

# Legal Fetishism at Home and Abroad

By Julieta Lemaitre

In 2002, when I left Colombia, human rights discourses were fighting words that invited threats and exile and bloodshed, and, even in the tamer area of women's rights, where the war remained panting at margins, the defense of human rights located one to the left. When my father heard this was my professional field, he dreamt I ambushed him in his land, wearing military fatigues and guerrilla emblems.

That fall I arrived in Cambridge and found Harvard Law School, or at least the activist section of it, in a flurry over David Kennedy's article on the human rights movement, where he wondered whether or not the movement was part of the problem and advocated for a pragmatic assessment of what he called "our most sacred" humanitarian tactics and tools.<sup>1</sup> This was my introduction to the United States academy's emphasis on cost/benefit analysis, perhaps the most illuminating aspect of a Harvard graduate education. I soon discovered it is the one thing most quarters apparently agree on: law is to be judged by its, preferably measurable, consequences, which are then spelled out, explicitly or not, as costs and benefits, or in any case as a matter of strategy, and above all, as a matter of winning.

Over the years, as the flame of my activism sputtered during the long winters in Cambridge, a particular intellectual curiosity about the law grew to replace it. I wondered about holding rights as "an object of devotion and not of calculation."<sup>2</sup> It seemed to me not only that in myself did rights indeed hold that place, or had, but that the phenomenon was in itself of interest, and not to be lightly discarded by the assumptions of consequentialism (i.e. that it was "bad faith," or bad politics, or alternatively, "false consciousness" or even "slave morality"). I do not mean to say that there is no need to examine consequences, and thus, costs and benefits. My point is rather that desire for and enjoyment in law reform is not fully explained by actual benefits or the expectation of benefits, but that there is instead an excess of passion and pleasure that is only explained by enjoyment in the law as an end in itself.

How to understand this passion? This question became not only the inspiration for a new academic project, but also a pressing personal question. I had abandoned other life plans because they paled beside the satisfaction brought about by legal activism and rights. It was a path that seemed at the time more poetic than poetry, more literary than literature: the path of legal protest and peaceful resistance and small constituent assemblies declaring territories of peace, and the endless marching and singing of protest songs, and reciting the name of the dead, and holding up a vision of justice that was doomed to be drowned in the rising tides of rightism, and then waving it like a flag. And all those feelings were somehow inevitably tied up with discussing in a workshop in a small town in the war zone whether or not community

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<sup>1</sup> Kennedy, David. "The International Human Rights Movement: Part of the Problem?" *Harvard Human Rights Journal* 15.99 (Spring 2002): 101-126.

<sup>2</sup> *Ibid.*, 101.

service for domestic violence was a violation of human rights, because of the ridicule it heaped on the aggressor. It was a discussion for a country that did not exist, carried out a few feet away from the site of a recent massacre, but it was also, hopefully, the weaving of that imaginary country. Not to mention the intense pleasure brought about by decisions such as the writs of protection where the Constitutional Court of Colombia held health insurance must cover sex-change operations for hermaphrodites, because sexual identity was a choice and not a destiny; it did not reside in the body but in the intimacy of consciousness.<sup>3</sup> It also said the child must give age-appropriate consent to the operation—that a child was not deprived of freedom over her life, but was only, in the Court's words, "freedom-in-becoming."<sup>4</sup> And these decisions produced a more intense pleasure than other types of beauty.

Because of this feeling about rights, I've been stuck in voluntary exile in Cambridge, in an intellectual milieu that insisted that my passion was misplaced. And while agreeing, and accepting and admiring the sophistication of cost/benefit analysis, at the same time, I have come to believe that it lacks a more thorough understanding of the devotion to law, which it dismisses as unpractical, maybe irrational, and sometimes unethical.

### *Legal Fetishism*

In legal theory the persistent metaphor to describe personal attachment to law is religious: such attachment is described as faith in law, devotion to law, a myth of rights, magical legalism and especially, legal fetishism—the adoration of law as if it were something different from the will of men. It is always an accusation of a serious shortcoming, a shortcoming of the character, of the mind, of one's politics. It appears in different texts and contexts persistently throughout the twentieth century, never losing its critical edge.

As far as I have been able to unearth it, the first appearance of the term "legal fetishism" is linked to the appearance of a French critique of formalism in legal interpretation, and is used to describe an excessive attachment to the letter of the law in contradiction with logic, convenience and justice. Francois Gény for example refers to the devotees of exegesis as caught up in a semi-religious trance and as practitioners of legal fetishism.<sup>5</sup> In fact, Gény's tremendous influence in the expansion of a social school of legal thought is probably responsible for the popularization of the term fetishism to describe formalism.<sup>6</sup> As these ideas were adapted to local political projects,

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<sup>3</sup> Constitutional Court decisions on hermaphrodites and informed consent for sex-change: see decisions T-443 of 1994, Su-337 of 1999, T-551 of 1999.

