be ugly, but it is very effective' (*Daily Telegraph* 1919b). Beyond the mask's perceived lack of becomingness, reporting focused on the unwelcome visibility the mask generated. A *Sydney Morning Herald* (1919b) journalist wrote:

> The objection to wearing a mask resolves itself simply and solely into the dislike of the average person to making himself [*sic*] conspicuous. Once the pioneers have introduced the fashion we shall think no more of wearing masks than of wearing hats.

The highly optimistic prediction that the mask would become a fashionable item is in no way supported by the primary evidence. It is clear that fashion was called upon to resolve some of the disquiet that wearers experienced while donning the mask, yet fashioning of masks was limited. Entrenched social norms were a major factor in restricting the reach of fashion to drive compliance, particularly in terms of gender and class divisions.

Though fashioning the influenza mask was not a typical response to masking regulation, masks could be made to connect with a pre-existing fashion regime, thereby offering the wearer some potential agency to interpret and in some way shape the enforced act of masking. For instance, the *Newcastle Morning Herald* (1919) reported: 'Society dames are having influenza masks made to match their gowns, and in some cases their eyes. All sorts of tints are being selected, but the favourite fancies are Rose du Barri pink and Alice blue.' Such 'fashioned' fabrications of the influenza mask in popular summertime colours had the potential to homogenize the mask within a pre-existing fashion regime. Alternatively, it could emphasize the wearer's distinct identity, socioeconomic position or cultural fluency via the expression of their knowledge of fashion trends.

Most masks were not made to match a specific outfit, however, and such investments were presumably only the domain of 'society dames' when attending a function that required them to wear more elaborate forms of dress, such as gowns. The majority of masks were not even embellished or decorated, but simply left as plain gauze. Some women covered their plain gauze masks with another textile, however, as revealed in *The Cumberland Argus* (1919): 'most of the women wore the regulation mask without any attempt at decoration, though they tried to hide its ugliness with veils'. In this same vein, the *Goulburn Evening Penny Post* (1919) reported that:

> a good many feminine wearers are finding a certain amount of comfort in transforming the useful but grotesque 'nosebag' into a thing,

> if not exactly of beauty, at any rate of a certain attractiveness. The Yashmak veil [what may be thought of as a form of niqab] is greatly in favour … Although it may be considered that the appearance of the mask is a trifling matter, there is, after all, no great harm in adding to its becomingness, so long as its utility is not interfered with.

This instinct to reduce the visual impact of the influenza mask by covering it with a veil expanded the discourse of the masking regulation beyond compliance/non-compliance, so that the focus shifted to the individual wearer and their ability to interpret or mediate between regulation and culture, made material through their acts of fashioning.

Such acts may have been undertaken to veil not only the conspicuous presence of the influenza mask, but also its material reality. A *Daily Telegraph* reporter (1919d) reasoned: 'Whatever the covering it is an unquestionable improvement on the white patch of gauze, which in the course of the day takes unto itself a soiled complexion [which is] anything but attractive.' The mention of masks becoming soiled over the course of the day encouraged a consideration of the mask itself in real-world terms, rather than the eternally white gauze suspended over the mouth as it appeared in photographs at the time. The *Daily Telegraph* reporter revealed that the fabric of the mask became dirty over short periods of time, taking on the grime encountered or generated by the wearer's body. The unadorned white mask made visible the relationship between the physical world and the body, while the coloured veil covering the mask had the potential to obscure these processes somewhat, replacing them with signs of ordered culture, specifically of fashion. Designing a mask or hiding it behind a fashionable veil, executing these choices or collaborating to produce them, locates fashion as a process rather than an object. That is, it becomes a series of related actions and responses that rely on formulation, rather than simple acquiescence, a negation or navigation within a series of interconnected social currents (Kaiser 2013, 14). The process of fashion generated the potential to shift the discourse of division surrounding regulation beyond whether a mask was adopted or not to how a mask would be worn and seen, with the capacity to shift the connotations attached to its adoption by its association with pre-existing and developing cultural patterns. As a tool to combat the uncertainties experienced over the visibility issues connected to the mask, fashion might in some way address them and thus aid compliance for those individuals able to access its mechanisms.

The fashioning of the influenza mask demonstrates the degree to which the masks required wearers to negotiate the network of social and cultural meanings, and discursive resources, that the introduction of the masking regulation instigated, and which formed a great part of their lived

experience. Whether framed as an emotional, physical or psychological response, the introduction of a masking regulation frequently required the wearer to undertake further action; the regulation was not an endpoint. Rather, it was an initiating act that generated a series of potential subsequent actions and practices. It is difficult to determine the impact fashion cultures had on compliance, but it was widely reported that women took up the mask more uniformly than men (*Sydney Morning Herald* 1919d, 6), and also that fewer women than men died of influenza (McCracken and Curson 2003, 120–2). Broadly speaking, women had access to a wider series of responses to the establishment of the masking regulation, particularly in the realm of fashion. Still, it is yet to be studied whether masking cultures and other factors contributed to these figures (Eastwood et al. 2009; Short, Kedzierska and van de Sandt 2018). While it is difficult to precisely connect cause and effect for this question, thus potentially demonstrating the complexity of the web of associations rather than its absence, cultures of fashion, communication and bodily ease and unease intersected with regulation, and in some form determined how compliance functioned. Ugliness, dirtiness, embarrassment and the cultivation of attractiveness were factors relevant to compliance, as were the relationship between the body, the physical environment and the material mask. Some factors – such as heat, fatigue and partial suffocation – were forces that were more difficult to overcome than others, and which, seemingly, no amount of fashioning could appease.

Coda: masking then and masking now

Beyond its function as the foundation of pandemic planning in Australia, the 1918–19 influenza pandemic offers an opportunity to examine the lived experience of pandemics and the intersections of culture, law, health advice and regulation to better understand how pandemics affect those who live through them. In our present moment of the COVID-19 pandemic, the experience from 1918–19 has never been of greater relevance. While acknowledging the magnitude of the 1918–19 pandemic in our present circumstances may bring little consolation – the number of Australians infected with influenza in its first year reached a figure more than sixty times greater than those who contracted COVID-19 over the same period of time – the clear similarities that run between the two historical events, despite their differences, offer valuable insights.

As was the case in 1919, face masks were made compulsory in public spaces in Sydney in 2021 where social distancing could not be guaranteed. Initially lasting from 3 to 24 January (Rabe 2021), compulsory masking was

again ordered for 6 to 17 May (*The Guardian Australia* 2021) and again on 20 June (Stuart 2021). Indeed, Sydney's masking regulations remain in effect at the time of drafting this chapter in November 2021, with no end in sight.

Though the circumstances of masking in 1919 and 2021 are largely different – particularly in terms of the materiality of masks themselves – significant parallels exist between the two moments. In 2021, Australia's masking regulation has been met with a variety of responses – including apathy – as occurred in 1919. While sensational accounts of individuals refusing to adopt masks have dominated news headlines in 2021 (Clifford 2021), a more subtle form of resistance, and potentially a more widely practised one, was also in operation. One Australian journalist humorously referred to this practice as 'half-masking' (Holden 2020), presumably a play on 'half-assing' – that is, to do something improperly with little effort or care, showing unwillingness to fully engage with a practice.[10]

Much as in 1919, a scan of the reporting and research on half-masking or other forms of reluctance to adopt the mask as advised reveals a series of context-driven responses that pushed this unwillingness. These included but were not limited to the cost of masks (Fitzsimmons 2021); non-medical physical impediments, such as having a beard (Rabe 2021); issues with general comfort (Koh et al. 2022); breathing issues (Patty 2021); impaired vision, including fogged glasses (Holden 2020); skin irritation (Stewart 2020); the desire to smoke a cigarette (Porter 2021); casual sex (Chow et al. 2021); and fear of abuse or aggression (Ma and Zhan 2020; Fang et al. 2020). During both the COVID-19 pandemic and the 1918–19 influenza outbreak, the possibilities of and actions related to engaging with masking regulation determined its effectiveness. Yet in both instances regulatory efforts rarely focused on the realities of compliance. While public health orders and the information provided by state regulators may tell us the correct way to interact with devices meant to protect us, they infrequently address the minutiae of physical or emotional experiences that may be encountered – and need to be countered – through efforts to follow regulations and advice. This neglect of lived, embodied experience generates a need for information, practice and accounts of negotiating the embodied moment of masking found in informal networks of information exchange and cultural expression, such as interpersonal networks or even beauty columns (Singer 2021).

As with the influenza outbreak of 1918–19, those tasked with disseminating health information in Sydney during the COVID-19 pandemic struggled to comply with masking regulation. In a 2021 national news report on a leading Australian commercial television channel, a pharmacist was interviewed on the eve of the introduction of the first round of compulsory masking in Sydney (9 News 2021). In one shot, the pharmacist restocked shelves in a pharmacy wearing her mask in accordance with New South

Wales health advice. When talking to the reporter, however, the pharmacist's mask appeared to have slipped below her nose, presumably resulting from the act of conversing. Unable to rectify the situation without a lengthy procedure of removing the mask, washing or sanitizing her hands and replacing it, the mask was left ineffectively worn, possibly harmfully so, covering the pharmacist's chin and top lip but leaving her nose exposed and rubbing against the mask's fabric (World Health Organization 2020). Like Mr Rankin during the 1918–19 pandemic, who had to remove his mask to properly address his audience about the pandemic, the pharmacist in question demonstrates the limitations of regulation, the agency of the body and the at times awkward and problematic intersection of the two.

As attempts to regulate the progression of the novel Coronavirus continue, we become witness to a particular kind of encounter, perhaps even a 'meeting of laws', between well-established social and cultural norms, embodied corporeal limits and the law of the mask. In this encounter, established conventions are met with the demand of law and the limitations of bodies. This meeting then alters the reception, representation and articulation of formal law, bodily practice and perhaps even the course of the pandemic itself. The way that these forms of authority find their mutual co-constitution in the pandemic mask allows us to understand the mask itself, not as a static but as a lived and historical apparatus, and the task of regulating COVID-19 as a similarly embedded practice, best understood as being in dialogue with those who receive it – a mask or regulation that operates upon and with the body.

Notes

1. The literature on the influenza pandemic in Australia tends to discuss it in waves. In a truer sense, they might be referred to as key episodes within the outbreak with high levels of mortality, as opposed to true waves like those suffered in Europe. Arrowsmith (2007, 23) identifies three waves, while McCracken and Curson (2003, 114–15) indicate that there were two. The discussion of 'waves' aside, the virus first appeared in Australia in late January 1919, spread throughout February and worsened in March. Cases became less frequent, but in May and June there was a significant increase in those afflicted, with respite coming in July and only a handful of new patients being noted in August 1919.

2. Although historian Anthea Hyslop is currently developing another monograph on the topic: see Hyslop (2018).

3. The research for this chapter began in 2018, with the initial work presented at the Australia and New Zealand Law and History Society Annual Conference. The scope of the project was expanded with the advent of the COVID-19 pandemic.

4. Ian Shaw's study of the 1918–19 pandemic presents a wide-ranging history of the influenza outbreak across Australia. Written for a general audience, with limited citations, the carefully researched volume provides a strong case for a deeper examination of the impacts of the influenza in Australia. The need for critical, scholarly studies of the social, cultural, political and institutional effects of the influenza is made clear through Shaw's valuable work: see Shaw (2020).

5. The exact requirements of the regulation evolved over the periods in which it was in effect, as is the case with present-day masking regulations in Australia. *Government Gazette of the State of New South Wales* (1919b, 1919c).

6. Lupton et al.'s compact study of the face mask and its 'sociomaterial' impacts during the COVID-19 pandemic, offered from a health and social policy perspective, adds a significant strand to an emerging body of scholarship presenting material readings of face masks (Lupton et al. 2021).

7. This was a new site of the long-running tension between the State Departments of Health and the Commonwealth Quarantine Service, and particularly its leader J. H. L. Cumpston, expressed most recently in the response to smallpox in Sydney in 1913; see Lewis (2003, 180).

8. Anger at Victorian actions from the New South Wales authorities was not unwarranted. The Victorian government did not notify the Commonwealth of the presence of influenza for a full week after it was identified and, furthermore, refused to acknowledge its first cases of influenza for a full fortnight – or, more correctly, not until the day *after* New South Wales proclaimed itself an 'infected state' on 28 January 1919. See Department of Public Health, New South Wales (1919, 159).

9. The proclamation, which banned all meetings, including for political purposes, was carefully managed by the Executive Government of New South Wales. The Minute Paper that contains the proposed proclamation for viceregal signature was edited by hand, with the effect that the earlier draft that provided specific notice that 'a political meeting' or to 'hear an address or discourse upon any subject' was deleted, leaving behind the phrase 'whether for religious service or … for any other purpose'. See Minute Paper for the Executive Council, 7 February 1919.

10. Even the newly appointed deputy prime minister of Australia was fined for non-compliance with the masking regulation after police received a tip-off that he had failed to put on a mask before entering a service station to pay for petrol in his electorate of Armidale (Zagon and Noble 2021).

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Chapter 5

Walls and bridges: framing lockdown through metaphors of imprisonment and fantasies of escape

David Gurnham*

Introduction

Imprisonment traditionally and popularly tends to be characterized by two features, namely that it impedes the prisoner's freedom of movement and that it contains and separates prisoners from those at liberty (Fludernik 2019). During the first twelve months of the COVID-19 pandemic in the UK we saw periods of extreme intensification of both features inside prisons as well as their extension into other kinds of institutions. Furthermore, we saw them extended by public health laws to society more generally, where the imposition of lockdown regimes resulted in severe restrictions on movement for millions of people (JCHR 2020). This extension of concepts traditionally restricted to prison settings out into wider society raises important questions about the potency of imprisonment metaphors in the socio-legal imaginary.

This chapter takes an historical view on the pandemic inasmuch as it looks back on the impact of legal restrictions imposed during the period of Spring 2020 to Spring 2021; however, the themes and ideas it addresses about law, language and metaphor are of contemporary concern. It begins with an account of imprisonment itself in terms of the broad features with which it is

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traditionally associated (i.e. impeding and containing the prisoner) and the intensification of these features during the pandemic, noting also how these features may be blamed for precipitating claustrophobia, depression, anxiety and fantasies of escape. The following section identifies how these features make imprisonment a wellspring of metaphors that, as Monika Fludernik (2019) has demonstrated, frame normative thinking and critical reflections in law and humanities scholarship. We finally turn to an analysis of restrictive 'lockdown' measures during 2020 and into 2021: in the prose of law and policy, but also in poetic and visual art responses. Reviewing critical academic and parliamentary committee commentary on the UK government's public health restrictions alongside some key collections of pandemic poetry and art, this chapter considers how experiences of lockdown have been framed in the popular imagination by imprisonment metaphors, and reflects on the broader significance of these metaphors for law and humanities.

This is a discussion that therefore crosses disciplinary borders between law, humanities and the arts, to explore how ostensibly separate endeavours draw imaginatively on a common store of metaphors in translating experience. The particular poetry and art collections analysed and discussed here were selected on the basis of their 'meeting' with the legal and policy initiatives both temporally (all of the poetry collected was written and published during the 'first wave' of the pandemic in the UK) and thematically (all of the poetry and art collections discussed are conscious and explicit responses to the pandemic). It was important, furthermore, that they should represent a broad and diverse range of material, including work by both professional and amateur poets and artists. Through this exploration of legal and artistic responses to the pandemic, the chapter observes how the experience of lockdown (and, in particular, experiences of being locked down at home) connects metaphorically to that of imprisonment by way of metonymic links and cues involving houses imagined as cages, householders fettered by chains, bars and manacles, and people imagined variously as caged birds or animals. The discussion of legal responses to the pandemic focuses on England and Wales, although the ideas proposed here go beyond the confines of jurisdictional borders.

Prisons in a pandemic: movement stopped and people contained

Prompted by fears that outbreaks of COVID-19 could overwhelm overcrowded jails and Young Offender Institutions (YOIs) in England and Wales, in Spring 2020 the government introduced severely restrictive public health measures, and these had two primary impacts. The first of these was an

abrupt and profound cessation of movement, both in and out of, and within, prisons and YOIs. Visits, educational and rehabilitative programmes, exercise regimes, transfers in and out to attend court hearings, or to institutions of a different security level, or to alleviate overcrowding, were all stopped (JCHR 2020, 34–5). Furthermore, provision of services beyond basic sustenance and hygiene was suspended (Ministry of Justice 2020, 4). The pause on new trial hearings and in-person parole hearings led to a large build-up of people in prison who might otherwise have been able to go to court or access early release (Brennan 2020, 1221–2). Likewise, the '*flow* of people into prisons' and the '*churn* in prisons, with people coming in and out'[1] was reduced by a greater recourse to suspended sentences as opposed to short custodial sentences. Indeed, the Sentencing Council (2020) advised at the time that sentencing judges should 'keep in mind that the impact of a custodial sentence is likely to be heavier during the current emergency than it would otherwise be [and] must bear in mind the practical realities of the effects of the current health emergency'.

The extent of the public health restrictions placed on movements in and out of and around prisons during the pandemic was certainly unusual. However, it is also right to understand these restrictions simply as an *intensification* of a traditional and permanent defining characteristic of imprisonment. For Fludernik (2019, 6), 'the curtailment of autonomous physical movement' is the 'most basic' quality of imprisonment, and in the cultural imagination manifests in prisoners being '*tied*, … *shackled*, or *fettered*[, etc.,] terms metonymically related to the dungeon scenario' (emphasis in the original). Frustration of the desire for movement is a staple theme for prisoners, who have used poetry to describe their experiences. It is the underlying theme of the Pinter Award-winning poem 'An odour was all it took', in which HMP Whitemoor prisoner Joe Gynane juxtaposes his 'earthbound' body against his 'sky[ward]' soul:

> The smell of cut grass stained the air,
> Evoking memories of a bittersweet childhood
> A time before care,
> Before I made my mother cry,
> Earthbound,
> Yet seeking the sky …
>
> (Longford Trust 2020)

Similarly, the depressing mundanity of prison routine described by Ian Hall in 'The Daily Grind' is flecked with a single, hopeful gesture towards

the possibility of autonomous movement by way of escape into a more dynamic life:

> It's time for dinner and then for tea
> The only two events that seem to be
> Left in my life, everything else is gone
> Do I live here, is it where I belong?
> Or am I just passing through
> Each day the same, nothing new ...
> (Hall 2010)

We recognize these personal reflections as offering a *critique* of the prison environment because they invoke a quality or sense of movement as essential for a fulfilling life in order to identify precisely that as being *absent* from the prisoner's experience. It is for the same reason that we understand the impact of social distancing measures imposed on prisoners during the pandemic in 2020, in particular the lack of opportunity for time out of cells and the cessation of group activities, as troubling. When the function of prison is reduced to that of a *mere* container, it sets movement as the antonym of imprisonment and is consequently understood to be generally harmful for prisoners. Contrastingly, assertions about prison sentences that have 'worked' (in the sense of having brought about rehabilitation in a prisoner) tend to associate movement with imprisonment *in a positive way*, most commonly through the metaphor of the rehabilitative journey: the 'distance' the prisoner has figuratively 'travelled' during their time behind bars, 'reaching' their potential after sustained reflection on their crime (Parole Board 2014).

The second impact of the 2020 measures imposed by government to control the spread of COVID-19 in prisons was a strengthening of prisons, and especially prison *cells*, as containers that confine and separate. A dramatic example of this aspect of policies for prisons during the pandemic was the time spent by prisoners in their cells. Once the lockdown measures had been implemented, the 22–4 hours per day spent by prisoners locked in their cells effectively amounted to 'solitary confinement' (JCHR 2020, 35), a measure traditionally regarded as a punitive one, and with well-documented risks for mental health. The government's national framework for managing prisons stipulated that during an outbreak, a stage 5 'complete lockdown' would mean 'no time in the open air [and] all meals served at cell door' (Ministry of Justice 2020, 4). According to HM Inspectorate of Prisons, reporting on the 'extreme restrictions' on prisoners in prisons in London, Liverpool and Kent:

> The vast majority were locked up for nearly the whole day with usually no more than half an hour out of their cells. We found some examples of even greater restrictions. In one prison, a small number of

> symptomatic prisoners had been isolated in their cells without any opportunity to come out for a shower or exercise for up to 14 days (HM Inspectorate of Prisons 2020, 7).

Additionally, radically reduced contact between prisoners and the outside world led to a figurative plugging and stoppering of the pores in the carceral membrane that had until then allowed a degree of penetration. This thereby reinforced the sense in which prison, and the prison cell in particular, is a vessel within which the prisoner is held. It is entirely unsurprising, therefore, that these multiple ways in which movement in and between prisons ceased in 2020 led to a spike in emotional and mental health problems: an increase in suicides, instances of unrest and disorder and a general sense of heightened 'anxiety, hopelessness, and anger' among prisoners have all been attributed to lockdown measures that restricted movement (Brennan 2020, 1223).

For Fludernik (2019, 6), 'containment in enclosed space', and the wall of the prison as an 'enclosing circumference' (25) that prevents escape, is the second most basic defining feature of imprisonment. Fludernik notes that a salient quality of the prison is that of creating a physical and a symbolic inside and outside, and the 'specific carceral manifestations [of that quality] in the symbolic functionalization of walls, bars, doors, and windows' (24). Writings about the experience of imprisonment, and applications of the 'container' prison metaphor outside of imprisonment contexts, often rely heavily on this 'functionalization'. Hence, writings on the experience of prison can be expected to reference the impenetrability or claustrophobia-inducing quality of the walls, and the barred windows that allow the prisoner to glimpse the world beyond the restrictions placed on them. As we find in the report by Brennan (2020, 303) about prisoners' mental health during the pandemic, it can be the perception of a sudden and unusually severe 'sealing up' of carceral pores that can provoke the most intense feelings, 'from grief, despair, or despondency all the way to rage, fear, or frenzy'.

Particularly in situations where prisoners are visible through cell bars, these are qualities that call to mind the image of the caged bird (or perhaps a wild animal), which we can understand well, since 'jail' derives from roots in Old French (*jaiole*) and medieval Latin (*gabiola*), which both mean 'cage' as well as 'prison'. Indeed, the caged bird is a metaphor commonly found in works of literature, standing both for actual prisoners (as 'jailbirds': 'When (like committed linnets) I / With shriller throat shall sing …')[2] and also for more informal situations in which a person may be or feel trapped or captured. In both instances, the appearance of the caged bird metaphor in literary writings about imprisonment tends to signify the desire to *escape*. As Fludernik (2019, 316) puts it: 'the mind (bird) can indeed take wing and

soar beyond the confines of the immediate prison (the body, despair, the current political situation, etc.) … Real birds, too … epitomize the captive's desire for freedom and hope of escape.'

The container metaphor frames Oscar Wilde's *Ballad of Reading Gaol*, in particular the narrator's insistence that from the inside, 'all we know … is that the wall is strong' (Wilde 2013, 26). The brutal reality of being held within that 'strong' grip is contrasted with what lies outside it, and which can be glimpsed through the window: the 'strange freedom' of the scudding clouds beyond the bars, whose 'ravelled fleeces' are contained by nothing at all. The celebrated Cavalier poet and prisoner during the English Civil War Richard Lovelace (1930) used the same device in 'To Althea, from prison' when, from behind the 'stone walls' and 'iron bars' that imprisoned his body, he compared favourably the undefeatable 'liberty' of his soul to the 'Fishes that tipple in the Deep' and the 'Enlargèd Winds, that curl the Flood'. Nelson Mandela also used it in a letter of 1 August 1970, when from his prison cell he wrote to a friend:

> Throughout my imprisonment my heart & soul have always been somewhere far beyond this place, in the veld & the bushes. I live across the waves with all the memories & experiences I have accumulated over the last half century … in my thoughts I am as free as a falcon (Mandela 2011).

The modern British prison poetry quoted above is framed by the same metaphor of fantastical upward movement. Joe Gynane's 'earthbound' creature 'seeking the sky' could equally be a caged bird or a prisoner. Relatedly, the one hopeful line of Ian Hall's modern poem uses a travel metaphor ('Or am I just passing through') to invoke a fantasy of autonomy, or even of being able to 'pass through' and out of the bars of his window.

Windows thus traditionally serve an important role in imaginative or narrative depictions of imprisonment that belies captivity and staves off the hopelessness of prison as 'live burial'. The cell window 'serves to underline the contrast between Nature (light, air) and symbolic Death (in the prison tomb), and between animacy (voices, human and animal life) and the enforced inanimacy of the prisoner' (Fludernik 2019, 31). As we shall see below, the symbolism of the window as a point of interpenetration between the prisoner and the outside world also provides the basis for fantasies of escape from confinement in artistic responses to the COVID-19 pandemic during 2020 and 2021.

Imprisonment metaphors in law and humanities

We have seen now that the arresting of movement and enclosure or containment are two particularly distinctive qualities of imprisonment, and that these qualities give shape and meaning to more general feelings associated with being imprisoned, caged, trapped or captured. In doing so we have drawn on information about the impact of lockdown on prison environments, about imprisonment more broadly and about the theoretical framing of imprisonment in the social and cultural imaginary, primarily by Monika Fludernik (2019). This section develops these reflections on the negative emotional impacts of imprisonment and extends them beyond carceral contexts. We review how recent law and humanities scholarship has deployed the key metaphorical and metonymic themes of imprisonment in the service of critical thought.

'Pinning, fixing, capturing': metaphors of impeded movement in law and humanities

We can readily appreciate the broad applicability of the idea of fetters on movement as the basis for a discursive framework for legal studies. Both Hobbes (1651) and Blackstone (1765) identified the absence of physical constraint as a necessary first principle in their treatises on the nature of liberty. Legal scholars within the humanities have also insisted on the possibility of movement as necessary for conceiving law by invoking metaphors and metonymies of imprisonment in pejorative descriptions of 'traditional' ways of thinking. Olivia Barr (2016, 72), describing her 'jurisprudence of walking', is careful to emphasize that she should not be misunderstood as engaging in an exercise of 'pinning or fixing or capturing movement' but instead merely of 'noticing and paying attention to movement'. She understands the scholarly act of 'describing' or (more modestly) '*re*describing' law, not merely in terms of conveying observations (although conveying is indeed already a movement metaphor) but furthermore as, respectively, 'to form or trace by motion or to pass or travel over a certain course or distance' and to 'mov[e] to another or the other side' (63). Barr's choice of words is crucial in clarifying the ethical dimension of her scholarship – the 'pinning' and 'fixing' she certainly is *not* doing to her subject metonymically, calling to mind the dubious practices of nineteenth-century naturalists attaching dead butterflies to a board for display.

Margaret Davies (2017), similarly, promotes the ethos of movement in the imagery and metaphors she uses throughout her writing. A good deal of what Davies finds faulty in 'traditional' legal theory and philosophy (the

tendency to 'misrepresent' the conceptual and abstract as being prior to the material and embodied (43)) she attributes to the malign influence of Descartes and his separation between the mind and the world: between the intellectual (reliable) and the sensible (unreliable). Importantly for our purposes, Davies is not content simply to critique that dualism. She goes further by depicting Descartes himself coming up with his famous '*cogito ergo sum*' while all the time almost comically static: 'sitting by the fire, wrapped in a warm winter gown' in his 'little room' (62). By contrast, Davies herself is to be found outside in the bracing fresh air and engaged in vigorous, *active* learning. Her approach is 'exploratory rather than analytical'; she seeks to 'extend' and certainly *not* to 'define' law, her approach being one that 'locates law in a variety of places' (2). Inspired by William James' assessment that 'Something always escapes', Davies' chief concern, as a legal philosopher, is to ensure that 'thinking [may avoid becoming] trapped by concepts' (12). Davies quotes Elrich's analogy between attempts to 'imprison law' within a code and attempts to 'confine' the 'living water' of a stream in a 'stagnant pool' (20).[3] The language of *trapping* and *imprisoning* is telling, as is the aversion to *defining*, the latter deriving from Latin roots associated with bringing movement and activity to a stop: *finire* (to bound, limit) and *finis* (boundary, end).

Andreas Philippopoulos-Mihalopoulos, likewise living true to his philosophical outlook, has described having hit on his ideas for his book *Spatial Justice* (2014) while riding his bicycle in Copenhagen and, like a mobile Isaac Newton, being (figuratively) struck by the ubiquity of law in the signage, road markings and layout, traffic lights, and so on. If those forms of law are themselves static objects, we would add that the author-cyclist himself is 'carrying' law with him, since by observing admonitions, for example, about where to cycle, when and where to wait, when to go and who to give way to, he lends physical reality to them at every (actual) turn. This materialist turn in law and humanities is one that responds to J. G. Ballard's cautionary tale of Faulkner, protagonist of the short story 'The Overloaded Man', whose descent into mental illness and murder proceeds from his unhinged desire to achieve a state of 'pure ideation, the undisturbed sensation of psychic being untransmuted by any physical medium [and to] escape the nausea of the external world' (Ballard 2014a, 343). Faulkner fails to heed the warning of his former colleague, a wise Business Studies professor, who cautions him that 'by any degree to which you devalue the external world, so you devalue yourself' (334).

Phenomenological studies offer even more examples of how the metaphors of impediment to or stopping of movement provide material for humanities scholarship in law. James Gray reflects on J. G. Ballard's childhood wartime memory of discovering an empty swimming pool and the novelist's uncanny return to it in his fiction (Ballard 2014b). For Gray (2019, 156), this

image is arresting insofar as it represents a jarring confrontation with the impossibility of the freedom of movement that a swimming pool *ought* to represent, and thus a traumatic 'dissolution of progress and the absence of the social'. He goes on:

> In the lifeworld, a swimming pool … usually … *extends to us an array of possibilities* and envelops us in the anticipatory sensation of the *act of swimming*. By contrast, an empty swimming pool … has a *disturbing gravity*, a *weightiness* of form greater than that of the material it displaces and a harshness of substance and angularity that exactly *oppose the lightness and freedom of swimming* (Gray 2019, 155–6; emphasis added).

The unsettling experience of inertia and absence represented by the empty pool of Ballard's childhood memory and Gray's analysis reminds us of the central place of movement and mobility in a 'living' society of functioning legal relations. The empty pool, with its 'disturbing gravity', 'weightiness' and 'harshness of substance and angularity', calls to mind the depressing architecture and grind of prison. Indeed, the weightiness and loss of momentum encoded in Ballard's arresting encounter with the empty swimming pool connects thematically with the references in modern prison poetry discussed above to the sense of being held down – 'earthbound', and the 'grind' of daily life. By contrast, the 'lightness and freedom' that a pool *ought* to conjure reminds us again of the yearning and fantasy of liberty in the soul of the prisoner that, oriented towards the light, transcends their grim reality.

'Inside': the container imprisonment metaphor in law and humanities

Container or capture metaphors have been applied in broader contexts in law and humanities scholarship, and in ways closely related to the metaphor of the arresting of movement. We referred above to J. G. Ballard's short story 'The Overloaded Man' as a cautionary tale that literalizes the 'new materialist' admonition that one should not follow Descartes' radical separation between mind (abstract thought) and body (the material world). The attitude of mind that Descartes prized as essential for sound philosophical thought is reimagined by Ballard as the road to mental breakdown and psychic disintegration. The horrific ending of that story sees its protagonist Faulkner casually murder his wife (whom, true to Cartesian principles, he finally comes to perceive merely as 'a bundle of obtrusive angles' (Ballard 2014a, 343)) and then calmly drown himself in the garden pond. From that position, the protagonist is able at last to enjoy 'existence uncontaminated by material excrescences' (344).

These events are echoes of the punishment of crime by imprisonment as live burial (albeit in water rather than earth in this case), and of the prison cell as an enclosing coffin or tomb from which escape is only possible in a spiritual or figurative sense. Reminding us of the birds that in the imagination 'take wing and soar beyond the confines of the immediate prison' (Fludernik 2019), the final words of Ballard's story describe how Faulkner, watching the sky from six inches below the surface of the water, 'waited for the world to dissolve and *set him free*' (Ballard 2014a, 344; emphasis added).

An application of the imprisonment-as-container metaphor as a guiding principle for legal humanities more broadly is proposed by Gary Watt in his description of the 'capture' of equity by the Court of Chancery, and his aim of 'releasing' it (at least as far as 'a reasonable outer limit' (Watt 2009, 19)) by way of a richer and 'more humane legal language' (25). Central to Watt's project is an analysis of the law and equity metaphors of Dickens' *Bleak House* and its central theme of the interminable Chancery suit of Jarndyce and Jarndyce. Of these metaphors, arguably the most memorable are the caged birds kept by Miss Flite, the latter a long-time party to that case. When we meet her at the start of the novel, Miss Flite has become aged and mentally ill awaiting her 'Day of Judgment' at the court. Like many others (such as the young Richard Carstone, to whom the following speech of Miss Flite's is addressed, and for whom it is an omen), she wrongly expects the judgment to be transformative:

> 'I began to keep the little creatures,' she said, 'with an object that the wards will readily comprehend. With the intention of restoring them to liberty. When my judgment should be given. Yees! They die in prison, though. Their lives, poor silly things, are so short in comparison with Chancery proceedings that, one by one, the whole collection has died over and over again. I doubt, do you know, whether one of these, though they are all young, will live to be free! Very mortifying, is it not?' (Dickens 1985, 104)

Dickens' use of the motif of caged birds as a metaphor for being 'in Chancery' (the words that Miss Flite uses to describe herself as a daily attendee in the court, and with which Dickens also opens *Bleak House* itself as the title of chapter one) only serves to reinforce the existing carceral implications of that expression. Furnishing his view that *Bleak House* 'clangs with echoes of the prison door', Watt (2009, 56–7) observes that 'in Chancery' and 'incarcerate' derive from the Latin roots *cancer* and *carcer* respectively, 'both meaning bars or crossed bars'. 'Cancel' also shares the same root, and 'chancellor' (from which we derive 'Chancery') comes from *cancelli*: bars or grating forming a barrier behind which a Roman *cancellarius* (official) was stationed in Basilica and courts of law, and which separated judges

from the public (Watt 2009, 56; Barnhart 2010). Far, therefore, from the spirit of responsiveness with which we would associate equity, Chancery is by contrast derived from strong barriers that hold certain things in and keep others out. It depressingly served, as the Elizabethan jurist William Lambarde put it in *Discourse upon the high courts of justice in England* (1591), in words quoted by Watt (2009, 56–7), to 'cancell and shut up the rigour of the generall Law, that it shall not breake forth'.

The negative etymological association of 'in Chancery' with a container that 'locks up' equity provides the impetus for Watt's exposition of 'equitable' legal practice and scholarship, which does not do away entirely with the container, but ensures a steady flow into, within and out of it. Like Margaret Davies and Ballard's Faulkner, Watt finds his meaning in a pool of water: 'the waters of the law stagnate when they are still. Equity supplies a stream to stir up what has settled down. It is this stream that keeps law alive' (Watt 2009, 212). This, then, is a view that connects with the ethical dimension of humanities scholarship in law as proposed in different (but similar) ways by Barr, Davies and Philippopoulos-Mihalopoulos, discussed above. They all represent a concern to describe and problematize instances of 'capture' and 'imprisonment' within material and figurative walls and ways of effecting meaningful 'release'. Indeed, on interdisciplinarity, Watt insists that 'the true aim of law's engagement with literature … is not *to capture* the literature [by way of literary citations in judgments or essays], but to *release* the law [from narrow, doctrinaire thinking]' (25; my emphasis).

Thus we can observe that both of the key characteristics of imprisonment we discussed in the previous section (namely, impediment to movement and containment) do indeed signify beyond the imprisonment context to which they apply literally. The degree of agreement on this point across a range of contexts means that these characteristics already serve as conceptual metaphors for framing the aims and techniques of ethical humanities scholarship. In the next (and final) section of the chapter we explore how this framework may be extended to assist in shedding some useful light on the framing of 'lockdown' experiences and policies during the COVID-19 pandemic in both the prosaic language of law and policy and the poetic and artistic imaginary.

The wider world as prison during a pandemic

We have seen now how the two salient characteristics of imprisonment (be they derived from actual experience or from imprisonment in the imagination) serve beyond carceral contexts themselves. They thus assist in framing ideas and arguments, and provide a principled basis for guiding

value judgements. In this final section we take this a step further, exploring what light they can shed on experiences of the pandemic and of restrictive public health measures imposed and enforced outside the prison context. Our focus here is on those periods of the pandemic marked by national 'lockdown' – that word itself an imprisonment metaphor. In this regard, we take as our starting point Fludernik's claim – which Fludernik (2019, 1) herself presents as a neutral observation – that '[i]mprisonment (at least metaphorical imprisonment) is a fairly familiar experience' by virtue of the ubiquity of references to imprisonment as a way to understand all manner of experiences that involve feeling trapped or frustrated:

> We all, at times, feel confined in particular situations or relationships. Traditionally, these intuitions translate into well-known prison metaphors like those of 'life as a prison', the 'body as a prison', or thought patterns or ideologies as confining structures (Fludernik 2019, 1).

