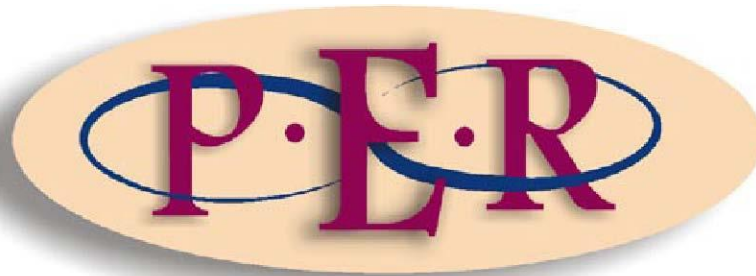Author: **JM Modiri**

LAW'S POVERTY

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JM Modiri[*]

> Of course the freedom struggle is far from over. The ravages of apartheid are enormous. Its wounds are deep.[1]

> The point is that there are far too many people who suffer. The point is that there are far too many people living a suboptimal existence.[2]

1   Introduction

This article joins the call in radical democratic political theory for a shift in the analytic and conceptual registers in which the relationship between law and poverty is conventionally addressed. It works to one side of recent South African legal scholarship on this topic,[3] and adopts instead an analysis that explicitly politicises the issue of poverty and relates it to the concrete history of racialised capitalism and structural inequality that defined colonialism and apartheid and continues to persist in "post"-apartheid South Africa.[4] In this analysis, then, poverty is to be conceived of within the broader context of our colonial and apartheid past (racial inequality, land dispossession, impaired citizenship, inadequate access to health services and quality education, poor infrastructure and spatial segregation) and the nation's systemic failure to come to terms with and redress the effects of this past.

[1]   Lawrence 1995 *Stan L Rev* 820.
[2]   Emeritus Justice Zak Yacoob cited in SAPA 2013 http://goo.gl/K6KyTv.
[3]   For a sample of the literature see: Mubangizi and Mubangizi 2005 *Dev South Afr* 277; Van der Walt *Theories of Social and Economic Justice*; Olivier and Jansen van Rensburg "South African Poverty Law" 107-141; Bilchitz *Poverty and Fundamental Rights*; Quinot and Liebenberg *Law and Poverty*; Dugard "Courts and Structural Poverty" 293-328; Thapanyane "You Can't Eat the Constitution"; Langford *et al Socio-Economic Rights*.
[4]   See Cornell and Panfilio *Symbolic Forms* 125-149.

The purpose of thinking race and poverty together in this inquiry is twofold. First, it interrupts the dominant assumption in legal and political discourse that views the new constitutional dispensation as a fundamental *rupture* and radical break with the past by highlighting the continuing patterns of racial subordination and socio-economic inequality that were generated by over 350 years of white colonial domination. While the laws of the country have changed considerably, the architecture, framework and logic of *colonialism-apartheid* remains. It refuses to fade. Because South Africa was for over 350 years expressly organised around white supremacist values and practices, the true demise of apartheid requires that the rejection of white supremacy as a normative vision must be tethered to a commitment to the eradication of the substantive conditions of racial subordination and domination - not merely a formal declaration of the end of apartheid.[5] Secondly, it displaces the orthodox Marxist class-reductionism which excludes (or minimises) questions of race, racial power and systemic racism in considerations of poverty and socio-economic rights. The erroneous view that class as a category of analysis supersedes (or is more foundational than) race, or that class is free of race, or that race-based identity politics heralds the abandonment of the critique of capitalism and economic subordination is one that often implicitly frames discourse on poverty in South Africa. This view is faced with the statistical oddity that Blacks make up an overwhelming majority of people living under conditions of poverty[6] – which in turn illustrates that the production of poverty

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5   Modiri 2012 *SA Public Law* 256.
6   Throughout this paper I shall use the phrases "the poor", "impoverished people", "people living in poverty" and "people living under poverty" interchangeably. I do so in part to indicate my own discomfort, ambivalence and anxiety with acts of naming or speaking for those living under conditions of poverty as well as to register my acknowledgement that all codifications and deployments of group identity run the risk of reifying that identity and entrenching woundedness and victimisation as fundamental to that identity. That said, I take it from thinkers such as Linda Martin Alcoff, Charles Mills and William Connolly that our identities are not completely voluntary. Due to the materiality of class, race and gender, for instance, as well as the shared - though not necessarily exactly similar - experience of a common reality of subordination and suffering engendered by poverty, it makes sense to speak of "the poor" even if this is always attached to a concession that all identities are internally homogenous and complicated. I prefer "people living in/under poverty" over "the poor" (which I will mostly place in inverted commas when used) because it allows a distance between the people and the poverty in a way that does not naturalise or reify poverty as an identity when it is more appropriately an injury to one's Be-ing in the world. My thanks to the one reviewer who pointed this out and pressed me to make this dilemma more transparent.

in South Africa is inseparable from the historical and current workings of racialised structures of power, domination and exclusion.

Slavoj Zizek famously claimed that "[w]e feel free because we lack the very language to articulate our unfreedom",[7] and so this article could be read as an attempt at theoretically developing a critical vocabulary through which to articulate aspects of that unfreedom. In it I shall draw on a variety of diverse traditions, thinkers and concepts, all of which more or less follow a critical legal leftist or radical democratic orientation, to examine law's vexed relation to the project of poverty eradication. The core animating theme is the rejection of economist, managerial, and legalist approaches to overcoming poverty in favour of approaches that would seek to challenge the fundamental structure of society and the root causes of poverty, injustice, inequality and suffering. A second underlying argument, given the explicit focus on race in this article, is that poverty eradication needs to be understood and evaluated from the vantage point of racial justice and postcolonial sovereign recovery.[8]

This article has three main parts. In the first part (part 2) I argue for a conceptualisation of poverty as a form of systemic oppression. For this argument I draw on Iris Marion Young's theorisation of the "five faces of oppression" and examine each of those "faces" from the perspective of racialised poverty in South Africa. Thereafter I shall (in part 3) refer to Drucilla Cornell's theory of justice, in which "matters of the heart" also stand central, and her concept of the imaginary domain as well as Judith Butler's notion of "precarious life" to highlight poverty as also being a problem that impacts upon moral recognition, the protection of dignity, the symbolic and ontological integrity of the Human and the ethical relation to the Other. All of these, I contend, need to be recognised and incorporated in theories, approaches, policies and laws that wish to comprehensively address the multifaceted injuries and injustices of poverty. Of central importance in all three thinkers is how, when applied to the issue of poverty, each enables a focus on *both* the distributive (economic and

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[7]   Zizek *Welcome to the Desert of the Real!* 2.
[8]   See Ramose "I Conquer, Therefore I am the Sovereign" 543-589.

material) and non-distributive (non-material, non-economic, ideological social, and cultural) dimensions of poverty.