<sup>4</sup> Ibid.

<sup>5</sup> Gény, Francois. *Méthode d'interprétation et sources en droit privé positif: A Critical Essay*. Trans. Louisiana State Law Institute. St Paul: West Publishing Co., 1954, 1963.

<sup>6</sup> Kennedy, Duncan. "Two Globalizations of Law and Legal Thought: 1850-1968." *Suffolk University Law Review* 36 (2003): 631-679. Medina, Diego E. Lopez *Teoría Impura de Derecho La transformación de la cultura jurídica latinoamericana*. Bogota: Editorial Legis, 2004. Kennedy, Duncan and Marie Claire Belleau "François Gény aux États-Unis." *Francois Gény, Mythe et Realites 1899-1999 Centenaire de Methode d'Interpretation et Sources en*

the description persisted. For example in the United States, Jerome Frank specifically mentions the problem of “rule fetishism”<sup>7</sup> and Felix Cohen also describes classical legal thought as “legal magic and word-jugglery” and derides the “theological jurisprudence of concepts.”<sup>8</sup>

Over time, the socialist/liberal accusation of legal fetishism coexisted with a Marxist version of the same term that went beyond a critique of the method of legal interpretation. In this second variant, legal fetishism usually referred to the adoration of law as if it was not the product of men’s wills and decisions and class struggle, but held some intrinsic normative value instead. This belief in the power of law then referred both to the nature of law as superstructural, in the sense that it depended on the economic regime, capitalism, and to the nature of law as ideological in the sense that it helped reproduce this regime.<sup>9</sup> Both underlie the fact that law was produced by class struggle, and that it was partial toward capitalism, in substance as well as in its individualistic and abstract forms.

The anti-formalist and the Marxist uses of the term “legal fetishism” and its stand-ins (devotion to the law, faith in rights, etc.) are still common in contemporary discussions on the relationship between law and politics, and the gap between formal legality and its application. Those uses also coexist with colloquial uses of the terms, which do not really belong exclusively to either tradition, but instead refer generally to the belief that “law can change reality” by its mere adoption. In this broader sense, legal fetishism refers to blindness to the tension between enactment of law and its application, through a focus on the rituals of the law rather than on its efficacy.<sup>10</sup>

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Droit Privé Positif, Essai Critique. Eds. Claude Thomasset, Jacques Vanderlinden & Philippe Jestaz. Montreal: Editions Yvon Blais, 2000.

<sup>7</sup> Frank, Jerome Law and the Modern Mind. New York: Coward-McCann, 1930, 1949. 81, 283.

<sup>8</sup> Cohen, Felix S. “Transcendental Nonsense and the Functional Approach.” Columbia Law Review 35 (1935): 809-849.

<sup>9</sup> Many people who used the term legal fetishism in this way took Marx’s analysis of the commodity form, and his later linking of law with superstructure, and combined them in a general critique aimed especially at the substance of law, and at its uncritical acceptance by would-be contenders of the system. See for example Castellanos, Camilo, et al, El Debate a la Constitución. Bogotá: ILSA and Universidad Nacional, 2002. 8, 61. However, Eugene Pashukanis still offers the most sophisticated approach to this analysis, and coins the term legal fetishism for Marxist theory. For Pashukanis, what makes law an instrument of domination is not the substance of law, however crafty, or the unquestioning obedience to law, but instead the formal abstraction of concrete social positions. Law then obscures real social relations of power by pretending all persons are legal subjects with wills that are essentially equivalent, and that this treatment is the natural result of individuality. Legal fetishism masks a reality not just in the sense that it hides the human origin of law, or its substantive partiality to dominant interests, but in that it hides power differentials in legal relationships through the form of the “natural” legal subject. Pashukanis, Evgeny Bronislavovich. The General Theory of Law and Marxism. London: Transaction Publishers, 1924, 2002.

<sup>10</sup> It is implicit for example in Mauricio García’s critique of the symbolic efficacy of law, whereby in Colombia governments have consistently used to their advantage the gap between the enactment of a progressive law and its actual application, in order to gain legitimacy without taking any other action beyond the adoption of the law. The implicit reason why this

These different meanings do not seem to cancel each other out. The term “legal fetishism,” and sometimes similar terms, while always deployed critically, has a persistent polysemy—the ability to have different meanings at the same time—or rather, to be used with a particular meaning in mind without losing the other meanings implied by the term. For example, the accusation of “magical thinking” in legal interpretation can imply at the same time complicity with power structures, excessive positivism, excessive formalism, and the attachment to ritualism, without one meaning, even if it is the preferred meaning, canceling out any of the others. It also takes on additional new meanings when it is used to describe the situation in Latin America, and becomes part of the description of multiple national failures, imagined as failures of the national will, character and reason.