One might question whether it is wholly appropriate to frame lockdown and other restrictive measures, adopted primarily to protect life and health under extreme and unusual circumstances, within the terms of imprisonment. Certainly, it would be wrong either to overstate the impact of lockdown in the general community or to trivialize the experience of people serving jail sentences. As noted above, imprisonment has always involved a severe kind of deprivation, and this reached extreme levels during the pandemic. Although the strongest lockdown measures imposed on the wider community in England and Wales did indeed involve far-reaching prohibitions – for example on leaving one's home without 'reasonable excuse', and on meeting more than one person from another household[4] – it would be wrong to equate these with the sorts of measures imposed in prisons. For these reasons, we would be wise to acknowledge certain perils in following too quickly the generalizing implications of Fludernik's observation about the translation of experiences into prison metaphors. Having acknowledged this caveat, however, there are at least three reasons to continue on this path.

First, it should be remembered that in drawing on imprisonment to frame experiences of lockdown more broadly, we are suggesting that there are concepts of imprisonment that help us to understand why lockdown in the wider community came to be framed the way it did. This is *not* the same thing as suggesting that people in that wider community suffered hardships analogous to those inside prisons. Although it is true that metaphor works on the basis of a perceived resemblance between things of different domains, we do not claim that lockdown in the community is 'like' being in prison in terms of the degree of burdens suffered.

Second, there is evidence that many individuals, both in prisons and in other institutions, experience some of the more extreme restrictions as if

they were imposed for the punitive and deterrent reasons with which they are traditionally associated. We have noted above that this was a criticism of lockdown measures implemented within prisons, and below we will also examine similar criticisms of measures imposed in care homes.

Third, the question of applying our imprisonment metaphors to understand the pandemic more broadly is primarily descriptive rather than prescriptive. In other words, it is foremost an issue about the extent to which these metaphors are *already* informing responses to the pandemic and what the implications of this may be, rather than whether they should be doing so. Of the now vast body of artistic and poetic responses to the pandemic, a rich seam of this work invokes the metaphor of movement impeded, which can be traced metonymically to imprisonment thanks to its deployment of carceral imagery. Therefore, to understand artistic and poetic responses to the relevant legal restrictions *requires* us to understand the translation of experience into prison metaphors. At a descriptive level, the appropriateness or otherwise of such acts of metaphoric translation is rather beside the point, and so below we review and analyse some examples of these responses.

Non-carceral detention and metaphors of impeded movement

The JCHR (2020, 39, 40–2, 43–4) highlighted at least four sites other than prisons or YOIs of (potentially unlawful) 'detention': Assessment and Treatment Units (ATUs) for young people with learning disabilities, mental health hospitals, care homes and Immigration Removal Centres. The chief effects of these developments can be understood in terms of the cessation or suspension of movement – the movement constituting relevant institutions' normal activities and processes, and also the movement of human bodies that would ordinarily circulate within and in and out of those institutions.

It is a matter of concern if the effect of protective measures introduced in non-carceral institutions is to call to mind the chief features of imprisonment. In certain care homes the emotional and psychological impact of prohibitions on residents leaving their rooms or receiving visitors has indeed been framed in punitive terms. In *BP v Surrey County Council* (2020), a case concerning an elderly man suffering from Alzheimer's disease who was in a care home, Hayden J observed (at para 6):

> All agree that BP has struggled to cope with or understand the social distancing policy which it has been necessary to implement. FP said that she believes her father thinks that he is being punished in some way … It is thought that the deprivation of contact with his family has triggered a depression.

In their later report on care homes, the JCHR frame their analysis of the hardships experienced by care home residents by invoking from the start a strong container metaphor that could well be a description of prisons: 'While care home residents were left on the inside, families have been forced to wait on the outside' (JCHR 2021, 4). In case a reader might wonder whether this prison-like nomenclature of a radically separate 'inside' and 'outside' is too dramatic, the report goes on to observe that government guidance at the time recommended that residents who did go outside – even just 'for exercise in a park or to sit outside at a hospitality venue' or a 'short walk out' – should then be required to self-isolate for 14 days. There were good reasons, therefore, for residents to understand such measures as punitive and as a deterrent against such temporary escapes, even if this was not the intention behind the policy (12).

The Committee was particularly critical of care homes whose operations most strongly evoked conditions prevailing in prisons: homes that banned visits altogether (rather than making individualized risk assessments), or else that imposed 'restrictions on visiting [that] forced families to endure "prison-like" visits, permitted only to speak to their relatives through telephones behind plastic screens' (JCHR 2021, 4). As for prisons, the mental health impacts of the restrictions on care homes are well documented. The Committee report collected testimonies from families of residents whose complaints about the regime further echo lockdown conditions imposed in prisons – of residents being 'isolated, often for 24 hours a day, in a tiny room', and consequently very quickly becoming anxious, isolated, depressed (14).

The impediments to movement experienced in prisons and care homes during periods of lockdown resonate thematically with numerous artworks displayed in the online Covid Art Museum (CAM). The museum features various images drawing attention to the suspension or arrest of the forward motion of time itself: a clock with its hands stopped by bits of masking tape (Bois 2021); another clock with its minute hand held, quivering, by an obstructing Coronavirus cell (Graph 2020); another clockface which, instead of numbers at each of the twelve hour marks, shows only the word 'PANDEMIC' (Andrade 2021); a weekday calendar on which the distinguishing part of each name of the days of the week has been scribbled out, leaving only the word 'DAY' repeated seven times (Zaremba 2021). Other images depict impediments to bodily movement: an Uber journey route plan displayed on a phone, starting at the prospective traveller's own bedroom and ending in the next room a few yards away (Rochat 2020); a padlock, the metal parts fused together to remain forever closed (Saade 2020); a manacle or ball-and-chain against a clear blue background, the 'ball' showing the characteristic corona spikes of the pathogen (Navarro 2020).

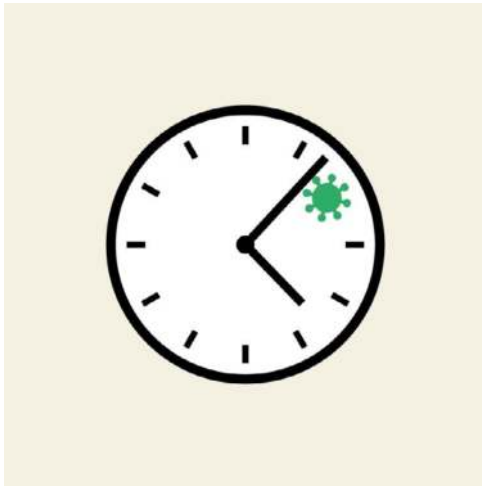

Figure 5.1: 'Covid Time' by Santi Graph

Figure 5.2: 'Daze of the Week' by Matthew Zaremba

These images speak to the theme of the normal course of things having been suspended or halted. The altered clocks and calendars suggest the temporal suspension of life, and the fused locks and ball-and-chain imagery explicitly reference imprisonment to suggest both personal and institutional pathways to justice blocked or stopped. For people actually 'doing time' in prison, of course, the sense of clocks having been stopped and locks permanently shut carries a particularly sharp meaning, cruelly suggestive of one's punishment being surreptitiously or capriciously extended – a figurative 'throwing away of the key to one's cell'. For those experiencing lockdown outside a prison environment, the images recognizably draw on a prisoner's frustration and helplessness at finding everyday, taken-for-granted possibilities regarding autonomous movement brought to a stop.

Staying at home and prison as a container

Three separate periods of lockdown restrictions in the UK from March 2020 prohibited the leaving of one's home other than for a limited number of 'reasonable excuses' (Brown and Kirk-Wade 2021).[5] Although this meant very different things in different places, lockdown-as-imprisonment and lockdown-as-cage metaphors quickly became familiar frameworks for conceptualizing experiences in the popular imaginary. Those relatively well placed and equipped to cope with and adapt to movement restrictions have been referred to as occupying 'a gilded cage' (Tingle 2021); at the other end of the scale, meanwhile, lockdown has been observed to exacerbate and intensify *already* confining and constricting conditions. For example, 'stringent restrictions on movement *shut off avenues* of escape, help-seeking

and ways of coping for victim-survivors' of domestic abuse while at the same time granting to abusers 'greater freedom to act without scrutiny or consequence' (Bradbury-Jones and Isham 2020; emphasis added).

Of the pandemic poems collected for this chapter, a number explore the mental health consequences of the sense of claustrophobia associated with being locked down with one's household. These touch on feelings of helplessness and isolation, of having public health measures 'done to' one, and the consequent risk of descent into depression and other mental health problems, abuse of substances and the risk of violence (Ertan et al. 2020). These are all themes that connect strongly with the sense expressed in the prison poetry described above: that of not being in control of one's life or its routine as a consequence of being inside the enclosing walls of the prison and its schedule. 'Since You Ask' by Carol Ann Duffy (2020) alludes to a number of different practical and emotional consequences of feeling imprisoned, including being the subject of frustration and disempowerment, as well as being the object of others' observation, judgement and anxiety:

> cornered, certified, crapped on, cursed,
> manhandled, mangled, miffed, mugged, mad,
> wits' end, worried, not waving but
> rat-arsed, ranting,
> rending, raving ...

Duffy's reference to Stevie Smith's 1957 poem 'Not Waving but Drowning' (in which a swimmer's distress signals are misinterpreted by observers on the shore as 'larking') seems to speak to the increased difficulty faced during lockdown by potential victims of mental health breakdown or domestic violence in being noticed and getting the assistance they need (Bullinger, Carr and Packham 2020). At the same time, the repeated 'ed' words emphasize an intensified observation in a more abstract, symbolic sense, the increasingly objectified subject of the poem coming to resemble a potentially dangerous creature in a cage. These lines call to mind Kay's (2020, 887) observations about how the 'stay at home' message made the home a central focus of scrutiny during the pandemic. The 'hypervisibility' of the home under such 'intense focus' exposed stark differences between those for whom it was a place of safety and those for whom it was not.

If Duffy obliquely invokes the visibility of prisoners to observation (whether through the 'fourth wall' of bars facing a central observation tower as in the Benthamite Panopticon, or else through the spyholes of solid cell doors), Caroline Gauld's 'Mirrors of Anguish' makes this allusion more explicit. Gauld imagines lockdown as a prison, which she names '*prism*' to emphasize its associations with observation and visibility. She

also invokes the image of 'hell' – the latter a popular allusion in modern prison writing as well:[6]

> Windows are soulless eyes
> Invisibly condemning us to hell
> Within clear view of heaven
> Encased, enclosed, locked in a prism.
> (Garner 2020)

Other lockdown poems reflect that sense of perceiving oneself to be apart from society and its sociability, and from the bonds of solidarity that come with being part of a community. This is another trope typically found in prison writing. In 'ZoomDoom', Carolyn Brookes looks with dangerous envy at her neighbour's property:

> One up two down, my tiny box,
> T'would even piss off Goldilocks.
> An elbow nudge at cuckoo pace
> I'd steal my neighbour's body space.
> (Garner 2020)

The idea of the home as a prison, cage, box or coffin that confines its human contents figures strongly in visual-artistic responses to the COVID-19 pandemic and lockdown. The CAM displays numerous variations on this theme, showing inhabitants trapped inside as if being kept, warehoused or buried. One striking artwork comprises a floorplan of an apartment that has assumed the shape of a person (Minchoni 2020); another features a house with human arms and legs that sits in a rural landscape (Tasky 2020). These sorts of images suggest occupants having become synonymous with the architectural structures that they occupy. In another image, a woman is shown in a box-like space, engulfed and wrapped around by billowing polythene sheets ambiguously calling to mind warehouse packaging, tangled bedsheets, even a corpse's winding sheet (Sorochinski 2020). Other images exploit cell-wall imagery such as endless repetitions of the characteristic four upstrokes and a strikethrough reminiscent of prisoners tallying the days to freedom (Allen 2020; Atay 2020), or of the 'cancelling', 'incarcerating' bars of Chancery discussed above.

As we noted above, these are all visual responses to the pandemic that depend on the familiarity of the metonymic elements of imprisonment as containment: enclosing walls and their confinement and separation of contents inside from the world outside. All of these images present visual metaphors of 'home-as-[cage/box/tomb]' and 'person-as-house' in ways that exude a sense of constraint, containment and claustrophobia. It is a combination of carceral themes that has translated into a language of protest as well. When the University of Manchester had steel fences erected

Figure 5.3: 'Confinement' by Orane Tasky

around its halls of residence in November 2020, with a single point of entry and exit to enable ID checks on students accessing or leaving their accommodation, students protesting held up signs including 'HMP University of Manchester', 'HMP Fallowfield' and 'students in cages' (Abbit 2020).

Moderating fantasies of freedom

What points of broader application for law and humanities do we find in these 'translations' of diverse experiences of legal restrictions into prison metaphors? One point would be to notice how the 'fantasy of liberation and escape' (Fludernik 2019, 316) found therein also tends to carry important normative overtones about the necessity for people to bear their circumstances with fortitude. In the CAM we find: a ghostly face staring sadly out from a small attic window at the same time every day (Velasco 2021); a man (the artist himself) alone in his room, gazing through his partially blinded window, the slatted pattern of sunlight and shadows falling on him and the interior as if through cell bars (Rodriguez 2020); a family of four posing in

a group as if for a formal portrait, staring back at the viewer from within a house-shaped birdcage that squashes them together (Werning 2020); a pen-drawn person sitting languidly in a cage while a bird flits past (Kushiyama 2020); a Magritte-esque painting of an interior view of a gloomy hallway, the viewer looking out through a doorway that frames not a natural exterior view, but a door-sized phone screen, its background image an alpine holiday paradise and its 24-hour digital clock set at 20:20 (Monreal 2020). In a words-and-music-and-images video by the band LYR (2020), film clips of Bristol families 'staying at home' and displaying their home-made art and signs from their windows and doors are accompanied by Simon Armitage's poem 'Lockdown' about dreams of 'bamboo forests and snow-hatted peaks, / waterfalls, creeks …' and a reminder that 'the journey a ponderous one at times, long and slow / but necessarily so.'

These works not only acknowledge that the confinement of the body can be imaginatively transcended in fantasy; they also subtly *reinforce the necessity* of that bodily confinement. I have written elsewhere that media reporting of cases of 'queue-jumping' at shops by people *also* prosecuted for criminal breaches of the COVID Regulations is indicative of the emergence of a strong normative code regarding movement in public places. In the pandemic, 'good' movements have come to mean movements that are patient, unhurried, in step with others. By contrast, movements that fall *out* of that common step betray a lack of decent self-restraint and forbearance. The latter may not necessarily constitute a breach of the regulations on social distancing, but they certainly lend a justificatory rationale for

Figure 5.4: 'Woman at Window' by Inés Velasco

Figure 5.5: 'COVID Cage' by Denis Kakazu Kushiyama

prosecuting in the popular imagination (Gurnham, 2022). To put it in Simon Armitage's words, responsible shoppers understand that the process is 'long and slow / but necessarily so'. These norms are referenced in various poems that reimagine the obligations on us to restrain and coordinate our movements through the terminology of choreography and dance. In 'This Dance', Dagmar Seeland describes the particular difficulty involved in rule-compliance in the pandemic as a problem of 'keeping in step':

> Recently we waltzed through life
> not caring where we trod.
> Now, moving to a different beat,
> We struggle to find our feet.
> (Garner 2020)

It has been observed before that the *performance* of law in its formal settings (say, in the courtroom or parliament) depends on the choreography of bodily movements to ensure the correct transfer of legal meaning (Mulcahy 2021). Seeland's poem goes further than this, reminding us that law is also enacted in the choreography of *ordinary* bodily movements. Claire Boot's 'Social (Distance) Dancing' (2020) takes up this idea, observing how (in the author's words) 'social distancing transformed the act of shopping into a kind of dance':

> Let's tango at two metres in Tesco
> And salsa at six feet in Spar,
> Let's waltz very warily in Waitrose
> And foxtrot in a pharmacy from afar. ...
> Join the chary cha-cha at the checkout
> And the cautious ceilidh in the queue,
> As we all try to avoid one another
> For the shopping that's essential to do.

Every verse of the poem reminds us that this 'dancing' is not at all an act of free expression, but rather a call for moderation and compliance with social distancing rules.

We can read dance performances produced during the pandemic as aligned with this serious ethos too: Corey Baker's (2020) *Swan Lake Bath Ballet*, featuring twenty-seven professional international ballet dancers all individually performing the theme from Tchaikovsky's ballet from within the confines of their own bathtubs; a video produced by Opéra de Paris featuring members of the company performing individual ballet routines from within their own homes and set to Prokofiev's *Romeo and Juliet*, dedicated to health care staff and all key workers, which starts with the admonition to 'stay home' (Klapisch 2020); a woman dancing in her bedroom, who features in the LYR

video referred to above, is a picture of contained exuberance. In all cases the bodily movements gesture towards freedom, but the subject of the performance always remains strictly within the enclosing circumference, be it the bathtub or the boundary of the performer's own home. If these productions are moving for audiences during periods of lockdown, then this is likely to be in large part because viewers can appreciate and share the fantasy of escape represented by the spirit of beauty contained within those boundaries, which, like Nelson Mandela's inner 'falcon' or the caged birds of Dickens' Miss Flite, evoke the sense of a soul transcending the bars that imprison its body.

Conclusions

The COVID-19 pandemic and its impact on social and cultural life has generated diverse responses and reactions from within the humanities and the arts, and it would not be possible to give anything like a full account of these in a short essay like this. By setting these responses within a broader humanities scholarship on law, however, I hope to have established that a significant portion of that response draws its meaning and moral force from imaginative familiarity with (if not actual experience of) imprisonment. Rather than being separate and disconnected from 'ordinary' social life, it seems clear that imprisonment – and its qualities of impeded or suspended movement, and of capture, enclosure and confinement – is crucial in understanding social and cultural responses to lockdown restrictions. This chapter has suggested that various and ostensibly unrelated forms of response to these restrictions – from parliamentary committee commentary to poems and visual art – draw on a common wellspring of imprisonment metaphors. These metaphors provide a foothold for debate and reflection on the impacts of relevant measures on individuals and families, and on possible alternative routes out of the pandemic.

Notes

1. Expressions used by, respectively, the Prison Reform Trust and David Gauke (former justice minister), quoted by Beard (2020), my emphasis.

2. The quoted lines are from 'To Althea, from Prison' [1642] by the royalist prisoner Richard Lovelace (Lovelace 1930).

3. On the stagnant pool as a legal metaphor, see Gurnham (2019).

4. The Health Protection (Coronavirus, Restrictions) (England) Regulations SI 2020, No 350.

5. In England, these were imposed from 26 March 2020, 5 November 2020 and 5 January 2021.

6. See also Gurnham (2019).

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Chapter 6

Penal response and biopolitics in the time of the COVID-19 pandemic: an Indonesian experience

Harison Citrawan and Sabrina Nadilla*

Introduction

The new Coronavirus pandemic has been critical for legal scholars in their understanding of the role of law within two competing discourses of state responses: biomedical and economic. While the former approaches the predicament by focusing on preserving the biological life of a population, the latter justifies the state's decisions through a cost–benefit calculation (Colombo 2020). However, rather than focusing on the rationality of measures taken during the pandemic, our enquiry into legal discourse extends to the broader social implications of this predicament. Suggesting the repressive nature of power, some of the techniques undertaken by states have demonstrated the idea of 'populist biopolitics' (Schubert 2020) and 'biopolitical nationalism' (Kloet, Lin and Chow 2020). By taking these dynamics of power into account, the pandemic implicates several changes in the socio-cultural dimension. From a psychological perspective, Abdullah (2020) argues that the pandemic threat caused several types of psychological trauma, including social withdrawal and hysteria, as well as individual and

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collective violence. The culture of threat during the pandemic potentially also allowed violent and extremist groups to expand their indoctrination and attack plans (Arianti and Taufiqurrohman 2020).

Given the wide range of social implications deriving from the governance of the pandemic, a further inquiry needs to address how power is being exercised through law in such an emergency. Existing studies, while invaluable in understanding the quality and impact of state policy in a pandemic, nonetheless have been focusing on legal responses exclusively from the disciplinary technology and technology of security points of view. In this context, we would argue that the global experience in dealing with people's lives during COVID-19 depicts a form of biopolitical practice: that is, a productive power to organize and foster the life of a population. By employing the frame that law is the *predominant* institution through which the connection between disciplinary power and governmentality is forged (Tadros 1998, 79), this chapter suggests that the idea of legal justice in a time of emergency can be explained through an elaboration of this biopolitical practice. As a mode of exercising power, biopolitics refers to a new modality of producing, circulating and enacting power that subjects and governs individuals (Mendieta 2014, 37). Mechanisms of biopolitics in the Coronavirus emergency are essentially deployed to 'intervene at the level at which these general phenomena are determined to intervene at the level of their generality' (Foucault 2003, 246).

Specifically, we suggest that the nexus between law and biopolitics is best reflected in the governmental measures taken in the justice sector, upon which state apparatuses, think tanks and scientists are voicing judgement on how law, regulation and legal institutional arrangements should work (Hasan et al. 2020; Nowotny et al. 2020; Seal 2020). Throughout the pandemic, ample consideration has been directed to the situation in prison and other detention or confinement facilities as part of the penal or criminal justice system, which is considered to be one of the most vulnerable sites for virus infection (Akiyama, Spaulding and Rich 2020; Cingolani et al. 2020; Lofgren et al. 2020). Based on rigorous resources provided by the Prison Policy Initiative (2020) which described prison and jail as 'notorious incubators and amplifiers of infectious diseases', measures to mitigate the risks were undertaken by prison administrators, including early release, reducing intakes, improving facilities' health care systems, and optimizing video-conference platforms as an alternative to prison and jail visits. Despite the vast array of justice sectors affected by the pandemic, an intervention directed towards carceral spaces has been deemed necessary to avoid further catastrophe in the population.

As a country with a high rate of imprisonment, Indonesia took swift measures to prevent outbreaks inside its correctional facilities by shunting

people away from carceral spaces – a policy which we loosely term decarceration (Sulhin 2020). In this sense, the decarceration policy is reflected in two forms of emergency response in the penal system – early release of prisoners and home parole[1] – and a massive expansion of pecuniary sanctions for infringements of the COVID-19 health protocol. These forms of response illustrate how crime has become a locus of governance during the pandemic. In this respect, we aim to investigate 'the network of relations among power processes, knowledge practices, and modes of subjectivation' (Lemke 2011, 119) as reflected in these responses. Through the lens of biopolitics, we attempt to understand these cogent policies as a reflection of the systematic knowledge of life informed by expert epidemiological and virological knowledge.

This chapter contends that these penal responses showcase the reinvention of knowledge that emphasizes dignity and the vulnerability of people within carceral spaces. This knowledge is produced from the perspective of 'others', which is distinct from the traditional penal knowledge produced by criminologists, politicians and jurists. Moreover, as a biopolitical practice we suggest that these penal responses towards crime operate within the logic of economic contingency substantiated by biomedical inclination. Thus, instead of assessing the decision to decarcerate during the COVID-19 pandemic as a mere moment of prerogative executive power, this chapter argues that it is 'a process of ongoing claiming and contestation occurring at the boundary of law' (Feldman 2010).

By taking Indonesia's penal responses during the COVID-19 pandemic as a case study, we use biopolitics to draw a nexus between governmentality/discipline and law. First, we scrutinize the process of systematizing knowledge of life in prison and jail through a review of reports and guidelines produced by experts during the pandemic. Second, the chapter examines the movement from fear of the virus to fear of crime through a process of the reconstruction of threat and normality against the backdrop of extensive enforcement of pecuniary sanctions and criminal trials. Third, we explore the banality of using penal or criminal law in times of emergency through an elucidation of the individual 'inclusion/exclusion' techniques in decarceration policy. This helps us to better understand the power/knowledge nexus that highlights the structure of inequality of criminals. Before we move to these substantive issues, it is important to initially highlight the biopolitical analysis of law that serves as our main framework for analysis.

Biopolitical analysis of law

Law and power are traditionally formulated as possessions. Law is understood as repressive, exercised by agents of actions and centralized in core structures such as the state and its legal institutions. Michel Foucault contested this approach by conceptualizing power as 'multiple and decentralised, and as productive of social structures and knowledge' (Turkel 1990, 170). Building upon this perspective, Tadros (1998) further suggests how modern law works between the concept of discipline and governmentality as it manages the *passage* of the individual from one system to another. In this section, we will begin by outlining Foucault's approach to power – from sovereign power to biopower.

In his analysis of power, Foucault refers to sovereignty as a form of power that existed before the birth of the modern state: the power to take life and to let live. To have power is to be 'on top of the pyramid': the king at the top issues a decree which is carried out by his ministers in the middle and aimed at his people as the subject of power (Lynch 2011). From this viewpoint, power is therefore formulated as possession, centralized in core structures with a repressive nature. It takes form in rules of law; by forbidding and punishing, it aims to discourage criminal acts and ensure social and political order (Lynch 2011; Lilja and Vinthagen 2014).

The emergence of capitalist society and the development of knowledge of the human body during the seventeenth and eighteenth centuries began the rearticulation of sovereign power (Lemke 2011). This historical transformation has resulted in a new rationality that requires specific techniques and modalities of power. To be precise, it requires a subtle, calculated technology of subjection to make the accumulation of men and capital possible (Mendieta 2014). In this sense, power is no longer seen as a homogeneous commodity or possession (Cisney and Morar 2015). Rather, it is understood as 'an interactive network of shifting and changing relations among and between individuals, groups, institutions, and structures … it consists of social, political, economic, even personal relationships' (Turkel 1990, 170; see also D. Taylor 2011, 3). The repressive nature of sovereign power thus has been complemented and partially replaced by the positive logic of biopower, which aims to improve the quality of life of its members through the government of life and the population. One major consequence of this shift is the growing importance of *the norm* at the expense of the juridical system of law. While law is exercised from above by a single individual or government body, biopower is dispersed throughout society and subsequently internalized by its subjects (C. Taylor 2011; Oksala 2014).

Foucault (1978) distinguished between two poles of this new form of power over life: the anatomo-political and the biopolitical. The anatomo-politics pole operates at the anatomic level of the body; it conceives the human body as a complex machinery which works by 'constituting and structuring the perceptual grids and physical routines' (Lemke 2011). By utilizing disciplinary techniques such as examination, observation and supervision, it examines the material and psychological conditions of individuals and generates forms of knowledge in respect of their behaviour. This information allows for an increase in the economic productivity of the body while at the same time weakening its forces to ensure political subjection – *docile* bodies (Lemke 2011; Peggs and Smart 2018). In other words, this particular power creates a new subject which transforms individuals into a tool for other interests – that is, to increase the productivity and effectiveness of people.

Biopolitics, on the other hand, operates at the level of a population. Its interest is in the productivity of society. This is achieved by steering general behaviour, stimulating particular tendencies and governing how life is reproduced (Lilja and Vinthagen 2014, 118). It aims to 'establish a sort of homeostasis, not by training individuals but by achieving an overall equilibrium that protects the security of the whole from internal dangers', and to 'invest life through and through' (Foucault 2003, 139). For this purpose, biopolitics applies the *technology of security* such as administrative policies, strategies and the tactics of law – all with the legitimation obtained from expert knowledge (Oksala 2014). While many of these tactics will be employed through disciplinary institutions such as schools, the military and prisons, the focus will now be on the population rather than the individual being. The information obtained from disciplinary mechanisms is translated into statistics, calculations and surveillance of patterns, and thereby utilized as the instruments to assess how to act, administer and regulate the trend in an optimal way.

From this point of view, it can be understood that the two levels of power with their distinctive technologies differ not only in their objectives, instruments and historical appearance. Disciplines were developed inside institutions, thereby creating the 'body–organism–discipline–institution' series, whereas the state organized and centralized the regulation of the population, thereby generating the 'population–biological processes–regulatory mechanisms–state' series (Foucault 2003, 250). It is important, nonetheless, to note that the two series do not stand on their own, as they are necessarily intertwined. They exemplify the mechanisms of what Foucault called a normalizing society in which 'the norm of discipline and the norm of regulation intersect along an orthogonal articulation' (253). These practices of power were founded on principles of governing inherent in the state itself: the state, like nature, had its own proper form of rationality and it had to be governed

accordingly (Oksala 2014). However, it is important to note that the notion of *government* refers to a broader meaning, which is the 'considered and calculated ways of thinking and acting that propose to shape, regulate, or manage the conduct of individuals or groups toward specific goals or ends' (Foucault 1991, 93–4; Inda 2005, 1–2). By governing, we are practising any rational effort to *guide* or *influence* others' behaviour, which is not only exercised by *the government* per se, but also by actors, institutions and agencies concerned with exercising authority over the conduct of human beings.

From the growth of productive labour to the welfare of the population, the diverse practices of government certainly have a plurality of aims. To achieve them requires various strategies, tactics and authorities to 'mould conduct individually and collectively in order to safeguard the welfare of each and of all' (Inda 2005, 6; see also Oksala 2014). These *technologies* utilize the law and discipline while simultaneously introducing their own rationality due to their distinctive focus on the population. In this regard, law does not hold much significance, as it is used only tactically so that the ends may be achieved (Foucault 1991). As part of the continuum, the notion of government also incorporates the forms of self-regulation, also known as *the technologies of the self*. Essentially, it renders individual (and collective) subjects responsible for social risks such as illnesses and unemployment, and transforms these into a problem of self-care (Lemke 2002). One example is neoliberal rationality, the key feature of which is the achievement of a responsible and moral – and an economic-rational – individual.

From this point, it is understood that biopolitical analysis conceives law as a neutral chain of transmission, an interface through which governmental decisions can take effect by adjusting the operations and arrangements of the disciplinary mechanisms (Tadros 1998; Martire 2012). This notion was later extended to a broader sense, as Martire (2012) argued, wherein law provides the structuring rules framing the general landscape and environment of social life. The normative language of law becomes the master language of normalization as it coordinates and regulates the fields of normality within society through its own norms (the ethical, the scientific, the criminal, the medical, etc.). Following Martire's thesis, this chapter recognizes a mutually reinforcing relationship between the law, discipline and governmentality which constitutes a normalizing complex. On the one hand, discipline – guided by governmentality – creates new subjects at a substantial level: a seemingly homogeneous social body upon which law can inscribe the universalism of the modern legal subject. Simply put, this relationship defines what kind of subject is seen as normal. On the other hand, law has the authority to provide legitimation for the practices commenced by biopolitical apparatuses. It activates and enables these practices and strategies to recodify the individual in the universal terms of the legal subject (Martire 2012).

Governing the crowd

Managing the rabble from the inside

Since 2020 we have relied heavily on the knowledge produced by epidemiologists, virologists and medical practitioners in carrying out our daily routines. This has resulted in a systemic shift within a vast array of institutional practices – from the prohibition of en masse religious activities to online trial proceedings – something unimaginable had the pandemic not taken place. However, COVID-19 has also highlighted the structures of inequality, hierarchies of value and asymmetries that are produced by biopolitical practice. As Lemke (2011) argues, recent studies of biopolitical processes have focused on the importance of knowledge production and forms of subjectivation.

One particular population which is *marginalized* in this sense consists of those involved in the criminal justice system: the prisoners, the warden, the police, not to mention their families and communities. Disparities in social determinants of health affecting groups that are disproportionately likely to be incarcerated, such as racial minorities, persons who are precariously housed and persons with substance-use disorders or mental illness, also lead to greater concentrations of illnesses in incarcerated populations (Akiyama, Spaulding and Rich 2020). In addition, the congregate setting of prison makes physical distancing almost impossible, and understaffed prison management will face the challenge of identifying necessary resources for effective quarantining (Nowotny et al. 2020). Considering the 'heightened vulnerability' of people in imprisonment during the pandemic, a joint statement by UNODC, WHO, UNAIDS and OHCHR (2020) urged states to 'take all appropriate public health measures in respect of this vulnerable population'. Recommended measures also include reducing overcrowding, ensuring access to continued health services, respect for human rights and the taking of necessary steps to adhere to relevant UN rules and guidance. The WHO (2020) also published further guidance as well as checklists to prevent and control COVID-19 in prisons and other places of detention.

Acknowledging the vulnerable nature of the prison population, experts have called for a systematic response to the situation. Akiyama, Spaulding and Rich (2020) outlined three levels of preparedness that need to be addressed: first, measures to delay the virus from entering the correctional facilities; second, the control mechanism if the virus is already in circulation within the setting; and third, preparation for the handling of an outbreak of the disease. The measures taken by different countries vary. They can apply both *inside* the prison setting, as seen in limitations on movement

inside prison, suspension or limitation of visitation, leave or other permits, and adoption of video-conferencing tools, as well as *outside* the prison, as in reduction of custodial sentences, suspension of serving prisoners' sentences, extension of parole systems and pardons (Alexander, Allo and Klukoff 2020; Iglesias-Osores 2020).

At the outset of the pandemic, like most states globally, the Indonesian legal institutions responded in a rather dubious, uncoordinated manner. Each institution declared its own self-regulation, based on its own mandates, at the expense of other institutions' work. While the government has been generous in providing health protocols and guidance for the public, mainly through the official website (www.covid19.go.id), none of the documents include a protocol for criminal justice enforcement, in particular as it relates to those persons in carceral spaces.

Informed by the urgent need to create social distancing within prison environments, in early March 2020 a district office of the Ministry of Law and Human Rights (MoLaHR), the government ministry that oversees the Directorate General of Corrections (DGoC), sent a circular letter ordering jail and prison administrators to halt the intake of inmates. The Indonesian police, which also administers temporary custody, responded through a Police Chiefs Resolution on 19 March that chiefly addressed the community caretaking issues rather than the performance of criminal justice – for example, protection of inmates while in police custody. This resolution was eventually revoked in June following the government's decision to lift the lockdown. On 23 March the Supreme Court issued a circular letter stipulating guidance for the Court's work practices and the acceleration of trials for defendants in jails. Subsequently on 27 March the Prosecutor's Office issued a letter urging some institutional steps including the use of virtual trial proceedings in court, the suspension of detention and the optimization of alternative forms of punishment.

While a timely response is unquestionably paramount in such a situation, this series of institutional responses rather manifests the lack of cohesiveness among the criminal justice institutions. Referring to the international guidelines and the practices of several countries, the MoLaHR alone decided to decarcerate prisoners through early release and home parole in early April. Given the high rate of overcrowding in the country's prisons, it was seen as a feasible effort to avoid a major catastrophe. This penal response in the form of a policy of decarceration has been highly contentious for the public. As an attempt to ease the tension, the early release and home parole policy excluded several categories of criminal, including those convicted of drug-related crimes, corruption, terrorism, crimes against national security, gross violation of human rights and transnational organized crimes. During a working hearing between the Parliament and

the government regarding early release and home parole, the House of Representatives (Dewan Perwakilan Rakyat) on the one side insisted that this policy was discriminatory due to its exclusionary clauses and that it lacked focus on risk mitigation among vulnerable prisoners, such as the elderly and juveniles. On the other side, the government contended that the exclusion of certain offences found its basis in the highly disputed Presidential Regulation of 2012, which classifies certain criminals as subject to restrictions in relation to prisoners' privileges, such as remission, conditional leave, parole and family visits. However, this classification policy should be read in the context of the populist tendency during the post-authoritarian regime, as discussed below.

As one might expect, the parliamentary working hearing led to a public discourse filled with allegations that the government was collaborating with politicians in the parliament to release criminals convicted of corruption and drug-related offences. To ease the tension, the president made a public clarification that clearly denied these claims. In several doorstep interviews, the Minister of Law and Human Rights, while lamenting the state of health of those convicted of corruption, reaffirmed the decision to exclude several types of criminal from the emergency penal measures.