Finally, I reflect (in part 4) on the implications of this reformulation of poverty for rights-based and law reform-oriented approaches. I consider the question of whether rights can provide the kind of emancipatory vision and praxis required for the full eradication of poverty and the realisation of radical democracy, substantive equality and collective freedom. To this end I rely heavily on Wendy Brown's critical study of legal efforts to procure rights for politicised identities to explore the possible tensions and contradictions between human and socio-economic rights activism and legal mobilisation strategies on the one hand and the struggle for substantive poverty eradication and freedom on the other. Figurations of rights discourse as excessively legalist to the detriment of radical politics, as regulatory and disciplinary, as silencing and coercive, as depoliticising, conservative and allied to hegemonic powers are among some of the lines of critique to be developed in this exploration.

By the end of this inquiry, rather than a pedantic and technical legal discussion on the law(s) on poverty, something of *law's own poverty*, its limits, incoherence and violence, should have come to the fore. Let us begin with the haunting/haunted words of Jacques Derrida:

> For it must be cried out, at a time when some have the audacity to evangelise in the name of a liberal democracy that has finally realised itself as the ideal of human history: never have violence, inequality, exclusion, famine and thus economic oppression affected as many human beings in the history of earth and humanity. Instead of singing the advent of the ideal of liberal democracy and of the capitalist market in the euphoria of the end of history, instead of celebrating the "end of ideologies" and the end of the great emancipatory discourses, let us never neglect the obvious microscopic fact, made up of innumerable singular sites of suffering: no degree of progress allows one to ignore that never before, in absolute figures, have so many men, women and children been subjugated, starved and exterminated on earth.[9]

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[9]   Derrida *Spectres of Marx* 85.

2   A left (re)conceptualisation of poverty

A useful framework for a politicised account of poverty, in particular poverty generated by the institutionalisation of anti-black racism, is Iris Marion Young's definition of "oppression".[10] As a disabling constraint, racialised poverty includes deep distributive and economic patterns but it also extends to issues of culture, epistemology, and social power, the division of labour, decision-making procedures, autonomy and agency - all of which are incorporated in Young's analysis.

Young begins with the argument that while many in mainstream society would not use the term "oppression" to name injustice in society, it is important for emancipatory social movements and critical theorists that we articulate "oppression as a central category of political discourse".[11] She urges the recognition that oppression – for black radicals, feminists, socialists etc – makes sense of much of our social experience and ideological perspective[12] - even as she explicitly points out that not all groups are oppressed to the same extent, in the same way or by the same configuration or kinds of subordinating social powers.[13]

What makes Young's idea of oppression resonant with a politicised account of racialised poverty is its understanding of oppression as a structural concept, and hence, its opposition to the traditional usage of oppression as meaning only the direct, formal, institutionalised exercise of tyranny by a ruling group.[14] Young notes that in dominant political discourse, oppression is used sparingly, only to designate either direct forms of military conquest and colonial occupation. It is also frequently used as a term of Western "civilizational discourse" to describe the political situation of Other non-Western, non-secular, communist or certain postcolonial African societies – societies, in other words, that do not aspire to the modern liberal democratic form.[15]

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10   Young *Justice and the Politics of Difference* 39-65.
11   Young *Justice and the Politics of Difference* 39.
12   Young *Justice and the Politics of Difference* 39.
13   Young *Justice and the Politics of Difference* 40.
14   Young *Justice and the Politics of Difference* 40.
15   Young *Justice and the Politics of Difference* 41.

In South Africa, where the dominant political discourse is one of post-racialism and colour-blindness and where it is assumed that the struggle for Black liberation ended with the formal demise of the apartheid government and the institutionalisation of liberal democracy, to use the term oppression to denote the lived experiences of the majority of Blacks would appear as wholly illegitimate, invidious, and even demagogic. However when oppression is defined as the disadvantage and injustice suffered by certain social groups not necessarily because of a tyrannical government but "because of the everyday practices of a well-intentioned liberal society", even a post-authoritarian state such as South Africa would be unable to escape being designated as oppressive.[16] Young writes:

> Oppression in this sense is structural, rather than the result of a few people's choices or policies. Its causes are embedded in unquestioned norms, habits, and symbols, in the assumptions underlying institutional rules and the collective consequences of following these rules.[17]

For Black South Africans, poverty is a strong constituent element of the objective material reality of racial oppression and it continues due to the inertia of the racial inequalities and disadvantages that are the consequence of over 350 years of totalitarian white supremacist rule in South Africa. Despite the establishment of a liberal constitutional order, the inclusion of a large catalogue of "justiciable" socio-economic rights in the Bill of Rights, as well as legal reforms in the area of remedial equality and anti-discrimination law, Blacks still constitute the majority of the poorest and most disadvantaged stratum of South African society.[18] Because a central outcome of *de jure* apartheid was the racial stratification of society in hierarchical terms, the unequal distribution of rights, resources and benefits continues to favour whites and disfavour Blacks. Thus we can say that we currently live under conditions of *de facto* apartheid or neo-apartheid/neo-colonialism in which the same macro-structure of "imperialist white supremacist capitalist patriarchy"[19] which defined colonial apartheid continues to operate, although under a different legal and political arrangement (ie a liberal democratic government under non-white rule). Following a

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[16]   Young *Justice and the Politics of Difference* 41. Also see Cudd *Analyzing Oppression*.
[17]   Young *Justice and the Politics of Difference* 41.
[18]   Terreblanche *History of Inequality*; Durrheim *et al Race Trouble* 16-20.
[19]   Hooks *Outlaw Culture* 116.

structural understanding of poverty reveals that the problems of poverty currently experienced by Blacks are not caused by our presumed cultural inferiority or lack of industriousness nor by the fact that apartheid set us back a few years behind whites, but by the very way in which society is organised and structured.

Young's extended structural definition of oppression shows more clearly the vast and deep injustices that Blacks suffer not only as a consequence of the legacy of systemic racial discrimination but also because of the normal routines of everyday life, which stabilise and perpetuate existing racial hierarchies and inequalities, either by denying them (colour-blindness and post-racialism), downplaying them (liberalism) or obscuring them (formalism). Thus, Young notes, "we cannot eliminate this structural oppression *by getting rid of the rulers or making some new laws*, because oppressions are systematically produced in major economic, political, and cultural institutions".[20]

Because the systemic character of oppression resists its own reduction into the conscious actions or premeditated intentions of individual social actors, it follows that the reality of oppression and the existence of an oppressed group does not require a correlate oppressing group that is organised directly around the objectives of that oppression. In other words, Blacks are oppressed in ways so well-organised at the level of social structure that whites do not need to be consciously involved in the actual oppression of Blacks. This does not mean, however, that many whites, as members of the dominant group, do not contribute to maintaining and reproducing that oppression. They do. And it also does not mean that whites as a privileged collective do not benefit enormously from that oppression and have a strong, even if unconscious and indirect, interest in its continuation. They do. *It simply means that in modern liberal societies, individuals involved in the maintenance and reproduction of systems of oppression are usually simply doing their jobs or living their lives.*[21]

Young then goes on to formulate her "plural explication of oppression" by describing the five faces of oppression, namely exploitation, marginalisation, powerlessness,

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[20]   Young *Justice and the Politics of Difference* 41. My emphasis.
[21]   Young *Justice and the Politics of Difference* 42.

cultural imperialism and violence, which show more clearly how poverty is a composite part of the racial oppression of Blacks. I shall briefly discuss each of these in turn.