This flexibility of the term seems to mirror the fact that the term fetishism in European social theory has several different uses even if it is not necessarily polysemic. These various meanings range from an early ethnographic description of African religiosity and art, to the importance of Marx’s fetishism of commodities to social analysis, to the influence of Lukács on Western Marxism, to the adoption of fetishism to describe a sexual perversion by Freud, to a proliferation of the term in Anglo/American cultural and feminist theorists of the eighties and nineties.<sup>11</sup> The different uses of fetishism within social theory all share the idea of an overvaluation of an object, of getting more pleasure out of it than is rationally warranted, and a sense of the “wrongness” of this choice, which is usually disparaged, but also sometimes celebrated.

Perhaps then the polysemy of “legal fetishism” can support an opening up of the term to incorporate these other meanings and uses from social theory in a way that can illuminate the ambiguity inherent in the feeling it describes.<sup>12</sup> It could allow for positive as well as negative evaluations of legal fetishism, especially if one follows the possibility of celebrating fetishism espoused by some lesbian feminists.<sup>13</sup> And finally, perhaps the “other life” of “fetishism” in social theory, its life as a psychoanalytic not

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would work, or at least why it would work for social movements, would be legal fetishism. Garcia, Mauricio. *La Eficacia Simbólica del Derecho*. Bogota: Ediciones Uniandes, 1993.

<sup>11</sup> For Lukacs, see especially Lukács, Georg. “Reification and the Consciousness of the Proletariat.” *History and Class Consciousness: Studies in Marxist Dialectics*. Cambridge: MIT Press, 1968. For Freud see footnotes 22 and 23. For feminist theorists, see De Lauretis, Teresa. *The Practice of Love: Lesbian Sexuality and Perverse Desire*. Bloomington: Indiana University Press, 1994. Apter, Emily. *Feminizing the Fetish: Psychoanalysis and Narrative Obsession in Turn-of-the-Century France*. Ithaca: Cornell University Press, 1992. Butler, Judith. *Bodies that Matter: On the Discursive Limits of Sex*. New York: Routledge, 1993.

<sup>12</sup> Fetishism is ambiguous in the figure of disavowal. The fetishist knows he has the “wrong” object of desire and yet he denies this knowledge with his desire. It is a split of the ego that explains holding contradictory positions (and not bad faith as Sartre would have it). More recently Zizek has taken up again Octave Mannoni’s helpful formulation of fetishism as an : “I know...and yet...” See Zizek, Slavoj. *Sublime Object of Ideology*. New York and London: Verso, 1990. and Mannoni, Octave *Clefs Pour L’Imaginaire*. Paris: Seuil Champ Freudien, 1969.

<sup>13</sup> See references in footnote 11.

a Marxist term, indicates that the term fetishism itself, because of its link to both psychoanalysis and Marxism, could help reflect on the emotional life of legal activism without renouncing the recognition of the importance of economic power and structures.

### *The emotional life of legal fetishism*

The emotional aspect of legal fetishism has received little attention in legal theory, and, in spite of the possibilities inherent in the use of the word “fetish” in social theory, references to legal fetishism generally show no interest in understanding the emotional origin of the phenomenon, much less harbor the possibility that it could be celebrated. Instead, most of the analyses that mention “faith in law” ignore motivations for emotional investment in the law, either by emphasizing consequences, rather than causes or motives, or by emphasizing structural patterns related to the function of law in society, ignoring individuals and the creation of meanings. Where the reference to motivation is made in relation to a similar phenomenon, most notably in Duncan Kennedy’s legal sociology of adjudication, the phenomenon is dismissed as a case of either “bad faith” or denial.<sup>14</sup> But even this type of cursory reference is the exception, since legal as well as sociological analyses of rights-claiming by social movements generally focus either on the consequences of these strategies or on the structural elements of protest.

Often the phenomenon of “faith in law” is linked, explicitly or implicitly, to a strategic error of a given social movement.<sup>15</sup> The most obvious perhaps is the co-optation of the labor movement in many democracies, but also of other movements such as feminists, Blacks, welfare recipients, etc. Most social movements in democracies it seems, pursue legal strategies at one point or another, and receive internal and external accusations of legal fetishism, even if not in those precise words. This criticism emphasizes consequences: social movements are afflicted by “faith in rights,” and therefore their action becomes ineffective, leaders co-opted and protest demobilized.<sup>16</sup>

The critique of excessive legalism in social movements has elicited a response that also emphasizes consequences, examining the balance of costs and benefits in particular movements, places, times. They have found that legal mobilization has positive effects for movements, such as garnering elite support, deflecting the brunt of

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<sup>14</sup> Kennedy, Duncan. A Critique of Adjudication (fin de siecle). Cambridge: Harvard University Press, 1997.