During the initial phase of implementation of the early release and home parole policy, the DGoC granted early release and parole to more than 35,000 inmates nationwide in April 2020 (Fig. 6.1). As a consequence, the role of parole and probation officers in conducting home visits intensified during the crisis. However, compared to the data from 2019, the number

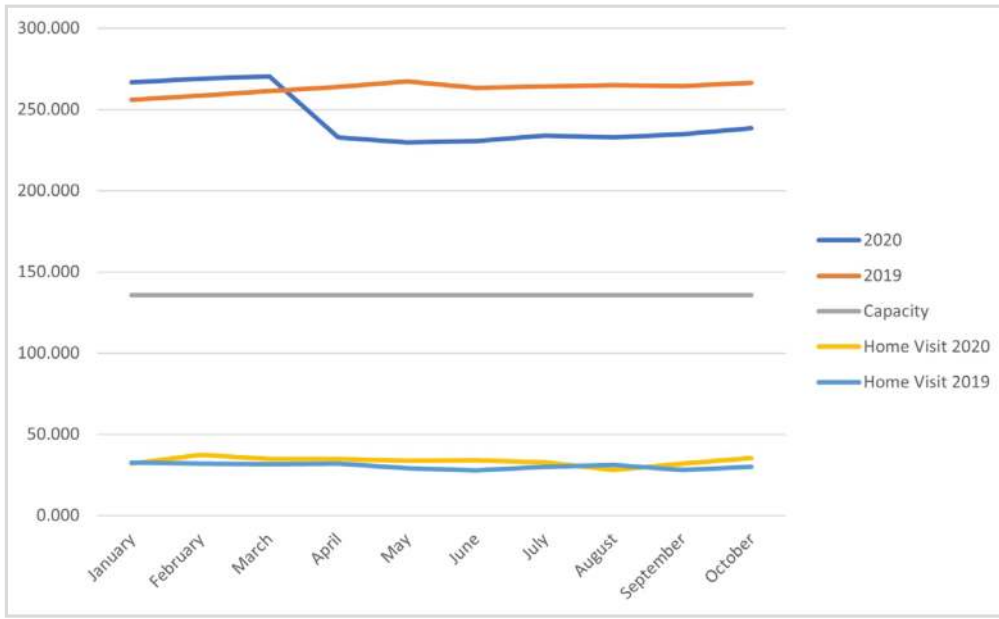

Figure 6.1: Prison population and home visits. Source: DGoC 2020

of home visits during the pandemic was mostly unchanged. The data also show that the policy failed to significantly alleviate overcrowding in prisons and jails as the overpopulation rate was still relatively high (roughly 70 per cent of the overall capacity). Despite the efforts to minimize the social risk through a thorough prisoner risk assessment, the public remained concerned about reoffending by released prisoners. In contrast to the ongoing viral pandemic, the 35,000 released inmates thus were perceived as an imminent threat to the public safety of Indonesians. While there were cases of reoffending in respect of petty crimes such as theft and robbery, the numbers were fairly low – fifty reported cases by April 2020 – compared to the total number of released inmates. The dominant narratives in the local media, nonetheless, played a significant role in shaping the public reaction, which focused on alleged failures in selective early release and home parole. Figure 6.2 shows the claimed surge in crimes covered by the media during eight months of the pandemic, which was dominated by murder, theft and drug-related crimes.[2]

Even though the recidivism rate in Indonesia is relatively low, we are inclined to see this policy as a measure to recycle the prison population. In this sense, the government was merely creating spaces while waiting for new prison occupants. Rather than solely focusing on creating distances inside carceral facilities, the early release and home parole policy is arguably an anticipative decision made by the government in the face of the rising crime rate caused by the economic recession (Olivia, Gibson and

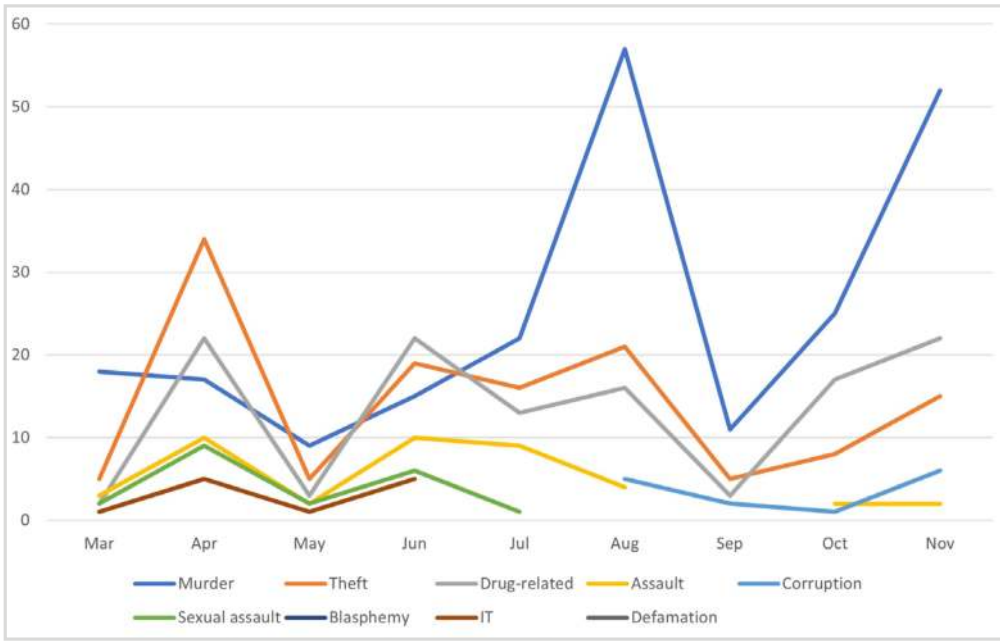

Figure 6.2: Crimes reported in the media, March to November 2020.
Source: Balitbanghkumham, 2020

Nasrudin 2020). As if to confirm the ongoing concern, the Minister, during the parliamentary hearing, argued that there would be 'challenges that might occur due to the large additional number of people [ex-prisoners] in the population'. While in normal times incarceration has substantially damaged the chances of employment upon release (Drakulich et al. 2012), the limited labour opportunities during the pandemic have brought additional challenges for the community at large. Such a substantial burden on released prisoners and their families may eventually lead to reoffending.

Managing the rabble from the outside

The unpredictable nature of the COVID-19 pandemic and the damage it caused hindered the Indonesian authorities' efforts to devise and implement a mitigation plan promptly. As a consequence, within the time span of one month (March–April) 4,557 cases of COVID-19 were diagnosed, and 399 deaths were reported in Indonesia (Abdullah 2020). The rapid escalation of cases forced the authorities to declare an emergency situation nationwide, along with a policy of large-scale social restrictions (Pembatasan Sosial Berskala Besar, PSBB).[3] The day-to-day use of militaristic language that likens these political measures to a *war* against the Coronavirus heightened the sense of urgency and disaster among the public (Zinn 2020). The measures, however, did not amount to a full-scale restriction on movement or a policy of lockdown, as they limited activities only within non-essential workplaces, private vehicles and public transportation. The government strictly prohibited any activities in public spaces, such as schools and campuses, religious facilities, community centres, shopping malls and tourist destinations. In practice, the PSBB policy was also supplemented by a strict health protocol that made face masks mandatory, especially in public places.

From this point, attention shifted from the threat of the released inmates to the national state of emergency and the severity of the pandemic. As previously mentioned, the continued coverage of the COVID-19 pandemic in Indonesia's 567 conventional media and 2,011 online media outlets has created a frightening spectre. The proliferation of this knowledge has been internalized within society, and manifested itself through the reconstruction of *threat*. The notion of threat has been transformed into a broader sense: the fear of illness, the fear of being the carrier of the virus and the fear of being unable to survive the ongoing outbreak.

This study contends that the recycling logic behind the early release and home parole policy has been intertwined with the governance of the population outside the spaces of imprisonment. We thus suggest that the

biopolitical practice of PSBB represents a modern governmentality: it works closely with a mode of subjectivation amongst the population through another form of penal response, namely the enforcement of pecuniary sanctions for any COVID-related offences. Given the emergency nature of the pandemic, it was deemed necessary to enhance the technique of discipline in the country. By issuing the 6/2020 Presidential Instruction, the president authorized the police, the military and local governments to optimize community caretaking in order to 'enhance discipline and the legal enforcement of the health protocol'. The Presidential Instruction urged local authorities to collaborate with local figures, tribal (*adat*) leaders and clerics, as well as with the police and the military, for the enforcement of the health protocols. Headmen (*Lurah*), as the lowest administrative government officials, are the embodiment of modern pastoral power: they are responsible for ensuring their community members adhere to the guidelines, and take disciplinary measures should there be violations of health protocols within their community. Furthermore, the local authorities also introduced pecuniary and social sanctions for violations of health protocols during the PSBB period. Any recurring violations of face mask mandates, for instance, faced progressive fines ranging from Rp 250,000 ($6.70) to Rp 1 million ($66.70), or from 60 to 240 minutes of community service.[4] The introduction of these sanctions appears to align with the concerns regarding prison overcrowding. By imposing fines and community service, the policy thereby espoused the penal response of the MoLaHR, police, Prosecutor's Office and Court.

The economic form of PSBB sanctions is related to what Foucault (2008, 249) saw as 'the least costly and most effective form for obtaining punishment and the elimination of conducts deemed harmful to society'. Clearly, from an economic perspective incarcerating the high number of violators of face mask regulations would be unnecessarily expensive, and would also create the potential risk of a viral outbreak within the correctional facilities.[5] The tactic of power used in the case of PSBB sanctions emerged in a formula relied upon by Beccaria and Bentham, where crime is defined as a breach of the law, fixed penalties are made available for such breaches, and these are graduated according to the seriousness of the crime (Malley 2013). Instead of a deviant, irrational, not entirely human person, the violator is conceived as a rational entrepreneur seeking to maximize profits while keeping costs down. In other words, the person who can be punished by law – *homo penalis* – is rendered into *homo oeconomicus* (Foucault 2008).

With its 'messy and tension-ridden projects', the biopolitical practice as evidenced in penal responses also provides an intimate interplay between power and resistance (Hannah, Hutta and Schemann 2020, 25–6).[6] However, the cultivation of anxiety and fear did not stop thousands of Rizieq Shihab's *jemaah* (congregation) from welcoming him on 10 November 2020.[7] As a

controversial firebrand cleric and the leader of the Islamic Defender Front (Front Pembela Islam, FPI), Rizieq Shihab and his followers have been gaining supporters in reclaiming Islamic puritanism around the country, while at the same time they have long been controversial in provoking and promoting vigilantism. Five days after his homecoming, the wedding of Rizieq's daughter along with the celebration of the Prophet Muhammad's birthday drew another throng of people around the cleric's residence and the FPI's headquarters in Petamburan, Jakarta. After these crowd incidents, he was fined Rp 50 million ($3,536) by the local authority. However, the case did not stop there, as the police proceeded to launch a criminal investigation alleging the cleric and some of his relatives had violated criminal law: that is, public incitement for the former and health quarantine infringement for the latter.

We are inclined to see this case as a form of refusal to be governed by the state's authority (Foucault 1982). The chain of events leading to the cleric's trial arguably displayed the act of 'resistance by the means of law' (Merry 1995, 16). On the FPI's YouTube channel, Rizieq Shihab responded to the allegations against him by explaining that '[i]t's okay, this is what my [supporters'] enthusiasm looks like. I hope we will be delivered from any diseases and that Allah will soon eradicate the coronavirus pandemic … Don't forget, everyone has to follow the command of clerics and ulemas' (Fachriansyah 2020). Such a stance is arguably a product of a long-sustained relationship between the *ulema* and his congregation that iteratively showcases a resistance against the government (Assyaukanie 2007; Woodward et al. 2014). Resistance, as Sarat (1990, 364) suggests, exists 'side by side with power and domination'. Thus, by agreeing to pay the health protocol infringement fine to which he was subjugated, Rizieq simultaneously resisted the legal order. He used the legal ideas to interpret the biopolitical practices inflicted upon him and to uncover its uneven impact, which to some extent disrupts the power relation with the state. Such public spectacle may not have a direct consequence for the case itself. However, it may reshape the public consciousness and redefine the law and punishment. The differing perspectives of local and national law enforcement agents prior to the cleric's alleged crimes further highlights the fragmented criminal justice system in Indonesia. By the end of 2020 the government had acted further to ban the FPI as a registered mass organization, making all related activities on behalf of the organization illegal on the basis of security concerns.

People fear what they do not understand, yet there is much that we have yet to know regarding the current situation. The rhetoric of fear and emergency easily produces distrust of others. In this respect, how society responds to the pandemic is just as concerning as the severity of the virus itself (Colombo 2020; Perkasa 2020). The reconstruction of threat has led to multiple implications. First, it aggravates the sense of vulnerability. The media plays a key

role in triggering the fear of crime within society (Hale 1996). Amid the call to maintain safe proximity, the addition of 30,000 people to the general population after release from correctional institutions triggered a struggle for (safe) space among the citizens. Second, the restrictions during PSBB have resulted in the economic risks of unemployment and poverty. The panic–fear–danger nexus became inevitable, since social assistance aid (*bantuan sosial*) from the government did not provide a sufficient sense of economic security (Roziqin, Mas'udi and Sihidi 2021). Relying heavily on the informal economy, citizens from the lower social class faced a choice between incurring penalties for violating health protocols or risking the loss of their basic income (Ansori 2020).

Biopolitical justice: penal responses and the power/knowledge of necessity

The final important aspect in the analysis of contemporary biopolitics is the power/knowledge nexus of biopolitical practice during the COVID-19 pandemic. Since its outbreak, the authorities have announced the severity of this novel disease in the form of daily transmission numbers illustrated by epidemiological curves. From this perspective, we can see how COVID-19 reveals power relations, such as the decision to escalate or decrease movement restrictions based on 'the curves'. Hence, at this level of analysis we attempt to understand how institutional practices – through excluding or including people in Indonesia's penal policies and through managing the crowds inside and outside carceral spaces – shape society's knowledge of punishment during the pandemic.

This line of enquiry into biopolitical practice in the emergency period leads us to better understand the power/knowledge that highlights the structure of inequality of criminals. In this sense, following Garland's argument in 'Punishment and welfare revisited' (2018), penal forms are produced by conjectural politics and by specific struggles within the sphere of penality itself. He further argues that 'penal and social practices are constructed by the actors and agencies most closely involved' (13). In this context, a brief overview of penal responses during several incidents of conjectural politics of emergency in modern Indonesia provides evidence of the way in which the discourse of emergency becomes prosaic as well as the banality of using the penal system in times of public emergency. Three historical periods in Indonesia's penal system – the post-colonial era, the new order era and the post-authoritarian era – reveal distinctive rationalities that underlie biopolitical practices. This historical timeline through several periods of emergency reflects the technique of the penal system in

responding to the situation, which in turn shapes institutional knowledge within the criminal justice system.

Historically, after its independence in 1945, Indonesia's penal system was still using the modern imprisonment regime invoked by the colonial authority – the Gestichtenreglement (Prison Regulation 1917). Along with the rise of nationalism in the country, the impact of the propaganda of *emergency* to fight against neocolonialism and neoliberalism was to divert the penal paradigm from imprisonment to correction. The momentous Lembang Conference of Prison Administration in 1964 marked this historical shift by integrating the ideology of *Pengayoman* (aegis) with the new *Pemasyarakatan,* which is commonly translated as 'corrections'. It is mainly based on *gotong-royong* (social solidarity), which during the postcolonial revolution was characterized as the national identity. Amid ideological contestation in the 1960s, late President Soekarno declared that convicts and criminals should be part of the Indonesian Socialism effort, an attempt to escape from the individualization of guilt as understood in liberal countries. While it has been argued that such an ideology is a clear reflection of the postcolonial legacy within the Indonesian legal structure (Iskandar 2016), the rhetoric used was also a clear sign of penal response in the time of emergency.

As turmoil occurred during 1965/6, the prison revolution appeared to come to a halt. During the new order era, under the military-backed authoritarian regime led by President Soeharto, prison and imprisonment became highly politicized through the securitization framework as a way to protect the state ideology *Pancasila* from evil communism. Mass incarceration was used during the war against communism, while prison institutions became a site where the state's violence, such as torture and ill-treatment, was likely to occur, especially against political prisoners. As the demand for human rights protection intensified during the early 1990s, the country finally enacted legislation on corrections in 1995. Heavily relying on the 1964 Lembang Conference recommendations, the 1995 Corrections Law was enacted to reinforce *Pancasila* as the state ideology through the penal system. It reaffirmed that prisoners should not be seen as merely objects of punishment but also as subjects upon whom the corrections system should strategize social factors beyond the individual. The period also showcases the introduction of penal welfarism in Indonesia, as the government decided to view punishment and imprisonment as part of a larger social policy arrangement. This is manifested in the government's decision to create the Directorate of Social Rehabilitation and Child Welfare (Direktorat Bimbingan Kemasyarakatan dan Pengentasan Anak, BISPA) in 1970 as a continuation of the colonial Probation and Enforced Education Office (Jawatan Reclasering dan Pendidikan Paksa). The transformation of BISPA into the Directorate of Exterior Corrections (Direktorat Pembinaan Luar Lembaga Pemasyarakatan) and then into the

present Correctional House (Balai Pemasyarakatan) in 1997 affirmed the idea of criminal treatment that was distinct from the former carceral prisons.

The 1998 reforms overthrew the previous thirty-two years of President Soeharto's rule in the country. Despite the successful transformation of legal and penal institutions, as well as the integration of various human rights principles into the judicial and penal system (Suh 2012), the era also marked a significant shift of attitudes towards punishment. As laws became more and more specialized, the course of this change was followed by the penal system, which established more spaces for specialized confinement. Neoliberal development strategies which were transplanted during the transition, and which were sustained until the present democracy (Warburton 2016), transformed Indonesia into a penal state. Criminal law and punishment are thus understood as a response to any kind of disapproved public behaviour, and this is seen as the best way to exercise democracy and liberalism.

As Simon (2013, 79) argues, '[i]f actuarialism is about spreading risk, precautionary technologies aim to contain it to specific locations. The prison has become a place to contain subjects who pose a risk of crime.' This kind of actuarial strategy has become commodified by the populist strategies of the two most recent presidencies. During the Yudhoyono administration from 2004 to 2014, the state's penal policy was framed by the idea of being tough on specific crimes, such as drug-related crimes, corruption and terrorism. This attitude has been largely followed by Joko Widodo's administration since 2014. The current government's mid-term development plan (i.e. a five-year governmental plan) also specifies the urgent need for the government to address these specific crimes. Along with the neoliberalism stream determining the national political economy, the technology of punishment promotes super-maximum security prison facilities aimed at confining mainly drug kingpins and terrorists.

During the twenty years since the 1998 political reform, the corrections management regime applies security-sensitive policies based on the crimes committed. In the aftermath of the transition, the Narcotics Prison was established for the incarceration of all drug-related criminals, including drug abusers and dealers, from mules to kingpins. In addition, after the deadly terrorist attack in Bali in 2001, the corrections management regime promoted high-security facilities for the perpetrators. The historical Nusakambangan Prisons Island, which has long been renowned as a site for dangerous criminal classes, is now occupied mostly by terrorists, drug dealers and other high-profile criminals. The recent construction of the super maximum-security Karanganyar Prison on the island can be seen as a reflection of the use of precautionary technology in the country. Facilitated by high-end technologies, the government attempts to strictly confine and restrict high-risk prisoners based on a technical correctional assessment.

The current administration of Indonesia is populist in its own particular way, which fuels the idea of *waste management* in the penal system. We understand populism in terms of Müller's (2016, 19–20) definition, as 'a particular moralistic imagination of politics, a way of perceiving the political world that sets a morally pure and fully unified … people against elites who are deemed corrupt or in some other way morally inferior'. In addition to being anti-elitist, populists are always anti-pluralists: populists claim that they, and only they, represent the people. The populist core claim also implies that whoever does not fervently support populist parties might not properly be part of 'the people' to begin with. Recent Indonesian studies have elaborated the lingering factors that impacted the government's emergency measures. The lack of preparedness and deficiencies in responding ensured that the pandemic was a frightening spectre. Wiratraman argued that by using civil emergency laws, the state violates the human rights and legal protections otherwise guaranteed by the rule of law. The COVID-19 policy 'showcases a repressive character in attempting to discipline civil society criticism' (Wiratraman 2020, 328). Mietzner (2020, 3), on the other hand, argues that it was 'the very specific form of Indonesia's democratic decline in recent years that predetermined the government's poor response to the COVID-19 crisis'. He elaborates five toxic combinations that influence the ineffectiveness of responses while at the same time reflecting the interests of the ruling class. These are: rising populism, increasing religious conservatism, escalating politico-ideological polarization, worsening political corruption and clientelism and the growing confidence of anti-democratic elite actors.

Evidently, the legal rhetoric of necessity in the conjectural politics of penal responses is seen as prosaic politics of emergency. In the context of the Coronavirus pandemic, instead of seeing the emergency of COVID-19 as a single conjectural moment, we tend to see it as an ongoing temporal process of managing a population (Feldman 2010). As a biopolitical technology of power, these penal responses are aimed at the problematic of the population given the power–knowledge structure. During the Coronavirus pandemic, the *emergency* of drug abuse, terrorism and corruption is *necessarily* excluded from the penal system through the decarceration policy. It is *just* a process of ongoing claiming and contestation of the selectivity of punishment insofar as it exhibits indications of penal populism. Reflected by the decarceration decision during the pandemic, the institutional knowledge of punishment for certain crimes prevails over the need to create space inside prison and jail facilities, which is systematized by massive epidemiological knowledge. The (public health) risk analysis also necessitates that the state put some forms of *resistance* on trial. Finally, to foster the life of the population, it is deemed *necessary* to let these specific criminals die in carceral spaces.

Conclusion

The idea of legal justice in a time of emergency can be understood through an elaboration of penal responses as a biopolitical practice. As a mode of exercising power, Indonesia's penal response designates a new modality of producing, circulating and enacting power that subjects and governs individuals. Undeniably, the populist response to Indonesia's biopolitical practice during the COVID-19 pandemic will affect the efforts in fostering a democratic penal system. It will be particularly compelling to see the future of the penal system in Indonesia, and of course worldwide, after the pandemic. Indonesia's experience showcases that over a period of time, the country has been in constant motion from one state of emergency to another. Incarceration, as a symbol of modernity in punishment, has long been the answer to overcoming any such emergency. The current necessity to decarcerate, however, might have potential to lead the country towards penal moderation. This stance is imbued with the creation of a new subject – *homo oeconomicus* – produced by ubiquitous pecuniary sanctions. While we are yet to know what kind of subject is going to be codified by the norm of law in the future, we firmly believe that this trajectory is contingent upon the political and economic climate after the pandemic.

Notes

1. Keputusan Menteri Hukum dan HAM M.HH-19.PK/01.04.04 tentang Pengeluaran dan Pembebasan Narapidana dan Anak Melalui Asimilasi dan Integrasi dalam Rangka Pencegahan dan Penanggulangan Penyebaran COVID-19 [Minister of Law and Human Rights Decree Number M.HH-19.PK/01.04.04 on the Release of Prisoners and Juveniles through Assimilation and Integration to Prevent and Anticipate the Transmission of COVID-19].

2. Indonesia's first two reported COVID-19 cases were on 2 March 2020 (Gorbiano 2020); the first COVID-related death was reported on 11 March 2020 (Asmara 2020).

3. Peraturan Pemerintah Nomor 21 Tahun 2020 tentang Pembatasan Sosial Berskala Besar dalam Rangka Percepatan Penanganan Corona Virus Disease 2019 (COVID-19) [Government Regulation Number 21 of 2020 on Large Scale Social Restriction in order to Accelerate the Handling of Coronavirus Disease 2019 (COVID-19)].

4. Peraturan Gubernur DKI Jakarta Nomor 79 Tahun 2020 tentang Penerapan Disiplin dan Penegakan Hukum Protokol Kesehatan Sebagai Upaya Pencegahan dan Pengendalian Corona Virus Disease 2019 [DKI Jakarta Governor Regulation Number 79 of 2020 on the Implementation of Discipline and Law Enforcement as efforts to Prevent and Control Coronavirus Disease 2019].

5. In Phase I of PSBB Jakarta and Surabaya Raya, 21,285 and 15,920 people were reported to have violated face mask regulations.

6. We are indebted to Prof. Carl Stychin for raising this issue during the Law and Humanities Series Workshop.

7. The public believed Rizieq Shihab's departure to Saudi Arabia in 2017 was an attempt to escape the official investigation related to his several criminal allegations, including alleged insults to the state ideology of Pancasila.

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Chapter 7

The pandemic and two ships

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Introduction

The origins of the COVID-19 pandemic have most commonly been traced to a wet market in Wuhan, China. In the first months of 2020, however, as the virus spread rapidly through global travel, cruise ships became another locus of contagion. Cruise ships, which are not typically newsworthy beyond holiday travel, suddenly became the subject of regular reporting. Fears of COVID-19 at sea first surfaced in February 2020 with the *Diamond Princess*. The vessel, which was carrying 2,666 passengers and 1,045 crew, reported that passengers were suddenly falling ill. Being in Japanese waters at the time, the ship was forced to quarantine outside the port of Yokohama. In the final count, there were 712 positive cases of COVID-19 and 13 deaths reported on the *Diamond Princess* (Tokuda et al. 2020). At the time, this was the highest number of cases outside mainland China (Klein 2020). Over the following months it soon became clear that the *Diamond Princess* was neither an exception nor an anomaly. By May 2020, forty cruise ships had positive cases. Between March 2020 and March 2021, CruiseMapper (2021) reported 3,519 COVID-19 cases and seventy-three deaths aboard cruise ships.

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Despite the introduction of vaccinations, cases continued to rise. In August 2021, twenty-six crew and one passenger, all fully vaccinated, tested positive for COVID-19 on the *Carnival Vista*, which was on its return voyage to Galveston, Texas from Belize City, Belize. The passenger who tested positive later died (Yee 2021).

In the first few months of the pandemic many cruise ships were stranded at sea. Fearing the rapid spread of infection, authorities in Australia, New Zealand, Canada and the US initially refused to allow vessels to drop anchor and thus prohibited passengers from disembarking. Under maritime law states have the legal right to close their ports of call. But as ships filled with well-to-do travellers from Western countries were turned away, critics asked what it meant for a ship to be in 'distress' and in need of assistance. At the time of writing almost two years later, concerns about cruise ships and COVID-19 continue, as the case of the *Carnival Vista* makes clear. Despite the demands of travellers who are eager to get back to sea, and the optimism and desperation of cruise lines seeking to recover their lost profits and their reputations, many countries continue to impose restrictions on cruise travel. In Canada, passengers planning to take cruises are warned that they 'could be subject to quarantine procedures onboard ship or in a foreign country' (travel.gc.ca [accessed November 2021]). The Canadian government maintains that it will not organize repatriation flights for stranded travellers. According to the Government of Canada website (2021): 'Cruise vessels in all Canadian waters and pleasure craft in Canadian Arctic water are prohibited until November 1, 2021.' Princess Cruises remains hopeful about the future, however. They have plans to relaunch the *Diamond Princess* in Spring 2022.

Cruise ships are massive vessels that operate as self-contained and floating resorts. Although they are leisure destinations for affluent passengers, these islands at sea also invoke longer histories of maritime mobility and immobility circumscribed by colonial, racial and imperial power. 'The contemporary cruise ship', Jonathan Rankin and Francis Collins (2017, 225) contend, 'appears as a paradox of mobility and containment. It is a vehicle for moving from place to place, and yet – more profoundly – it is a moment of enclosure constituting an event in itself.' As the history of quarantine suggests, ships – including leisure vessels – have long been spaces of confinement, especially for crew. As sites of white pleasure, cruise ships demand racial exploitation for some (crew, who are mostly people of colour) in the service of others (passengers).

As the *Diamond Princess* was quarantined outside Yokohama port, the crew were required to continue working, servicing the ship and those aboard. Some were required to share small cabins with other crew who visibly displayed symptoms of COVID-19 (Khalili 2020). According to one source:

> crewmembers [aboard the *Diamond Princess*], later identified as infected … continued to work in roles allowing for potential further spread, including providing guest services and meals to passengers during the quarantine. This may have been a potent route of continued transmission, as at least five passengers with close contact to these crewmembers subsequently developed COVID-19 symptoms (Tokuda et al. 2020, 95).

These exploitative working and living conditions may be one reason why infection rates were so high.

Since the first cases of COVID-19 were reported in February 2020, cruise ships have appeared frequently in the news, mainly through the pleas of desperate and stranded passengers. But some networks have also reported on the dire conditions faced by abandoned crews. As Laleh Khalili (2020, 7) writes:

> In a pandemic with cities and borders closed, shore leave and crew changes not permitted by transit ports, welfare visits to ships disallowed, and no clear and consistent end in sight for such restrictions, the world's 1.6 million seafarers have been feeling anxious about their own fate, about their families' health, about their income now and availability of work in the near future.

The oscillation between mobility and containment aboard the cruise ship – what Rankin and Collins (2017) call a 'paradox' – has long been a condition of life at sea, particularly for sailors and seafarers (Rediker 1989). This dynamic has visibly materialized in the current pandemic, especially as it has unfolded aboard cruise ships and particularly in the vastly different experiences of (white) passengers and crew. The ship as a site of mobility and containment becomes less of a paradox and more of a political, legal and racial strategy of containment when it is situated in longer histories of quarantine and juxtaposed with the conditions facing migrants at sea, as we discuss later in this chapter.

The spread of COVID-19 at sea, narrated through the accounts of stranded passengers and the experiences of exploited crew members, has opened important vantage points from which to consider the current pandemic. As sites of multiple legalities and competing jurisdictions, moving ships bring into sharper focus the ongoing tensions between national sovereignty and international law (Mawani 2018). Importantly, they also reveal the inherent conflicts within the current international legal order, particularly between the UN Convention on the Law of the Sea (UNCLOS) (1982) and the UN Refugee Convention (1951). These competing jurisdictions over maritime mobility and the legal status of migrants have created vastly uneven regimes of life and death. To draw out these tensions between the national

and international legal orders in the context of the COVID-19 pandemic, this chapter focuses on two ships at sea – the cruise ship and the migrant dinghy. Centring these two very different vessels – one explicitly aimed at leisure and mobility and the other at confinement and death while always with the deferred possibility for freedom – invites other angles from which to track the global pandemic and its devastating effects. Specifically, a juxtaposition of the cruise ship and the migrant vessel, we suggest, offers a glimpse into how the COVID-19 pandemic, and the uneven responses to it, has deepened the forces of imperialism, colonialism and racial capitalism.

The argument we develop here, on mobility and immobility, competing legal jurisdictions and maritime regimes of life and death, draws inspiration from the fields of colonial and postcolonial studies and offers a critical reading of the pandemic from an overlooked vantage point: ships at sea. Our reading of the cruise ship against the migrant vessel, we hope, signals how ships have always been spaces of mobility/immobility and freedom/confinement caught in national and global legal orders. These contentions demand that we situate the COVID-19 pandemic within a longer historical arc, one that signals the ongoing importance of the humanities in asking and analysing how the global pandemic has continued to entrench existing inequalities while creating renewed regimes of terror and confinement. When viewed historically, the global pandemic raises urgent questions about the presumed effectiveness of containing the spread of COVID-19 through the fortification, and in many cases the militarization, of territorial borders both on land and at sea.

Histories of quarantine at sea

Conditions of confinement aboard cruise ships that have been brought into view in the current pandemic are preceded by longer histories of quarantine. Moving ships that crossed territorial boundaries and entered ports of call necessitated forms of regulation, inspection and confinement that have been imposed on land through immigration restrictions and prohibitions (Mawani 2018; McKeown 2012). For Alison Bashford, quarantine was deeply entangled with shipping and maritime worlds from the very start. From the early modern era onward, she observes, the archipelago of quarantine stations that appeared along coastal regions joined the world's oceans in unprecedented ways. Quarantine stations linked 'old world and new world histories as surely as the shipping lines and trade routes that connected them' (Bashford 2016, 1). These stations operated as a *cordon sanitaire*, creating an inside and an outside that was ostensibly aimed at protecting port cities and empire states from threats of contagion from without. Quarantine islands, as

Bashford (2017, 265–6) describes them, became 'meeting places of ship and shore', both in their placement and design. Their architecture 'deliberately mirrored the spatial organization of a vessel', separating first-class and steerage-class passengers, and thus reinforcing racial and class distinctions. But ships themselves were spaces of contagion. The regulation of vessels, as the history of quarantine suggests, was central to the creation of racial lines that demarcated inside/outside, healthy/diseased and citizen/foreigner.

Quarantine islands connected the old world and the new, but they had different targets and objectives in Europe and the Americas. In the sixteenth-century Mediterranean, quarantine practices were directed mostly at goods. Ships entering ports of call were required to drop anchor outside and wait – usually 18 to 20 days – before being permitted to enter port. If signs of illness were detected aboard, goods would not be offloaded. Sailors and crew who displayed symptoms of poor health and disease would be sent to island lazarettos or isolation hospitals, where they were quarantined until they recovered or perished (Bashford 2016; Inì 2021). Practices of quarantine in the Mediterranean were intended to strike a balance between health and trade. This was not the case in Atlantic regions, however. After Columbus' so-called discovery of the 'new world', and as European ships began travelling more regularly across the Atlantic from the sixteenth century onward, carrying European colonists and then captive Africans, quarantine became a regular practice that was not only linked to the movement of goods but also to the movements of people. Ships, which were already prisons for enslaved Africans, were increasingly used as spaces of quarantine and confinement (Rediker 2008; Sheridan 1985).

It bears noting that the racial constructions of disease, which continue to inform how we understand health, contagion and transmission, emerged from conquest and colonization. Although European ships were vectors of contagion that were instrumental in bringing new diseases to the Caribbean and to the Americas, and are therefore directly implicated in the genocide of Indigenous peoples, they are not often viewed in these terms (Davis and Todd 2017). The arrival in 1778 of the *Resolution*, which carried Captain James Cook and his crew to Nootka Sound, brought foreign diseases including smallpox, tuberculosis, influenza and measles. Indigenous elders along what is now the west coast of Canada recall that sustained contact with Europeans produced major epidemics that led to the devastation of First Nations communities which did not have immunity (Kelm 1998). Despite these long histories of European colonists bringing disease across the Atlantic to the Americas, the vessels and bodies of Europeans have not been framed as epidemiological or foreign threats, certainly not in conventional histories of the 'new world'. Rather, disease has been more often associated with Black and colonized bodies, as histories of conquest, slavery and immigration make clear.

Quarantine measures in the Mediterranean that centred on the transport of goods and commodities were in part extended from Europe to the Americas through the transatlantic slave trade. Captive Africans who were kidnapped from West Africa and forcibly shipped across the Atlantic to the Americas were transformed in these voyages, and more specifically in the Middle Passage,[1] from humans into 'goods' (Philip 2008; Smallwood 2008). Conditions aboard slave ships were horrific (Mustakeem 2016; Rediker 2008). Captains, acting on behalf of ship owners who were clearly motivated by profits, expressed concerns about the health of enslaved people. Yet illness and death remained widespread. Malnutrition, seasickness and poor hygiene, combined with contaminated food and water supplies, made the slave ship a breeding ground for disease, illness and death (Smallwood 2008, 136). The unsanitary conditions and the 'intermingling of bondspeople into cramped ships holds facilitated the exchange of contagious diseases' (Mustakeem 2016, 57). Upon arrival at their destinations in the Caribbean and the southern US, captive Africans who survived the Middle Passage were carefully inspected to determine their health and ultimately their value (Smallwood 2008). Those who showed signs of illness were confined aboard slave ships, or forcibly held in quarantine stations or in slave hospitals until they were deemed healthy enough to be sold (Sheridan 1985, 132).

Transatlantic slavery, as scholars have noted, was the largest forced migration of peoples in history (McKeown 2012; Mustakeem 2016). For Adam McKeown (2012, 22), racial conceptions of bondage and freedom that developed in the context of Atlantic slavery shaped the regulation of and the restrictions imposed on nineteenth-century migration. Whereas ideas of forced and free labour informed the conditions, transport and circumstances of Chinese and Indian indentureship from the 1880s onward, these legal formations were also used to justify Asian exclusion from white settler colonies, including the US, Canada and Australia (McKeown 2012, 23). Racial concerns of trade and forced migration in the Mediterranean and Atlantic thus also shaped quarantine practices and immigration controls in the Pacific. By the nineteenth century, the spread of disease across oceans and continental regions clearly illustrated the perils of maritime trade and travel. During this period, practices of quarantine became central to the demarcation and protection of national borders (Bashford 2016). Racial practices of border control that distinguished free from unfree, healthy from diseased and citizen from non-citizen, which were shaped by racial distinctions that were developed aboard the slave ship and marked the bodies of enslaved peoples, continue to shape how we think about contagious and non-contagious diseases in the twenty-first century, including leprosy, AIDS, Ebola and more recently COVID-19 (Bashford and Nugent 2001; Mawani 2003, 2007; Murdocca 2003).