2.1   Exploitation

In capitalist societies, with liberal legal systems, legally enforced class, race and gender distinctions are removed in favour of the promotion of the legal freedom of persons to work and contract with whomever and however they choose, however abstract this freedom may be. Without the Marxist understanding of exploitation we can be left a little clueless as to how it is possible that racialised class distinctions (between wealthy whites and poor Blacks, for example) can persist even despite the removal of race and class distinctions in laws prohibiting abuses based on such distinctions. Young explains it as follows:

> The injustice in a capitalist society consists in the fact that some people exercise their capacities under the control, according to the purposes and for the benefit of other people".[22]

Through private ownership of the means of production and through markets that determine value and allocate labour and the ability to buy goods, capitalism works to systematically transfer the labour power of some persons to others, thereby giving the latter power over the former. Under this system, the dominant class acquires and maintains the power to extract benefits from workers. This extraction and transfer of power from one group (the workers) to the other (the dominant class) affects the power of workers not simply in the amount of transfer but also in the fact that the workers suffer material deprivation, lack of control over their own production capacity (alienation) and a loss of important elements of self-respect. Exploitation thus "[e]nacts a structural relation between social groups".[23]

Because of its roots in the Marxist privileging of class as the basic cleavage of social stratification, this understanding of exploitation needs to be broadened to explain racial oppression.[24] For our purposes, I want to suggest that the racialised element of

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[22]   Young *Justice and the Politics of Difference* 49.
[23]   Young *Justice and the Politics of Difference* 49 -50.
[24]   Recall Fanon *Wretched of the Earth* 31: "[M]arxist analysis should *always be slightly stretched* every time we have to deal with the colonial problem".

the exploitation still remains despite the creation of a small class of enormously wealthy black elites and a slowly growing Black middle class and also despite the presence of poor whites (and here we should note that class differentials between blacks and poverty in white communities existed prior to 1994). What is important is not who constitutes the capitalist class, but who constitutes the large majority of the poor, unemployed and working class (*viz* Blacks). Furthermore, I want to suggest also that the structural relation enacted by exploitation is normatively influenced by white supremacist prescriptions that deny Blackness any sense of human dignity and purpose and thus provide a justificatory frame for the use and abuse of Black bodies. How else to understand the institution of slavery and other forms of unfree black labour except through this connection between capitalist exploitation and white supremacy?

Derrick Bell, for instance, has noted that in racially-structured polities there exists a depressingly strong correlation between economic resources and race and between resources and eventual success, prosperity and fulfilment.[25] Young also suggests that we can distil from Marxist theory a distinct form of exploitation that is racially specific. She proposes menial labour/servitude as a starting point.[26] As she writes,

> Wherever there is racism, there is the assumption, more or less enforced, that members of the oppressed racial groups are or ought to be servants of those or some of those, in the privileged group.[27]

In South Africa, poor Blacks occupy a large majority of formal and informal menial work such as that of domestic workers, car and security guards, cleaners, street sweepers, garbage collectors, farmworkers, construction workers, miners, drivers etc. There is a strong historical, symbolic and mnemonic link between these modern forms of servitude and the system of racial slavery that should be noted here. In all cases these jobs are a form of "servile, unskilled and low-paying work lacking autonomy".[28] They involve Blacks taking orders from many people and their work serving an auxiliary function to the more important, high-status work of others, thereby rendering

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[25]   Bell 1995 *U Ill L Rev* 894.
[26]   Young *Justice and the Politics of Difference* 52.
[27]   Young *Justice and the Politics of Difference* 52.
[28]   Young *Justice and the Politics of Difference* 52.

them vulnerable to disposal and sacrifice. Because of the normative influence of white supremacy, there still remains a strong cultural association between menial work, servitude and non-professionalism and Blackness and also strong cultural pressure to fill these jobs with Blacks.[29]

2.2   Marginalisation

The second "face" of oppression in Young's taxonomy is marginalisation, which is manifested by the creation of an underclass of often racially marked people whose lives are permanently confined to social marginality. Under conditions of marginalisation, "[a] whole category of people is expelled from useful participation in social life and thus potentially subjected to severe material deprivation and even extermination".[30] And of course, in a racialised capitalist society, the medium of that expulsion takes place along racial lines. Young notes that contemporary advanced capitalist states respond to marginalisation by means of welfare, social development programmes and the provision of basic services which in the long run do nothing to "eliminate large-scale suffering and deprivation".[31] She also notes, however, that material deprivation is not the only harm caused by marginalisation. Young claims that the provision of welfare produces new injustices by depriving those dependent on it of rights and freedoms that others have. What makes marginalisation unjust, then, is the way it blocks the opportunity for the marginalised to exercise their capacities, express themselves intellectually and culturally, and assume control over the conditions/processes of their own lives.[32]

Those dependant on welfare and other medical and social services often have their needs constructed by agencies and professionals and treated as though they do not know what is good for them. Worse still, they are often subjected to punitive, demeaning, inconveniencing and arbitrary treatment by the policies and people associated with the bureaucratic administration of the welfare. The story of Skhumbuzo Douglas Mhlongo, a 22 year-old black man who committed suicide in

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[29]   Young *Justice and the Politics of Difference* 52.
[30]   Young *Justice and the Politics of Difference* 52.
[31]   Young *Justice and the Politics of Difference* 54.
[32]   Young *Justice and the Politics of Difference* 54.

despair after not being able to obtain an ID book after a Home Affairs official ripped up his application and threw it in his face attests to the routine disregard of the dignity of those dependent upon social welfare.[33] The racist (and dishonest) rhetoric of Blacks as lazy complainers, undeserving of social advancement and suffering from an "entitlement complex" is obviously implicated in marginalising the Black poor as well.