<sup>15</sup> I am adopting the definition of social movement as sustained and essentially unarmed challenges to elites by groups that do not engage in electoral politics and claim to represent subaltern interests.

<sup>16</sup> Classics in this line: Scheingold, Stuart. The Politics of Rights: Lawyers Public Policy and Political Change (Second Edition). Ann Arbor: University of Michigan Press, 2004. Piven, Frances and Richard A. Cloward. Poor People’s Movements: Why They Succeed, How They Fail. New York: Vintage Book-Random House, 1979.

state repression, positively shaping cultural representations and mobilizing protest.<sup>17</sup> There is, however, in the response as well as in the critique, little interest in motivations and even less in emotions. The reason might be that the literature has been geared toward supporting social movement strategizing, which requires a balance of costs and benefits, or it might respond to a rationalist bias that equates motives with consequences, or both.

There is, however, a small body of legal literature interested in the emotions awakened by law “as an end in itself” that takes a psychoanalytic approach to understanding law and its social meanings.<sup>18</sup> The best known is perhaps Pierre Legendre,<sup>19</sup> and more recently both Jacques Derrida<sup>20</sup> and Slavoj Žižek<sup>21</sup> have proposed distinct types of ideological critique of the law. In either case they share the assumption that the emotions generated by “the Father” are linked to the emotions generated by “the Law” and, following Freud, that there is an isomorphism between social law, moral law and the paternal figure.

This use of psychoanalysis for the study of law is the direct inheritor of Freud’s formulation, especially in *Totem and Taboo* but generally in his lifelong elaboration of the Oedipus complex where he signaled the relationship between social laws and internal morality and linked both to the figure of the Father.<sup>22</sup> It is however a Freud filtered through Lacan, and his own development of the theory of the paternal function, and especially of the essential contradiction in the paternal law: while on the one hand it establishes the prohibition of incest, on the other it demands an identification of the boychild with the Father, an identification that then requires the forbidden desire. This contradiction has led to troubling insights on the essentially contradictory nature of desire for law, which shows both the desire to prohibit *and* the desire for that which is prohibited. In this sense, the law is based on the desire to break the law, and

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<sup>17</sup> The leading work in this genre is McCann, Michael. Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization. Chicago: The University of Chicago Press, 1994.

<sup>18</sup> Goodrich, Peter and David Gray Carlson, Ed. Law and the Postmodern Mind: Essays on Psychoanalysis and Jurisprudence. Ann Arbor: University of Michigan Press, 1998. See also Gabel, Peter. The Bank Teller and Other Essays on the Politics of Meaning. San Francisco: Acada Books, 2000.

<sup>19</sup> Legendre, Pierre. L’amour Du Censeur, Essai Sur L’ordre Dogmatique. Paris: Le Seuil, Champ Freudien, 1974. Lacan himself as editor of Seuil’s Champ Freudien series chose this book for publication.

<sup>20</sup> Derrida’s position is best known in the US in the “Force of Law” article. Derrida, Jacques. “The Force of Law.” Deconstruction and the Possibility of Justice. Ed. Drucilla Cornell, Michel Rosenfeld and David Grey Carlson. London and New York: Routledge, 1992.

<sup>21</sup> Žižek repeats himself in several works but see main thesis in Žižek, Slavoj. The Sublime Object of Ideology. New York and London: Verso, 1990.

<sup>22</sup> In his second topography, the superego took the function of laying down the law, both for the individual and in society. Freud, Sigmund. The Ego and the Id: Standard Edition of the Complete Psychological Works of Sigmund Freud. Trans. James Strachey with Anna Freud. London: Hogarth Press, 1957-74. Volume 19.

the desire for law is accompanied by illicit desires.<sup>23</sup> This contradiction in turn fuels cruelty as an increase in repression, cruelty then being also a part of the paternal function and implicit in the desire for law.<sup>24</sup>

While this analysis of law can be applied productively to many feelings generated by law, and surely to many instances of law reform, it does not seem to be concerned with the problem posed by the enjoyment of law by protesters against the status quo. Rather it seems to address the defenders of the status quo, those who identify with and uphold paternal power in society. Perhaps one could argue that the identification of law with the Father is such a powerful proposition that protesters who seek law reform are still caught up in it, seeking in the law a good Father. This might explain some aspects of desire for law, such as the urge to punish and reward, but it does not fully explain the difference between law as a weapon against political enemies and law as public morality. And in fact, much progressive law reform is not attempting to enact Kant's categorical imperative, but is perceived as a weapon aimed specifically at political enemies who represent the status quo, the Father, if you will.