From the mid-nineteenth century onward, as large-scale European resettlement and Asian migration increased across the Atlantic and Pacific Oceans, quarantine became more closely associated with the movements of people. Health restrictions were written directly into immigration regulations in the US, Canada and Australia, and became coercive technologies of racial border control (Bashford 2003; Mawani 2003). In the US, for example, Ellis Island and Angel Island served as the first stops for ships crossing the Atlantic and Pacific, respectively (Lee 2003; Shah 2001). Upon arrival, all passengers were inspected for signs and symptoms of contagion, but it was travellers from China, Japan and India who were most often described as being 'diseased'. In Canada and the US, anti-Asian racism directly informed legal regulations directed at Chinese, Japanese and Indian migrants not only in ports of call but also inland. Claims that Asians were diseased dramatically shaped Chinese exclusion through incarceration, deportation and prohibitions on entry (Shah 2001). Racial characterizations of healthy and contaminated bodies – and particularly of Asians as ostensibly diseased – have re-emerged with renewed violent intensity in the COVID-19 pandemic.

The racial regimes of border control that were central to the origins of the nation-state continue to persist both in immigration legislation and in the recent rise of anti-Asian violence. This brief historical account of quarantine and shipping is intended to serve as a reminder that forced quarantine, whether on ships, islands or detention centres is rooted in longer colonial and maritime histories. Quarantine practices that began in the 'old world' Mediterranean and were aimed at goods have newly returned from the 'new world' Atlantic and Pacific through a growing fear of migrants. With COVID-19, racial concerns regarding disease have re-entered the European imagination, shaping violent responses to the thousands of migrants fleeing from North Africa, Southeast Asia and the Middle East across the Mediterranean and seeking entry into Europe (Bashford 2016, 9; Heller 2021). This is an important historical context in which to situate the global pandemic. We return to the figure of the migrant later in this chapter. But first, let us say more on the cruise ship and the jurisdictional tensions between national, maritime and international law that it has brought into view.

COVID-19 and maritime legal orders

By drawing attention to cruise ships at sea, the COVID-19 pandemic has also brought maritime legal orders into sharper focus. In the early months of the pandemic, as we mention in the introduction, cases of COVID-19 rapidly spread aboard cruise ships and infected passengers were placed in

confinement. Many countries denied these vessels entry into their territorial waters. Some states claimed that passengers and crew must first seek assistance and repatriation from the flag states in which the ships were registered (Tirrell and Mendenhall 2021). In the first months of 2020, flags of convenience, a ship registry system that originated in Panama, became a point of focus in stories of stranded cruise ships (Campling and Colás 2021, 783). Under maritime law, the nationality of a ship and the laws under which it operates depend on where a vessel is registered. A flag state determines which laws apply on board. In principle, a ship can fly only one flag at a time. Historically, however, ships carried multiple flags; captains changed them opportunistically to avoid international legal restrictions and regulations. The origins of flags of convenience, some argue, are themselves rooted in illegality at sea. In 1808, after the US and Britain formally abolished the slave trade, ships engaged in illegally transporting captive Africans flew American flags to protect themselves from British searches of their vessels at sea. As historian Walter Johnson (2008, 240) puts it, 'Old Glory became the flag of convenience for slave traders worldwide.'

A ship flying a flag of convenience is typically registered in a country other than the place of residence and nationality of its owners. Flag of convenience states include Panama, Liberia, Honduras, Lebanon, Costa Rica and the Bahamas (Meyers 1967, 57). Typically, ship owners pay a fee to a country to register their vessels in order to avoid the legal restrictions and regulations imposed by their own governments. Flags of convenience allow ship owners and shipping companies to avoid labour laws, environmental regulations and national tax laws. By registering a ship in Panama, the Bahamas or Liberia, shipping companies argue that they can significantly increase their profit margins. In *Fish Story*, Allan Sekula (1995) argues that the flag of convenience registry, which he dates to the 1940s, reveals the destructive effects of globalization. Maritime worlds, he argues, 'underwent the first legally mandated internationalization or "deregulation" of labour markets' (49), allowing a company's owners to live in one country, its ships to be registered in another, while crews are recruited from poor coastal nations including the Philippines and Indonesia. A flag of convenience, he explains, adds 'a new ensign of camouflage and confusion' to the juridical order of ships. 'The flag on the stern becomes a legal ruse, a lawyerly piratical dodge' that allows shipping companies to use unseaworthy vessels and to employ foreign crew without the protection of labour regulations that set a minimum standard of pay and which ensure safe working conditions (50; see also Khalili 2020). In the context of cruise ships, some identify the 1920s as a key historical moment in the flag of convenience system. Many ship owners and companies adopted the Panama flag so they could serve liquor to passengers during American prohibition (Tirrell and Mendenhall 2021, 4).

The appeal of flags of convenience for cruise ship companies continues in the present day. Cruise ships are responsible for causing significant environmental pollution and health concerns for humans and maritime species. Flags of convenience allow cruise ship companies to avoid and defy environmental regulations (Ellsmoor 2019).

Many cruise ships affected by COVID-19, including the *Diamond Princess*, were flying flags of convenience. Carnival Cruise Line is a US-based public company with headquarters in Miami and stocks traded on the New York Stock Exchange. Yet every Carnival ship is registered in Panama, Malta or the Bahamas (Tirrell and Mendenhall 2021, 5). Under maritime law, flag states extend national identity and legal jurisdiction over vessels, and thus are legally responsible for its passengers and crew (Klein 2020). What the COVID-19 pandemic has revealed are the inherent problems with the flag of convenience system, including the tensions between maritime, national and international legal orders. Although these jurisdictional problems have long existed, often with devastating implications for crew, they have become newsworthy now because of their implications for well-to-do cruise travellers. The governments of Panama and other flag of convenience states do not have the financial resources to rescue and repatriate passengers from Europe and North America who are vacationing on luxury cruise lines, even if these vessels are registered in their respective countries. As many cruise ships affected by the global pandemic were registered in Panama, passengers who were confined on these vessels were unable to file successful claims for repatriation. The COVID-19 responses to passengers and crew aboard cruise ships have been highly uneven. While cruise lines such as Royal Caribbean tried to repatriate stranded passengers as soon as possible, many crew remained abandoned at sea and have not yet been paid for work they have already completed (Khalili 2020).

Flags of convenience also have serious financial implications for cruise ship companies seeking pandemic-related assistance. Countries such as Poland, Denmark and the US have refused to provide bailouts for shipping companies, including cruise lines that are flying foreign flags, because they have not been paying national taxes and have not contributed to the national economy. In announcing its bailout plan in 2020, the US government stated that companies such as Norwegian Cruise Lines would be excluded from their $2.3 trillion stimulus plan, thus leaving Norwegian and other cruise ship companies to seek out alternative ways of recovering their losses or risk filing for bankruptcy (Wolfe 2020). It is estimated that cruise lines are burning anywhere from $100 million to $1 billion a month as they wait for cruise travel to resume. Some companies have been aggressively advertising and have resumed travel despite the emergence of new strains of COVID-19, as the *Carnival Vista* makes clear. Carnival, Royal

Caribbean Cruises and Norwegian Cruise Lines have all raised money to stay afloat during this unprecedented pandemic shutdown. Some critics ask whether the pandemic and the resulting cruise ship crisis might finally end the flag of convenience system (Tirrell and Mendenhall 2021). Despite financial and legal troubles, many cruise ship companies insist that the flag of convenience system cannot end, as reflagging in the US would require that they follow tax, labour and environmental laws, thereby significantly diminishing their profits (Harotounian 2021, 977).

Moving ships have raised other legal issues resulting from competing jurisdictions. Some passengers have filed lawsuits against cruise ship companies including Princess Cruises for failing to protect them from COVID-19. Given that these vessels fall under the jurisdiction of flag states and are governed by maritime legal orders, travellers have found themselves confronted with obscure maritime laws that have placed them between jurisdictions, making it difficult, if not impossible, to seek compensation from flag states, cruise ship companies or the countries in which they live. The COVID-19 pandemic, and the refusal of states to allow ships to enter their ports of call, has also raised key legal and political questions about what it means for a ship to be in distress. Under the International Convention on Maritime Search and Rescue (SAR Convention 1985), 'distress' is defined as '[a] situation wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance'.[2] Concerns regarding ships in distress have compelled coastal and port states, often begrudgingly, to assist illegalized migrants when their vessel is in danger of sinking, often without any media coverage or response (Tirrell and Mendenhall 2021, 7). During the COVID-19 pandemic, distress has gained attention only because those imperilled are cruise passengers from Western countries.

Cruise ships have taken on a new visibility and significance in the current global pandemic. For passengers, these ships have been transformed from sites of pleasure and mobility to spaces of contagion and confinement that are reminiscent of earlier colonial and racial histories of maritime travel and quarantine. For many crew members, by contrast, these luxury liners have long been floating prisons – even more so under pandemic conditions. These uneven and unequal conditions brought into view by COVID-19 at sea have revealed the tensions between national, maritime and international law and how these jurisdictional overlaps work to exacerbate global and racial inequalities. The outbreak of COVID-19 at sea is a potent reminder that profits remain paramount and only certain lives are worth saving. These conditions are further exemplified when the cruise ship is juxtaposed against the migrant vessel, to which we now turn.

The virus and the migrant dinghy

COVID-19 has had a devastating effect on migrants crossing the sea. In comparison to the cruise ships that we discuss above, migrant vessels have received far less media coverage and state action. Although concerns regarding migrant vessels have historically been concentrated in the Mediterranean, the global pandemic has expanded the so-called 'migrant crisis' to other waters, most notably in the Indian Ocean. On 16 April 2020 the Royal Malaysian Air Force spotted a small boat off the coast of the Pulau Langkawi in the Malacca Strait. The boat was carrying over 200 refugees who were fleeing the overcrowded camp of Cox's Bazar in Bangladesh, where they were stranded after facing persecution and genocide in Myanmar (Ratcliffe 2020). Noor Hossain, a Rohingya community leader living in the Balukhali refugee camp in Bangladesh, stated that as COVID-19 has rapidly made an already untenable situation worse, 'more and more Rohingya are willing to flee Bangladesh' in search of different shores (Ellis-Petersen and Rahman 2020). Soliciting the help of human traffickers who provide passage in overcrowded and unseaworthy dinghies at a high price, Rohingya refugees are commonly turned away upon arriving in the coastal waters of Indonesia, Thailand and Malaysia. With the global COVID-19 pandemic, the situation for Rohingya people in refugee camps and at sea has declined even further.

Following the interception of this small boat, the Malaysian Royal Military Air Force (RMAF) reported that the Malaysian government feared that a group of 200 'foreigners' might bring COVID-19 into the country, claims that are reminiscent of longer racial histories of quarantine, disease control and national protection, as we discussed earlier. The RMAF claimed that the Navy, operating on humanitarian grounds, gave these 'foreigners' provisions before pushing the vessel outside its territorial waters (Malay Mail 2020). This case is one of many that demonstrates how the COVID-19 pandemic has been used by coastal states to legitimize the protection of their territorial borders through the killing and the letting die of migrants stranded at sea (Heller 2021).

In the Mediterranean, where migrant deaths at sea have long been a source of conflict between coastal states and non-governmental organizations, migrants and activists have reported a rapid decrease in search and rescue missions. On the one hand, this decrease is a result of a European Union (EU) policy to shift the surveillance of refugee boats in the Mediterranean from sea to air. The EU is using unmanned drones developed with the assistance of Israeli military technology (Mazzeo 2020), which places the responsibility for search and rescue missions on the Libyan coastguard. European states have engaged in illegal push-backs and have

criminalized activists and fishermen who assist in rescue operations at sea (Ahmed 2020; Rankin 2019). Coastal states and the EU are using COVID-19 to normalize efforts to close national borders to supposed foreign threats at sea and to further justify 'non-assistance' at sea, as noted by activists from the monitoring organization Alarm Phone (2020).

Since 2019, illegal push-back actions by coastguards have become more systematic. 'Help-on' policies and push-back actions violate the principle of *non-refoulement* stipulated in the UN Refugee Convention of 1951 and its 1967 Protocol, which prohibits rejection at the frontier, interception and indirect refoulement of individuals at risk of persecution (UN High Commissioner for Refugees 1977). The pandemic has expanded flows of migration due to the effects of lockdown policies (Gazzi 2020). Push-backs and non-assistance at sea have become increasingly routinized as supposedly legitimate border management practices (Border Violence Monitoring Network 2020). What this brief discussion of the migrant ship suggests is that international legal regimes governing the movements of subaltern peoples at sea – UNCLOS 1982 and its 1994 amendment, and the UN Refugee Convention of 1951 and its 1967 Protocol – are often in conflict with one another. Like the cruise ship, the forced maritime travel of migrants and refugees during the COVID-19 pandemic reveals the tensions between national, maritime and international legal orders, as well as the inherent limits of addressing a global pandemic through the militarization of borders and the reterritorialization of the nation-state into ocean regions.

Shipping, as some scholars have noted, was foundational to the development of an imperial international legal order that persists to the present day (Anand 1982; Benton 2009; Mawani 2018). If 'global capitalism is a seaborne phenomenon', then international law has emerged and developed to protect European and American interests, rather than the well-being of subaltern subjects who have been forced into ocean spaces as cheap and exploitable labour, as enslaved people or as forced migrants (Campling and Colás 2021, 1). UNCLOS makes no mention of refugees or transnational subaltern working classes. It is dedicated to shipping, the movements of global capital and the supposed protection of ocean resources (Ranganathan 2019). Migrants who qualify as refugees are regulated by the UN Refugee Convention of 1951 and its 1967 Protocol, which is rooted in a notion of individual human rights (Mann 2016). Terrestrial in origin, the Refugee Convention makes no mention of the struggles or the legal position of migrants stranded in international waters, often aboard unseaworthy vessels. It is not coincidental that in contemporary legal discourse, oceanic refugee crossings continue to be undermined and invisible. The criminalization of migrant crossings must be situated 'in the wake' of colonial practices of confinement including histories of maritime quarantine. As Christina

Sharpe (2016, 15) argues, Black people crossing the Mediterranean have become '*carriers* of terror [including disease] ... and not the primary objects of terror's multiple enactments', which include colonial occupation, war and climate catastrophe (emphasis in the original).

Under UNCLOS, the only way migrant vessels may become visible as (il) legal actors is in article 98, which mandates 'the duty to render assistance' to ships in distress at sea 'without serious danger to the [rescuing] ship'. Distress, as we suggest earlier in this chapter, has become a point of contention in pandemic conditions. Whereas cruise ships have newly claimed to be in distress and thus are in need of saving, migrant boats in distress are framed as 'diseased' and viral, as potential 'carriers of terror' rather than people terrorized at sea. Article 92 addresses the status of ships, including 'ships without nationality'. It bears noting that upon arriving in coastal waters, migrants are often moved by human traffickers from larger vessels onto flagless dinghies (Mann 2016). Article 111 grants coastal states the right of 'hot pursuit' to apprehend ships navigating coastal waters that are in violation of national laws including those against human trafficking.[3] Unflagged vessels do not have a nationality at sea and thus are considered stateless and thereby lawless. Stateless ships have a different legal status than ships under the sovereign jurisdiction of a flag state, even a flag of convenience. UNCLOS makes no mention of stateless people stranded on flagless or stateless ships, other than to authorize local coastguards to board these ships when they enter coastal waters. For flagless ships with no national sovereignty, the coastal state's sovereign power is in force against the vessel and its passengers. These jurisdictional overlaps, contradictions and divides between UNCLOS, the UN Refugee Convention and the national jurisdiction of coastal states are making conditions at sea even more deadly for migrants.

(Re)territorializing the sea

UNCLOS divides the sea into six oceanic zones predicated on what we might think of as negative and positive sovereignty. Zones one to five fall under different specifications of national jurisdiction, while zone six, the high seas and the deep ocean floor, is beyond the jurisdiction of nation-states. The latter is considered to be the 'common heritage of mankind' (article 136). Where it concerns the full extent of the sea, the Convention pertains to the movement of ships and jurisdiction over customs infringement, fiscal immigration and sanitary laws, while at the same time defining the high seas and the deep sea as 'free' and beyond the territorial claims of nation-states. Originally, the inauguration of oceanic zoning, and the Exclusive Economic Zones (EEZs) in particular, was a response initiated by coastal

states in the Global South to the imperial and colonial lines dividing oceans and informing maritime imaginaries (Anand 1977; 1983). In effect, however, UNCLOS has provided the conditions for the perpetuation of imperial and territorial expansion that is rooted in a notion of the sovereign nation-state (Ranganathan 2019; Esmeir 2017). With a focus on facilitating the movement of global capital and resource extraction, UNCLOS' ocean imaginary remains restricted to what Dutch humanist and United Dutch East India Company (VOC) ideologue Hugo Grotius in 1609 called the 'free sea' (Grotius 2004). For Grotius, the high sea was the free sea, beyond sovereign jurisdiction, and thus open to European imperial expansion (Mawani 2018, 39).

Under UNCLOS, a coastal state is entitled to use its jurisdiction to impose sanitary laws, such as quarantine regulations, and to prohibit the entry of non-citizens assumed to be a threat to the health of the nation-state. At the same time, the UN Refugee Convention stipulates the principle of *non-refoulement*, which warrants that a state must protect those facing persecution elsewhere.[4] The seaborne migrant who attempts to come to shore is one example of how the international legal regimes that address the sea and refugees collide. Although push-backs might be illegal under the UN Refugee Convention, these actions are enabled by UNCLOS, another international legal regime that (re)territorializes the ocean, dividing national territories from international ones. The creation of EEZs, critics argue, has promoted a scramble for the oceans that has remapped 70 per cent of the planet (DeLoughrey 2017, 32). Yet in the Mediterranean, 50 per cent of the sea continues to be considered the high seas. Most countries surrounding the Mediterranean have not yet claimed or defined their EEZs. No Mediterranean border state could claim its EEZ without infringing the EEZ of another state (Grbec 2014, 1–2). With half of the Mediterranean designated as the 'high seas', and thus a zone of negative sovereignty, refugees become the responsibility of 'the international community', which often means no one. The legal status of the high seas actively produces and exacerbates the statelessness of migrants, despite the mandate for rescue under international law.

The principle of *non-refoulement* is part of customary international law, which is binding on all states across the globe (International Review of the Red Cross 2018). Although Malaysia, Thailand and Indonesia are signatories of UNCLOS, they have not ratified the UN Refugee Convention. Italy and other European states, by contrast, have ratified the Refugee Convention but have not claimed their EEZs, thereby leaving the protection of seaborne refugees stranded on the high seas to 'the international community'. Rather than simply framing push-backs and inaction as illegal, which they are, juxtaposing UNCLOS and the UN Refugee Convention shows how international law is implicated in the crisis of migrant deaths at sea. These overlapping international legal regimes and their competing jurisdictions

obscure refugees fleeing from violence and create conditions for letting migrants die at sea (Heller and Pezzani 2017). Within these international legal regimes 'illegal push-backs' are enabled through the very mechanisms that seek to render such actions unlawful. The territorial and cartographical grid that UNCLOS has placed onto the ocean enables push-back actions as a means of deterring responsibility for search and rescue and protecting the health of the nation-state from 'viral encroachment' through the enforcement of sanitary laws (Heller 2021). Furthermore, both UNCLOS and the UN Refugee Convention require ratification to carry authority. They are always already written and formulated with ambiguous legal language, including 'reasonable cause and action' and 'potential risk' for sovereign states. In other words, if the security or sovereignty of the nation-state is presumably threatened, a state is able to act in its own interests, creating conditions in which some can live (citizens) and others are left to die (migrants). Such legal determinations are often accompanied by racist and anti-immigrant discourses rooted in longer histories of forced displacement (Smythe 2018; Black Mediterranean Collective 2021).

In an article on the 1955 Bandung conference, Samera Esmeir (2017) problematizes the ways in which UNCLOS has continued to redefine the ocean according to the principles of territorial sovereignty. Decolonizing states attempted to limit and change imperial laissez-faire politics on the high seas by introducing EEZs and the 'common heritage of mankind' principle. The sea, she explains, is split into two parts: 'one where competing sovereigns can navigate the ocean's surfaces and project themselves onto them, and another where humankind can descend to preserve its heritage (while also failing to counter the destruction of the commons)' (Esmeir 2017, 89). The introduction of this horizontal regime of freedom, aimed at navigating the high seas, she writes, forms the conditions of possibility for a vertical regime of resource extraction: 'the heritage of humankind in the depths of the sea is conceivable only once its surface has been detached as a distinct but enlarged domain for sovereign states' (89). Esmeir observes an important parallel between the reification of the logic of the nation-state projected onto the ocean and the division between citizens and non-citizens in international human rights law. Human rights campaigns advocating for rights in the Global South assume that citizens of the Global North have sophisticated civil rights regimes to which they can appeal. 'The two splits, in the law of the sea and in human rights law', Esmeir concludes, 'posit humans as an object of protection of international law, leaving strong states free' (89). What international human rights law and international refugee law have in common is that one's humanity depends on the law's capacity to confer or confiscate that status (Esmeir 2012, 6). One can only appeal to the law's protection insofar as one is rendered human by and through it.

The 'crisis for refugees' at sea, as Gurminder Bhambra (2017) calls it, reveals the violence inherent within these overlapping regimes of international law. On the one hand, the law of the sea transforms the ocean into a terrain for both the extraction of resources and the movement of global capital via ships. At the same time, however, refugees are cast as objects of international refugee law whose access to the protection afforded to citizens of the nation-state remains forever deferred. In both legal regimes, the supremacy of the imperial state remains persistent and undeterred. Examining the pandemic from the perspective of the sea brings new insights. A view from ships at sea sheds light on the politics of containment and contamination experienced by subaltern people on the move, both historically and in our current context. Histories of quarantine and racial fears of disease and contagion, as discussed above, reveal how colonial-racial policies continue to determine who can cross oceans freely and whose movement must be contained and restricted. Today, viewing the pandemic from the cruise ship and the migrant vessel offers a sober reminder that certain lives continue to be valued while others are not. This racist distribution of life and death, which is rooted in longer colonial and imperial histories of quarantine, transatlantic slavery and immigration controls, suggests that (inter)national legal regimes rooted in the sovereign nation-state remain spaces of violence.

Although the challenges for migrants at sea have existed for much longer than the global pandemic, COVID-19 has exacerbated these conditions. Coastal and island states in the Mediterranean, Southeast Asia and beyond are using the pandemic to justify push-backs and inaction. Within what Sara Ahmed (2004, 15) has called an 'affective economy', the viral refugee is portrayed as a threat to the body and health of the nation-state, turning anti-immigrant hatred into concerns over the health of the nation, particularly for the bourgeois citizen-subject. Both depend on prior colonial and racial histories of containment and border control. What the COVID-19 pandemic makes clear is the differential distribution of responsibility and accountability. The mobility of the bourgeois citizen-subject via cruise ships has contributed to the global spread of COVID-19. Yet passengers, like European colonists on ships that crossed the Atlantic, are rarely described as 'diseased' or dangerous (Khalili 2020). As discussed earlier, in the early months of the pandemic, cruise ships reported the highest rates of infection beyond mainland China. For migrants, oceans remain 'carceral spaces', not simply through push-backs, but also in the redeployment of ships, ports, warehouse stations and islands which have become the containment sites of contagion and which are deployed as spaces for the indefinite incarceration of refugees (Braude 2020; Khalili 2020). Since 2020, Italian politicians have started to conflate threats of COVID-19 with fears of migrants. Although Italy was at the centre of the European COVID-19 crisis in early 2020, Matteo Salvini, former minister of the interior, criticized the arrival

and disembarkation of 276 migrants. He argued that 'allowing the migrants to land from Africa, where the presence of the virus was confirmed, is irresponsible' and called for Italy to make its borders 'armour-plated' (cited in Heller 2021, 118). Italy has also been hiring vacant cruise ships to use as spaces of quarantine and ultimately 'as floating jails for refugees' (Braude 2020).

The movement of seaborne migrants, Ratna Kapur points out, poses a challenge to the borders of the nation-state and the idea of the liberal subject at the centre of national and international law:

> The legal regulation of cross-border movements is contingent on law's understanding of and engagement with difference ... Although migration is a fact of a globalized economy, the response of the international legal order to what is cast as the migration dilemma is either incomplete, or one that aggravates the situation of those who cross borders (Kapur 2003, 7).

This 'migration dilemma' has become particularly pronounced at sea during the pandemic. For Sudeep Dasgupta (2019, 102), political discourse around the threat of migration and the need for clearly demarcated spaces in political discourse 'represses a relational understanding of the world as a space of the co-presence of peoples'. This co-presence becomes particularly repressed under a regime of international law that is premised on reifying the boundaries and powers of the nation-state while facilitating global capitalism at sea. It is the movement of migrants, sailors and refugees, who serve as cheap, racial, exploitable and expendable labour, that continues to challenge 'the rearticulation of the nation-state and the uniformity of the liberal subject' (Kapur 2003, 8).

Conclusion

Cruise ship passengers and crew confined at sea have drawn attention to the competing jurisdictions of national, maritime and international legal orders. These recent reports recall racial and colonial histories of immobility, incarceration, capture and maritime violence (Perera 2013, 157). Under pandemic conditions, the cruise ship – a site of leisure and pleasure for well-to-do travellers – has been newly transformed into a space of terror and confinement, as it has long been for the mobile working poor and for migrants at sea. 'Questions of the mobility and blockage of bodies', Suvendrini Perera writes, 'of who moves, and how, or who cannot, or does not, are questions of power, naturalised, made invisible' (60). With the rapid global spread of COVID-19, we are led to believe that globalization has been stopped in its tracks. But as Charles Heller (2021, 113) notes, it is the 'global web of transport infrastructure, enabling human mobility for business, tourism, and migration', that has

become 'the conduit through which this new virus [has] spread at lightning speed'. The effects of the current pandemic have been most devastating for subaltern subjects 'already present within countries or those seeking to reach them such as refugees and migrants – leading to heightened border violence but also hardening social boundaries within daily social interactions' (114).

Following Deborah Bird Rose, Perera describes international law as part of the 'death-work of unmaking water'. UNCLOS, she claims, subjects 'the livingness of water' to a logic of national security, economic advantage and territoriality. International law, in Perera's formulation, 'ensnares sea-borne refugee bodies in the crude sovereign logic of territoriality' (2013, 59). Examining the overlapping regulatory mechanisms and uneven responses directed at cruise ships and migrant vessels draws attention to the lethal effects of international law for those trying to cross the sea. The pushing back and allowing migrants to die, which has only intensified during the pandemic, shows the clear limits of international legal regimes based on the logic of the liberal citizen-subject, the flow of capital and the nation-state. The cruise ship has now become a carceral space where crews are confined until further notice and where migrants are detained under the guise of quarantine (Braude 2020). The high seas are a liquid graveyard. The global division of labour, capital and citizenship becomes particularly visible when the cruise ship and the migrant vessel are juxtaposed. The figure of the ocean-borne migrant emerges alongside the dispossessed maritime subaltern labouring class and stands in stark contrast to the white and wealthy passenger.

The pandemic has brought into sharp relief the differential distribution of mobility and immobility, the unequal right to protection and the limits of international law, including the flag of convenience system, the principle of *non-refoulement* and oceanic zoning. Whereas most cruise ship passengers who spread COVID-19 across the globe (Khalili 2020) have long been returned to their countries and are seeking ways to initiate legal actions against cruise lines for negligence, migrants in distress at sea have no recourse to legal protection and are simply left to die. COVID-19 has deepened disputes around who must take responsibility for those at sea, thus illustrating how territorial sovereignty and global ocean governance interact in deadly ways. Closing borders has only exacerbated rising nationalism, xenophobia and racist border policing. Shifting our attention to the cruise ship and the migrant vessel opens a longer historical perspective on who is worth saving and who is left behind. This letting live and letting die, based on racist regimes of freedom of movement, is what Achille Mbembe (2019) calls 'necropolitics'. International law conditions this power to *let live* and *make die*. Contemporary politics of containment and contamination at sea have hardened the boundaries of the nation-state while at the same time declaring a(n) (inter)national state of emergency that leaves those without recourse to legal representation and citizenship the most unprotected.

Notes

1. The 'Middle Passage' is commonly used to reference the seaborne transport of enslaved peoples and the unspeakable violence that European captains and crews inflicted upon African women, men and children aboard ships as they were transported from Africa to the Americas.

2. See https://www.international-maritime-rescue.org/news/sar-matters-defining-distress-continued

3. This article is further expanded in article 8 of the Protocol against the Smuggling of Migrants.

4. It must be noted that the concept of who constitutes a 'refugee' in a legal sense is unstable and dependent on shifting international and local categories. *Non-refoulement* only applies to those who fall within this category.

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Chapter 8

Women, violence and protest in times of COVID-19

Kim Barker and Olga Jurasz

Introduction

The COVID-19 pandemic has brought issues of gender and violence – domestic and political – to the forefront, alongside issues of women's rights to reproductive health care and choices. This is coupled with, of course, the right to protest to protect these freedoms and choices. The large-scale impact of domestic violence during the pandemic – to take one example – highlights this. Cumulatively, however, these issues have been thrown to the front of the public conscience, highlighting the acutely gendered nature of the pandemic itself and its long-lasting gendered impacts.

There are a wealth of issues concerning women's rights in times of COVID-19. Whilst the predominant focus has fallen on the reporting of domestic violence, there are 'untold' narratives about how laws and regulations are used to further restrict women's rights in times of pandemic; the role and remit of emergency legislative measures; women's activism – including online (and offline) protest – to protect their rights in times of pandemic; and the role of women politicians in drawing attention to these issues, not to mention the backlash that is received as a result. The increased dependency on online tools for communication and access to everyday essentials during varying and numerous periods of restricted physical movement has given rise to significant tranches of online violence and abuse that have been directed at women for daring to raise issues connected to women's rights in the midst of a global pandemic.

Whilst progress pre-COVID was being made towards gender equality, the pandemic has disrupted both this progress and the broader gender equality agendas – not least, the commitments expressed in the Sustainable Development Goals. That said, it has also presented a unique opportunity to 'challenge' both the ways in which things are done and how rights have been used – and abused. The pandemic has shown a regression in terms of women's rights, yet at the same time it has illustrated that some women are much more prepared to fight for their rights, irrespective of the health and personal risks involved. Consequently, whilst the pandemic is a marker in time for the damage done to gender equality, it is also an indicator of the resilience of women and their commitment to fighting for their rights – and fundamental rights, too.

Drawing on experiences of the pandemic, this chapter explores the gendered dimensions of violence and protest during COVID-19, focusing on the activism of women and the resultant backlash, all considered from perspectives of violence against women. It brings together three distinct but interconnected themes: women's rights; protest; and the impact of COVID-19 on both rights and protest. Whilst the predominant focus of the chapter falls on law and rights, we situate the discussion within the broader socio-political and global context of the events which took place during the COVID-19 pandemic. We examine examples of (mis)uses of the law as well as women's activism in response to them across the UK, in Poland, Argentina, Namibia, Malta and on social media. We illustrate women's role in advocating for their rights in times of unprecedented disruption (COVID-19) which exacerbated other phenomena such as the global rise in online violence against women and anti-gender propaganda. As such, the discussion presented here positions legal developments during the COVID-19 pandemic not only within the discipline of legal studies but also in politics and gender studies.

Women's rights and COVID-19: gendering the pandemic

The COVID-19 pandemic has had a significant detrimental impact on the progressive realization of women's rights and gender equality, putting a halt to the – admittedly limited – progress made towards realizing these goals. According to the United Nations (UN) Population Fund (UNFPA 2020), the pandemic is likely to cause a one-third reduction in the progress towards ending gender-based violence (GBV)[1] by 2030 – a target set by the UN Sustainable Development Goals agenda – with a predicted additional 15 million cases involving GBV globally for every three months of lockdown.

It is undoubtedly true that the pandemic has impacted on everybody – albeit in different ways and to varying degrees. However, it is essential to emphasize that the impact of the pandemic is highly gendered, showing a clear gender differential and disproportionate impact on women (Eurofound 2020). Whilst emerging sex-disaggregated data suggests higher mortality rates amongst men infected by COVID-19 (Global Health 50/50 n.d.), gendered dimensions of COVID-19 are far from limited to this perspective alone. The International Labour Organization (2020, 9) has noted the disproportionate impact of the pandemic on women's employment, especially in sectors affected by the crisis (e.g. retail, hospitality, arts and entertainment, domestic work), whilst highlighting the additional risks of exposure and burdens placed on health and social workers, the majority of whom (more than 70 per cent) are women (10). Furthermore, the closure of schools and childcare services, as well as disruptions to long-term care provision, have reportedly heightened care burdens for women who, even outside the time of pandemic, carry out approximately three-quarters of all unpaid care work (Bahn, Cohen and van der Meulen Rodgers 2020; Eurofound 2020, 23–4; International Labour Organization 2020, 10). For instance, a study by Eurofound (2020, 23) suggests that on average across EU Member States (EU27), women have been more involved in housework and childcare than men, with the largest difference in hours spent on childcare being reported in the Netherlands – forty-nine hours for women compared to twenty-three hours for men.

Violence against women and the COVID-19 pandemic

The COVID-19 pandemic has highlighted the global problem of violence against women (VAW), especially intimate partner violence and/or domestic violence, but also femicides. Alarmingly, between 28 February 2020 and 13 April 2020 more women were murdered in Mexico than died due to COVID-19 (Castellanos 2020), with many other Latin American countries reporting similar rises in femicide (Lopez 2020). Whilst VAW – and gender-based violence generally – was a significant problem prior to the pandemic, the notable rise in reported cases of VAW and domestic violence across the globe which coincided with periods of lockdown has prompted the UN Women (n.d.) to refer to it as a 'Shadow Pandemic'.

Domestic and intimate partner violence

The Coronavirus restrictions on movement have put women who have already been in abusive relationships (intimate partner or domestic) in a position where they are forced to be in isolation with their abuser(s),

making it more difficult to seek support and report the abuse. Combined with exacerbating factors such as restrictions on movement, likely reduction in income and limited access to support services, this has put many women in a particularly precarious and vulnerable position, frequently with reduced ability to leave their abusers (Council of Europe 2020). The significant rise in cases of domestic and intimate partner violence is far from anecdotal, with emerging data strongly supporting the existence of heightened patterns of violence since the start of the COVID-19 pandemic and during periods of lockdown. In the UK alone, the 24-hour National Domestic Abuse Helpline, run by Refuge, reported a 65 per cent increase in logged reports of domestic violence between April and June 2020, with a further 700 per cent increase in visits to their Helpline website (Office of National Statistics 2020). A notable rise has been recorded in other countries not only across Europe (Gunka and Snitsar 2020) but also worldwide (UN Women n.d.), prompting the UN Secretary-General to call on states to adopt measures to address the 'horrifying surge in domestic violence cases' affecting women and girls (UN News 2020).

The role of technology in the context of domestic and intimate partner abuse has also been highlighted (UN Women n.d.). The increased reliance on the Internet, online services and smart devices during the pandemic has resulted in the growth of technologically facilitated violence against women (TFVAW) (Barker and Jurasz 2020a). Technologically facilitated forms of coercion, control and abuse (e.g. monitoring online communications, disabling location services) have been on the rise since the start of the pandemic. For instance, the Web Foundation (2020) noted the increase in non-consensual sharing of images – mostly within the intimate partner violence context – which aims at threatening and controlling women. Whilst using image-based abuse as a means of intimidating, coercing, controlling and shaming was common prior to the pandemic outbreak, the socioeconomic conditions which have arisen as a result of it have been a significant aggravating factor in exacerbating abusive behaviours. This is echoed by reports from charities and helplines, which have noted a large increase in reported cases involving such abuse (Price 2020). However, TFVAW during the pandemic has not been limited to domestic/intimate partner contexts. A number of other forms of TFVAW – including death and rape threats, stalking, harassment and hostile, often misogynistic (Barker and Jurasz 2019) violence, which saw heightened levels before the pandemic – have manifested themselves in a backlash against those women campaigning for women's rights during the pandemic (Phillips 2020). We discuss this further below.

Furthermore, the surge in cases involving online abuse and TFVAW exposed the precarity of support services available to the victims of such abuse. The majority of these services – including online chat services,

domestic violence hotlines and domestic violence apps – by their very nature require access to a phone, smartphone or another electronic communications device (Barker and Jurasz 2020a, 4). In many cases, the sole reliance on technology as a means of accessing support services has also highlighted the issue of pre-existing economic inequalities, the digital gender divide and digital exclusion, which are particularly felt by women.[2] In addition, given lockdown restrictions around the world, support services have also altered the ways in which they provide some of their support – specifically including online provision[3] – making situations where there are digital transgressions (such as digital coercion and control) even more difficult to address.[4] The combination of these factors has had the very real effect of cutting off digital support services for victims of domestic violence, meaning that the technology once relied upon as a means of support in turn became a further tool of the violence.