2.3   Powerlessness

In addition to having their labour exploited and being marginalised, there is another dimension to oppressed groups' experience which Young names powerlessness.[34] We could also include voicelessness, invisibility and social immobility in this third "face" of oppression. As Young writes:

> The powerless are those who lack authority or power in even this meditated sense, those over whom power is exercised without their exercising it, the powerless are situated so that they must take orders and rarely have the right to give them.[35]

Powerlessness as a social position allows people little opportunity to develop and exercise their skills; it deprives people of the capacity for autonomy, creativity and judgement. When one is powerless, one is subject to the plans, decisions and ideas of others either in the sense that they determine the conditions of your life or in the sense that you are the one who must execute them. As Hooks puts it, under relations of powerlessness "the poor" are "overseen" rather than "seen".[36] Here again we must be reminded that the violent devastation of racism in the lives of Black people has created unequal levers of power not simply at the level of economic and distributive injustice but more deeply also at the moral, psychic and symbolic levels as well. It is the structural effects of apartheid that have placed most Blacks in the social position of powerlessness. Although South Africa is a country "ruled" by the mainly black ANC-led government, we are faced with the anomaly of large numbers of Black communities whose grievances and protests in relation to socio-economic rights and

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[33]   Staff Reporter 2009 http://goo.gl/ynGWtN.
[34]   Young *Justice and the Politics of Difference* 56.
[35]   Young *Justice and the Politics of Difference* 56.
[36]   Hooks *Yearning* 22.

service delivery remain unheard – sometimes being violently silenced - and their needs and desires unfulfilled.

2.4   *Cultural imperialism*

In addition to the concrete socio-economic and political relations of power that are implicated in the oppression of women and Blacks, there is also another form of oppression which Young names "cultural imperialism".[37] As Young writes:

> To experience cultural imperialism means to experience how the dominant meanings of a society render the particular perspective of one's own group invisible at the same time as they stereotype one's group and mark it out as Other.[38]

Cultural imperialism involves the universalisation of a dominant group's experience and culture, and its assumption of normative superiority. In such a context, the dominant social group is the one that has exclusive or primary access to the dominant modes of communication and interpretation in a society, thus enacting a linguistic-symbolic and cultural hegemony over the social and political order. This hegemony enables the dominant group to project their experiences and perspectives in such a way that those experiences and perspectives are the ones expressed in the core cultural and epistemological products and practices of society, but also in such a way that those experiences and perspectives become the rubric for humanity. Mogobe Ramose argues that colonialism (what he calls "the unjust war of colonisation") was not only genocidal but "epistemicidal" as well.[39] As he writes:

> Coupled with its mission to christianise and "civilise", colonisation was by intention and inspiration poised to annihilate and obliterate all the experiences of the indigenous conquered peoples, replacing their experience and knowledge with its own unilaterally defined meaning of experience, knowledge and truth.[40]

Ramose, like most African philosophers, notes the strong philosophical and epistemological dimensions to colonial racism. As he notes, the belief in the naturalness of white supremacy, the association of whiteness and Western Europe with reason, intelligence, complex thought and civilisation (the so-called Prospero

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[37]   Young *Justice and the Politics of Difference* 58.
[38]   Young *Justice and the Politics of Difference* 58-59.
[39]   Ramose 2007 *GLR* 313.
[40]   Ramose 2007 *GLR* 313.

complex) and a general climate of white over-representation in knowledge production resulted in an "intellectual and spiritual holocaust from which indigenous conquered peoples are yet to recover".[41] The cultural imperialism described by Ramose was also of concern to Steve Biko in his reflections on African culture. [42]

First-generation US critical race theory (CRT) also emphasised the importance of narrative, storytelling and counter-storytelling as a means of "naming", and perhaps also finding, one's own reality for Black people. Working mainly as legal theorists, they stressed the need for a language and vocabulary that could articulate the experiences of Black people in society in ways that would expose the many ways in which Blacks experience rights, law and social life differently to whites. They too understood that the dimension of cultural imperialism inherent in racial oppression would effect an erasure/omission that would render Black needs and experiences unintelligible within dominant social meaning and legal discourse. As Young notes:

> Those living under conditions of cultural imperialism find themselves defined from the outside, positioned, placed, by a network of dominant meanings they experience as arising from elsewhere. From those with whom they do not identify and who do not identify with them.[43]

This is what Frantz Fanon meant when he said of the black subject that "I am over-determined *from without.* I am not the slave of the idea that others have of me but my own appearance".[44] Black subjectivity then is constructed through the white gaze that exclaims, "Look a Negro".[45] For Fanon, the moment when this devaluation, objectification and depersonalisation is imposed on the black subject is marked by a severe trauma and wounding that in turn produces a psycho-racial dynamic in which Blacks are not only cast as inferior but as *non-existent*.[46] In such a moment, the Black acquires the status of object rather than subject.

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[41]   Ramose 2007 *GLR* 313.
[42]   Biko *I Write What I Like* 40-46.
[43]   Young *Justice and the Politics of Difference* 59.
[44]   Fanon *Black Skin, White Masks* 187.
[45]   Fanon *Black Skin, White Masks* 82.
[46]   Fanon *Black Skin, White Masks* 106.

2.5 *Violence*

The final "face" of oppression that Young discusses is *violence*.[47] Most systems of oppression are often initiated and maintained by the use of brute force and physical violence on its subjects. Despite the Foucauldian recognition that the control and subjugation of oppressed groups is maintained through new and more subtle technologies of violence,[48] actual physical violence, killings, rapes, and beatings still remain part of the disciplinary apparatus of most forms oppression such as white supremacy and heteropatriarchy. Young writes:

> Members of some groups live with the knowledge that they must fear random, unprovoked attacks on their persons or property, which have no motive but to damage, humiliate, or destroy the person.[49]

South African public discourse contains a vast catalogue of acts of white racist violence and terror against Blacks - most often poor, homeless, or located in vulnerable areas. Here we can recall the "Waterkloof Four", four teenage white boys, who taunted and brutally attacked, stabbed and killed a homeless black man in Moretela Park;[50] or the case of Martin Scott-Crossley who threw the body of Nelson Chisale, a worker he had just fired over a wage dispute, into a lion's den on his game farm – leaving most of his body devoured with only a skull, bones and a few fingers remaining.[51] We have also witnessed the case of Jewell Crossberg, who shot and killed his black employee and wounded four others because he "mistook" them for a pack of baboons,[52] and the case of Johan Nel, a 15-year old white adolescent who shot four black people including a three-month old baby in the Skierlik informal settlement in the North West. During the shooting spree, Nel was heard shouting the word "kaffirs!" repeatedly.[53] The list is literally endless.