Instead, the analysis of law as analogous to a sexual fetish posits desire for law as an attempt to defer identification with the Father, with the powers that be, an identification that so often comes with the admonition to political realism and practicality. This identification is deferred by the unreasonable and impractical insistence in the possibility of the power of the weak, a sort of phallic Mother if you will. Legal fetishism then can describe desire for and celebration of a law that denies the need for a moral/cruel Father and insists instead the beloved (m)other has all it needs and the proof is in the law.

This desire for law as an end in itself, for law because of its symbolic power to defer acceptance of the status quo, is a highly ambiguous enterprise. On the one hand it is a rejection of the reality principle, with all its costs and benefits. On the other, it is a celebration that requires no excuses, and postpones acceptance of the status quo. In the crevices of this ambiguity, lie the meanings of the legal fetish.

### *Legalism is a humanism*

Surely the law is many things to men, and recently to women, clamoring for its reform or its improvement. And its meanings change with time of course, and sometimes buried meanings come back in new wine-jugs. The law reform I know best, and have cherished, is rooted in a particular set of meanings about the human related both to scholastic humanism and to revolutionary law of the late 18<sup>th</sup> and early 19<sup>th</sup>

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<sup>23</sup> Lacan, Jacques. "Seminar XX: On feminine sexuality; the limits of love and knowledge." *The seminar of Jacques Lacan*. Ed. Jacques Alain Miller. Trans. with notes by Bruce Fink. New York: Norton, 1988. In *Totem and Taboo*, Freud put forth the thesis that the Oedipus complex had an historical origin in a primal scene of sons murdering a Father who had access to all the women and excluded the sons. Guilt over the murder is exorcised by turning the memory of the dead Father into a totem, laying the basis for religion and morality. Freud, Sigmund. *Totem and Taboo: Standard Edition of the Complete Psychological Works of Sigmund Freud*. Trans. James Strachey with Anna Freud. London: Hogarth Press, 1957-74. Volume 13.

<sup>24</sup> Lacan, Jacques. "Kant avec Sade." *Écrits*. Paris: Editions du Seuil, 1966. 765-790.

century. It barely survived 19<sup>th</sup> century positivism (and realism), but gathered strength again with the (sometimes half-veiled) return of natural law after World War Two, and under the aegis of U.S. Liberalism.<sup>25</sup>

In this genealogy, law reform, or the passion for it, is all about claiming and expanding the status of the human—its sacredness, inviolability—and above all the equivalence, even if only before the law, of human beings. This sacredness of the individual human is the kernel of modern-day liberalism in its many variants and with its persistent sentimentality—a kernel that remains and grows stronger even as the human status is bestowed on women, indigenous peoples, Blacks, colonials, homosexuals, children and perhaps soon even on certain types of mammals. As secularization deepens, and hard-core Marxism falls a casualty of history, this creed of the human has become a modern-day religion.

Like the sacred canopy of religion,<sup>26</sup> the web of meanings that constitutes this modern day religion is spun around an empty center, but this empty center is not the power of law, but rather, the sacredness of the human. In a modern secular state social life is constantly mediated by the premise that every individual has intrinsic worth as human. In other words, social life is premised on the idea that the human has value *qua* human, a value that is assumed, at least emotionally and certainly discursively, to be ontological. This is the ground for the patterning of social relations, the foundation of a secular morality, and the implicit rationality of law. It is perhaps Rousseau's (and Locke's?) optimistic imprint on democracy, and the legacy of monotheistic morality, undefeated.

The problem with the premise and the reason why it is easily revealed as having an empty center is that the value of the human is not ontological; there is nothing in a human that makes her naturally inviolable in the same way we are bipeds, or mammals, or use language and tools. In fact the overwhelming weight of history shows also that the intrinsic value of the human is an artificial product of a political will and not the natural state of affairs. Perhaps there are a few groups, insulated in their privilege, where the assumption of the sacredness of the human is reflected in their day-to-day lives, enough to make exceptions seem like aberrations. But to most of the world population, social relations contradict the claim. The emptiness of the idea of the human as sacred can be revealed by a petty accumulation of incidents surely, or by the one-time recognition of being firmly attached, by whatever insufficiency ails you, to a subordinate or despised location in a hierarchical society. This is another version of double consciousness: on the one hand, the belief in the value of the individual as such, and on the other the personal knowledge of lack of full humanity, in one's self or in the miserable beings that surround us.