Sexual and reproductive rights

Violence against women during the pandemic was particularly visible in the severe limitations on – and abuse of – their sexual and reproductive rights. Women's reproductive choices during the COVID-19 pandemic have been disrupted on an unprecedented scale, with changes in the access to and provision of health care (Barker and Jurasz 2020b). For instance, emerging studies (Kotlar et al. 2021) suggest that COVID-19 has had a significant impact on women's health (UNFPA 2021), especially in maternal and perinatal contexts. A decline in maternal outcomes has been reported on a global scale (Chmielewska et al. 2021). Sexual and reproductive health needs have been severely affected, limiting women's access to reproductive health care and their ability to exercise their reproductive rights, including complete and regular provision of antenatal care (UN General Assembly 2020, para 73). Whilst some governments have prioritized continuation of adequate access to sexual and reproductive health services, others have not only deprioritized this objective, but also taken proactive measures to change the law to further restrict women's (already fragile) rights in this domain. This was particularly observed in relation to abortion, especially in countries that already had restrictive laws concerning termination of pregnancy. As noted by the UN Special Rapporteur on Violence Against Women, its Causes and Consequences, 'some Governments have sought to take advantage of the crisis by restricting those [reproductive] rights and are creating new barriers to access to abortion services by deeming it a non-essential medical procedure' (para 72). For instance, in countries such as Malta, where abortion is illegal, travel restrictions caused by COVID-19 further exacerbated the existing barriers to women exercising their reproductive rights and

being able to travel abroad for abortion. In March and April 2020 alone, the UK-based charity Abortion Support Network noted a 2.3 times increase in the number of requests for help from women in Malta, with Women on Web (a Dutch charity providing abortion pills) reporting that at least sixty-three women from Malta contacted the organization to seek help in the same period (Doctors for Choice 2020).

In the UK, the outbreak of the pandemic prompted consideration of how to provide easy and safe access to abortion for women. However, the provision of access to abortion differed between devolved jurisdictions. In England, the circumstances of the pandemic resulted in a change of regulations allowing women to receive abortion pills via the post for terminations up to ten weeks after gestation (Department of Health and Social Care 2020). The decision of the Department of Health and Social Care was welcomed with enthusiasm by leading human rights organizations (Margolis 2020) and was further endorsed by leading expert bodies such as the Royal College of Obstetricians and Gynaecologists and the Faculty of Sexual and Reproductive Healthcare (2020). This decision was mirrored by the Welsh Government (2020). In Scotland, similar measures were put in place for termination of pregnancy up to eleven weeks and six days, enabling women to carry out early medical abortions at home and, notably, at a more advanced time of gestation than in England and Wales (Scottish Government 2020a). In Northern Ireland, in contrast, despite abortion being legalized as of 31 March 2020, the impact of the pandemic meant that effective access to abortion for women in Northern Ireland has been further delayed. Unlike the rest of the UK, taking mifepristone at home is not allowed under the NI Regulations, making it impossible for women to carry out early medical abortions at home (Bracke 2021). Although the UK experience of ensuring access to abortion amidst the pandemic outbreak has been largely positively received, in the vast majority of countries this aspect of women's reproductive rights has not received similar attention. To the contrary, women have not only faced yet another battle to protect their existing reproductive rights but also an unforeseen fight against arbitrary decisions by authorities to use the pandemic to further restrict this aspect of their rights.

The backlash

The time of the COVID-19 pandemic has been characterized by a huge backlash against women's rights worldwide. The UN Secretary-General, António Guterres, has encapsulated this widespread and significant detrimental impact of the COVID-19 pandemic on women and girls by calling it 'a crisis with a woman's face' (Guterres 2021). As global attention has been focusing

on tackling the virus and combating complex crises arising from it, more insidious tactics have been deployed by some governments to capitalize on the fragility of the situation and to curtail women's rights. This once again demonstrates the power of law to encroach upon women's rights and freedoms.[5]

In a number of countries, the law (including pandemic-related emergency powers) has been used to oppress women and limit their rights. For instance, the far-right populist government in Poland has been attempting to use the COVID-19 situation not only to force through new laws severely restricting women's access to abortion, but also to withdraw from the Council of Europe Istanbul Convention. This is a leading treaty on violence against women ratified by Poland in 2015, which Deputy Justice Minister Marcin Romanowski called 'neomarxist propaganda' and 'gender gibberish'.[6] In England and Wales, the introduction of the Police, Crime, Sentencing and Courts Bill 2021 (hereafter PCSCB 2021) saw a public outcry over the curtailment of rights to peaceful protest and extension of police powers. For instance, the Bill introduced higher sentences for criminal damage to a statue than those applicable to cases of sexual assault or rape. The protests from a number of women's groups and the general public were particularly strong given that the introduction of the Bill coincided with the tragic death of Sarah Everard – a young woman abducted, raped and murdered by a police officer whilst walking to her home in London.

The pandemic has also unveiled other forms of backlash against women organizing and protesting. Zoombombing of events – such as those to celebrate International Women's Day – has become a relatively common occurrence, with pornographic, misogynistic and sexist comments and images disrupting online meetings (Little 2021; Elmer, Burton and Neville 2020) and even university classes (Redden 2020). Furthermore, women's organizing efforts, especially in relation to protests concerning limitations on sexual and reproductive rights during the pandemic, have been subverted by the appropriation of the slogan 'my body, my choice' by anti-vaccination and anti-masks protesters. The hijacking of this landmark reproductive rights movement slogan is particularly detrimental in the specific context of the pandemic. Not only does it undermine decades of women's fight for securing sexual and reproductive rights, but it also depreciates the current struggle to secure such rights amidst pandemic-related restrictions by spreading vaccine misinformation both online and offline.

Protest and the COVID–19 pandemic: a new normal of disruption?

The UK government made amendments to the Public Health (Control of Disease) Act 1984 (hereafter PH(CD)A 1984) on 5 March 2020, enshrining a legal obligation on doctors to report cases of COVID-19. These changes seemed, if not innocuous, then precautionary at that point in the unfolding of the global pandemic. What was – and remains – less innocuous is the profound impact of the pandemic, and the resultant legal restrictions the UK government and devolved legislatures would introduce in the eighteen months following that day in early March.

Pandemic disruption to freedoms: violence and protest during COVID-19

The raft of emergency legislation ostensibly driven by the need to manage the COVID-19 outbreak with a singular focus impacted numerous freedoms that have rarely been at the forefront of everyday thinking in the UK. The resulting powers granted under the PH(CD)A 1984 are all designed to allow for – or, more cynically, circumvent – the usual routes of legislative (and governmental) scrutiny (Barker, Uribe-Jongbloed and Scholz 2021, 125–6) in the pursuit of responding to something representing a 'serious and imminent threat to public health' (PH(CD)A 1984 s 45C). These necessary measures allowed relevant government ministers to table legislative regulations without the usual parliamentary scrutiny in the interests of speed.

This included, in England,[7] legislation that imposed movement restrictions[8] and limited the number of people permitted to meet, both indoors and outdoors. Similar legislation was tabled in Scotland to impose equivalent limitations, preventing people from leaving their homes without 'reasonable excuse',[9] and again limiting the number of people permitted to meet.[10] As the pandemic unfolded, permitted gatherings and numbers of people allowed at gatherings continued to be limited. For instance, the Scottish government position was to consistently categorize protests and demonstrations as outdoor organized events (Scottish Government 2020c). In categorizing these events as 'outdoor', and introducing a numbers cap on attendees, the Scottish government was able to mandate separate guidance for protests and demonstrations (Scottish Government 2021). Consequently, only when the pandemic limitations reached the stage of easing, and reduced limitations were imposed, were demonstrations, protests and 'organized' outdoor events permitted. Even then, they were only permitted in areas in which limitations on movement had been eased.[11] These restrictions had an impact

on all manner of planned protests, but included gatherings organized by women to advocate for women's rights. To take but one of many examples, the Women's March Foundation's annual LA Women's March was cancelled in January 2021 because of COVID-19 concerns (CBSLA Staff 2021). Similarly, in England (and Scotland) the movement restrictions prevented leaving home for protest. This was not one of the 'reasonable excuses' for leaving home, and as such was illegal. This approach was controversial, with numerous MPs and non-profits Liberty and Big Brother Watch all calling for the right to protest to be protected, even during lockdown (Stone 2021).

The disruption of the norms of being able to meet, move and gather in large numbers is something that has sparked much debate, not least because of the interference with the human rights and fundamental freedoms that have become established parts of everyday life. The European Convention on Human Rights (1950) provides protection for both freedom of expression (Article 10) and the right to assembly (Article 11), but both of these rights were 'interfered with' during the most critical stages of the pandemic. The justification for this was in terms of prioritizing the competing right to life (Article 2) given the public health crisis. That said, there is a clear need to balance the Article 10 and 11 rights with those of Article 2. This balance is arguably more pressing given the need to protest, share opinion – including criticism – and demonstrate to protect other fundamental freedoms during periods in which the usual routes for scrutiny and accountability are not available. Hickman, Dixon and Jones (2020), for instance, suggest that there are elements of the Coronavirus Regulations that are unlawful, making the legitimacy of the interference with fundamental rights questionable. These concerns resonate with the outcry from Human Rights Watch (2021a) over the abuse of free speech rights and protections that have been bundled up with overreaching legislation and restrictions. They also accord with the views of Amnesty International (2020b, 2020c), which has reported on the significant number of human rights violations facilitated under the guise of COVID-19 law enforcement. In at least ten countries, government authorities have banned or dispersed protests targeting COVID-19 restrictions, or have used such restrictions to prevent gatherings unrelated to COVID-19 on the basis of social distancing requirements (Human Rights Watch 2021a). The disrupted normality of COVID-19 emergency powers and public health justifications provides a convenient reason for interfering with protest, COVID-related or otherwise.

While not the only measures introduced to prioritize public health, restrictions on gatherings and movement are two of the most obstructive and restrictive for everyday life that have been endured in the periods of lockdown during the pandemic. This is especially the case for women, given the resulting consequences for unpaid labour and for women's safety – both

inside the home and elsewhere – as well as the restricted access to health care and reproductive choices.

The combination of disrupted normality and a significant regression in women's rights is directly attributable to the pandemic. This is combined with the way in which the restrictions are rooted in pre-pandemic structural inequalities. The impact on women has been profound, with increased inequalities undoing decades of work to enhance women's rights, a point highlighted by the UN Secretary-General on International Women's Day: 'even as women have played critical roles during the pandemic, we have seen a roll-back in hard-won advances in women's rights. This regression harms women and girls above all' (UN Women 2021). More fundamentally, the impact on women during COVID-19 has been twofold: first, the restrictions have impacted exercising and benefitting from the advances in women's rights, but second, there has also been a significant interference with the ability to protest against limitations on women's rights, and to campaign for changes to enhance them. At the very time when rights have been at the heart of discussions in the UK and beyond, the ability of women to contribute to that dialogue, and challenge the narrative around them, has been removed by the limitations on protest and gathering.

These limitations have, necessarily, forced women and women's groups to mobilize in different ways and through different channels. The increased time spent at home and connected to the Internet, for example, has provided additional and alternative means of protesting for those with the economic power to utilize them, albeit not without risk.

Women, protest and violence: a COVID-19 cocktail?

The killing of Sarah Everard by a serving police officer not only triggered an outcry over VAW, but also a national outpouring of broader concerns about the ways in which women's and girls' safety is a constant theme. While this was not pandemic-specific, it quickly became embroiled in discussions about protest and women's public safety, as well as about VAW. The gatherings, vigils and protests that followed, as part of what has been described by government adviser on VAW Nimco Ali as 'collective grief' (Dodd et al. 2021), highlight not only the difficulty women face when campaigning for their safety in everyday situations, but also the challenges of doing so during the pandemic itself. Everard's killing also sparked an outcry about the policing of VAW, given that it was a serving police officer who was charged with her murder. This was exacerbated through the (mis)handled policing of the vigils and gatherings planned in her memory, with an initial attempt to obtain a ruling (from the High Court) indicating that a gathering was

not in contravention of the Coronavirus Regulations and was permitted as an exercise of fundamental rights. While the High Court refused to say it could proceed, it also refused to confirm that the Metropolitan Police's policy of prohibiting all protests was unlawful (Dodd et al. 2021). The judicial 'fence-sitting' by Mr Justice Holgate did little to ease the feeling that women were being silenced, although it did not entirely prevent the vigil from being held (BBC News 2021a; Dearden and Dalton 2021).

Despite the official cancellation of the vigil, members of the public nonetheless exercised their right to protest, and gathered as initially planned, with nine women being arrested for breaching Coronavirus Regulations once the police intervened (HMICFRS 2021). Media coverage of the arrests and dispersal of the women gathered at the vigil reinforces the impression that arresting and moving attendees was not done to enforce the movement and gathering restrictions, but rather to silence women and to change the narrative of the debate, thus subverting broader debates about women's rights and safety. The imagery of male police officers using force to arrest women who were commemorating a woman murdered by a male police officer is a stark reminder of the safety concerns triggered by the Everard killing initially. The fallout from the policing of the vigil, the silencing of women and the prevention of them exercising their fundamental rights drew significant outcry, with calls for Cressida Dick, the Commissioner of the Metropolitan Police Service, to resign over the management of the gathering. The Joint Committee on Human Rights (2021) criticized the law and the handling of the policing days later, and sixty MPs advocated for an amendment to the legislation to allow protests, irrespective of COVID-19 limitations (Stone 2021).

The difficulties of protest during the pandemic, especially because of the ways in which it has been policed, have inevitably led to alternative modes of gathering. In Scotland, for instance, online vigils (BBC News 2021b) rather than physical ones were arranged to ensure the safety of women when marking the safety of other women. While this protects the physical safety (at least temporarily) of women in preventing the physical spread of COVID-19, it does little to prevent a different pandemic – that of online violence – from spreading rampantly, and with significant impacts. The use of technology as a 'default' alternative causes significant problems, too, exposing women to different risks, including those of online abuse, of Zoombombing, of being traced and digitally stalked and of being monitored through smart technologies in the home. It is therefore something of a myth to suggest that protesting online is safer than offline, given the significant harms arising from online attacks and the persistent tranches of abusive comments being received. The impacts of online and digital violence are also significant, and have also increased during the pandemic.

The interplay between protest, restriction, violence against women and the resulting outcry was particularly evident at the peak of the lockdown period in England during March 2021. The restrictions on movement were prolonged but also coincided with other factors: the ongoing heightened nature of risks of violence to women, as well as parliamentary moves to amend protest rights in non-emergency times. These issues all came together at the time of the fallout from the Sarah Everard killing and resultant vigil (Dodd et al. 2021), combined with the passage through Parliament of the PCSCB 2021.

The debates over the PCSCB 2021 were profound, more so because of the Everard killing, vigil and policing, and the stark warnings of the impact and scale of VAW. The combination of the events, together with the timing of law reform to further restrict protest (PCSCB 2021 s 59), reflects a staggering lack of sensitivity, not just for women's safety, but for the damage to women's rights too. While the timings of the PCSCB 2021 and the Everard killing were inadvertent, one has compounded the other at the very time when women's rights and safety were at the forefront of national debate.

These concerns were particularly prevalent in the debates in Parliament concerning the Bill, not least because of the lack of consideration of women, and women's safety within it. MPs from all political parties were critical of the Bill, especially for the lack of protections for the right to protest, and for women's rights within the criminal justice system. Stephanie Peacock MP highlighted the shortcomings, remarking that: 'It [the PCSCB 2021] does not mention violence against women once. It fails to address the issue, yet it proposes to give the police extra powers and the right to limit peaceful protest.'[12] This point was reiterated by Charlotte Nichols MP[13] and others, with Apsana Begum MP remarking that: 'The impact of this Bill will be felt … by women, unable to protest at the everyday violence they face.'[14] Anne Mclaughlin highlighted the more pervasive problems of legislation designed to limit the ways in which protest can be held, reflecting on the Everard vigil and the dangers that exacerbated that debacle:

> Given the context of Clapham Common on Saturday night, surely sensitivity should have been the watchword. I cannot imagine how frightened some of the women must have been, particularly given the circumstances. They have just had an alarming reminder that the police uniform does not give a cast-iron guarantee of safety and some of them find themselves on the ground, handcuffed, with knees on their back, flowers for Sarah [Everard] trampled on, legs held down and unable to move at the hands of the police. Sarah Everard was just walking home; these women were just expressing their grief. If the current powers to curb protest can lead to what happened on Saturday night, imagine how much worse it will get if this legislation goes through.[15]

The cocktail of police aggression, women's safety and protest limitations combined potently here to highlight the impact of the pandemic on women's rights and equality – not only offline, but also online. The proposed s 59 of the PCSCB 2021 was designed to replace the common law offence of public nuisance.[16] However, it had remarkable similarities to the limitations imposed through the Coronavirus restrictions – invoking a 'reasonable excuse' defence where there was a prosecution under the proposed new offence (PCSCB 2021 s 59(3)). Given the parallels to the pandemic restrictions on protest, and the striking similarity in their application, it is little wonder that there was significant outcry. That said, the PCSCB 2021 went further than the Coronavirus Regulations limitations because it was not time-limited. Rather, it was reflective of a more permanent change. Rozenberg (2021) suggested the proposed reform was 'In principle, a good thing', yet others, including Liberty (2021, 1), described it as a 'concerted attack on the right to protest'. The breadth of the proposed new offence suggested that these powers can – and will – be used to stifle any kind of protest. Given the damage which was caused to fundamental rights, to protest, to policing and to women in March 2021, the legislation was particularly problematic. It offers nothing in the way of protection for women's rights and women's campaigning, serving instead to echo notions of 'disaster patriarchy' (p. v).

Gendering protest during the COVID-19 pandemic

In spite of the difficulties posed by the (ab)use of law to curtail women's rights, the pandemic and periods of lockdown have also been marked by remarkable resilience on the part of women across the world, as evidenced by their efforts to mobilize and organize to fight for and defend rights, freedoms and democratic values. Women's protests – both online and offline – have rapidly become a key tool in holding governments to account for their actions and ensuring scrutiny for heightened powers, especially in light of many parliaments shutting down due to the pandemic. Although many of the protests had a clear focus on women's rights – such as anti-femicide protests in Namibia (#ShutItAllDown) (Ossenbrink 2020) or protests in Argentina to pressure the government to decriminalize abortion (Fernández Anderson 2020) – women's protests have also become symbols of resistance and have embodied the fight for democratic values and freedoms of others. For example, the Polish Women's Strike (Ogólnopolski Strajk Kobiet[17]), which started as a pro-abortion/reproductive rights movement, has become a much broader movement with a strong social mission and increasing social support across the political spectrum.[18] Whilst equality and women's rights remain central to the work of the Polish Women's Strike,

the organization has adopted a thematic approach to its demands and proposals directed at the Polish government. This includes (but is not limited to) access to health care, discrimination against LGBTQI+ persons, labour conditions, climate change, education and a free media.[19]

The pandemic has also prompted different ways of mobilizing and organizing protests – especially online. Expanded online mobilization, as well as use of social media including Twitter, Instagram and Facebook, has enabled women to more efficiently organize both locally and globally, especially amidst various pandemic-related restrictions on physical protest (see, e.g., Alcoba 2020). The use of hashtags on social media (e.g. #NiUnaMas, #ReclaimTheStreets), often accompanied by short videos, pictures and messages expressing support for women's strikes, have been a testament to the scale of women's movements and the contemporary significance of this work. However, protesting during the pandemic has also come at a significant personal cost to the protesters. For example, in Poland many protesting women have been harassed, threatened (both online and offline), subjected to hate[20] and even detained on bogus charges for taking to the streets to oppose governmental policies and proposed changes to the law (Human Rights Watch 2021b). The continuous attempts of the authorities to suppress protests through the use of excessive force, detention and various harassment measures (Amnesty International 2020a) highlight the threats faced by protesters and human rights defenders. It also demonstrates the authorities' determination to crack down on the right to peaceful protest (Human Rights Watch 2021b).

Conclusion

The experience of the COVID-19 pandemic has undoubtedly brought to the fore the scale of social inequalities and their continuing impact on the lives of women. It has also reaffirmed points which have been made by feminist movements for decades with regard to the 'hidden' value (and cost) of women's work, especially in care, as well as the need to address structural causes of inequalities and violence against women. The unprecedented times of COVID-19 have highlighted the amount of work and the interventions – at international, regional, state and local levels – that still need to be done to ensure that women's rights are effectively protected at all times.

Furthermore, the striking differences in states' approaches to women's rights and tackling violence against women in times of pandemic highlight the gendered dimensions of law and politics, and the power of law in curtailing women's rights. One of the key 'lessons learned' during the pandemic is the duality of the power of law. Whilst the law is crucial in

upholding rights and liberties (especially in times of crisis), it can equally be abused by authorities and governments to curtail the rights and freedoms it is empowered to protect in the first place. Women's rights occupy a very frail place within this dynamic.

As such, the right to protest as a tool for accountability against the abuse of power by governments is more important than ever. Women's mobilization, organization and protests throughout the pandemic (and in spite of it) have been crucial in upholding women's rights and minimizing the negative impact on gender equality. That said, women's protests have become much more than just a fight for women's rights. They have become a lasting symbol of the fight for freedoms and democracy for everyone.

Notes

1. Throughout this chapter, the terms gender-based violence and violence against women are used. Violence against women is understood here as a form of gender-based violence, as categorized by the CEDAW Committee and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence 2011 (the Istanbul Convention: Preamble and Article 3(a)).

2. For example, in low- and middle-income countries, 234 million women are unable to connect to the Internet and 143 million fewer women own a mobile phone compared with men. See: GSMA (2021).

3. For instance, Women's Aid is using online chat options. See: Women's Aid (2020).

4. This problem is something that is not exclusive to the UK or Europe, and has been widely witnessed elsewhere: Marganski and Melander (2020).

5. The argument presented here draws on the critique of the law and legal system put forward by Carol Smart (1989).

6. https://twitter.com/MarRomanowski/status/1260469909189988353?s=20.

7. Legal regulations having equivalent effect were introduced through devolved legislatures.

8. The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, ss 6–7. These regulations came into force on 26 March 2020, at 1pm.

9. The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 (revoked) SI 2020/103, s 6.

10. The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 (revoked) SI 2020/103, s 8.

11. In Scotland, demonstrations, protests and mass gatherings were permitted only once a locality reached one of levels 0–3 in terms of restriction. See Scottish Government (2020b).

12. Hansard, HC Col 90, 15 March 2021.

13. Hansard, HC Col 109, 15 March 2021.

14. Hansard, HC Col 106, 15 March 2021.

15. Hansard, HC Col 80, 15 March 2021.

16. The PCSCB 2021 received Royal Assent on 28 April 2022.

17. @strajkkobiet.

18. Social support for the Polish Women's Strike reached nearly 70 per cent in January 2021, including approximately 1 in 3 supporters of the ruling far-right Peace and Justice party. See Karwowska (2021).

19. https://www.loomio.org/osk.

20. For example, Marta Lempart, Polish activist and the founder of the Polish Women's Strike, has openly spoken about the harrowing wave of online and offline hate received due to her involvement with the movement as well as the significant personal and economic consequences of her activism (IPPF 2021).

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Chapter 9

COVID-19 and the legal regulation of working families

Nicole Busby and Grace James

Introduction

In this chapter we critically assess the UK's response to COVID-19 in terms of its implications for working families with care-giving responsibilities. The chapter draws upon a prior historical consideration of how working families have been regulated through labour laws and policies (Busby and James 2020) and builds upon the arguments presented there by considering the repercussions of the UK state's response to the COVID-19 pandemic. Our critique is framed with reference to the vulnerability theory (VT) pioneered by Martha Fineman (2008, 2010, 2019, 2020), which has at its heart the vulnerable subject as an alternative to the 'mythical autonomous liberal subject of neoliberal rhetoric' (Fineman and Grear 2013, 2). We demonstrate how, during the pandemic, priorities were framed, and policies imposed, that expose and compound existing fragilities surrounding law's engagement with working families in the UK. Here we consider the impact of the state response on working parents and carers as well as those requiring care, specifically older people with care needs and children. Of course, families are composed and function in myriad ways that defy classification based on social identity (Fineman 2020, 30). VT helps reveal part of our core argument: that the interests of working families have largely been sidelined or ignored during the pandemic. The response of the UK to the pandemic is reflective of an historically embedded approach which problematically underscores and promotes liberalism's idealization of the autonomous and independent 'liberal legal subject'.

We then consider the UK government's long-term strategy for recovery from the effects of the pandemic and assess this with reference to VT. This analysis demonstrates that despite the pandemic's exposure of substantial gaps in the legal and policy framework surrounding working families and the huge social costs endured by many, no real lessons have been learned: the government's response is to revert to 'business as usual'. We conclude by reimagining an alternative vision, one where 'the vulnerable subject' is the target of legal and policy intervention, and consider what the resulting framework might offer by way of improvements to the lives of working families.

Theoretical framing

Fineman (2008, 10) contrasts the vulnerable subject with the liberal subject, which is the human construct at the heart of political and legal thought. As the following analysis shows, individual transactions and interactions with the state and its institutions are focused on this supposedly autonomous and independent actor in processes of negotiation, bargaining and consent. Competence is assumed and differences in power, circumstances or ability are ignored. In contrast, Fineman argues, the state should act on behalf of the vulnerable subject, representative of all of humankind, which recognizes that our vulnerability is inherent and inescapable (19). This approach has obvious resonance in the context of a global pandemic through its recognition that our corporeality places us in a state of constant vulnerability. In contrast to dependency, which in most cases arises from a temporary phase such as childhood, illness or old age, vulnerability is 'universal, inevitable and enduring' (8). In arguing that '[l]ike vulnerability, dependency is not a harm or injury, nor is it deviant or exceptional', Fineman (2020, 28) underlines the distinction between vulnerability which 'arises from the characteristics and essence of the body' and dependency which describes 'relationships we have with particular social or institutional arrangements'. In critiquing the law and policy framework relevant to working families, VT has much to offer. It has been particularly influential in critical feminist legal theory, as it can help us to understand and give value to reproductive labour and care for dependants (Kittay 1999; Dodds 2007; Fineman 2008; Busby 2011; Busby and James 2020). This understanding of vulnerability as an inevitable consequence of human existence has also been used to theorize disability in ways that seek to challenge oppression and problematic paternalism (Beckett 2006; Clough 2017).

In challenging the political liberalism that idealizes the liberal legal subject as the appropriate target of law and policy, VT offers an alternative

political theory which is based on collective societal responsibility rather than the valorization of individual autonomy and endeavour. VT thus offers a theoretical frame which draws on our common humanity and which provides an opportunity to assess the impacts of pre-existing structures, systems, processes and practices on our ability to live with and through the pandemic. The resulting analyses can inform our choices about how we want to live in the future and how law can best support those choices. In this way, VT can directly contribute to the desire that lies at the heart of this collection to make sense of the relationship between law and the pandemic through the insights offered by the humanities.

The counter to vulnerability is not invulnerability but resilience, which varies between individuals based on our capabilities and the opportunities that we are able to access over the life course. It is this variation that determines individuals' susceptibility to harm. Central to VT is the claim that we have a collective responsibility, exercised through the state, to be responsive to vulnerability, primarily through the establishment and support of societal institutions which aid the building of resilience (Fineman 2010, 255). The 'responsive state' is thus driven by meeting the practical and ethical obligations involved in the inevitably messy realities of our embodiment over the life course. The role of the responsive state is not to eliminate vulnerability, which is a constant – and often positive – feature of our humanity, but rather to mediate, compensate or lessen any negative consequences of our collective and individual vulnerability by promoting greater resilience in individuals and institutions. Thus, 'comparisons should not be made between individuals based on how vulnerable they are, but between states and institutions based on how good they are at providing us with resilience to our shared vulnerability' (Mattsson and Katzin 2017, 117). Resilience in VT is not embraced in order to promote the negative, neoliberal desire to glorify independence and autonomy. Rather, accepting the state's role as a resilience-builder enables us to interrogate institutional arrangements and practices that (re)produce inequalities and injustices and perpetuate disadvantage, and to reimagine state activities and obligations. In this way, VT 'brings institutions – not only individual actions – under scrutiny, redirecting attention to their role in providing assets in ways that may unfairly privilege certain groups, even if unintentionally' (Fineman 2008, 18). Fineman (2019, 342) calls for 'a state that is responsive to universal human needs and for the reorganization of many existing structures, which are currently based on a conception of legal order that unduly valorises individual liberty and choice and ignores the realities of human dependency and vulnerability'. It is with this in mind that we interrogate the UK government's response to, and recovery plans out of, the COVID-19 pandemic.

The state response: a working families' perspective

There is no doubt that the catastrophic and global nature of the COVID-19 pandemic, which has caused millions of deaths and continues to have an impact on the health, well-being and functioning of most of humanity, required a state response. In this chapter we unpack and consider what the UK state response reveals about law's engagement with working families from a VT perspective. The plethora of government interventions impacting the lives of working families have changed during the pandemic, with variations between the four nations of Scotland, Wales, England and Northern Ireland. Our focus and primary evidence base is England, although we flag English-specific and/or devolved policy provisions where relevant. As a whole, the interventions under review represent a degree of state interference that is, in the UK at least, historically unimaginable and certainly unprecedented in peacetime (Rodgers 2021). It is this broad interface of regulation that we seek to capture when we refer to the UK state's 'response' to COVID-19.

We do not offer a detailed account of all legal provisions, but the term clearly incorporates key measures that have impacted the functioning of the labour market. These include the March 2020 Health Protection (Coronavirus, Restrictions) Regulations that restricted movement of workers in England (similar regulations were enacted in the devolved nations), requiring us to 'work from home where possible', and a tier system of local restrictions from March 2020. They also include the UK-wide Coronavirus Job Retention Scheme of March 2020, whereby the state covered 80 per cent of a furloughed employee's wages up to £2,500 (for discussion of the scheme's pitfalls, see Bogg and Ford 2020) and relevant provisions around schooling, childcare and other care-giving facilities.

The first enforced school closures were announced in March 2020, with schools remaining open only for critical workers and vulnerable children. Most schools opened, with limitations imposed, for some year groups prior to the summer recess, but a further lockdown occurred across the UK from January to March 2021, after which regular lateral flow tests (home testing) and mandatory face coverings were introduced alongside a complex system of home isolation requirements for those testing positive as well as for anyone who had been in close contact with that individual. Early year (EY) providers were also closed during the first lockdown but not the second, and care homes closed their doors to visitors and subsequently introduced limited visiting provisions.

Finally, the term includes the more generic measures and guidelines that have impacted everyone's lives during the pandemic, such as the general restrictions on travel within and beyond the UK, rules around isolating,

distancing and face coverings, closure of non-essential businesses and often strict limitations on which individuals could meet, as well as how many and where.

The state's response to COVID-19 has penetrated all aspects of our lives. The following discussion explores the impacts of the UK state response to COVID-19 on working families, focusing on working parents/carers first and then considering the 'cared for' – children and older people in need of care. We demonstrate that the impacts of the state response have been immense and consider, more broadly, how lived realities of working families have too readily been ignored, undervalued and sidelined.

Parents and carers

The state response to COVID-19 is reflective of a deeply entrenched problematic approach to regulating working parents and carers per se. Despite legislative reforms over several decades in both the UK and the EU that have clearly responded to the need for paid work and unpaid care work to be reconciled (for critiques, see Lewis and Campbell 2007; Busby 2011; Busby and James 2015; James 2016; Caracciolo and Masselot 2020), it is still too often assumed that unpaid care work is *easily* absorbed by families in general, and mothers or daughters in particular. This assumption has been promoted throughout history by policies of gendered 'familization' which construct care work as a principally private, female concern (Busby and James 2020; Herring 2013, 110–15). This problematic assumption is itself underpinned by an equally problematic belief that families are permanent, unchanging, always willing and competent institutions in this regard (Fineman 2004, 155). The core assumption of easy absorption has, we would argue, permeated the response to COVID-19, and harmed working parents and carers.

The ramifications of the approach adopted to circumvent the repercussions of COVID-19 consistently downplay or ignore the implications of those policies for working parents and carers. The lived realities that have resulted from the state response have been considerable. These realities undoubtedly change over time and, significantly, vary between individuals. For example, the 'pandemic journey' has been substantially harder for the 1.8 million lone parents in the UK and those caring for children with special needs – and the existing inequalities of their circumstances have been 'exacerbated' as they cope with what has been months of pressure (Clery, Dewar and Papoutsaki 2021; Disabled Children's Partnership 2020). To demonstrate the harms caused, three broad core realities are outlined here: the increase in workload experienced by parents and carers, the impact on mental health

and well-being of working parents and carers, and the repercussions in terms of workplace security and experiences.

Workloads

Lockdowns, closures of schools and childcare provisions, and isolation policies have meant that, for many working parents and carers, home schooling and/or a significantly increased amount of care work and domestic chores had to be undertaken alongside paid work responsibilities (IFS 2020). In addition, the response often disrupted informal support structures, revealing and restricting an 'invisible workforce' that, pre-pandemic, enabled many working parents and carers to function productively (see Lafferty et al. 2021 for discussion of this reality in Ireland). Moreover, studies demonstrate that the majority of the inevitable additional unpaid care work that resulted from national lockdowns was undertaken by women. There is evidence that during lockdowns, fathers in households with different-sex parents doubled the amount of time they spent caring for their children, especially where they had lost their job or had been furloughed, and their partners had continued in paid work (IFS 2020). However, the same study suggests that mothers spent less time than fathers on paid work and were interrupted by household responsibilities over 50 per cent more often. For working carers, the number of hours spent caring increased significantly, as the help they would normally have received – both formal and informal – was drastically cut (Dementia UK 2020).

Mental health and well-being

The mental health of working parents in the UK has deteriorated more significantly than that of other members of the population during the pandemic. This is strongly related to financial insecurity (see below) and childcare/home schooling (Cheng et al. 2021). This is not equally distributed, however: a study of working mothers by the Trades Union Congress (TUC 2021) found that nine out of ten mothers had experienced stress and anxiety during the pandemic, and Cheng et al. (2021) found that greater numbers of mothers and working parents in poorer families experienced mental health issues. Many working carers also experienced significant difficulties around mental well-being during the pandemic. For example, a study by Dementia UK (2020) found that carers experienced greater feelings of isolation (89 per cent) and loneliness (85 per cent).

Workplace insecurity

The state response to COVID-19 caused huge repercussions in terms of workplace insecurity. The number of recorded redundancies in the UK during the pandemic is far greater than the highest rate reached during the 2008–9 financial crisis – 370,000 in the three months to October 2020 (ONS 2021) – and unemployment was predicted to increase dramatically following the end of the furlough scheme in September 2021 (see discussion in Cribb and Waters 2021). Job insecurity and in-work poverty are likely to challenge many families, and this is particularly concerning given the poverty levels, discussed further below in relation to children, that already exist in the UK.

Whilst redundancies and an increase in job insecurity are likely to affect all workers, the state response again has been particularly harmful in this regard for women. Indeed women, not least because of the implications of closures of the workplaces where they are often employed, were more likely to have been compulsorily furloughed. Women were also more likely to leave or lose their paid employment (IFS 2020). Yet, interestingly, where working mothers requested to be furloughed to enable them to care for and home-school their children, their requests were overwhelmingly denied (TUC 2021). The scheme clearly protected the needs of businesses and employers but was used less sympathetically in relation to the needs of working families. It is unsurprising that many mothers used annual leave to manage the extra care work required during the pandemic, or reduced their working hours, or took unpaid leave (TUC 2021). These strategies adopted within working families offered short-term solutions, but as the state response to the pandemic entered a new phase of ongoing sporadic home schooling due to contact rules in schools and limits on wrap-around care, the struggle, especially for lone parents (Clery, Dewar and Papoutsaki 2021), to balance paid work and care work was set to continue. Of course, the wider picture is key here, as workers without care-giving responsibilities are more likely to have been able to thrive during the pandemic, with less commuting time and more availability to rise to the work-related challenges that the pandemic might create. This cohort will be more likely to benefit, in the long term, from demonstrating loyalty, whilst, restricted by the constant and exhausting realities of lockdown, working parents (especially mothers) and carers will have been less able to perform beyond what they are contractually obliged to do during the working week. This gendered dimension of the harm caused by labour laws and policies is reflected in our historical engagement with paid employment and unpaid care work (Busby and James 2020). The state's response to COVID-19 is likely to have entrenched gendered expectations and to have reinforced the divide between the experiences of workers with and workers without care-giving responsibilities, bolstering the problematic liberal subject that VT seeks to challenge.