But violence, according to Young, means more than just these severe incidents or hate crimes; it also includes harassment, intimidation and general ridicule – even when it

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[47]   Fanon *Black Skin, White Masks* 61.
[48]   See for example Foucault *Discipline and Punish*.
[49]   Young *Justice and the Politics of Difference* 61.
[50]   Staff Reporter 2008 http://goo.gl/X7OnKw.
[51]   Meldrum 2005 http://goo.gl/fLZUOr.
[52]   SAPA 2007 http://goo.gl/UZjSHF.
[53]   Lelliot and Brandon 2008 http://goo.gl/ietuLG.

appears light-hearted to the perpetrator.[54] What makes these phenomena of violence oppressive is not simply the violent acts in themselves, but the surrounding social context that makes them possible, frequent and acceptable (or at least tolerated). Under this view, violence is a phenomenon of social injustice and oppression because of "its systemic character, its existence as a social practice".[55] This violence is systemic because it is directed at members of a group simply because they are members of that group.[56] Central to the systemic character of violence is the fact that it is often legally sanctioned as in the case of police brutality and extra-judicial killings in response to black service delivery and wage protests, as well as court-ordered or State-initiated evictions of the homeless and demolitions of property.

Frank Wilderson III draws from the Fanonian concept of "vertigo" a distinction between subjective vertigo and objective vertigo that illuminates how violence operates as a form of racial oppression.[57] Subjective vertigo is the dizzying sense that one is moving or spinning in an otherwise stationary and stable world. Wilderson III argues that those who undergo subjective vertigo, human subalterns (whether figured as workers, as women or as gays and lesbians) suffer from contingent violence, that is, violence that kicks in only when one resists a disciplinary force or discourse.[58] By contrast, objective vertigo entails a life constituted, rather than interrupted by, the disorientation of vertigo, a life built on and not simply threatened with violence. He argues that only Blacks suffer objective vertigo.[59] Blacks are subsumed by violence as a "paradigmatic necessity", not simply as a performative contingency as in the case of subjective vertigo.[60] "This is structural as opposed to performative violence".[61] Here Wilderson III usefully rehearses the idea of the banality of racism, the fact that racism is normal in a racist society. He borrows from Fanon's contemplation of the dilemma of being Black in an anti-black world to show that violence against Blacks exists not simply because of an apathetic social context but more importantly because it is this

54   Young *Justice and the Politics of Difference* 61.
55   Young *Justice and the Politics of Difference* 62.
56   Young *Justice and the Politics of Difference* 62.
57   Wilderson 2011 *InTensions* 3-5.
58   Wilderson 2011 *InTensions* 3-4.
59   Wilderson 2011 *InTensions* 3.
60   Wilderson 2011 *InTensions* 4.
61   Wilderson 2011 *InTensions* 3.

violence against Blacks that conditions normal relations and daily interactions in that social context. As Young writes, "group-directed violence is institutionalised and systemic".[62] It is encouraged, tolerated and enabled by institutions and social practices.

2.6   Racial poverty through the lens of the five faces of oppression

Although the schema of oppression that I have outlined here applies generally to most of those trapped in conditions of abject poverty, I am insisting, at least for the moment, on a formulation of racialised poverty that remains focused on the way in which the historical particularity of structural racism remains a central "cause" for the continued suffering and misery, mistreatment and degradation, disadvantage and deprivation experienced by most Black South Africans. As we can see, Blacks who are poor generally suffer all five aspects of oppression. Some will manage at least to escape the conditions of exploitation and violence through high-level employment and economic upliftment but the conditions of powerlessness, marginalisation and cultural imperialism tend to affect Blacks irrespective of their class position.

Conceiving of poverty as a form of oppression and domination opposes the presumption that poverty is an aberration or a mistake, an unintended side-effect of certain policy choices or legal arrangements. Instead it demonstrates that poverty is the logical outcome of a system which distributes benefits and opportunities along specific axes of social power. It is an inherent feature of a liberal democratic society governed by a neoliberal capitalist economic order. In our specific context, racialised poverty is a symptom not so much of a conservative court jurisprudence or badly implemented policy but of the inherent falsity of the liberal constitutional promise and the *Constitution*'s seeming blindness to the brutalities engendered by white supremacist capitalist patriarchy.[63]

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[62]   Young *Justice and the Politics of Difference* 63.
[63]   See Madlingozi 2007 *JLS* 77-98.

In what follows I turn to Drucilla Cornell and Judith Butler for a further exploration of the aesthetic and moral as well as symbolic and ontological/existential dimensions of poverty.

3   The effects and *affects* of poverty: starving hearts and precarious lives

Central to Young's theorisation of oppression, which I adapted above in linking race and poverty, is the displacement of a purely distributive paradigm of social justice. By "distributive paradigm" Young denotes theories of justice that restrict its meaning to the distribution of benefits and burdens and goods and resources among members of society to the exclusion of questions about decision-making power, the division of labour, and culture. In its emphasis on the acquisition of material goods, things, wealth, money and jobs, the distributive paradigm fails to interrogate, indeed presumes as given, the institutional contexts and social structure that shape the distributive patterns in the first place.[64]

While distributive questions are obviously crucial, the reduction of social justice to economic outcomes is a mistake. Not only does it focus on persons as possessors, employees and consumers rather than as social and cultural actors, decision-makers and persons with the capacity for collective self-governance and public participation, it also elides crucial questions about the power relations and ideological underpinnings that inform the particular injustice being contested.[65] That is to say that distributive approaches (including the famed "substantive equality" discourse) tend to presuppose very contestable features of the society in which the justice claim is made, such as the capitalist economic system, the centrality of the individual, the traditional family structure, the hierarchical division of labour and so on.

This displacement of the distributive paradigm surfaces powerfully in Drucilla Cornell's theory of freedom, justice and equality, which she insists begins with the recognition

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[64]   Young *Justice and the Politics of Difference* 15.
[65]   Young *Justice and the Politics of Difference* 16.

that "hearts starve as well as bodies".[66] She derives this phrase from the union song: "hearts starve as well as bodies; give us bread and give us roses", and goes on to argue that "theories of justice that ignore the heart [or what she calls the 'affective aspects of human life'] can never deliver on the roses".[67]

Cornell's call for us to take account of both the starving heart and the starving body, and her claim that questions of the heart need to be addressed by any theory of justice,[68] is useful in underscoring my concern that current approaches to poverty rooted in socio-legal, empirical and technical-managerial methods reduce impoverished people to mere bodies, through convening and reiterating a figure of "the poor" defined solely by their corporeal needs for shelter, clothing, food, medical treatment, ablution facilities, clean running water, etc, thereby excluding them from the domain of the imaginary and the aesthetic, of the affective and the sensual, the intellectual and the artistic – doing to them what poverty does to them: objectifying and dehumanizing. Incorporating Cornell's insights here would show that freedom from oppression, from poverty, certainly requires addressing material deprivation and evaluating the ways in which goods and resources are distributed, but it must also include the freedom to express and pursue one's desire and to imagine oneself as a sexual, cultural, spiritual and emotional creature.[69] Cornell's theory is based on a commitment to a notion of human life that promotes not merely survival but also thriving and flourishing. The notion of freedom she advocates also encompasses the "freedom to be ourselves and to participate in the richness of life".[70]