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<sup>25</sup> Also related is the enormous impact of the Civil Rights movement on protest in the U.S. and its globalization through international organizations and U.S. imperialism. The legal success of the Civil Rights movement made rights the privileged frame for protest in the United States after the 1960s. See Sidney Tarrow for an analysis of frames and rights frames for social movements. Tarrow, Sidney. Power in Movement: Social Movements and Contentious Politics. 2nd ed. Cambridge: Cambridge University Press, 1998.

<sup>26</sup> Berger, Peter L. The Sacred Canopy: Elements of a Sociological Theory of Religion. New York: Doubleday, 1967.

Violence also provides a shortcut to this knowledge, that the sacredness of the human is an artificial construct. That there is nothing there in a human that makes him sacred. Or else how to explain the contorted face of a hanged man, a severed limb by the side of the road, the horrors that can be inflicted on a child, without consequence? Other types of violence too, more subtle, only named as violence because they deny human equivalence: the life of indentured workers, the endless misery, the half-life of poor women contained in their bodies, the public branding of homosexuals. The knowledge of one's own lack of full humanity, acquired in a school yard, in a public bathroom, in a parking lot, over the course of a night or a week or a lifetime. And the weight of all this revealing at every turn that there is nothing intrinsically sacred in the human because there is no god—as Sade knew well, and probably so did Kant. But it's a knowledge shared not just by the moralist and the sadist, but also those who are moved by compassion to work with those who suffer, only to discover their endless need and degradation, and find that they, the others, hold on like a drowning man and drag you down to a life apparently without redemption and where compassion is yet another privilege of class.

And if there is nothing intrinsically sacred in the human, then there is no moral meaning in social life, or rather, it is woven around an empty core.

This knowledge is denied by law, and that is its allure. Law, reformed by social justice activists, claims that suffering and humiliation caused by others is an aberration. That law-less-ness is also ab-normal, the normal being what is established in the norm. And if horror is an exception, a deviation from the right and normal path, then the center of moral life is again full of meaning. And the real effect of degradation, the constitution of a half-human subjectivity, is invisible to justice, who cloaks all with the magic names of “citizen” and “human.” Original sin, now named as abnormality, is exorcised by the ritual purging of the criminal, branded by the law as the exception to purify social life and call it normal.

If desire is awareness of a lack, it is the lack of ontological human dignity that constitutes desire for law that claims the human sacred. Law stands in the empty space and purports to fill it. This is the reason why law produces so much pleasure, and is desired with so much passion by social justice activists.

But just as Catholicism is much more than longing for a missing, an in-existent body of god, legalism is more than longing for the law, so revealing the absence is not so simple. Around it is spun a tremendous meaning-making web over every event in public and private life, giving meaning to social interactions. Pointing out the empty center threatens the sanity of those who have no alternative theology—no religion, no Marxism, no philosophy, not even Nietzsche, nothing to tide them over. Persisting then in the vision of the void, the ascetic passion of the negative way, is only for the very few.

Instead, law invites you to meditate on a full center, and by occupying the empty space of meaning at the center of social life in a modern, secular society, it produces immense pleasure to those who turn to it. It is a pleasure easily recognizable by anyone who has ever lobbied for law reform, and then had their bills approved, or won a case for social justice. It is a pleasure that overwhelms pragmatic assessment and that spills over into the symbolic role of the law. Every group who has engaged in legal activism has its own unfulfilled longings and perhaps as well its own memories of

celebration that still cause pleasure after over fifty years. Think for example of *Brown*,<sup>27</sup> of course, and the refusal of so many liberals who lived through it to give up on the pleasure it produces. Or of the NAACP's campaign for a federal prohibition of lynching, a bill that never passed but that the organization kept presenting even when lynching had all but disappeared as a social phenomenon.<sup>28</sup> It is easy to imagine the immense satisfaction it would have produced, the parties and the marches and the songs, a pleasure far exceeding, as in *Brown*, its actual impact on Jim Crow and the federal government's capacity to implement it. And again, it is not a matter of getting pleasure from a law that is ineffectual, but a matter of the persistence of pleasure brought about by law as an end in itself, a pleasure which is not warranted by the instrumentality of the law.

Another familiar example of this excess of pleasure is human rights law and its modern origin in the admonition "never again." Almost every provision in the Universal Declaration of Human Rights is a direct rebuke of Nazi laws, reasoning, and acts as is the creation of an international tribunal to judge crimes against humanity, and the idea of a crime called genocide. Witness the recent commemoration of the Nuremberg Trials at Harvard Law School,<sup>29</sup> which were certainly not only based on a pragmatic assessment of international criminal courts. The excess of pleasure obtained from the existence of the laws themselves comes not only from its possible instrumentality, but from the words of law, and their power to insert horror into the web of symbolic meaning of a secular society. Genocide then, for the unbelievers, is a more satisfying explanation than the description of what happened as a Holocaust, a burnt offering to the God. It is a name for that which did not have one, claiming, as Adorno said, the unspeakable as commensurable.<sup>30</sup> And as such, rescuing the possibility of moral meaning in secular society.