Having touched on some of the key implications of the state response for working parents and carers, it is clear that many have struggled, and many continue to struggle, as a direct result of the restrictions imposed. The main argument presented here is that the particular realities outlined above have been consistently ignored or downplayed. This is not new – it is in keeping with an historical approach to working parents and carers that has consistently prioritized and privileged certain groups and interests above others (Busby and James 2020) and, in doing so, has denied the realities of the human condition (Fineman 2008, 2019).

Dependants

This section shifts the focus to those family members who are dependent upon others for their care – elderly dependants and children – and demonstrates how the state response also under-represented and sidelined their needs during the pandemic.

Elderly dependants

Whilst the needs of older dependants, whether living in care homes or within family homes or living alone, have also been under-represented in the state response to COVID-19, it is not that this cohort have been ignored. Indeed, much of the initial state response and later the vaccine roll-out was largely initiated with a core stated aim of protecting the 'vulnerable elderly'. This very construction is problematic, as it positions old age as a 'separate category of human existence' rather than viewing it as a natural part of the human life cycle (Mattsson and Katzin 2017, 129; Fineman 2008, 12–13). Moreover, whilst the well-being of older people appears to have been a core focus of state attention, it is clear that their real needs have been secondary to the greater ambition of protecting the NHS and getting all 'non-vulnerable and autonomous' individuals back to normality. A closer consideration of the real impact of the development of the state response on older people reveals how their lived realities have not been adequately engaged by policy makers. In fact, these members of working families, who are in need of care in their old age, have arguably suffered an immeasurable amount of harm as a result of the state response to the pandemic. Research undertaken by Age UK (2021) discovered that many older people found that their physical health and mental well-being deteriorated during lockdown restrictions. Many reported isolation and loneliness, and suffered when support with mobility and meal preparation was withdrawn. Even in periods where restrictions on movement and lockdowns were not

in place, many older people were unable or unwilling to leave their homes because they were shielding or simply concerned about the virus, which is understandable given that it is older people who are most at risk of developing complications and dying if they contract COVID-19. The Age UK study found that 'many face a double-edged sword where they are afraid of leaving the house but at the same time cannot cope with the loneliness and isolation at home' (11).

These impacts felt by older people largely echo those felt by all generations, but the knowledge that COVID-19 could, for them, be fatal impacted their lived realities in a particularly profound way. However, the variety of concerns of older people were not identified or factored into the state response; hence, the impacts on them and their particular needs, as with those of their carers, have been ignored. For example, one study shows that for those with dementia, the imposition of restrictions on movement and visitors, staff turnaround and mask wearing was particularly harmful (Alzheimer's Society 2020). It is also clear that older BAME people, who may be more likely to catch COVID-19 and more anxious as a result, were disproportionately affected by the virus (Age UK 2021). In terms of our core argument, these nuances of the lived realities of older members of families appear to have been under-explored and under-represented when policy responses to COVID-19 were developed. Indeed, the state response was reactive, with the government appearing to have lacked *any* clear strategy, or to have even been willing to sacrifice the needs of older people in developing its response. This is especially evident in the lack of strategy around personal protective equipment (PPE) in care homes. A study by Brainard et al. (2021) found that a lack of PPE or inadequate supplies helped to spread the virus amongst care home residents, who were very likely to have health complications that could more easily lead to hospitalization and death. Problems with maintaining consistent staffing levels within care homes during the pandemic were never prioritized by the government and, significantly, an abhorrent policy of releasing individuals who tested positive for COVID-19 in hospital back into care homes was mandated, which increased the spread with catastrophic results. A Public Health England report (2021) acknowledges that mistakes were made, and that this policy led to hundreds of deaths in care homes in England and Wales. However, the report has been criticized for using a methodology that underestimated the true impact, especially given the problems with testing during that time (O'Dowd 2021).

Children's well-being

The final family members to be considered in this section are dependent children, and here we outline how the state response failed to engage meaningfully with their well-being. The closure of schools and EY settings, the impact on childminders and, later, the isolation rules are the main responses that had a direct impact on children's lives. They are our core focus here, but the lived realities are also fundamentally affected by broader impacts of the pandemic and the state response. For example, COVID-related increases in redundancies (see above) and poverty (discussed further below), increases in incidents of domestic violence and severity of abuse (ONS 2020; Harvard 2021), the operation of furlough schemes (TUC 2021), the impact of ending eviction bans and rent and mortgage payment relief (Hetherington 2021) and the deaths of loved ones from/with COVID-19 (Young Minds 2021) have all hugely impacted children's well-being. In addition, the economic impacts of the pandemic and the approach to fiscal management in particular are likely to have a negative impact on the well-being of this generation of children for years to come (Mayhew and Anand 2020). These issues are an important part of the monumental harm caused to children by the UK state response, and whilst their detailed consideration is beyond the scope of this chapter, we outline key detriments caused to children's academic/developmental and mental health and well-being, once again to demonstrate the persistent sidelining and under-prioritization of the lived realities of families.

Various changes have been made to the academic grading process for students whose studies were impacted by the lockdowns during years when they would normally sit exams, but these were hugely controversial. Concerns were raised around the fairness and appropriateness of the processes adopted and the broader implications of loss of learning opportunities. The closure of schools meant that, not including the impact of isolation rules, most children missed over half a year of face-to-face schooling (Sibiete 2021). It is estimated that children face losing over £350 billion in lifetime earnings as a result of lost learning opportunities (Sibiete 2021; Thorne 2020; Adams 2021).

Beyond their academic significance, schools and EY settings are also key to children's social development and their physical and emotional well-being. The broad importance of in situ schooling – including face-to-face teaching and organized sports, performing arts and music events – is well known. The majority of EY providers felt that upon return after the first lockdown, many younger children had regressed in terms of their basic development: for example with language and communication skills, toilet training and confidence. Interestingly, regression was noticeable where parents had been

unable to spend quality time with children at home during the lockdown due to work pressures (Ofsted 2020). In relation to mental health and well-being, there is evidence of an increase in poor mental health in children during the pandemic: the Mental Health of Children and Young People in England report estimates that 16 per cent of children aged 5 to 16 had a mental health issue in 2020, compared to 10.8 per cent in 2017 (NHS 2020). Children with existing mental health conditions reported how symptoms had worsened during lockdowns (Young Minds 2021), and it seems that already fragile NHS provision is now stretched beyond capacity, leaving needs unmet.

Beyond the list of harms that the state response to COVID-19 has caused, or at least magnified and exacerbated, the fact that the response has cemented persistent forms of inequality is particularly evident in our discussion of children's well-being. The shift to online learning left many without access to education, as they had no or inadequate devices or space for working at home. Families often felt that children with special needs had been 'forgotten about' (NCB 2020), and school closures had a particularly harmful impact for the most 'at risk' children. There was a significant rise, of nearly a quarter, in the number of child exploitation and abuse cases reported to charities and councils, and yet this was felt by many to be the tip of the iceberg, as there had been a worrying decrease in referrals to social services from schools, clubs and health visitors (Razzall 2020; NSPCC 2021). Many children were simply 'off the radar' during lockdown and isolated from those who could offer protection against an increased threat of abuse and exploitation both online and offline (Interpol 2020).

For many families, however, basic poverty magnified the hardships they faced during the pandemic. The state's historical failure to tackle child poverty in the UK has been revealed, and the problem escalated as a result of its response to COVID-19. Millions of families had been living in poverty prior to the pandemic – an estimated 34 per cent of children in the UK in 1999/2000 (House of Commons Work and Pensions Committee 2003–4). Before COVID-19 this number had been predicted to rise to over 37 per cent, or over five million children, by 2020 (Hood and Waters 2017). Poverty levels increased as family incomes reduced – and was further exacerbated when the furlough scheme came to an end – with an increasing number experiencing food insecurity (Loopstra 2020) and resorting to the use of food banks (Trussel Trust 2020). For many children school meals are a necessity: there was a national outcry at the numbers going hungry when schools were closed, but the true depths and implications of child poverty in the UK have been historically and conveniently ignored (Busby and James 2020, 106), or constructed as a private familial problem (Main and Bradshaw 2016). To be clear, though, poverty 'permeates every corner and every crevice of the poor child's social landscape' (Goldson 2002, 686). The fact that basic

welfare provisions were not a central concern when initiating a response to COVID-19 reflects, once again, how the realities of children are 'often invisible in a society that promotes the interests of those who are already in possession of power and resources – those who are autonomous and self-sufficient' (Busby and James 2020, 110).

We have demonstrated how the implications of the state response for parents, carers, older people and children has exposed fundamental flaws: the needs of members of working families are not valued and care work is not fairly distributed. Cracks in the historical retreat of state responsibility for care (Busby and James 2020) have been revealed. This has occurred over many decades of familization strategies which, over time, (re)placed the main onus for care work firmly upon individuals and families. Within the context of this deeply neoliberal framework, families and outsourced care providers have clearly struggled to support those in need of care throughout the pandemic. The ongoing lack of state support for these critical institutions has perpetuated and deepened harms to parents and carers and those in need of their care. The state response has exposed the limits of a strategy that fails to apportion responsibility fairly for the provision of care work and to support such work which arises because of our human vulnerability and dependency across the life course.

A vulnerability approach

What can VT add to the current critique of the UK's response to COVID-19 in terms of its implications for working families with care-giving responsibilities? Under Fineman's schema, vulnerability is both embodied – our physical state makes us all susceptible to viruses and other ontological harms – and embedded, so that we are all part of or connected to social institutions through the state in all its guises including its narrow governmental form. VT recognizes and asserts our connectivity and dependence through the various relationships that structure our lives, whether within the 'private' domain of the family or the 'public' realm constituted by the various state institutions on which we are all, to varying degrees, reliant over the life course. These institutions are themselves vulnerable to the effects of changing extraneous circumstances, including government policy (Fineman 2008, 11; 2010, 269). The relationship between our shared and individual vulnerability and the conditions imposed upon us by the pandemic is clearly identifiable. However, the undoubted challenges which have shaped our lives since 2020 derive largely from the pre-pandemic landscape and the lack of recognition within existing law and policy of the need to counter vulnerability with resilience.

When the pandemic hit UK institutions, the education system and childcare infrastructure, which as core sites of our collective reliance building should have long been the recipients of state investment, were sorely tested and found wanting in myriad ways. These institutions, collectively deemed to be the stalwarts of the UK's system of support and often held up as exemplars of 'the best of British' (see, for example, Johnson 2019), floundered and, at times, appeared to lack the necessary infrastructure and resources to mount an effective and sustainable response to the pandemic. As the discussion above has highlighted, much of the responsibility for supporting and caring for individuals was (re)located in the family, and it became increasingly apparent that the public institutions had in fact been weakened and depleted over many decades by the liberal state's preoccupation with privatization.[1]

The delegation of care primarily to women through their roles as mothers, daughters and partners is evident in the shift from public service provision to the private profit-making sphere. Yet the distinction between private and public that liberalism's social ordering is predicated on is itself a false and fictive premise. This resulting dichotomization of home and work, reproductive and productive labour, is reflected in Britain's post-war settlement. The creation of the modern welfare state was intended to herald a new social contract between the state and its citizens with a focus on social intervention and redistributive policies intended to provide protection 'from cradle to grave'.[2] However, despite an increased emphasis on the state's role in protecting and advancing the rights of workers, unpaid care work in the post-war era remained an almost exclusively female activity which took place within the private and unregulated confines of the family home. Women's waged labour was viewed as secondary to their care commitments. Men, in their role as 'breadwinners', were deemed responsible for bringing home the family wage. State interference in household arrangements, although seemingly innocuous and laissez-faire, was distinctly engaged in maintaining this gender order over the subsequent decades (Busby and James 2020, Chapter 2). As Judy Fudge (2015, 14) asserts, 'The boundaries between home/market and public/private have become deeply inscribed in contemporary legal doctrines, discourses, and institutions to such an extent that the initial jurisdictional classifications appear natural and inevitable rather than political and ideological.'

VT challenges the central tenets of liberalism, namely that the market is autonomous and that the state is, in turn, neutral and inactive, by offering an alternative account of the market and the state's role in social and economic ordering. In Fineman's (2010) view, the state is always active and the central question we should ask ourselves is 'in whose interests does it act?' Likewise, the notion of markets as naturally occurring, self-sustaining

phenomena is replaced by an understanding of them as man-made constructs imbued with an innate ability to reproduce and sustain pre-existing hierarchies of power and privilege. The liberal subject is rational, autonomous and unencumbered, enabling him to participate 'freely' in the contractual relations necessary for the operation of the market through the performance of productive labour. Notwithstanding the encumbrance such an individual almost certainly places on others who are required to perform reproductive labour on their behalf, this formulation overlooks the basic human need for interconnectedness which arises from our universal vulnerability (Fineman 2019, 357). A responsive state which acts in the interests of the vulnerable subject who, as the true subject of legal and policy intervention, is representative of all of us, 'fulfils [its] responsibility primarily through the establishment and support of societal institutions' (Fineman 2010, 255) concerned with imparting socially just outcomes. Our ability to counter our inherent vulnerability through resilience building, which, because of our social and economic positioning, will vary, is led and facilitated by the actions of the state. The pandemic exposed our vulnerability both through our physicality and in relation to our embeddedness in social institutions and relationships. How has this shared experience shaped the UK state's medium- to long-term plans for recovery as we move out of the pandemic?

The UK's COVID recovery plan

The UK government's COVID recovery plan is built around its 'Build Back Better' initiative, which focuses on economic growth. In the Spring 2021 budget, Chancellor Rishi Sunak announced a '£65 billion three-point plan' (Sunak 2021). In extending the furlough scheme and support for the self-employed, and continuing the £20 uplift in universal credit for a further six months, the spending plans provided some short-term relief for those families struggling to manage the continuing uncertainty brought about by the pandemic. However, the longer-term recovery plan is based on a particular interpretation of the events of 2020 and their causes and effects, as well as on a specific conception of the role of the state in guiding the country out of the crisis. The budget set out a range of fiscal repair measures, by which the government expected to reduce borrowing from its 2021 rate of 10.3 per cent of GDP to 3.5 per cent in 2023/24, its aim being to reduce the budget deficit to near zero during the same timeframe. However, the renewed focus on fiscal consolidation is likely to require a return to the austerity policies that predated the pandemic and which 'had undermined the very services – health and social care – that were needed for an effective

response and, thereby, directly contributed to the UK having one of the highest mortality rates from Covid19 in the world' (Women's Budget Group 2021, 6). This return to the economic modelling of the past is repeated in other aspects of the recovery strategy.

With its plan to 'build back' literally through construction projects, the government adopts a very narrow conception of what comprises infrastructure. The focus on narrow economic goal setting does not extend to investment in the UK's social infrastructure, including health, education and social care, which was found to be so seriously under-resourced during the pandemic and which has undoubtedly been further depleted as a direct consequence of it (Women's Budget Group 2021). Even on a purely market-based assessment, such investment with accompanying social goals, for example to eliminate or reduce child poverty, could be seen as the stimulus needed to yield increases in productivity and employment as an aid to recovery. Furthermore, because of the large numbers of women employed in related occupations, investment in social infrastructure would contribute to closing the gender pay gap, which has potentially widened during the pandemic (Scott 2020).[3] Despite the closure and consolidation of many businesses, particularly in the service sector (Women and Equalities Committee 2021, Chapter 2) – another big employer of women who were significantly more likely to be furloughed than men (IFS 2020; Adams-Prassl et al. 2020) – the plan makes no mention of additional spending on social security. It is also largely silent on social care, despite the clear evidence of a system already under severe strain prior to COVID-19, and further decimated by the effects of managing a pandemic on behalf of those most at risk with scant resources (Glasby and Needham 2020; Dunn et al. 2021). In relation to housing, the policies highlighted in the plan were largely targeted at homeowners through the extension of the stamp duty holiday until 30 June 2021 and the introduction of a government mortgage guarantee for lenders who provide mortgages to home buyers with a 5 per cent deposit (Sunak 2021), but with no investment in building more affordable homes. Local government bore much of the brunt in terms of additional spending on essential services during the pandemic (Gore et al. 2021), yet no additional funding was allocated to the sector.

Reimagining the state's response

In reimagining the state's response to enable a more sustainable, inclusive and socially just future for all, it is necessary to go much further back than the start of the pandemic. As this chapter shows, many of the social institutions and related systems and processes already in place were straining,

fractured and ill-equipped for life in pre-COVID times. Thus, when the pandemic struck, individuals, families and communities lacked the state support necessary to manage the sudden change in working lives, educational provision and social care arrangements. The conditions exposed by the pandemic have severely challenged liberalism's central tenets, as the supply and demand necessary for global capitalism have been disturbed, revealing its core fragility and the need for alternative thinking (Grear 2013). VT's potential to move beyond the narrow comparative approach, within which all valued human activity is measured against the standard of the unencumbered liberal subject, gives it a particular currency in this context. A vulnerability approach is built on a responsive and reasoned analysis rather than the reactive and somewhat erratic determination to get back to 'normal' in record time characterized by the government's Build Back Better campaign. It requires an integrated response aimed at building and bolstering resilience in the most effective and sustainable way. It demands recognition of vulnerability and dependency, not as signs of weakness, but as inevitable components of human existence.

Over the course of the pandemic, our shared and inherent vulnerability has been laid bare, exposing our dependency and need for care in a variety of ways related, but by no means confined, to the parents/carers and recipients of care considered in this chapter. It can be argued that 'care provides a better focus from an investment stimulus [perspective] than construction' (De Henau and Himmelweit 2020). If the state investment in employment which will inevitably be needed to lead recovery is focused on the childcare industry, and in recruiting and improving working conditions for 'the massive numbers of care workers' needed to remedy the 'dire state of social care in the UK' (5), rather than in construction and physical infrastructure projects, this would result in the same multiplier effects but with greater social benefits. The resulting investment in social infrastructure would 'enhance the UK economy's resilience' and 'yield returns to the economy and society well into the future in the form of a better educated, healthier and better cared for population, preventing social costs being shifted to other parts of the public sector, improving productivity and helping prevent the need for greater health and care interventions' (5). Such investment, albeit embedded in the current social and economic structures, would signal a positive move towards a vulnerability approach. However, the full realization of our embodied and embedded vulnerability requires a more fundamental redesign of the social arrangements on which the state's relationships with its citizens are founded.

Conclusion

The individuals grouped together and classified by way of their social identities are too often assessed in terms of their relational and relative values. This may be as economic actors (current or future workers) or in terms of the 'burden' that they place on those economic actors or on state resources, for example through reliance on state pensions, social security benefits or social care and health service provision. This valorizes independence, casting dependency as an exceptional state. In contrast, VT cuts across this restrictive focus on social identities, recognizing that they are in fact the products of legal and social relationships shaped and defined through the choices made by law and policy makers. As Fineman explains:

> social identities are not natural and inevitable, although they may correspond with natural human impulses and emotions. As legal or social relationships, they are constructed by policy choices in which the state, through law, confers not only responsibility, but also power and privilege (Fineman 2020, 30).

The resulting legal subjectivity treats independence and autonomy as the natural state, casting vulnerability and dependency outside the range of everyday experience. By reifying the conceptualization and acknowledging the universality of vulnerability as *the* human condition, VT makes possible a different value system: a system that, at its core asks 'what does it mean to be human?' and then considers the repercussions of our understanding of what it means to be human for institutions, relationships and rules. The humanities-based approach required by VT's application enables us to build upon this normative question in seeking how to achieve a more just society. In doing so we must recognize that the state is not neutral 'and cannot be passive, noninterventionist or restrained' (Fineman 2020, 32).

As life during the COVID-19 pandemic has confirmed, we are bound together through common experience so that our shared vulnerability is ameliorated through relationships of care and expressions of solidarity. This need for interconnectedness does not exist solely between human beings, but also between people and the institutions that bind us and are required to support us, which thus should be structured in response to this fundamental human reality. Liberalism's preoccupation with independence and individual autonomy and the resulting impact on social ordering has left those institutional sites of resilience building susceptible to risk, which has been exposed but not caused by the pandemic. Unfortunately, the UK government's prioritization of economic targets and business as usual in its plans for recovery do nothing to disturb existing institutional arrangements.

Recovery will require recognition of both our vulnerability as embodied beings and our reliance on social institutions which are themselves vulnerable. An appropriate state response thus would be aimed at providing the necessary resources to future-proof both aspects. This is not just about the 'hundreds of thousands of needles going into arms every day' (HM Treasury 2021, 6), but also requires resilience building within and from the social institutions, including the family, that have been heavily relied upon during the pandemic and on which we are all to varying degrees dependent. This reconceptualization calls for a wider, more inclusive definition of 'infrastructure' which incorporates care and related activities. By asking in whose interests the state is acting in its response to, and in its plans for our recovery from, the pandemic, VT requires us to look beyond the immediacy of the current crisis, to reflect on our pre-pandemic lives and to interrogate the state's lack of preparedness and derogation of its duty as a builder of resilience. A reasoned response to the individuals, communities and institutions that together contribute to the lived experiences of working families demands a complete re-evaluation of our legal and policy framework that places care and dependency at its heart.

Notes

1. The term 'privatization' captures the turning over of public services to the private sector as well as to the private sphere of the family.

2. The Labour Party's victory pledge following the 1945 general election that it would provide for the people 'from cradle to grave' gave it a mandate to strengthen welfare state provision, so that in 1945 family allowance was established, which provided financial support for low-income families, with National Insurance being introduced in 1946.

3. The overall effect of COVID-19 on the gender pay gap is unknown, as gender pay gap reporting requirements for employers with more than 250 employees and related enforcement activities were suspended for the 2019/20 financial year due to the pandemic.

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Chapter 10

Law, everyday spaces and objects, and being human

Jill Marshall*

Introduction

In this chapter I identify, and draw on, connections between law, space and objects arising out of the COVID-19 pandemic. This is part of my project exploring and probing law's functions and the ways in which law shapes our understandings of who we are, of human freedom, identity and ways of life, especially by reference to Georges Perec's 'infra-ordinary' (Perec 1999) and Xavier de Maistre's *A Journey around My Room* (Maistre 1794/2017). This analysis explores how space and objects methods help us find our own anthropology with potential to change our ways of being and living in dynamic and transformative ways at this pivotal, potentially transformative moment during the COVID-19 pandemic. These methods provide a tool to highlight injustice and to illustrate how law shapes spaces and how spaces shape law. This enables us to interrogate our current ways of knowing, our understandings of who we are, who we want to be and how we want to live, and to carve new spaces based on these findings. Perec (1999, 210) says, for example, that ordinarily, '[w]e sleep through our lives in a dreamless sleep. But where is our life? Where is our body? Where is our space?' A pandemic, with death and illness all around, showing the interconnectedness

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of global coexistence and physical confinement, must force us out of this sleep. These methods can, therefore, be part of a transformation to new and better ways of being human and living enabled by law.

This chapter begins by setting the scene within the COVID-19 pandemic and lockdowns, before analysing aspects of Perec's then Maistre's work in Part One. Everyday objects and phenomenological works of some other theorists cast the backdrop for Part Two. This is followed by an exploration of the connections between our own anthropology and law through analysis of feminist insights into the construction of public and private spaces, and ways of learning from everyday spaces for International Human Rights Law in Part Three.

COVID-19 lockdown forced those of us previously free to move to different spaces and places into physical confinement. Emergency laws came into effect in national laws throughout the world. These took different forms but routinely restricted our ability to meet, associate and assemble with others, including often with family, friends and loved ones. These laws demanded social distancing, self-isolation and the wearing of face coverings, the latter previously not only highly unusual in most countries but banned in many, particularly in relation to the wearing of full-face veils by Muslim women (see, for example, Matwijkiw and Oriolo 2021). What was previously unthinkable became the norm: the state in liberal democracies telling its citizens that they were effectively detained or at least severely restricted in terms of movement and meeting others. For those of us complying with the rules and guidance, we stayed in those spaces and surroundings in which we were placed at the time of lockdown; for most, this was our own homes. For many of us working at home, maintaining family life and routines or living alone, reading, writing, producing artwork, we began to observe and record the somewhat mundane or normal events, occurrences and objects that surrounded us, which then took on new meaning. A conscious awareness of those things usually taken for granted – our coffee, our cornflakes, our cup and saucer, our TV, our computer and so forth, in short our everyday objects – was for many a useful method to transform them into imaginary flights of fancy: visionary journeys inside our heads mapped out on paper. We were forced to be in these places and could concentrate on those objects, those spaces, and be aware of how they made us feel, what they reminded us of, and noticing what worked and what was frustrating. What can we learn from what we have and want to have around us? For many, there was no such time, particularly for those working night and day in hospitals, supermarkets and food and essential goods' supply chains. The pandemic and lockdowns highlighted this and, at least initially, positively focused on and highlighted those providing such services. It led to a questioning of the values by which we live and who is worthy of our gratitude, revealing how

societies are interconnected and individuals are reliant on each other. Two short pieces of literature by Perec and Maistre are analysed in the next part of this chapter, demonstrating their potential to bring to life some opportunities arising from this dreadful pandemic.

Part one: Georges Perec, *Species of Spaces and Other Pieces* and Xavier de Maistre, *A Journey Around My Room*

Species of Spaces and Other Pieces

Georges Perec was a prolific and eloquent writer, with much work produced, especially in the 1970s. He demonstrated an unrivalled mastery of language in every kind of writing, from the apparently trivial – the observation of everyday objects and spaces – to the deeply personal. His personal history is important. He was born in France to Jewish Polish parents who had migrated to Paris with their families between the First and Second World Wars. His father enlisted and died during the Second World War. His mother was deported to Auschwitz in 1943 and no record of her was found. In 1958 she was officially declared to have died in 1943 (Perec 1999, 41).

Perec's work was celebrated in France during his lifetime and he received many awards. He worked as an archivist for most of his short life rather than as an academic or full-time writer. The exploration of his literary production by English speakers is more recent. Academic David Bellos has translated many of Perec's books and wrote a highly regarded biography of his life during the 1990s (Bellos 1993/2010). Perec's output has been explored within cultural studies and by French scholars as well as by some anthropologists. However, to date I have found little to no reference to him in legal literature or legal research. What I seek to highlight here is his *L'Infra-ordinaire*, before identifying connections with law and geography, and law and the 'spatial turn' (Blank and Rosen-Zvi 2010). In *L'Infra-ordinaire*, Perec examines what is truly daily, those everyday habits and material objects of which our lives consist, what goes without saying. He asks us to question our habitual spaces, those we do not question because we are so habituated to them. As Perec explains:

> What speaks to us … is always the big event, the untoward, the extra-ordinary … Aeroplanes achieve existence only when they are hijacked … Behind the event there has to be a scandal … as though life reveals itself only by way of the spectacular, as if what speaks, what is significant, is always abnormal …

> In our haste to measure the historic, significant and revelatory, let's not leave aside the essential: the truly intolerable, the truly inadmissible. What is scandalous isn't the pit explosion, it's working in coalmines. 'Social problems' aren't a 'matter of concern' when there's a strike, they are intolerable 24 hours out of 24, 365 days a year (Perec 1999, 209).

He continues:

> The daily papers talk of everything except the daily … what's really going on, what we're experiencing … where is it? How should we take account of, question, describe what happens every day and recurs every day; the banal, the quotidian, the obvious, the common, the ordinary, the infra-ordinary, the background noise, the habitual? (Perec 1999, 209–10)

Perec says these things do not seem to pose any problems. We live in and through them without thinking, as if they contain 'neither questions nor answers', as if they did not convey information:

> This is no longer even conditioning, it's anaesthesia. We sleep through our lives in a dreamless sleep. But where is our life? Where is our body? Where is our space? (Perec 1999, 210)

He guards against being numb to the importance of these things. Instead, we can ask what they may tell us about what is important in life, what makes it worth living. We need, he says, to question 'what seems so much a matter of course that we've forgotten its origins' (Perec 1999, 210). Perec talks of 'the world's concreteness, irreducible, immediate, tangible, of something clear and closer to us: of the world … as the rediscovery of a meaning … the earth [as] a form of writing, a *geography* of which we had forgotten that we ourselves are the authors' (79; emphasis in the original). What is needed is an ability, a language, a way of being that will enable us to speak of these 'common things' to assist us in tracking them down, to 'flush them out, wrest them from the dross in which they remain mired', in order to more honestly be aware of who and what we are (210).

What is the everyday, the infra-ordinary, the endotic? These are the material realities of our everyday existence. We therefore need to question bricks, concrete, glass, our table manners, our utensils, our tools, the way we spend our time, our rhythms: 'To question that which seems to have ceased forever to astonish us' (210).

Perec's method

Perec explains that this questioning is fragmentary, 'barely indicative of a method'. It matters that these everyday objects and spaces seem trivial and even futile, for, in his view, it is this which makes them so essential. So he urges us to 'make an inventory of your pockets, of your bag. Ask yourself about the provenance, the use, what will become of each of the objects you take out' (Perec 1999, 210). As we see from Perec's own documentation, he meticulously accounts from the void to the page, to the bed, to the bedroom, the apartment, the street, the neighbourhood, the town, the countryside, the country, the world, space. Even whilst Perec may stay at home in familiar, everyday surroundings, his generous essays and projects invite us to wander critically and imaginatively with him. Before exploring their potential use in law, I pause to incorporate another French author, this time from the late eighteenth century.

A Journey around My Room

In spring 1790 a twenty-seven-year-old took a journey round his own room (Maistre 1794/2017). Finding himself in forced isolation, Xavier de Maistre wrote a short book in which he explained what objects he had in his room – those things most taken for granted. Yet, as Andrew Brown notes in his Introduction to Maistre's *Journey*, there is nothing which can say more about who we are than the things with which we surround ourselves (Brown 2017, xii). Earlier in his life, Maistre had secured himself a place in a hot air balloon which floated above his home town for a few moments before crashing into a pine forest. In describing his room-travel journey in isolation, it is therefore perhaps not unsurprising that he starts with his geographical bearings and the size of the room. However, he then proceeds to cross it without rule or method with 'his soul open to every kind of idea, taste and sentiment to avidly receive what presents itself', rather than setting an 'itinerary in advance' (Maistre 1794/2017, 7). The isolated and stationary traveller goes from a table to a picture then towards the door. He meets an armchair on the way, a fire, books, pens and so on. During the 'journey' he reminisces, telling us stories of the objects and of himself. As is visible on the front cover illustration of the 2017 Alma Classics reprint, he travels in and through the everyday and the objects wrapped in his dressing gown, satisfied by the confines of his own bedroom. Alain de Botton sees Maistre 'gently nudging us to try, before taking off for distant hemispheres, to notice what we have already seen' (Botton 2017, viii).

Part two: law and spaces

Studies of the everyday, including works by Simmel (1971), Lefebvre (1991), Certeau (1984) and Perec (1999), have been used by human geographers, those working on urban studies, anthropology, cultural studies and the humanities. But can study of the everyday inform our methods and ways of understanding law? Law shapes our understandings of identity, our environments and our ways of living. Law has the power to regulate, adjudicate and interpret social and cultural meanings, creating fixed definitions within the legal system. This means that any such definitions are vitally important and have disciplinary consequences. Our existence depends on legal, social and cultural contexts, environments, spaces and places, where our individual personalities are formed and have potential to flourish. Any understandings of how we live our lives are contextual. Our relationships with others, including non-human animals, developments in artificial intelligence and the environment, are crucial. The use of the everyday can illuminate this and help us to creatively reimagine new futures in which law is enmeshed. Once again, Brown, in the Introduction to Maistre's *Journey*, sees the writer as making us reflect on the extent to which '[t]he journey around your room may be as good as any trip around that slightly bigger but equally finite room, the world' (Brown 2017, xv). Maistre's focus on the objects in his room is used as an illustration of how to deal with a challenge 'to become more truly self-aware and to use our freedom to change ourselves for the better' (Stevenson and Haberman 2009, 199). This is not solipsistic, as, by doing this, 'we can work toward a worldwide society in which all people have equal opportunity to exercise their freedom' (199). This is a method to cultivate an imaginary sphere, providing a window to its more directly lived counterpart (Bauman 1993; Woodyer 2012). It is a way of *seeing otherwise* familiar things and places. This is a method designed 'to let something else be apprehended obliquely, something utterly serious and important' (Sheringham 2006, 250). The process is 'not just to imagine, but to make the world otherwise' (Levinas 2013).

The method of focusing on and through objects can assist us in learning about law and life, raising many questions for exploration: what are the object's origins; who made it; what material is used and has that damaged the natural environment; how was the object manufactured and who got paid; who gave you the object; of what does it remind you? Further, we can ask: is the object necessary for life itself – is it food or medicine – and do we even have access to these objects at all? These are all questions crucial to law. They show how law does or does not enable certain ways of living and provides justice, equality, non-discrimination and human rights to

enable us to survive, and even flourish. The method can be part of the transformation to new and better ways of being human and living that are enabled through law.

Space and law – and law and geography more generally – have become objects of study in the last few decades. Space is not just the natural environment around us which we inhabit, although, of course, that is important. There is a growing body of work on how the law shapes this environment, its social spaces and organizations, and our subjective awareness and mental understandings of the world, and how we make sense of it. '[T]he politics of space is enacted and negotiated' in law and this needs 'an understanding of the extent to which legal spaces are embedded in broader social and political claims' (Blomley 1994, xi; Benda-Beckmann, Benda-Beckmann and Griffiths 2009, 3–4 citing Lefebvre 1991). Lefebvre classifies space into the material, the social and the mental-subjective. The relationship between these is intertwined: spatial practice highlights lived-space, representations of space reflect state-centred conceptions and ordering of space, and representational spaces embody the ways in which space is perceived from citizens' perspectives. '[S]pace not only serves "as a means of production but also as a means of control and hence of domination of power"' (Benda-Beckmann, Benda-Beckmann and Griffiths 2009, 3–4, citing Lefebvre 1991). Further, the level of the everyday is associated with creative potential: revealing its contradictions and ambiguities is to want to change them, and to want to change equates to change in and of itself for Lefebvre. This focus on space can reveal the extent to which law is a powerful tool that is constantly dynamic, being used in different ways for different purposes to 'create frameworks for the exercise of power and control over people and resources on varying scales' (Benda-Beckmann, Benda-Beckmann and Griffiths 2009, chapter 1).

A number of socio-legal scholars have more recently examined the construction of spaces, mostly in relation to communal and public, social spaces (Benda-Beckmann, Benda-Beckmann and Griffiths 2009; Philippopoulos-Mihalopoulos 2007; Cooper 2013; Blank and Rosen-Zvi 2010; Layard 2012, 2019; Koch 2018). In terms of social spaces, the law recognizes pre-existing social organizations and constructs new ones (Blank and Rosen-Zvi 2010). In terms of mental space, legal geographers have studied the impact of legal norms on subjective experiences of space. This has much in common with phenomenological scholarship in philosophy and literature, which is concerned not just with the objects themselves but also with the discourses around them. As Blank and Rosen-Zvi (2010, 15) point out, 'phenomenology stresses the inseparability of the subject, the object and the intentionality of the former towards the latter. Hence, material space becomes wholly entwined with the experiencing subjects and the intersubjective mediation of the two.' This leads to questions such as: what are the ways in which legal

concepts, rules and principles create certain human subjects with specific needs and values; and how does law maintain and reproduce this world? Cross-disciplinary work attempts to discover how legal rules and ideas produce spaces which, in turn, construct specific human subjectivities. In this approach, the human subject is a product, rather than being ahistorical, pre-legal and pre-social. Blank and Rosen-Zvi (2010) regard Simmel as influential in this regard in developing a typology of urban and village types, seeing the urban type as the manifestation of modernity and capitalism.

This creation of the human by law has been explored by critical and feminist legal theorists, who highlight how law creates and produces a certain idealized person (Naffine 2009; Lloyd 1984; Frazer and Lacey 1993; Okin 1979, 1989; Marshall 2005). In Part Three, I explore how some of these theorists expose how this happens through the distinction between public and private spaces and how identities are formed, enabled or restricted in such spaces. If an idealized person of law maps to a human being, this can result in exclusion of others, as it is a representation of economic *man*, traditionally an adult, detached and self-interested: that is, someone fully able to always make decisions, with rational capacity and free will, able to freely choose his own way to live, seemingly without attachments (Marshall 2005, Chapter 2). I then move on to focus on the human of International Human Rights Law and what might be learned from Perec's strategies and methods.