In Cornell's work this freedom is associated with her notion of the "imaginary domain", which names the moral and psychic space that every person needs to evaluate and to represent themselves, to articulate their desires, and to freely imagine and re-imagine themselves as persons of intrinsic moral worth.[71] Although I depart from Cornell's formulation of the imaginary domain as a "moral and *legal right*", conceiving of it

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66   Cornell *At The Heart of Freedom*; Cornell *Beyond Accommodation* xv; Cornell *Just Cause* 7; Milgate 1999 *Rutgers L Rev* 1031-1062.
67   Cornell *Just Cause* 7.
68   Cornell *Beyond Accommodation* xv.
69   Cornell *Beyond Accommodation* xv.
70   Cornell *At The Heart of Freedom* ix.
71   Cornell *At The Heart of Freedom* x. See also Cornell *The Imaginary Domain*.

instead as a political ideal of social and cultural difference that cannot ever be fully codified by legal rules and even as my reading of the imaginary domain asserts a considerable degree of distance from its potentially conservative connection to a classic public/private divide and liberal individualist notions of personhood and rationality, it carries the critical potential of disrupting mainstream distributive, pragmatic and instrumental theories and discourses on poverty. The idea that people living in poverty are not merely hungry, vulnerable and sick bodies, but real people demanding full protection and respect of their dignity corresponds to an understanding of poverty as not merely a problem of economic distribution and basic needs but also one of moral recognition.

Following Cornell, it can be argued that official state and NGO institutional representations of those in poverty as exclusively needy, helpless and vulnerable and conversely in need of charity and "empowerment" actually denies impoverished people the agency to be ethically and politically self-representing and self-defining.[72] This is not to deny the reality of imposed need and deprivation that they experience; but rather to recognise that such need and deprivation does not exhaust who they are and who they can become under a more just, radical egalitarian and democratic social order.

A further displacement of a distributive paradigm can be found in the work of Judith Butler, and specifically her notions of shared vulnerability, mourning and precarious life. Here poverty is apprehended once again not only in material and economic terms but also in terms of its psychic, symbolic and ontological dimensions; that is, in terms of how poverty does not merely violate socio-economic rights or deprive one of basic needs or resources but more profoundly offends our shared ethical humanness by structuring the lives of those living in poverty outside or below the category of humanity. I enlist Butler here because I want to suggest that like war, torture and genocide, poverty also raises what she calls "a question of the human"[73], namely the

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[72]   Van Marle 2002 *Stell LR* 299-308.
[73]   Butler *Precarious Life* 20

question of "who counts as human? whose lives count as lives? and finally, what makes for a grievable life?".[74]

It is surely not hard to see how poverty also creates a situation in which "[c]ertain lives are not considered lives at all, they cannot be humanized … they cannot fit any dominant frame for human".[75] This occurs both in the ways in which impoverished people are represented in the media, the law and in government welfare programmes and also because poverty exists in socio-political and economic systems which produce extreme differentials of wealth, property ownership, living conditions, and access to resources and opportunities that expose vast populations and social groups to conditions of precarity, violence and destitution. Those living under such conditions then inhabit the category of "precarious life".[76]

Butler's concern is that when lives are rendered precarious in this way, when they are exposed to such extreme conditions of suffering and vulnerability, our very understanding of social and human reality is altered, rendering some lives "unreal". As she asks:

> What is real? Whose lives are real? How might reality be remade? Those who are unreal have, in a sense, already suffered the violence of derealization. What, then, is the relation between violence and those lives considered as "unreal"?[77]

The concept of "derealisation" is the name Butler gives to the process by which certain lives are made "unreal" and thus denuded of any human teleology or presence either through genocidal and oppressive practices (war, apartheid, Holocaust) or through systemic state negligence (abject poverty, inequality, homelessness). For her, derealisation raises two questions. The first is a question of ethics, of "how there can be an ethical relation to those who cannot appear within the horizon of ethics, who are not persons, or are not considered to be the kind of beings with whom one can

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74   Butler *Precarious Life* 20.
75   Butler *Precarious Life* 34.
76   Butler *Precarious Life* 128.
77   Butler *Precarious Life* 33.

enter into an ethical relation".[78] The second is a question of mourning and memory, of "what counts as a liveable life and a grievable death?"[79]

We could understand poverty as a form of "derealisation" or "social death", as a condition that renders certain lives unreal and as an erasure of certain groups of people from the category of the Human. Once such lives are displaced by the violence of derealisation, they no longer appear within the horizon of ethics and thus are no longer regarded as the kind of beings with whom one can enter into an ethical relation. Thus, both at the normative level and at a practical-experiential level, they are made to cease being persons altogether. To quote Butler once more:

> Some lives are grieveable, and others are not; the differential allocation of grievability that decides what kind of subject is and must be grieved, and which kind of subject must not, operates to produce and maintain certain exclusionary conceptions of who is normatively human...[80]

The oppressive practices that constitute racism and the systemic negligence by the government that causes so many people to be trapped in poverty work to discursively liminalise "the poor" as "non-human others" who are outside the realm of the humans and thus not subjects of dignity. The racial dimension here inheres in the fact that, due to the persistent racial character in the levels of poverty and inequality in South Africa, the production of precarity coincides with enduring forms of white power.

The derealisation of impoverished people in South Africa largely converges with, and mirrors or repeats, the ontological denial of humanity to Blacks that Aime Cesaire and his better-known student, Fanon, observed as being at the core of white supremacy.[81] While white supremacy is premised on a "perverse ontological designation by race", whereby the social category of race is biologised and an essentialist and rigid frame is imposed on Blacks, its fundamental purpose is in fact to draw a distinction between whites and Blacks, so that whiteness represents humanity and all its great virtues (goodness, beauty, morality, intelligence, wealth, art, civilisation etc) and blackness

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[78]   Butler "Precarious Life" 7. The thoughts Butler shares in the lecture are expressed in Butler *Precarious Life*; Butler *Giving an Account of Oneself*; Butler *Frames of War.*
[79]   Butler *Precarious Life* xv.
[80]   Butler *Precarious Life* xiv-xv.
[81]   Cesaire *A Discourse on Colonialism*; Fanon *Wretched of the Earth*; Fanon *Black Skin, White Masks*. See also Birt "Existence, Identity and Liberation" 203-214.

symbolises its negation and the lack or corruption of those virtues. On this account, racism not only promulgates illusions of racial superiority and inferiority, by which an imposed racial essence forces Blacks to become prisoners of their blackness, it Otherises Blacks not as a different kind of human (to whites), but as *not human* at all. This has given credence to the view held by US black studies scholars that while the worker, the woman, and the homosexual are subordinated *in* the world, *within* the pale of humanity, Blacks are subordinated *by* the world, *erased* from it, and thus denied even the notion of humanity.[82] Poverty, understood through the lens of Butler's notion of precarious life, is thus sinisterly continuous with the central function of white supremacy.