The experience of lack of meaning can also be presented more concretely in the body of a victim. Many human rights narratives do this implicitly through the personal stories that adorn the reports of fact-finding missions. It is as if the reports, with their prurient interest in every degradation, insist on showing how the victim is stripped of its humanity, while at the same time denying that this stripping of humanity can be done. The horror of a person that is not one, or is only part a person, part a body, even more than the persistent accumulation of the intimate certainty of being half a person, cannot be fully understood or mastered. The narratives are then coupled with the articles that affirm the humanity of the victim and the existence of rights

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<sup>27</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

<sup>28</sup> See Zangrando, Robert. The NAACP Crusade Against Lynching, 1909-1950. Philadelphia: Temple University Press, 1980.

<sup>29</sup> Harvard Law School and Facing History and Ourselves Program. *Pursuing Human Dignity: The Legacies of Nuremberg for International Law, Human Rights and Education* (Cambridge, MA) Nov. 2006.

<sup>30</sup> Adorno, Theodor W. "Messages in a Bottle." Mapping Ideology. Ed. Slavoj Zizek. London and New York: Verso Press, 1994. 35. Adorno put it most succinctly when he says: "What the Nazis did to the Jews was unspeakable. Language has no word for it. And yet, a term needed to be found...So in English the concept of genocide was coined. But by being codified, as set down in the International Declaration of Human Rights, the unspeakable, was made, for the sake of protest, commensurable..."

and this produces pleasure, especially when there is a favorable ruling for the rights of the victim. It is a pleasure more intense after the titillating effect of almost revealing that there is nothing human, really, in the wracked body exposed earlier, in the details of degradation and horror.

Another way of getting pleasure from human rights work is by making the victim speak and thereby be human again. Thus, human rights reports often use first person narratives. Testimonies are collected and reproduced verbatim, and the peak of pleasure comes from actual autobiographies like Rigoberta Menchú's,<sup>31</sup> or from the parading of survivors in northern cities or on TV. Their humanization is indispensable to disavow the effects of the victims' status as non-human, as animal or as thing—the only other alternative is to deny the suffering existed.<sup>32</sup>

And denial is perhaps the path chosen by most, denial in the sense of closing off, not thinking, looking through. Claiming then there was no threat to coherence because there was no suffering in the first place, not to *that* degree. None that matters—perhaps because it didn't really happen, or it didn't happen that way, or its import is exaggerated, or the victim was an agent and as such never a thing, not even close to one—they deserved it, or they chose it, or they participated in it. Much like U.S. alien combatants had it coming, or date rape victims. But this kind of denial, while common, does not really make for activists.

Rights-activists cannot refuse the burden of knowing horror, but they do refuse its full impact, and instead of seeing the subjects produced by violence, urge the law to humanize them, to deny their lack of sacredness, to adopt the victim's perspective, her voice, his point of view, speak for her, create spaces, processes for him to speak, to participate, to give witness, testimony. Just naming him or her a victim is a thrill, and there are more to be had in law reform. And by imagining (taking the place of) the victim as human, law restores moral meaning to the social world. All these rites and formalities and the various forms of victim hagiography once more produce the pleasure of affirming humanity and deferring the knowledge of its absence.

By pretending the victim has always been fully human, rights-oriented law reform disavows the knowledge of the victim's status as non-human, a disavowal that is resistant to all calls to realism. The project of progressive law reform is, however, threatened in the rare but devastating moments when the fetishist hears the victim's haunting silence, or when the actual work "in the field" is so devastating it ruins the possibility of legal fetishism. But those incidents are kept quiet even by their protagonists, who it seems, dread in any case ruining the collective fantasy and resort instead to private cynicism.

### *The fetish as fantasy*

Legal fetishism is still, I think, a mask, a way of hiding a reality that is known and rejected. But the reality rejected is not to my mind that of exploitative social relations,

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<sup>31</sup> Menchú, Rigoberto. *I, Rigoberto Menchú: An Indian Woman in Guatemala*. Ed. Elisabeth Burgos-Debray. Trans. Ann Wright. London: Verso, 1984.