Part three: public and private spaces and learning from everyday spaces for International Human Rights Law

Public and private spaces

Second-wave feminists in particular exposed the way a favoured version of the person is constructed through the distinction between public and private spheres or spaces. Put in the language of spaces and law, the very definition of the person of *public* life was shown to be cast from the male experience. Further, feminists demonstrated that the concept of public spaces is delineated by the construction of what is private. These different spaces have an asymmetrical and hierarchical nature. The economy, politics, law, employed work – public spaces – are dominant and more valued (Olsen 1995; O'Donovan 1985; Lacey 1998). Nikki Lacey explains that 'a consequence of this is the consolidation of the *status quo*: the *de facto* support of pre-existing power relations and distributions of goods within the "private sphere"' (Lacey 1998, 77). The existence of the public sphere

is upheld by the existence of the private, with domestic, family relations being explained as the 'natural' foundation of civil life that required little critical scrutiny but ought to be 'simply' legally recognized. Feminist analysis demonstrated how women have been prevented, or at least greatly hindered, from participating in the public sphere. This can prevent women from realizing and creating their own freedom (Marshall 2005, 27). What were routinely explained as women's 'natural' functions and capacities led to the apparently universal category of the individual in public life being exposed as often sexually particular, constructed on the basis of male attributes, capacities and modes of activity. As Susan Moller Okin stated, if what is defined as 'human nature' is applicable only to certain men in a gendered society, then clearly human nature needs to be rethought (1989, Afterword). These criticisms often made explicit that the term 'certain men' applied to the stereotypical masculine heterosexual norm of Western life, and therefore men who did not 'fit' within this description would also be disadvantaged and suffer discriminatory treatment.

Carole Pateman (1987, 1988) explains that the public figure depends on the corresponding private space where men recoup their energy after a hard day's work in public life. The history of this division shows women excluded from the world of the marketplace and instead looking after others, particularly men who work outside the home and live daily in the public sphere. This role is seen as more important than women's own self-sufficiency and autonomy. The private sphere gives men literal breathing space. As Fran Olsen (1995) explains, men can relax and be compensated for the failure of the marketplace, with its lack of meaning in capitalism and its failure to fulfil men's needs. Socialist and Marxist scholars and certain feminist scholars, notably Pateman and Olsen, argue that liberal ideology creates a false division within the self, alienating humans from their own true self. The division of the public and the private into two binaries leads us to understand ourselves as divided into our private and public selves. Projecting each 'self' onto a different space denies our true nature, with resulting fragmented, self-alienated individuals.

If women have traditionally been allocated to the private sphere, and the public sphere individual is the norm, this conception of the constructed human self takes little account of the lived experiences of women. This circular argument means that women are said to lack the capacities required for life in the public space of free and equal individuals. Women have been given less opportunities in public, so their experiences have not been taken into account in developing public life and spaces. Instead, these experiences and ways of living are seen as existing more 'properly' in the private space, where care, love, nurture, kindness, compassion and particularized focus are seen as appropriate. This is why one of the earliest rallying cries

of second-wave feminists was 'the personal is the political'. Consciousness-raising became *the* method of feminism (e.g. MacKinnon 1987). This is an interactive, collaborative process of articulating one's experiences and making meaning of them with others who also articulate their experiences (Bartlett 1990).

Debates within feminism highlighted the 'colour' of feminist approaches to the public and private. Many pointed out the injustice to groups or sections of women that had been ignored. Western-based notions of patriarchy obscured intersectional discrimination faced by Black women and women of colour (Harris 1990). The 'feminine mystique' of the disenchanted suburban American housewife and the confinement of women in domestic circumstances in the modern family uncovered in the early 1960s by Betty Friedan (1963) overlooks the role of the racial ethnic 'domestic help' which eases the burden of those other women and their private spaces, and is correspondingly public. The public and the private are not straightforward. Story-telling narrative methods – so strong in Black feminist theory in particular – demonstrate the empowering character of transforming the articulation of everyday experiences. When people are socially powerless, their freedom, starting with expressing subjective understandings, can change the story, and create new ways of thinking and knowledge production (Collins 1991; Williams 1991). To paraphrase Perec, this is our ability to have a language to speak of these common, everyday things (Perec 1999, 210).

The feminist analysis of the public and the private linked to consciousness-raising highlights the patriarchal nature of the governance of spaces. Critical theory focuses on the problems of law and legal frameworks, highlighting what is wrong with them; but this can result in a failure to imagine alternatives. This is not the case with most feminist legal theory/jurisprudence. Feminist jurisprudence asks, how can law protect us and be used to improve lives in an unequal and hierarchical world to avoid entrenching stereotypes and existing inequalities? How can we examine what people actually value now while seeking to address the normative question of what it is right or appropriate to value and why? (Frazer, Hornsby and Lovibond 1992). How can we produce normative ideals while helping real situated people without reinforcing inequalities and stereotypes? What would be of moral importance in a post-patriarchal world? In what ways do traditional conceptions of the human or person and ways of living need to change to construct a better place, and way, to live?

Feminist – and other – visions of the future, as well as utopian models of transformation to a more just and post-patriarchal society, have played vital roles in changing lives for the better. However, they can also lead to accusations that such proposals are too abstract and authoritarian, and are perceived as dictating to people how to correct their behaviour

while setting out a single right answer to overcome oppression. Davina Cooper persuasively suggests moving away from a binary of critique *or* hopeful reimagining. She posits that it does not need to be one or the other, which thereby avoids arguments about which is most worthy of our time and attention. Instead, we can develop richer ways of thinking through the interconnections between critique and transformation (Cooper 2013, 2014, 2017, 2020).

In her analysis, Cooper explores the work of Marina Valverde and Ruth Levinas (Valverde 2012; Levinas 2013). Marina Valverde's focus on 'the everyday' through the traditions of Certeau and Bourdieu demonstrates how close study of the seemingly mundane – in the context of the Toronto urban experience – can reveal key insights into the functioning and failures of – in this case – urban city governance. Ruth Levinas seeks to reclaim the hope of utopian studies through her theory. She argues that a utopian method for the twenty-first century 'facilitates genuinely holistic thinking about possible futures … it requires us to think about our conceptions of human needs and human flourishing in those possible futures. The core of utopia is the desire for being otherwise … [it is] better understood as a method than a goal' (Levinas 2013, xi). Levinas calls this the Imaginary Reconstitution of Society. It involves locating ourselves within our 'natural' or material environment or spaces and challenges the assumption that sociology constitutes a form of knowledge while utopianism is simply a form of speculation. This is because all societies involve knowledge and what she is talking about involves a 'transformation both of existential experience and of the objective structures of the social world that generates that experience' (xvii).

Perec's strategy is to try to resist oppressing narratives – specifically, to find ways to write new narratives about the self and the concept of self, in order to allow new narratives of the self to take shape (O'Brien 2017). In the next section I use insights from his work on everyday spaces and objects to inform our ways of thinking in International Human Rights Law (IHRL). This focus is timely. The COVID-19 pandemic is global. Increasingly, the traditional perspective of legal regulation by self-contained domestic or national states is shown not only to be empirically untrue, but also to lack coherence and meaning in a world affected by global catastrophes and issues that impact everyone. IHRL highlights what we all share in common. Its underlying purpose is to recognize the inherent dignity, equality and rights of everyone based on the ideal of free human beings. This abstract universalism seeks to uphold universal characteristics which we all share by virtue of being human. This is a potentially liberatory norm. In Patricia Williams' words: '[f]or the historically disempowered, the conferring of rights is symbolic of all the denied aspects of their humanity: rights imply

a respect that places one in the referential range of self and others, that elevates one's status from human being to social being' (Williams 1991, 153). However, as I now explain, to have meaning when put into practice, IHRL needs to be informed by varied and inclusionary lived experiences.

Learning from everyday spaces for International Human Rights Law

Possessing human rights is a normative statement about social status, one that determines access to a range of resources used in constructing ourselves in and through interconnected material, social and mental-subjective spaces. Yet when universal dignity, equality and rights are put into practice, a notion of the abstract human needs to somehow protect and encompass the messiness of who we actually are in our lived realities. Closing the gap involves adding 'flesh, blood and sex to the pale outline of the "human" ... and extending the dignities and privileges of the powerful (the characteristics of normative humanity) to empirical humanity' (Douzinas 2013).

There is an anthropological notion of culture set out in Article 27 of the International Covenant on Civil and Political Rights which emphasizes a sense of belonging to a community and enjoyment of one's own culture and, relatedly, rights to profess and practise one's own religion and beliefs. These are our situated lives. We live our lives in and through relationships with others in communities and cultures, intersubjectively, feeling included or excluded, with a sense of belonging or not in these spaces, be that through exclusion, isolation or governmental or other non-recognition or stigmatization. In terms of IHRL, this requires respecting the situatedness of those involved in the violations and the specificity of the lives concerned, listening to, and taking seriously, those who have lived and are living through their own unique experiences of human rights abuses and social injustice. Through participation of survivors of human rights violations, *their* individual, culturally situated, grounded-in-reality experiences will be expressed. Hearing and feeling their expressions and ensuring that legal regulation is then informed by them should be the starting point for the 'human' of human rights law to be given 'flesh'. The articulations can be gleaned through methods more familiar to anthropology, cultural studies and human geography than law, with the latter's traditionally hierarchical system of knowledge based in written technical, detached legal language and form. Needs and experiences can be expressed through participatory research methods, to hear participatory forms of knowledge emerge, to 'give them a meaning, a tongue, to let them, finally, speak of what is, of what we are' (Perec 1999, 210). Patricia Leavy (2015, ix), for example, argues

that arts-based methods 'can uniquely educate, inspire, illuminate, resist, heal and persuade'. They encourage us to discover what other 'shapes' our research can take, what 'structure' we might build, and build anew, and also to consider what new audiences we 'might speak to and with'.

Aspects of connecting law and IHRL to our own everyday lives, spaces and objects have been brought to life and put into practice in our recently organized research projects and events. The aim was to bring new perspectives as to whose voices count in shaping the world we see and experience, and in turn the laws we create within it.[1] Elements of those events are explored here. The first event was part of the Being Human 2020: a Festival of Humanities programme. We collaborated with the Afghanistan and Central Asian Association (ACAA) to organize and host a café event.[2] The ACAA is a charity that provides support and advice for refugees and migrants in the Afghan communities based in west and south-east London. ACAA runs a wide variety of events and projects, with the aim of supporting refugees and immigrants throughout the UK who feel isolated and are in need of advice and support. Student volunteers from our Legal Advice Centre, together with me and Nicola Antoniou, Director of the Clinic, took part in the 'Afghan Women Small Spaces Café: Sewing Pathways to Human Rights'. This was held in ACAA's community hub, where in November 2020 women from the regular sewing class met and the rest of us and some other participants joined via Zoom.

Nicola and I worked with the Sycamore Trust at their Autism Hub for the second related event in June 2021. The Sycamore Trust is a charity dedicated to providing a variety of tailored services to support families, carers and individuals affected by autistic spectrum disorders. Services offered by the organization range from parent support groups and youth clubs to a girls' and young women's project – a scheme designed exclusively for girls and young women with autism. In addition to these programmes, the organization aims to raise awareness about autism.[3] The experimental session was largely carried out in person, with one student attending remotely. This sought to encourage the young women at the Autism Hub to express their experiences and thoughts about their daily lives and challenges through various creative outlets such as painting, drawing and air-drying clay. This methodology has also been incorporated into an interdisciplinary, international collaborative research project with the University of Ibague in Colombia, co-designed with the Chaparral Women's Network for Peace and the rural people's cooperative of Tolima. These communities have been deeply exposed to multiple traumatic events including armed conflict and the COVID-19 pandemic.[4] In these projects, participants were encouraged to express their own creativity.

Everyday spaces methods and the pandemic

The COVID-19 pandemic and government reactions have emphasized existing inequalities through, for example, who has died, the unequal global vaccine rollout, and the imbalance in health and social care within our own societies and globally. Our lives have been shown to be intricately connected to each other; what happened far away has affected the whole world, and the local and the global are deeply connected, whether people like it or not. There is potential in everyday spaces research methods to help us find our own anthropology to change the injustices highlighted by the pandemic: it gave many of us an awareness of the everyday in which we were confined, what this means and says to us and what this tell us about others and the material world. We have tools to reveal injustices and can learn to use them at this pivotal, potentially transformative moment. The projects described in the previous section aimed to apply what Joanne Lee calls Perec's willingness 'just to see what happens'. She argues for alternative, more mobile considerations of the intellectual and affective rigour applied to creative and critical work (Lee 2017). This can involve, to paraphrase Lee, a free-floating sort of attention pursued at a desk or in a café, like Perec's drifting and meandering as thoughts or observations prompt recollection and digression. Similarly, Emma Cocker considers investigations through practice as a form of resistance in that they are sometimes about 'making something less known'. The tactics of remaining receptive, wandering and getting lost – 'an endless series of maybes, an interminable set of tests of trials' – through which there is no definitive conclusion offers ways 'to stop things getting assimilated all too quickly back into meaning, from being classified or (re)claimed swiftly by existing knowledge' (Cocker 2013, 130). Cocker writes that it is 'necessary to *know* how not to know' and that 'not knowing is not experience stripped clean of knowledge, but a mode of thinking where knowledge is put into question, made restless or unsure. Not knowing unsettles the illusory fixity of the known, shaking it up a little in order to conceive of things differently' (131).

Everyday spaces and objects can be part of a process to find resistance to oppressing narratives: to find ways to write new narratives about the self and the concept of self, to allow new narratives of the self to take shape (O'Brien 2017). Human rights begin at home, in our daily everyday actions and practices, where we are now, and entail an awareness of who is able to freely speak and express their perceptions of their spaces and objects and ways of being human. As Sheringham observes:

> the everyday … is where we already are: to find it, we cannot 'arise and go there', in Yeats's phrase, but have somehow to bring about a

> transformation that will make it visible or palpable … The everyday is both superficial and profound, strange and familiar, insignificant and fundamental, outside praxis yet the harbinger of anarchic energies (Sheringham 2006, 188).

These are the 'small spaces' of our lives referred to by Eleanor Roosevelt when she asked where universal human rights begin. She answered:

> In *small places*, close to home – so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; These include the neighborhood we live in; the school or college we attend; where we work: places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these human rights have meaning there, they have little meaning anywhere. If we do not uphold these rights close to home, we will look in vain for progress in the larger world.[5]

The formation of who we are starts in those small spaces. To paraphrase Perec, our material everyday world of seeking and seeing something clear and closer to us enables us to rediscover a meaning of which we are the authors (Perec 1999, 79). This is not something we sustain alone. Care and nurturance by others is necessary for human survival and flourishing. This is essential for newborns and infants but is also continually essential for many, as the pandemic has vividly shown. In IHRL terms, states are becoming ever more legally responsible for failing to ensure – directly or indirectly – that people within their territories have social conditions and resources that enable them to live their lives in peace, in safety, with clean water, with a roof of some type over their heads, with welfare and social care, with an education. There are many IHRL provisions setting out such rights. These include the International Covenant on Social, Economic and Cultural Rights 1966, the Convention on the Rights of the Child 1989 and regional treaties such as the African Charter on Human and Peoples' Rights (Banjul Charter) 1981. Reconceptualizations or reformulations of rights can make them more meaningful and inclusive. Law can play a role in how our 'heads' develop and become our own, through anti-discrimination and equality laws, education, the regulation of home life, and the care needed when growing up and at many points in life, and when caring for dependants – all part of who we are, our imagination and lived experiences.

Conclusions

In this chapter I have explored the focus on the everyday, especially through Perec's work detailing an imaginary journey in our own immediate space, as invoked by Maistre. I have linked this to some work in law and geography, law and the humanities and cultural studies, feminist analysis of public and private spaces, and learning from everyday spaces for IHRL. The chapter forms part of my wider project exploring and probing law's functions and the ways in which law shapes our understandings of who we are, our human freedom, identity and ways of life. In thinking through how to make the future better than what we have now, I have turned to the method of reflecting on the everyday. This provides for a focus on everyday objects and spaces, as explored by Perec and Maistre. This exploration has also been provoked by the sense of confinement in lockdown which, I argue, has potential to liberate our ways of living, starting in the present. There is something in the ordinary that comforts, heals and restores by resisting bigger ideologies of what it is to live or to be (O'Brien 2017). These strategies help us to find resistance to narratives that oppress. That includes finding ways to write new narratives about the self and the concept of self; allowing new narratives of the self to take shape in and through the law, including new legal landscapes unfolding in the future; and shaping the future to be a new and exciting place of equality, fairness, justice and liberation.

New and alternative understandings of how to live well continue to emerge, especially given the COVID-19 pandemic and its effect on our lives globally, nationally and locally. We are all born into a set of ideas of the good life which are culturally available to us, and over which we have no control at birth. Existing inequalities have been starkly shown through and by the pandemic and reactions to it, including legal ones. Yet the interconnection to and reliance on each other globally, nationally, locally and intimately has highlighted the importance of how we care for each other, from our intimate partners and families to those we do not know. It has made visible the particular oppression of certain groups of people, such as the elderly, the homeless and the disabled. Forced confinement for many has made us more aware of how we feel at home – how secure or how fearful – and whether we feel disconnected, lost and alone. It has shown the public and the private spaces to be enmeshed, interconnected and overlapping. For many, this has challenged the very assumptions by which we live. An opportunity exists now to redress the balances, to distribute justice where it is due. Let's hope it will be used.

Notes

1. See https://www.royalholloway.ac.uk/research-and-teaching/departments-and-schools/law-and-criminology/news/autism-caf%C3%A9-an-exploration-of-how-our-everyday-surroundings-connect-to-our-understanding-of-law/ with thanks to Mariam Diaby for research assistance in relation to this event.

2. See https://www.royalholloway.ac.uk/research-and-teaching/departments-and-schools/law-and-criminology/news/join-us-for-an-afghan-women-small-spaces-caf%C3%A9-with-the-afghan-and-central-asian-association/. Being Human is a festival of humanities large-scale week of events organized annually by the School of Advanced Study, University of London and funded through the Arts and Humanities Research Council and the British Academy.

3. http://www.sycamoretrust.org.uk/.

4. See https://www.royalholloway.ac.uk/research-and-teaching/departments-and-schools/law-and-criminology/news/prof-jill-marshall-and-prof-carl-stychin-will-be-hosting-a-being-human-festival-2021-caf%C3%A9/. This project was part of law–psychology fieldwork, some of which involved the production of two books of photographs of everyday objects and spaces, and of videos of exhibitions of the photographs which took place in the summer of 2021 in Tolima, Colombia. For further details, please contact the author. This work was presented at the Being Human festival in November 2021 in the form of a series of talks and discussions about the project, kindly hosted by the Institute of Advanced Legal Studies and chaired by its director Professor Carl Stychin, assisted by Daly Sarcos.

5. https://unfoundation.org/blog/post/10-inspiring-eleanor-roosevelt-quotes/, emphasis added.

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Chapter 11

Pandemic, humanities and the legal imagination of the disaster

Valerio Nitrato Izzo

Introduction

No matter the origin of the event, human or non-human related, consequences are always a problem of human responsibility. From this perspective, catastrophes are *epiphanic events*, as they reveal how our laws work, what values they protect, the shortcomings of any order of regulation and if they are successful in protecting us from vulnerability in the global arena of risks. But all catastrophes – and pandemics are no exception here – contrary to an old belief, are not 'big levellers', but rather are extraordinary *magnifiers of injustice*. In a globally interconnected world how can law protect some without injuring others? How is it possible to limit the infectious body without expelling it into a void of rights denial? In which ways will it be possible to protect an idea and practice of public space in the urban environment? How much of this discussion should be placed in dialogue with the climate change transformation and the legal meaning of the Anthropocene?

Given this theoretical background and these questions, in this chapter I will explore several works of literature that seem to have been absent from the public discussion and debate. These include Jack London's *The Scarlet Plague* (1912), in which mankind's vulnerability is dramatically exposed by an (almost) human extinction in a world that was already based on discrimination, and in which the plague renders everybody vulnerable without advance warning.

Another useful source for discussion is J. G. Ballard's numerous attempts to describe the fall of the world in *The Disaster Area* (1967), where he is extraordinarily successful in illuminating how the disaster is already among us and our infinite cities. Finally, I turn to the magnificent *Beasts of the Southern Wild* (2012), a dramatic movie in which Hurricane Katrina's disaster is seen through the eyes of a community displaced yet reluctant to leave their place. The film brilliantly shows how each regulation encompasses a fragmentation of the legal subject: as represented by the levee, law excludes and protects in a contradictory way, especially those at the margins socially, geographically and ecologically.

Thinking pandemics through the humanities and the imagination of the catastrophe

As I propose to understand the term, catastrophes are sudden breakdowns from the normal status of things. They break down the world, such that it cannot exist in the same way in the aftermath of the event, or it may be very likely to not exist at all. When the COVID-19 pandemic hit the world, the most immediate social framework for understanding such a rupture was conceiving it as a disaster (Hagen and Elliott 2021, 2). The popular song 'It's the End of the World as We Know It (And I Feel Fine)' [1] became a very apt description of the reality which the world, with different degrees of intensity, was experiencing.

Especially in media discourses, COVID-19 has been represented as a *great leveller*, with similarities traced to past epidemics, such as the Black Death in the Middle Ages or the Spanish flu in the aftermath of the First World War. This is also the case with catastrophes when they are represented as unpredictable events or Acts of God, with which human responsibility has little connection. Despite this common *locus standi* in public discourse and mainstream media, disaster studies have long since advanced to the point that it is recognized that there is no such thing as a natural disaster. Physicalist and technique-led approaches to disasters have proven to be a limited theoretical framework for understanding why an event becomes a disaster and explaining the magnitude of destruction (Blaikie et al. 2004). Exposure to risk and social vulnerability show that context matters, and no individual or community is comparable to others before extreme events occur (Fassin 2020).

It is possible to find a similar framework for making sense of the importance of the social dimension of what makes COVID-19 the deadliest pandemic of our lifetimes. In medical anthropology this approach was first advanced by Merrill Singer, when he proposed the term 'syndemic' to

highlight the complex medical and clinical conditions that, far from being simply a comorbidity situation for the individual, namely the presence of more than one pathology or disease, were influenced by various factors. The syndemic approach showed how biological and social interactions are important for prognosis, treatment and health policy (Singer et al. 2017). These interactions show that a health strategy must also take into consideration the crucial factors of socioeconomic inequalities when seeking to regulate both the spread and the distribution of the heaviest consequences of a disease. As has been stated, 'the most important consequence of seeing COVID-19 as a syndemic is to underline its social origins' (Horton 2020, 874). Even within a framework that recognizes the syndemic nature of the actual crisis, it has been argued that context matters greatly (Mendenhall 2020).

In many respects the COVID-19 syndemic revealed what we already knew about many things and the state of affairs of this world. Ecological degradation, the consumption of natural resources associated with economic activity and the consequent climate change, while not direct causes of this global threat, have been linked to the factors that make it possible for the virus to reach human populations with the consequences which we all are still facing. In any event, none of this was entirely unforeseeable or unexpected. Authors have warned about the *spillover potential of viruses* as something to worry about (Quammen 2012), as well as avian flu and SARS, which have been identified as epidemic diseases capable of turning into something bigger and deadlier (Davis 2020).

Catastrophes have the potential to reveal a great deal and in different ways. I will identify three ways that are relevant for this chapter. First, from an abstract point of view, they make visible as a phenomenon what before the event was just a projection of abstract thinking: they make visible what was or still is invisible or only partially invisible. In the ecological 'reading' of the COVID-19 pandemic, this has allowed us to finally start to realize how the consequences of the Anthropocene – the era of the earth in which mankind has become a geological force – is becoming much more difficult to ignore at all levels. It announces a possible future, showing at the same time the critical danger from which we need protection and the possibility for a radical inversion of our business-as-usual lifestyle (Latour 2021). It has also helped to show the ways in which a tipping-points approach can be epitomized by such an event (Horn 2018). The 'problem' with climate change is that it is happening slowly but constantly, even if intensity and speed are dependent on many factors such as geography, space, time and social position. As a consequence, it is more difficult to *visualize* the danger we should be ready to act against.

The second revelation of the catastrophe lies in showing that what was thought to be impossible, beyond any risk calculation, unthinkable and

unimaginable, in fact has just materialized as a catastrophic event. This is the case especially with technology-related disasters. This point can be made clearer by recalling a story told by Nobel prize-winning writer and journalist Svetlana Aleksievič. In a new preface[2] to her stunning and dramatic account of the Chernobyl disaster of 1986 (*Chernobyl Prayer*) she remembers having been a visitor to the Tomari nuclear power plant on Hokkaido island in Japan. Talking about the Chernobyl disaster, technicians were certain that such a failure would not have been possible there, as the structure was designed to resist earthquakes of magnitude 8 on the Richter scale. They could not know at that time that in 2011 a terrible earthquake of magnitude 9, the first in Japanese history, would produce a tsunami that would eventually hit Fukushima's nuclear power plant. The two events, in an unfortunate conjunction, led to one of the greatest nuclear catastrophes in human history, both in terms of persons impacted and in terms of environmental nuclear contamination. This story underscores that in order to be able to prevent something or protect from it, it is necessary to be able to imagine it, to be able to conceive it, no matter how unlikely or impossible such an event might seem. It is the imagination of the catastrophe that prepares us to face it. Such a mechanism may show how even the contested principle of precaution can work in social sciences only under certain epistemological conditions (Dupuy 2002). Interestingly, at the very beginning of the report issued by the Independent Panel for Pandemic Preparedness and Response (2021, 4), COVID-19 is associated with the Chernobyl disaster. According to the report, the association is made because both a pandemic and a nuclear accident entail the responsibility to protect, especially on the part of those in charge of the institutions and governments that every catastrophe dramatically puts under stress. Without preparedness – being able to imagine the worst-case scenario – it is the capacity to respond that is undermined.

The third way in which a catastrophe is revelatory is by bringing us nearer to the perspective of the end of the world as a measure of human existence. This is an anthropological pattern in human society that is experienced in very different ways according to different societies and cultures. The anxiety regarding the end of the world, according to Viveiros de Castro and Danowski (2016), is typical of the separation between humankind and nature that is so deeply embedded in the Western tradition of looking at the world as something shaped by humans, rather than as an ecosystem of coexistence between different species.

While I will not engage directly with these debates, they all demonstrate how the complexity of the interaction between the pandemic and the ecological crisis implies an attempt to use all cultural means available in order to make sense of the disaster. They also show what the most recent approach to disaster studies has tried to bring to the fore: disasters

are not only breakdowns of the normal situation but also ongoing parts of the social reality. In times of ecological permanent crisis, this could not be more evident. The actual rhetoric of being back to normal life just ignores how this 'normal' was already a social domain in which some experienced 'normality' in a very different way to others. Thus, disasters must also be studied for 'what they do in the social world' (Hagen and Elliott 2021, 5).

If catastrophes are moments which take the form of the structures that give sense to our suffering (Neiman 2002), they belong not only to the realm of the unknown event that comes to shake the world, but also to a complex cultural appropriation that is tied to the symbolic medium (Walter 2008). In other words, extreme events are inextricably tied to our cultural lives. So it is not surprising that apocalyptic and disaster-based novels offer an analogous array of elements useful for the social and legal imagination. They structure how societies represent themselves and shape 'reality' (Horn 2018). Exploring this perspective during pandemics, literature, movies and art in general constituted a fertile reservoir of social imagination. The variety of works of art is infinite and deeply context-dependent: everything from Boccaccio's *Decameron* to Dan Brown's *Inferno*, via Camus' *The Plague* and Saramago's *Blindness*, as well as an array of movies of which *Contagion* has been one of the most mentioned. Of course, epidemics have long been a subject of art in general, and especially for literature. Even in times of highly influential web-based interaction and social networks, the function of these pieces of art is common: they help in making sense of a world that has been deeply shaken in its usual features. They are a powerful tool that helps us to understand our social imagination in depicting fictional catastrophes or making sense of real ones. It is debatable whether literature can effectively help in preventing catastrophe rather than fostering reflection on our ethical relationship with a world in which catastrophes now occur often (Lavocat 2016, 26). The humanities challenge and strengthen our understanding of extreme events because, exactly as the events they evoke and describe, they illuminate the needs and perils, attitudes and beliefs of a community in the face of something that can put an end to its very existence. At the same time, we cannot take for granted how catastrophes are culturally relevant for the humanities. Any exercise of this kind must be confronted with its own limits. It would be unrealistic to ask too much of the humanities. Taking the example of literature and the form of the novel, Amitav Ghosh has argued that the difficulty lies in putting natural forces and events that we thought improbable at the centre of a narrative plot: a modern novel normally hides such events, while the actual deepest challenge is how to imagine what is unthinkable in our era (Ghosh 2017, 33).

Looking at the relationship between law, culture and the humanities and the pandemic situation as intersections of different possible cognitive

approaches, I will use literature and movies as pieces of art that are related to extreme events to question how they can contribute to normativity in disaster times. Imagined catastrophes are exceptional situations for decision making, both individually and collectively (Horn 2018, 12). They are relevant in helping to frame the social ties in which law and disaster take place and are enforced, and how the dynamics of this illuminate many social facets of the ties between the pandemic situation and the law.

How do we think about law during a pandemic?

In this section I question how we conceive the role played by law and its function during an event like a pandemic. Once again, this has many aspects that resemble the function of law in a catastrophe. I will refer here to the theoretical analysis of Roberto Esposito, a philosopher considered one of the main representatives of the so-called Italian Theory.[3] When, in 2002, he wrote a book entitled *Immunitas* that dealt with the relationship between the protection of life and the social paradigm of immunization, he certainly did not foresee the pandemic that would hit the world almost twenty years later.[4] This work, together with *Communitas* (1998), in which Esposito argued about the relevance of the *munus* for the understanding of the community, and *Bìos* (2004), in which he considered the notion of biopolitics, have been praised as an original attempt at understanding the relationship between community and biopolitics, as well as the different philosophical and political dimensions of institutionalism (Esposito 2021). In *Immunitas*, the Italian philosopher investigates how life can be protected from what it negates only by means of a further negation (2011). In this audacious philosophical attempt, he scrutinizes how immunization has become an epistemological, social and scientific paradigm strictly linked to the development of modernity. As in most of his works, law here plays an important role. It is the law that assures the immunization: 'law ensures the survival of the community in a life-threatening situation [and] … seeks to protect the common life from a danger that can be seen in the relation that makes it what it is' (28–9).

Deploying Esposito's insights regarding the deep link between law and the social process of immunization, it is also possible to establish a connection to how law functions during a catastrophe. If the ultimate goal of the law is that of assuring the survival of a community, the parallel with the disaster situation is immediate. Esposito helps us to think about the role of law and legal regulation during pandemic times. If we establish a link between the protection of the community and the role played by law, the immunization paradigm provides protection from the relationship that

makes a community in a social sense. At the same time, the law tries to suppress, to a certain extent, these relationships in order to protect life from itself. This is exactly what happened during the lockdowns that most of the world has faced during the last year and a half. On the one hand, if the lockdown imposed by law was a necessary measure, especially during the 'first wave' of the spread of the virus, many nevertheless asked how much obedience to the law was bearable, not only in terms of health measures but also for social relationships that involve survival itself: that is, to have the possibility to work or to live a life with enough social meaning, that was opposed, sometimes in caricatural terms, to mere biological life. This also has sacrificial characteristics, as the ultimate goal of law is the conservation of life (Esposito 2011, 39).

When dealing with the role of law in an emergency or catastrophe, it seems that an emergency is a situation outside the law or where law has little to regulate. However, for a long time the issue of catastrophe has attracted very little attention from legal scholars and doctrine. Hurricane Katrina in 2005 was a detonator for reversing this situation. It resulted in a 'Katrina effect' that had consequences particularly for the anglophone world, and the unfortunate increase in the occurrence of extreme events has attracted much more attention from legal scholars ever since. Catastrophe plays a double role in its relationship to law: it shows law's failure but at the same time it is the reason for its invocation (Delmas-Marty 2012). Exactly as with the mechanism of immunization invoked by Esposito with reference to the link between law, life and protection, catastrophes offer a double movement of affirmation and negation of the law: a kind of Janus-faced relationship with law (Douglas et al. 2007, 4). Catastrophes are ' [...] moments when we confront the limits of our normative world' (Meyer 2007, 20).

Nevertheless, the 'ordinary' law enforceable during normal times does not vanish: as a protection from undesired consequences of catastrophes, it reveals how the immunization paradigm is at work in different situations. When, for example, people in extreme existential threat are obliged to trespass or steal due to necessity – a justification for illegal acts that has existed for centuries – and are treated by the law as looters, the idea of immunization appears. That is, ordinary regulation is applied in an extraordinary situation that is not recognized by the law as such. This serves an ideal of continuing the process of 'normality' in an 'abnormal' situation, where the subversion of the order of the catastrophe is negated. According to Émile Benveniste (2016), one of the etymologies of the word 'survive' is *to survive an event*. COVID-19, like all disasters, certainly is an event. However, unlike most disasters its temporality is fluid, as we do not know when and how this process will eventually end (even if we know that most pandemics can be declared over at one point or another).

In the next section, with the help of literature, I will show how an event such as a pandemic can completely change the social world we inhabit: how it is possible to make sense of it and at the same time how much loss is inevitably involved in such a process.

London's *Scarlet Plague*: the end of the world as we knew it

The first example of a novel through which I want to elaborate upon these themes is *The Scarlet Plague* (1915), a short story written by Jack London and published for the first time in 1912. The story is set in 2073, sixty years after a global pandemic reduces humanity almost to extinction. The narrator is an old man, Granser, one of the few known survivors who is still able to remember the world as it was before the coming of the plague. The disease that affected the world imagined by London is an invisible illness about which the unfortunate inhabitants did not manage to gather much knowledge. It spread suddenly and in unpredictable ways, dooming its victims to quick death by suffocation, the only mark of it being a series of scarlet pustules appearing on the face of the infected subject when their fate was already determined.

London set his story in a world structured around fierce discrimination between people. In a way, the story depicts a world where law does not seem to be useful anymore, a kind of return to the state of nature where law no longer protects as it did before the spread of the plague. *The Scarlet Plague* introduced the genre of dystopic fiction, which was anticipated by Mary Shelley's *The Last Man* (1826), in which the survivor was the sole person in the entire world. London also anticipated the worries of an overpopulated planet, a topic that was developed in another short tale published just two years earlier, *The Unparalleled Invasion* (1910). *The Scarlet Plague*, while it may not be the best literary representation of London's work, proved to be extraordinarily prescient: the Spanish flu would strike and kill its many victims just a few years later.

One of the themes underlying the work is how survival does not make sense when a civilization is about to collapse, sweeping away the social world in which one had a place before. It does not matter that such a world was already inhospitable for many due to the iron laws of market competition and discrimination, as London depicts it. A socialist by political credo, London seems to blame a certain capitalist way of exploiting nature as the ultimate cause of the appearance of the plague (Riva, Benedetti and Cesana 2014). The society that was flourishing before the plague was one in which a small number of people were controlling a large amount of the

available wealth. Younger and older generations do not share the world anymore, and this creates a society in which there is no communication between them. The younger generation to whom the old man tells his story is also profoundly lacking in education: the story is orally recounted, as the young are illiterate. The oral narrative is recalled as the only way in which knowledge is shared.

Describing the collapse of civilization, London also shows how normative meaning disappears in a kind of return to a state of nature where law neither protects nor discriminates anymore. For example, relationships between persons are now dominated again by physical violence, as shown in a passage of the story in which a woman is treated as a mere object of possession of another man younger and stronger than the narrator Granser, who describes a situation in which all of his social capital has disappeared. Does London make us think about the meaning of survival in an apocalyptic context? Is survival everything, as people often think at a certain point in a difficult time, such as during a peak of the COVID-19 pandemic? Furthermore, based on London's insights on the disaster scenario, in the end is there such a 'thing' as a right to survive during an extreme situation such as a pandemic or a catastrophe? Surviving makes much more sense when the civilization to which we are accustomed stays the same, in a kind of return to the normal. The main character of the story survives the pandemic but loses most of his links to the life he lived before. This is also due to the loss of a position of superiority in relation to others, as a university teacher belonging to the upper class (Rossetti 2015). The return to a kind of primitive state erases much of his social status, which was backed by legal and social norms available to him. London vividly depicts the end of a world as he knew it.

London's talent not only virtually gave birth to the genre of apocalyptic literature; he was also one of the first writers to deal with complex themes such as the relationship between science, knowledge and social organization, as well as inequality and overpopulation. For the purposes of the argument of this chapter, what matters most here is that London was also able to imagine how the idea of surviving through such a deadly event was really *surviving an event*. However, survival as an end in itself seems a goal of limited desirability. When an entire social world collapses, there is little left to do in a present without a future, as the grimy circumstances of Granser show us.