For Butler, the reality of the multiple techniques of derealisation that pervade contemporary global political life (war, imperialism, sexual oppression, and in this case especially poverty) raises issues about our collective, political and public responsibility to those who have been dehumanised - a responsibility which is rooted in our shared vulnerability, in how contemporary global processes have deprived us all of full control over our lives.[83] When people living under conditions of poverty are presented as a faceless and amorphous mass, when their condition is depoliticised, when they are blamed and held responsible for their own suffering, when they are criminalised and demonised, presented as threats to safety, economic growth or public order, or even when we are made to believe that poverty is natural and insurmountable, we are then authorised to become senseless and irresponsible to those whose lives have been eradicated and whose grievability has been postponed.[84] We are freed from having to face up to the annulment of human life – whether as biological or social death – effected by poverty, and also from recognising our own vulnerability, relationality and "fundamental dependency on anonymous others".[85]

Butler's argument is multifaceted and complex, and while we cannot explore it further here, it is suggestive insofar as it underscores my argument that all current laws,

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[82]   Wilderson "Biko and the Problematic of Presence" 108; Sexton 2011 *InTensions* 1-47.
[83]   Butler *Precarious Life* xii-xiii.
[84]   Butler *Precarious Life* xvii. Here we can recall *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC).
[85]   Butler *Precarious Life* xii.

economic strategies and government policies (including but not limited to those formulated to explicitly address poverty) should be examined and transformed so as not to affirm or participate in the pervasive derealisation of "the poor" effected by the inherent brutalities of neoliberal capitalism but also aided by law's affiliation with capitalist forms of social and economic organisation. Conversely, an understanding should be cultivated that the eradication of poverty as a means of combatting precariousness should not just be limited to economic distribution, inclusion into the free-market and entry into the job market, but it also involves a certain recognition and respect of the humanity of those caught in the grip of poverty, and a redressing of the fragmentation of the ethical relation caused by poverty.

4   The critique of rights and the injuries of poverty

> Rights emblematize the ghostly sovereignty of the unemancipated individual in modernity.[86]

I have so far reconceptualised racialised poverty as a form of oppression, emphasising its political, moral, ethical and ontological dimensions. To the extent that how we define poverty also determines how we approach its overcoming, and to the extent that the discourse of human and in particular socio-economic rights is the dominant currency in South Africa's battle against poverty,[87] it is of substantial importance to briefly consider the centrality and emancipatory force of rights discourse in the light of the foregoing reconceptualization of poverty. While the rights critique of scholars in the Critical Legal Studies (CLS) movement is most familiar to progressive South African lawyers,[88] the work of political theorist Wendy Brown and her engagement with rights as a medium of emancipatory politics in relation to politicised identity offers a more compelling theoretical and political account of the contradiction between rights discourse and the struggle to end poverty, and of the paradoxes and dangers of rights discourse in general.

It should be stated at the outset that to label Brown's engagement with identity-based rights discourse as a rejection of or case against rights as such would be a reductive

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86   Brown *States of Injury* 170.
87   See the sources cited in n 3.
88   See West 2011 *Wm & Mary L Rev* 713-746 and the sources cited there.

and inattentive reading.[89] Rather, hers is a historically situated, targeted examination of the effect of mobilising rights claims on behalf of politicised identities in liberal regimes.[90] In the same vein, for purposes of my argument, what concerns me is not so much whether or not rights-based legal reforms *should* be employed in attempts to eradicate poverty. Rather my interest is with what it means for the discourse of liberal constitutionalism and human rights to be placed at the heart of poverty eradication, especially in the light of a leftist understanding of poverty as a form of oppression.

In this context, the conceptualisation of poverty as oppression is not insignificant, for if the absence of poverty would imply freedom from oppression, and such freedom requires the actualisation of substantive political freedom, social equality and justice and radical democracy, it needs to be asked whether rights can indeed deliver on this freedom, this equality and justice, and this democracy, especially given the fact that what rights have more frequently promised and/or offered are specific remedies, individual relief, and state protection. In any instance, liberal legal scholarship for the most part tends to posit rights (their assertion, protection, improved enforcement, clearer elaboration of their content and their cultural proliferation) as the panacea for all social problems. Paradoxically, rights by definition are constructed in ways that deny the possibility that they can co-exist with, indeed *within*, oppressive social orders. Rights discourse converts oppressive conditions and practices into action or inaction, into the behaviour of devious persons or the policies of lethargic governments rather than as expressions of how oppressed social groups are positioned within the social structure – the stability of which is in large part secured by law in the first place. From their global instantiation in the 1948 UN Declaration of Human Rights, rights have always appeared to claim to be what follows *after oppression*, as symbols of the triumph over oppression, thus following what could be described as a modernist narrative of historical progress.[91] Here is Brown:

> Rights function to articulate a need, a condition of lack or injury, that cannot be fully redressed or transformed by rights yet within existing political discourses can be

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89   See Brown 2000 *Political Theory* 469-479.
90   See Brown and Halley "Introduction" 25.
91   Brown *Politics out of History* 3. Also see Kapur 2006 *Syd LR* 668-673.

signified in no other way. Thus rights for the systematically subordinated tend to rewrite injuries, inequalities and impediments to freedom that are consequent to social stratification as matters of individual violations and rarely articulate or address the conditions producing or fomenting that violation.[92]

Brown suggests, as an initial matter, that in evaluating the efficacy and political value of rights in any given context, attention should be paid also to "that which rights discourse does not avow about itself",[93] to the ways in which rights, irrespective of their stated purpose, not only reduce suffering and protect citizens against coercion or abuse but also harbour their own political rationality, their own ideological vision of social life, and their own moral prescriptions. The ways in which rights operate, the nature of the remedies and the protections they promise thus also need to be critically examined for their own "normative or subject-producing dimensions" and cultural assumptions and for the *particular* ways in which they configure the political and rival other justice projects.[94] Therefore, law and rights are not simply empty vessels into which any and all articulations of political desire can be inserted, but a form of *power/knowledge* that actively constructs that desire and regulates the modes of its insertion into executive policy-making, legislative schemes and judicial processes.

As it turns out, despite their aspiration to an apolitical and universal image, rights, especially liberal constitutional rights, represent a very particular form of politics that organises and even monopolises political space. Rights discourse carries its own (moderate) image of justice, freedom and equality. Even more significantly, rights discourse operates as a dismissal of more radical political projects and also happens to converge neatly with and aids in the civilising mission of Western liberal democracy and the global expansion of neoliberal capitalism.[95] In my view, to the extent that constitutional rights litigation and rights-based reform involves an acceptance of the key terms of South Africa's faulty negotiated settlement, the disappearance of the discourse of reparations and redistribution in South African legal and public discourse and its replacement with a discourse of socio-economic rights and service delivery should be understood in this light.