<sup>32</sup> On this topic see Cohen, Stanley. *States of Denial: Knowing about Atrocities & Suffering*. Cambridge: Polity, 2001.

abstracted by law. That reality is a matter of truth for most social movements. What is rejected is the reality of emptiness, the reality of the lack, the lack of intrinsic morality and value of the human *qua* human.

The genius of liberal law is that the same legal abstraction that attempts to mask, less effectively, social relations of oppression, is also the one that makes law an object of desire. Through the abstraction of the legal subject, by claiming equivalence and dignity, law, at least law after the appearance of human rights, serves to mask the knowledge of the lack of ontological value of human beings. This explains the litany of survivors who insist on the same metaphor, that claiming rights means they are not dogs, not animals, or, when talking about what they witnessed, that others were killed or treated “like a dog.” Meaning of course that they are human, which is the fantasy behind the legal fetish.

Human rights courts give striking examples of the power of the legal fetish and its workings as a fantasy. One of my favorite examples is the 1999 Interamerican Court decision in the Villagrán Morales case, where the Court decided Guatemala was responsible for the murder of street children by plainclothes police men and by unidentified actors.<sup>33</sup> Reparations were symbolic as well as material and the Court further developed its conception of the purpose of human rights justice. And between the lines one hears the sobbing of the mothers, insisting that “they killed him like a small animal (*animalito*).”<sup>34</sup> Like a small animal, as if she knew that the allure of law laid in its claim to negate that they had, in fact, killed him like an animal, and that this was the precise fact judges find intolerable and that turns them in the mother’s favor.

Pretending murdered children had rights all along, law disavows the reality of the description in the phrase “they killed him like a dog.” Pretending they had rights is a fantasy, not because it offers an escape from reality, but because it offers reality, a different reality, as an escape from the impossibility of a child treated as a dog.<sup>35</sup> Not impossible: a children’s rights defender once told me of rescuing a child that had been raised as a dog, in a kennel; the child then six or seven, forever unable to speak, licked the defender’s shoes, in gratitude, and happily curled on the floor, as it preferred. But in the fantasy of human rights, children always had rights, and they were violated and they were never animals. In the Villagrán Morales case by calling the victims children, these boys, who were adolescents, swaggering in the certainty of almost-manhood, erect genitals and deep voice, by calling them as the law calls them, children, we insist on a different reality than the one presented by the murderers who saw in them nothing but dogs. The fantasy that they were children and humans with rights does not fulfill a desire, it constitutes a desire, a desire for law, for reports, cases, judicial decisions, condemnations, reparations, trials, responsibilities, precedent.

The problem with this idea of fantasy is that when applied to law, at least human rights law, as a fantasy shows that even though the fantasy has no particular purchase on truth, neither does the description of the children as dogs or as criminals or as

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<sup>33</sup> Interamerican Human Rights Court. Villagrán Morales and others v. Guatemala (“Street Children” case). November 19 1999, IHR Court. (Ser. C) No. 63 (1999).

<sup>34</sup> Ibid.

<sup>35</sup> I am using Slavoj Žižek’s definition of fantasy. Žižek, Slavoj. The Sublime Object of Ideology. New York and London: Verso Press, 1990. 49, 118-119.

anything else, because their dead bodies, and the way they died, constantly escape the power of language to give their death social meaning.

If legal fetishism—the valuing of law as an end in itself, the valuing of the Villagrán Morales decision as an end in itself, for example—is then a fantasy, this does not mean that it is a fantasy as opposed to a real description of the events. It is an alternative description of the events, and in a sense, a way of choosing something over nothing—over the void of meaninglessness.<sup>36</sup> There are no words in short that properly explain (symbolize) the act of gathering homeless boys, taking them away in vans, torturing them for no apparent reasons to the death, abandoning their bodies in a city park. It is in a sense a fact that is “up for grabs” descriptively, and whatever formulation is used is in a sense a fantasy, having an uncertain hold on the facts.

As I now face my imminent return to Colombia, where human rights remain a left-political project, and a fantasy, fighting for the chance to be the only description of reality, I wonder what it will mean for me to return. In the last five years at Harvard, I have been resisting consequentialism, for fear that it would mean having to relinquish the fantasy of human rights, only to face the facts with no other alternative explanation, no other way to live with them.

But now I wonder if my legal fetishism has really survived my Harvard graduate education, and if I have not, unwittingly, caught instead the bug of pragmatism. And what that means for me, to have in a sense gone through the legal fantasy when the need for fantasy again slams up against my face? What will it mean for my teaching, and potential activism and political location in the scary spectrum of a civil war?

That remains, for the time, an open question.

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<sup>36</sup> In the later Lacan, symptom is the way we choose something over madness—this is the way Žižek puts it. Žižek, Slavoj. *The Sublime Object of Ideology*, 74.