City air makes you infected: disaster in the city through Ballard's eyes

As with all epidemics, COVID-19 strikes cities and the urban environment most fiercely. While the virus can be everywhere, obviously it is spread by people, and most people worldwide now live in cities and their environs. In fact, 60 per cent will live in cities by 2030, according to UN-Habitat predictions (2020, 305). The link between epidemics and the urban dimension is well known. COVID-19 has been able to shake many established assumptions and much of the rhetoric regarding cities and their characteristics. Many debates and reflections on the urban dimension have been tested during the pandemic. Density, for example, a common and desirable feature of the urban environment, suddenly became something to be feared. The denser a place, the more contagious the virus would prove. Thus, any congregation of people, even the informal ones so typical of urban life, quickly became dangerous. This has produced other phenomena such as that of 'quitters', those typically upper-middle-class professionals (other than medical professionals) able to work remotely, who abandoned the city for the countryside, far from the contagion. Mass touristification and gentrification, with their impact on housing affordability worldwide, came to a stop. As a consequence, some cities appeared unlike how they had looked in the past fifty years, Venice being a typical example of a city completely transformed by the absence of tourism.

Notwithstanding the overwhelming literature on them, cities are still very difficult to define. Nevertheless, most would agree that a city without people is not only unattractive but a contradiction in terms. COVID-19 emptied cities, making them look like a De Chirico painting, where nobody is in sight and the space of the urban is usually suspended. A city without people is a kind of ghost town, as the Rolling Stones (2020) sang during the initial lockdown. Interestingly, Deyan Sudjic (2016, 208) defined a curfew as 'the most anti urban act possible' apart from physical destruction of a city. But during the COVID-19 pandemic we have been obliged to become accustomed to a completely different urban scenario. All through 2020, and sometimes even during 2021, the antivirus measures have emptied the cities, restricting circulation for many, but not for all. What has been experienced through legal restriction is a kind of *pandemic legal proxemics*. Proxemics is a term coined by social theorist and anthropologist Edward Hall, which he used to indicate the study of the relationships between space, culture and the individual. Particularly in *The Hidden Dimension* (1966), Hall showed how the place we occupy in space and the different distances people interpose between each other are cultural matters. That is, some individuals and communities will tend to distance more or less than others. Fairly absent from public debates, proxemics can be a key concept

for investigating how COVID-19 has produced normativities that have had a major impact in reshaping our relations with space. The logic of immunization is again at work here: *law obligates us to protect*, to protect from the other, from other individuals, from everyone and no one, because each living body could be contagious. Even material objects located in the city or in its infrastructure, such as the public transportation system, can be a vehicle of infection. The result was that the living space of a city, which is grounded in the interaction of different persons – at least in its noble version – stopped making sense. In its place there emerged a spectral urban landscape where each physical presence was placed under precise legal scrutiny. For example, Italy was the first Western country to be affected by the disease at a time when information regarding it was still scarce. Its red zone provision, which limited freedom of movement, initially in certain cities or regions and later across the entire country, imposed a curfew during specified hours. During the most intense period of restriction, even going outside the home was subject to enforceable rules and required legal justification. This paved the way to a *pandemic legal proxemics*, including social distancing between persons (1.5 metres), between persons and places (for example, being allowed to go for a walk *in prossimità* to one's home) and between family members (the ambiguous legal term *congiunti*, which regulated the number of people authorized to gather around a table). Different rules determined how people should move and act across different kinds of space – public, social, intimate or familiar – and no place was outside the law of the pandemic. All of the rules had the shared goal of putting each individual in a specific place from where they could be legally distanced.

Thus, the pandemic showed again what we already knew: that there is a link between immunity and a sealed space. According to Peter Sloterdijk (2016), from an immunological point of view, a dwelling is a defence measure that allows an individual to define a zone of well-being against invaders and carriers of disease. The home represents the form through which the relationship between immunity and the sealing of space comes into being. It makes clear the fact that human openness to the world always corresponds to a complementary attitude that avoids it. In this way, the relationship established between density of people and urban life seems completely overturned. These intuitions from a provocative thinker such as Sloterdijk lead us to the second writer to whom I want to refer, namely J. G. Ballard (1930–2009). Ballard, a British author of dystopian novels, is one of the few writers to share the privilege of having his body of work come to be associated with a new adjective, Ballardian. His best-known works have been transposed to cinema by celebrated directors: *Empire of the Sun* (1987 by Steven Spielberg), *Crash* (1996 by David Cronenberg) and *High-Rise* (2015 by Ben Wheatley).

Even if a sense of anguish permeates his entire aesthetics, Ballard did not attract much attention during this pandemic. A critic of the absurdities and psychosis of modern life, Ballard mastered the ability to recount the sense of disaster, for example in *The Drowned World* (1962), as well as an acute urban sensibility for how city spaces interact with individuals and their behaviour. Here I focus on a short story, entitled 'The Concentration City', initially published in 1957 (Ballard 1967), and a better-known example of his milieu, *High-Rise* (1975). In these notable works, Ballard, who showed an interest in the urban dimension many times in his literature, is able to establish a relationship between disaster and the urban in both ordinary and imaginative ways. 'The Concentration City' is an obscure short tale in which the main character, M., is trapped both temporally and spatially. Except through the retelling of a myth about its foundation, it is simply not possible to escape the city. There is no world outside the city because the city is infinite; there is no space outside of it, for it is the beginning and the end of all possible worlds. Free space is considered a contradiction in terms within the story. But not all spaces in such a city are pleasant, as dead spots and neighbourhoods are slowly expanding. The city, being infinite in this way, can be depicted as being a disaster in itself, as Paul Virilio noted some years later (2007).

In the successful novel *High-Rise*, Ballard tells the story of a condominium outside London, which could be described as a 'gated community'. Little by little, life inside the building starts to acquire more importance than what happens outside, as the inhabitants lose interest in all activities beyond the complex, including their jobs, while their entire lives are slowly reframed. The condo is used by Ballard as a kind of microscopic observation of how social life can slowly but inexorably deteriorate, ending in a kind of state of nature in which everyone is simply concerned for their own physical protection. The condo is a normative micro universe set apart from the world and its fate where, in the end, everything collapses.

In these works, Ballard warns us that the disaster is already among us, even if we are not able to see it and even if we are actively contributing to it. Furthermore, the disaster is a typical urban problem. Ballard's characters do not seem to fight against the disaster; rather, they just accept it as part of their inner life experience (Orr 2000, 481). These intriguing pieces of literature also highlight the normative potential of cities and urban spaces to challenge state-based legal and political order.

Ballard's writing has not attracted much attention within the law and literature field of research that is now well established (with the exception of Gray 2019). Nonetheless, his aesthetics have an important normative, if not a legal, meaning. Ballard demonstrates how the social order can end up in a very different place from what is expected in modernity. This is especially

relevant in *High-Rise*, where neither legal regulation, nor municipal intervention, nor police order seem capable of noticing, much less preventing, what is happening inside the building. Here, the double role of space and law as immunization can be highlighted as a marker for what has happened during the COVID-19 pandemic. While most people were obliged to seek shelter inside their homes, many of those homes in turn were transformed into places of tense relationships. Finally, those without a home were often simply not contemplated by the legal pandemics proxemics – how does a homeless person stay at home? This confirms Sloterdijk's (2016) insight that the house is first and foremost a protection from the outside world but, as the immunization paradigm and Ballard's urban nightmare show, it cannot fully protect from the dangers that are *inside* the domestic space.

The right to survive in *Beasts of the Southern Wild*

In 2009 the international NGO Oxfam International issued a report entitled *The Right to Survive. The Humanitarian Challenge for the Twenty-First Century*.[5] The report focused on humanitarian assistance in the context of the drastic rise in the number of extreme events globally and their impact upon people. Years later, the ecological crisis and the COVID-19 pandemic together prove that the report was all too prescient. For my purposes, of particular relevance is the report's title: *Right to Survive*. What exactly does it mean in legal terms? Is this right to survive something different from a *right to life* enshrined in many international law documents, such as article 2 of the European Convention on Human Rights? I want to understand this conceptual dynamic through its beautiful and, in many ways, tragic portrayal in the movie *Beasts of the Southern Wild* (2012), directed by Benh Zeitlin and adapted from the play *Juicy and Delicious* (2012) by Lucy Alibar. The film had considerable success for an independent enterprise, gaining four Oscar nominations and winning several other awards, including in the special prize section at the Cannes Festival 2012 and the jury award US Dramatic at the Sundance Festival.

The story, somewhere between reality, fantasy and flashbacks, deals mainly with the figure of Hushpuppy, a six-year-old girl, who lives in the Bathtub, a peculiar community of people in South Louisiana behind a large levee. There she lives with her father Wink, who finds himself sick but refuses the treatment offered outside the Bathtub. Escaping from the hospital, he tries to make Hushpuppy aware of the fact that he probably will not survive much longer and begins to instruct his daughter on how to survive without him. As a consequence, Hushpuppy tries to find her missing mother while suffering the idiosyncratic behaviour of her father.

The story is resolved on the other side of the tub. Meanwhile, the climatic situation is deteriorating and a big storm is about to hit the spot, leaving the entire community to face a difficult choice: abandon their modest houses and possessions or face the possibility of death. Most of the community is very reluctant to leave what seems not only a place in which to live but also a kind of lifestyle apart from the busy modernity on the other side of the levee. Hurricane Katrina clearly inspired the entire story, especially in the adaptation from the theatre to cinema. The film is not only a touching story of love and separation between loved ones, as is the case with Hushpuppy and both parents (one dying, one long since missing), but also a beautiful representation of the right to survive. Also, Hushpuppy is a very special subject trying to find her way in a world that is falling apart around her. Not only is she a small child who needs to make decisions (including to leave her father at some point) that are overwhelming for someone at any age, but she also acts in a social world that seems to be excluded from the 'other world', the other side of life marked by the levee which is increasingly unable to protect the community.

Beasts of the Southern Wild also offers an interesting postcolonial (Barnsley 2016) representation of the right to survive in marginal communities, and how this changes its social meaning through experience. What kind of survival makes sense and to whom? Both Hushpuppy and Wink, her father, do not fit in any of the categories in the 'disaster preparedness' paradigm, nor does the rest of the community, reluctant as they are to abandon the Bathtub. This is not because they are unafraid of the incoming catastrophe but because they know there is no social place for them outside the levee. The analysis of Evans and Reid, critical scholars who work between political philosophy and international relations, is particularly illustrative of this mechanism of theoretical inversion. They state that '[a]s such, the game of survival has to be played by learning how to expose oneself to danger rather than believing in the possibility of ever achieving freedom from danger as such' (Evans and Reid 2013, 83). In short, the subject is immersed in a sea of uncontrollable risks from which she is doomed to no longer emerge, and vulnerability becomes her specific condition. Returning to the hypothesis I initially advanced of an epiphanic character of the catastrophe, the concept of subjectivity allows us to affirm the idea of an ecstatic subject. This is the non-passive product of the opening of an exceptional space created by the catastrophe, which confers reality and makes the disaster event itself meaningful. The catastrophic subject, from a juridical and political point of view, is then an eccentric, elusive subject, whose production and appearance is in some ways the true measure of confirmation of the catastrophic situation in progress (Miller 2009). Proof of this can be found in the variety of legal conformations that subjectivity

can concretely assume. From the looter being threatened with being shot on sight to the environmental refugee who has no choice but to flee (although it is not possible to recognize refugee status exclusively for environmental reasons), all these subjectivities, in their ontological exposure to risk, are in reality exclusively committed to surviving. The relationship between exception and catastrophe in the legal field then takes on the uncomfortable and often painful contours of the failure of the law, as it concerns the inability of the law to provide protection to the most vulnerable people (Verchick 2010, 128). As Katrina showed us years ago, and *Beasts* beautifully crafted on the big screen, the state can easily fail to assure protection to certain kinds of subjects rather than to others.

Stories like the one depicted by *Beasts* also offer ethical challenges that arise during disaster time. Hospital assistance, allocation of resources during triage and the possibility of having to choose between different possibilities for people to survive have all been well documented during the pandemic. Ethical and moral problems, rather than disappearing during COVID-19, have been enhanced by the struggle for life in the exceptional space opened by an extreme event. It is more likely that a tragic choice will have to be faced during such an event rather than in *normal* times. This represents another limit of the law during pandemics and disasters. An absolute juridification of all social actions during emergency situations is completely at odds with the necessity for quick and rapid action, both in terms of humanitarian assistance and health services. But in fact the world has faced the absence of clear guidelines as to the allocation of scarce resources in terms of assistance – an example could be the mad dash for pulmonary ventilators by states at the outbreak of the pandemic. The double face of the law during disaster appears again here: negation and affirmation at the same time. What *Beasts of the Southern Wild* helps us to think about is the idea that the right to survive is not the same for everybody, and sometimes it is the reasonableness of having such a right which comes to be questioned in liberal legal regimes.

Some provisional conclusions

The parallels explored above between disasters and the COVID-19 pandemic help to show how law functions in similar ways in these difficult contexts of the production and application of legal materials. From this point of view, it is the law that makes visible the exclusion and the excluded. Space has claimed again its importance, as we have seen that the physical domain, the coexistence between people and its intrinsically dangerous features immediately became the preferred domain of legal regulation. The

physical space does not disappear even if the legal proxemics empties the city. This has been highly visible in urban space, where another kind of city emerged: transparent, deserted, supervised, decent, safe, non-infected and non-conflictual. All these adjectives describe this compulsory idea of the city we have become accustomed to during this period. Indeed, we are still trying to understand how the urban will look beyond the pandemic.

What this global health crisis has also shown is that the presence of the state has regained attention after decades of debate on state-weakness in the global arena. This analysis needs to be applied cautiously, not only because it is highly dependent on the globalization and interconnection processes from which the debate mostly emerged, but also because not all states are equal or weak. For example, China and the United States of America seem to have emerged stronger from the pandemic. Other countries have shown their vulnerabilities both in institutional and social terms.[6] As for the disaster context, it is hard to say if the state, for example in the context of the European Union, will continue on this trajectory of regaining regulatory force. As a corollary of the return of the state, the pandemic has clearly demonstrated the need to re-establish the centrality of the social dimension, together with the importance of social infrastructure, national and local health services, and the value of proximity in the provision of services (with the exception of digital services).

I hope that I have illustrated how the humanities are a valuable tool for imagining alternative legal meanings, inspired by the disaster theoretical framework. The collapse of the social world is what brings together London's attempts at rethinking the world after the plague, with Hushpuppy's efforts at finding her way to survive the disaster. But Ballard's highly original treatment of the theme highlights that the disaster is a condition of existence and not only a space of exception. It is only by *imagining* the catastrophe that we will be able to overcome it. The Coronavirus and climate change crises are perfect examples of this needed exercise, from which law and legal studies have much to learn.

Notes

1. US rock band R.E.M. released the song in 1987 on the album *Document*.

2. The English-language edition seems not to have included this additional piece of writing by the author, dated March 2011. Here, I refer to the Italian edition of the book published by E/O, Rome (2002).

3. The term loosely indicates a certain philosophical style associated with Italian authors.

4. Esposito has recently tried to combine his work on institutionalism with the issues emerging from the pandemic situation (*Istituzione* 2021).

5. Available with updates at https://www.oxfam.org/en/research/right-survive.

6. Brazil could be the best example, with President Bolsonaro's highly contested management of the pandemic.

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Chapter 12

Prospects for recovery in Brazil: Deweyan democracy, the legacy of Fernando Cardoso and the obstruction of Jair Bolsonaro

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Introduction

Former Brazilian President Fernando Cardoso, along with Enzo Faletto, wrote the classic *Dependency and Development in Latin America* in the 1960s, which linked both dependence and development to the bipolarity of 'central and peripheral' national economies (Cardoso and Faletto, 1979). This historical materialist approach became an influential paradigm for understanding Latin American economics and government for half a century. Yet today its theory and insights are too rarely recalled. The question we wish to address in this chapter is a fundamental one: how does a society, now plagued by poverty, discord and disease, move forward in the absence of a guiding theoretical vision?

The problematic administration of Jair Bolsonaro arrived amidst the failure of explanatory models in Latin America and the absence of any clear and promising roadmap for the future. Reflecting the general loss of confidence in political science and theory, Bolsonaro even called for defunding education in those disciplines. His approach points towards a non-reflective and impulsive government. Indeed, his government's response to a severe crisis has failed in the face of growing deaths from the COVID-19 pandemic,

and has resulted in the current investigation of his acts and omissions in combating it by a parliamentary commission of inquiry.

The global COVID-19 pandemic has transformed the political environment in Brazil, as it has in other Latin American countries as well as in the United States. Even before it arrived, there existed an extraordinary and unwelcome absence of thoughtful, programmatic designs for a recovery of public confidence in government. We address the question of how John Dewey's pragmatist methodology relates to the crisis and to explanatory models in both education and the logic of legal reasoning. In this regard, the contrast between the two presidents, the former Fernando Cardoso and the current Jair Bolsonaro, should not be understood in terms of a comparison of their political profiles or personalities. Historically, the role of the president in Brazil is of absolute importance in guiding the destiny of the country through public politics and in the legislative agenda.

After Fernando Cardoso's administration (1995–2003), Brazil experienced the problematic governments of Luiz Inácio Lula da Silva (2003–2011) and Dilma Rousseff (2011–2016), which ended with impeachment and was completed by her vice president Michel Temer. The current president, Jair Bolsonaro (2019–), was elected amidst several crises, and represents in many ways a reaction to the major national problems, which unfortunately have only been aggravated by him.

The main purpose of this chapter is not to explore the great problems faced by each government, nor to give a political analysis of their contribution to these problems, but to advance the Deweyan democracy view as a way to recover from the absence of prospective theoretical guidance. The contrast between Cardoso and Bolsonaro should be seen as a contrast in attitude which demonstrates how Brazil has moved from an attempt to apply a fruitful (although limited) explanatory model to a reckless and aggressive discourse that undermines a scientific approach to problems.

Practical issues now dominate the national scene. We suggest that the way forward may be guided by the Deweyan ideal of empirical democratic enquiry. Public philosophy must be reconstructed from the conceptual and analytical with an empirical, dynamic and therapeutic methodology. While there are many dimensions of this reform, we focus on education and law. In education, we argue in favour of the Deweyan programme of continuity and integration, and the overcoming of both dualisms and rigid, static analytical models. In law, we urge a focus, not on the conceptual nature of law, but on its operation in resolving conflict.

A brief account of Brazilian political and cultural history

Summarizing the complex political, social and educational problems of the Brazilian nation in the last sixty years would be, on its own, a Herculean task. Nevertheless, for the purposes of this chapter, a brief account is necessary.

To understand the meaning and significance of the successive political and educational crises which have occurred in Brazil, as well as their economic and social implications, it is necessary to provide an overview, starting with the military dictatorial government which ruled Brazil from 1964 to 1985, the year in which the National Congress through an indirect process gave civil power to Tancredo Neves and José Sarney, respectively president and vice president of the Republic of Brazil.

In order to describe this history, it is convenient to split it into three separate historical periods. Methodologically, this strategy follows the steps already adopted by Maria D'Alva G. Kinzo (2001), professor at the São Paulo University (USP), in her article 'Brazilian democratization: an assessment of the political process since the transition'. The first period, starting in 1964, lasted approximately seventeen years. It is characterized by absolute control by the Army, with no prospect of democratic openness. The second period can be demarcated from 1982 to 1985. During these years, although military control still persisted, one can observe a greater openness towards the participation of civilians in the political decisions of the government. In parallel to the loss of political power by the Army, another important development took place: among the military troops, a radical group expressed great dissatisfaction and resistance to the lack of democracy.

The origins of this insurgence can be traced to the third military president, General Ernesto Geisel, who took power in 1974. He announced that his government would introduce a gradual project of political distension, which represented a light at the end of the tunnel and a starting point towards the process of democratization in Brazil. Geisel suspended the censorship of the press and valorized the legislative state elections, specifically those of 1974. As a consequence, a new political party was created, the MDB, which brought together the opposition to military rule, while another political party, ARENA, represented the conservative end of the political spectrum. This opened the space for a kind of two-party system within the National Congress.

Geisel's decisions forced him to restrain the violent actions of military groups whose practices of torture and other violations against human rights reached an intolerable level. Geisel dismissed the entire military command of São Paulo State due to deaths following the torture of journalists and political opponents of the regime.

In the final period, from 1985 to 1989, an enormous mobilization of political forces throughout the nation called for increased civil power, opposed military interventions in political decisions and opened space for civil political forces. This was supported by trade unions and other civil society institutions. It eventually led to the National Congress deciding to transfer the supreme command of the country to the civilians Tancredo Neves and José Sarney.

There is an aspect of the era of military dictatorship in Brazil which contrasts with the experience of other Latin American countries. In Brazil, there was, throughout military rule, a continuous attempt to return to institutional political normality. This began with decisions by the military itself followed by civilian demands for normalization. In other countries, such as Chile and Argentina, the harshness of the military regimes remained, characterized by cruelty and violence which only ended with the overthrow of the regimes. This was mainly due to the historical roots which underlay the foundations of those countries.

Portuguese colonization in Brazil had unique features, mainly because it allowed the country to preserve its continental dimensions, combined with a racial diversity that resulted in a type of melting pot. This understanding can be found in interpretations of Brazilian culture in such works as *Casa-Grande e Senzala* (Freyre 2006), *Raízes do Brasil* (Holanda 1995) and *Os Donos do Poder* (Faoro 1975). By contrast, Spanish colonization fragmented its colonies into small states, resulting in permanent conflicts among them, which cultivated racial intolerance between groups.

This brief sketch of the political and social history of Brazil sheds light on certain features of its culture and character, such as how, even in periods of social uncertainty, political instability and dictatorial regimes, the country could demonstrate perseverance in relation to certain ideals of democracy. It also helps to explain how these challenges would be confronted and managed through tolerance of resistance and reconciliation. These complex and somewhat contradictory reactions permit a clearer understanding of how Brazilian culture faces its political instabilities. They have persisted since Brazil was a colony, through the first and the second Empires, the old republican period, the dictatorial government of Getúlio Vargas and the governments that came after the period of 1964–89, led by Itamar Franco, Fernando Henrique Cardoso, Lula, Dilma and Michel Temer, as well as the present mandate of Jair Bolsonaro.

In order to develop the implications of this analysis, it is important and relevant to make reference to the educational problems which have arisen in Brazil, which have interacted with the political and social scene. These will be important in understanding and redressing the barriers which impede the foundation of a more stable and democratic nation.

Brazil was colonized by the Portuguese Empire in 1500. The country's first experience of colonization was of exploitation, without any civilizing intention. Our first experience as a colony was to enrich the colonizer. Politically, socially and spiritually, Brazil was subject to the will of the colonizer. In educational terms, the stated goal was to provide education to the children of the Portuguese colonizers, as well as diffusing the Catholic creed among the natives. In the nineteenth century Napoleon Bonaparte, influenced by the philosophy of the Enlightenment, sought to conquer Europe and to dominate its countries. Eventually he announced the invasion of Portugal which, at that time, was under the protection of Great Britain, the arch-enemy of Napoleon. With that protection, the king of Portugal, D. João VI, decided to move to Brazil, thereby raising Brazil's political status from a colony to part of a single kingdom with Portugal. With the return of the king of Portugal to Europe, D. Pedro I, a son of D. João VI, became the first emperor of Brazil.

In 1889 Brazil removed the monarchy and became a republic. Since then, its political, social and intellectual life could be characterized as a pendulum, swinging from periods of democratic stability to authoritarianism. In the field of education, the traditions of the Catholic doctrine persist, while progressive approaches are revived during republican periods.

Pragmatist methodology

John Dewey was the great theorist and proponent of organic democracy. Philosophical-legal pragmatism seeks continuity and interaction as indispensable for an interdisciplinary analysis of human experience. Pragmatism is grounded in the assumption that genuine experience is social, transcending individual interests. Freedom of action is genuine only when associated with the capacity to think reflectively. While preserving respect for the individual, it demands fraternal responsibility, with the corollary that meaning and strength be exercised in democracy and education. This can be connected to Fernando Cardoso's idea of development from dependence, which implies restriction of individual freedom (Cardoso and Faletto 1979, 151–61).

A democracy is more than a form of government; it is primarily a mode of associated living, of conjoined communicated experience. The extension in space of individuals who participate in an interest requires that each refers their own action to that of others, to give definition and direction to their own. As Dewey emphasized, this is equivalent to the breaking down of barriers of class, race and national territory, which kept people from perceiving the full import and value of their activities.

Since a democratic society repudiates the principle of external authority, it must find a substitute in voluntary disposition and interest. These can be created only by education and legal ordering rooted in a dynamic, therapeutic philosophy. Although separated by almost a century, we find an interesting parallel between Fernando Cardoso's formulation of dependency theory and John Dewey's pragmatic philosophy. If, on the one hand, the Brazilian sociologist formulated a theory that attempts to explain underdevelopment beyond classic Marxist and determinist perspectives, the American philosopher tried, in the field of education, to find within experience a middle ground between traditional and progressive education.

Dependency theory tried to extrapolate a common post-war thinking, which consisted in believing that development would depend mainly on the capacity of each country. Each would be able to achieve success in a constant and linear way, not only with minimal state intervention, but also with minimal influence from foreign countries. The theory tried to move away from a sociological argument that there would be a 'stagnationism' among underdeveloped economies, generated by attitudes going back to the beginning of the colonial period, and that it would be impossible to disengage without institutional ruptures.

We can find in Fernando Cardoso's version of dependency theory an attempt to consider the evolution of the social structure of each country such that a broad understanding of the most recent phenomena is possible. It thereby explains the failure of public policies and models of government that were transplanted from central to peripheral countries without any respect for continuity. The principle of integration is linked to a dynamic balance between objective and subjective factors of experience, in a constant contestation between these conditions.

With this, we can see that all aspects must be considered for the progress of education and its social, economic and political effects, avoiding the zero-sum trope of 'all or nothing' that evaluates evidence of one factor to the detriment of the other. In Cardoso and Faletto's theory, this principle gains prominence through the justification that the phenomenon of the social is always multifaceted. The analysis of only one of its aspects will make it impossible for the researcher to discover truly relevant answers. In applying this insight, we suggest an integrated analysis of development, transcending the dichotomy between 'modern' and 'traditional' society, in the context of more orthodox economic and sociological perspectives.

In sum, the solution to the problem situations with which human beings are constantly confronted cannot be determined through the deductive prison of binary logic, which is reduced to a confrontation, as mentioned above, between either and or. This is all the more true when it comes to the so-called social sciences, which include sociology, politics, economics and

law. In this regard it is opportune to turn to the therapeutic philosophy of Dewey and an apt aphorism of the father of American legal pragmatism, Oliver Wendell Holmes Jr (1881): 'The life of law is not logic, but experience.'

The theory of education

In *Experience and Education* (1997), Dewey provided a theory of education that sought to understand the process of learning as development from the inside out as well as a formation from the outside in. In other words, education is to be interpreted as a set of obstacles that must be surmounted by the natural gifts of the subject in overcoming their own inclinations. This dichotomy was seen in the clash between traditional and progressive education, and ended up causing serious consequences both for pedagogical growth and for the health of democracy itself. This dispute even brought pernicious influences that still persist for the development of the democratic ideals that inspired the Brazilian Constitution of 1988. For Dewey, it is not by abandoning the old that it will be possible to solve the problems of the new in education and society, much less by rejecting the new. Rather, it will be necessary to find an ideal point at which the paradigms no longer compete for space, trying to supplant one another. They must work in a complementary way, generating a balance that will enhance practical experience within education.

The point of contact between these two apparently distinct theories is the detachment from the game of 'this or that'. In Dewey's terminology, it is the dialectic overcoming of the antithetical confrontation between 'either versus or', with a view to the construction of a more tangible synthesis, which would result from the overcoming of extreme categories (Dewey 1938). Both Dewey and Cardoso make use of two important principles – *continuity* and *integration* – to overcome exclusivist paradigms. Dewey understands that the principle of continuity is linked to a necessary communication between the past and the present, and that any analysis must take this continuum into account, so that previous experiences are not discarded simply because they are old.

Cardoso came to power at a time when, even more than in earlier decades, observers questioned whether reform would be possible in Brazil. The pervasive corruption that dominated Brazilian society and politics throughout history had been reinforced by Collor's disastrous presidency and impeachment, and unfortunately has been an endemic problem discovered in every government after Fernando Cardoso.

Cardoso worried about this historical narrative in discussing the role of *jeitinho*, the Brazilian approach to obstacles (from the Portuguese *jeito*,

meaning 'way'). *Jeitinho* has a double meaning. The first is that you try to solve problems rather than putting up obstacles. It is a hopeful attitude, which might be characterized as 'Let's try to solve this, let's try to help you.' However, there is another meaning, which is the advocacy of disregard for the law and for rules; to not let them get in the way. The question, in this regard, remains whether Brazilian civic culture is strong enough in the democratic sense to respect the rule of law. According to Cardoso, although *jeitinho* can be an impediment, the belief that Brazil cannot change is neither productive nor universal: 'It's a matter of attitude; more traditional people prefer not to change anything. And they are always accusing the "reformers" of being self-serving and the poor will suffer the consequences. It's not necessarily true, but they use this as an excuse not to change' (Scott 2012, 12).

The rule and theory of law

This leads us to consider the insights for the rule and theory of law which can be drawn from the pragmatic tradition and its history (see, e.g., Kellogg 2018). We look for insights to rebuild a robust view of the role of law in the courts of Brazil and Latin America.

How should the tension between the declining influence of Cardoso's broad perspective, and the arrival of Bolsonaro's nihilist populist rule, affect our thinking about law? At the heart of the analysis of the new nature of dependence, Cardoso and Faletto (1979, 155) stated that when a political crisis arises, 'the only alternatives are opening the market to foreign capital or making a radical political move toward socialism'. This assumes that when in power in Brazil, President Cardoso (1995–2003) had only two alternatives. This ignores the global loss of faith in government, and the stigma now associated with the term 'socialism'. William J. Dobson (2020), summarizes the new situation:

> We find ourselves now in a very different moment … The appeal of xenophobia, populism, and authoritarian causes has risen, not coincidentally at the same time that faith in democratic ideals has faltered. The crisis of confidence is mounting as illiberal populists propagate divisive notions that tear at democratic norms from within.

Meanwhile, the COVID-19 pandemic has been ravaging Brazil. Brazil is deep into both a health and a governing crisis. There is a feeling of both a practical and intellectual powerlessness. Cardoso governed in an age of models. Populism has undermined progressive government programmes as 'socialism', even while other forces have undermined the hopes Cardoso

entertained for progressive free enterprise. If there is a salient weakness in Cardoso's 1967 analysis, it is the dualism reflected in his reference to 'the only alternatives', the inevitability of a unitary bipolar choice, between two 'fundamental' conceptions. But Cardoso was actually more prescient than that.

As we think, and act, anew in the post-model era, we should not ignore Cardoso's keen sense of *jeitinho*, or disregard his awareness of the possibility of transformation, both of which are associated with John Dewey's pragmatism. Cardoso recognized the possibility and importance of solving individual problems on their own terms, and also of ultimate transformation. For this, the contemporary challenge is now to escape ideology and respond to reality. The pandemic, dear students, is our new professor. The pandemic is the unwelcome teacher, who has arrived with a crisis that will call us, at the end of the term, to a final examination. This teacher ignores ideology.

Experience is now our textbook. The models have become irrelevant and they obscure the necessity of moving forward with a renewed empiricism, a process of thought that begins and ends with facts, rather than new dreams and old resentments. Empiricism is as crucial now to the law, as it is to science. Brazil is a country of law and many lawyers, and the legal community must reject ideology and respond to the urgent problems, one by one, until each is resolved on its own terms.

Law and science are both part of the social continuity of inquiry, and they must be integrated in a fact-based response to the situation. Dewey and Cardoso shared two important principles, continuity and integration, for overcoming exclusivist paradigms. Their shared commitment dictates a view of law as part of the continuity of inquiry.

Law and the logic of conflict resolution

The traditional attitude, still taught in law schools, reflects a deductive conception of law, a static and analytical conception, whereby judges must always find a syllogism that decides the case. Such a vision is still endemic in contemporary legal philosophy, characterized by the label 'legal positivism', and embedded even in attempts to correct positivist flaws through judicial recourse to 'moral principles'. Law is generally viewed as autonomous and deductive, a static body of rules and principles. Our pragmatist alternative, by contrast, privileges flexibility and the dynamic of social enquiry.

Conflict is viewed as a problem that must be settled by law, by diktat. This view reflects the social contract theory of Thomas Hobbes, where an omnipotent state is ceded authority to resolve or remove conflict inherent in the state of nature. The American Civil War, itself a failure of law, gave rise

to an alternative theory of law as an inductive system of inquiry, implying a threshold of success or failure.

Conflicts are endemic in society. Some level of disagreement or dialectic is normal, and reflects how knowledge grows. But conflicts are either resolved through convergence of opposing practices and precedents, or lead to non-legal resolution, including violence. Our view emphasizes law's social and historical grounding, conceiving conflict resolution as an adaptive process of knowledge development and social order. Influenced by the experimentalism of natural science, it implies an extended continuum of inquiry, and a pragmatist logic as articulated by Dewey (1938).

Rather than defunding philosophical education in Brazil, as proposed by President Bolsonaro, the philosophy of law must be reformed to become less analytical and more therapeutic. Applied to law, pragmatism seeks understanding not of the conceptual nature of law, but of the operations that determine its success or failure in resolving conflict.

Conventional legal logic has focused on the operation of judges deciding the immediate case. Pragmatism, from analogies with natural science, came to understand law as an extended process of inquiry into recurring social problems. The role of the legal profession is thereby recast to recognize the importance of input from outside the law – the importance of the social dimension of legal and logical induction. Lawyers and judges perform an important but often largely ancillary role, one that must nevertheless be evaluated from the standpoint of a logical method prioritizing experience over general propositions or axioms. Lawyers must respect facts, above all legal authorities.

Conclusion

While the long-term effects of Cardoso's policies may never become fully evident, it is already clear that he was able to effect significant changes in Brazil. His greatest reforms remain his wide-reaching social initiatives. He knew how to operate successfully within Brazilian society and within the Brazilian political process. Cardoso took major strides in helping Brazil to realize its potential as a 'country of tomorrow' and helped to transform the country into the emerging world power that it is today.

However, Cardoso's formative model has proved insufficient to address the complexity of contemporary Latin America. What is needed now is a path forward beyond unitary modelling, a problem-solving path addressing the many individual needs of society, engaging insights from across the educational spectrum: science, law, communication, engineering and reconstructed philosophy. The history of pragmatism illustrates key

characteristics of therapeutically deconstructing the barrier that has been serving to create frontiers that separate and dualize knowledge, whether it be scientific or social and humanistic.

By establishing the bases that sustain dualism, gaps are naturally created. At the same time that these gaps separate different areas of knowledge, they also contribute to the devaluation of many theoretically and functionally relevant fields of human enquiry. Sociological and logical-scientific positivism and the theories of linear evolutionary currents clearly illustrate this.

Unfortunately, the obstructions and the absence of prospective thought of Bolsonaro's government became even more evident in the tragedy of the COVID-19 pandemic. Putting aside political issues, it is necessary to refer to the work of the parliamentary commission of inquiry (CPI: Comissão Parlamentar de Inquérito), constituted to investigate the actions of the federal government during the pandemics. It was concluded on 26 October 2021.

In Brazil, the CPI has investigative powers, but it is not a judicial court. Thus, it cannot prosecute, but only send a report to the judicial system. Nevertheless, it is an important legislative commission of investigation, and it found several errors (and even crimes) perpetrated by Bolsonaro: for example, actions and omissions which caused unnecessary deaths, infractions against sanitary measures, improper use of public money, inciting the commission of crime and the promotion of quackery.

Recovery in Brazil will only be possible, then, if prospective and pragmatic thought can be implemented at all state levels, starting in the constitutive powers and including the presidency. The pandemic has shown that the absence of this is a major problem, because the risks and injuries will always increase, and, lamentably, carry the Brazilian people to the worst scenario – perhaps irreversibly.

Based on these considerations, we hope to establish the assumptions that will support the objectives that guide this study, whose purpose was to examine to what extent it is possible to shed more light on the relevance of broader socioeconomic and political interpretations through the light of John Dewey's conceptions of democracy and education as applied to Brazil's recovery.

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