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92   Brown "Suffering the Paradoxes of Rights" 431-432.
93   Brown 2004 *SAQ* 461.
94   Brown 2004 *SAQ* 461; Brown *States of Injury* 116.
95   Brown 2004 *SAQ* 461; Derrida *Spectres of Marx* 85. Also see Mutua 2008 *Buff L Rev* 1027-1034.

The presentation of rights as a benign defence of the innocent and the powerless against a negligent State and rapacious economic powers centres on a moralistic discourse of pain and suffering rather than a political discourse of comprehensive justice and liberation.[96] And so, rights discourse potentially depoliticises the historical and political conditions of the suffering it claims to combat. Brown concludes from a reading of Karl Marx's "The Jewish Question"[97] that the principal "depoliticising move" of liberal rights discourse transpires in its declaration of all persons as free and equal, and of race, class, gender and property ownership as irrelevant to one's standing as a citizen, a declaration which paradoxically removes from public view and from the ambit of public redress these very elements of social power.[98] In other words, when such elements of social power as race, class and gender are abolished in liberal constitutions as formal markers of personhood, citizenship and entitlement to rights, they are "ideologically naturalized as mere differences … in the realm of civil society".[99]

Thus "the ruse of power" or "deviousness" that according to Brown is integral to liberal rights discourse lies in the way in which "liberal constitutionalism [grants] freedom, equality and representation to *abstract* rather than *concrete* subjects".[100] Similarly, the *Constitution* grants equality, dignity, and freedom to our *abstract* representatives in the "post"-apartheid State, while failing to address the social powers and historical inequalities that stratify and subjugate our *concrete* selves. Consequently, our equal right to own land is restored but not the land itself and we are all legally given the rights to education, healthcare, food, water and social security while the majority still lacks and is unable to freely acquire decent and dignified access to these things. To be clear, the ruse internal to liberalism occurs in the situation in which our abstract selves have the rights, but our concrete selves continue to lack the access and thereby remain subordinated by that which liberal rights purported to have overcome in the first place. In this way, the subject of rights is "ideally emancipated" through being anointed, in an abstract way, as a free and equal person while being "practically

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[96]   Brown 2004 *SAQ* 453, 455.
[97]   Marx "On the Jewish Question" 50.
[98]   Brown 2000 *Political Theory* 475.
[99]   Brown 2000 *Political Theory* 475. Also see Brown *States of Injury* 106-115.
[100]   Brown *States of Injury* 106.

resubordinated" through the idealist disavowal of the material power relations of race, class and gender, which in actuality constrain, hinder and contain our freedom.[101]

But more than depoliticising, rights discourse works to silence and prevent political deliberation about what poverty is and means, what its root causes are, what systems sustain it, and how to address it. It does so by already circumscribing and determining the nature of the particular problem being contested (in this case, poverty) and also by producing the kind of impoverished subject it deems to be in need of state protection, welfare and socio-economic upliftment. In most instances, rights discourse simply cancels out such deliberation by juridicalising it and redefining it into a matter that falls under the operational domain of the courts and legal professionals.[102] This point cannot be overstated: If the problem is defined in an abstract way as hunger, homelessness, disease, insufficient water supply, poor service delivery and so on, then socio-economic rights and technical legal and economic expertise may very well be the apposite solution. But if the problem is diagnosed politically as the continuation of racial and gendered inequality and suffering that are symptomatic of a broader system of oppression under a neoliberal capitalist economic regime and a liberal constitutional order that privatises public services and commodifies basic necessities, excludes ordinary citizens from public democratic self-governance and has failed to concretely and substantively transform the lives of Blacks, another more far-reaching remedy for the named injustice may be more appropriate.

Brown's assessment of rights acknowledges the multivalent and contradictory ways in which rights discourse operates across different historical, cultural, political and social contexts, namely: rights as a boundary and as access, rights as markers of power and as masking lack, rights as claims and as protections, rights as articulation and as mystification, rights as disciplinary and as anti-disciplinary, rights as a mark of one's humanity and as a reduction of one's humanity, rights as the expression of desire and as the foreclosure of desire.[103] While this renders rights indeterminate and contingent, and consequently vague, impotent and unenforceable, Brown argues that it is the

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[101]   Brown *States of Injury* 110.
[102]   Brown *States of Injury* 110.
[103]   Brown *States of Injury* 97.

constitutive paradoxes of rights and rights discourse that should be confronted in order to examine their emancipatory potential. For Brown, the central paradox of rights, that "between the universal idiom and the local effect of rights",[104] transpires on both a temporal/historical and spatial/social level.

On the temporal/historical level, she argues, with reference to Derrick Bell, that while rights may operate as an indisputable force of emancipatory social struggle at one historical moment, "they may become at another time a regulatory discourse, a means of obstructing or co-opting more radical political demands, or simply the most hollow of promises".[105] So while it may have been the case that 20 years ago the inclusion of justiciable socio-economic rights in the Constitution echoed the liberatory vision of the Freedom Charter and symbolically served to consecrate the new dispensation's commitment to poverty eradication, it is also the case that both that liberatory vision and that symbolism may have simply become irrelevant for the vast majority of South Africans. As Bell argued, and as the persistent outbreak of community uprisings in South Africa together with the rising public visibility of black radical nationalist sentiments indicate, the symbolic force and material impact of human rights gains and socio-economic reforms secured through law often substantially erode and wear off over time as power relations and economic arrangements adapt, leaving the position of the marginalised and the impoverished unchanged, and their political hopes frustrated.[106]

On the social/spatial level, she argues that rights "that empower those in one social location or strata may disempower those in another",[107] or put differently, that "in inegalitarian orders, rights differentially empower social groups, depending on their ability to enact the power that a right potentially entails".[108] The most classic example of this is of course the right to private property, which is illuminated usefully in disagreements over the constitutional property clause.[109] The liberty versus equality

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[104]   Brown *States of Injury* 97.
[105]   Brown *States of Injury* 98.
[106]   See Bell 1991 *Howard LJ* 79-93; Bell 1992 *Conn L Rev* 364; Bell *Faces at the Bottom of the Well.*
[107]   Brown *States of Injury* 98.
[108]   Brown "Suffering the Paradoxes of Rights" 423.
[109]   See the exchange between Sanele Sibanda (2011 *Stell LR* 482) and Frank Michelman (2011 *Stell LR* 706).

debate that haunts legal and political philosophy also captures aspects of this problem. Liberalism presumes the fundamental antagonism in society as being one between the State and the individual, and fashions rights as the appropriate medium for the negotiation of this antagonism. But as we know, horizontal asymmetries of power *between* individuals "in economic arrangements where some gain at the expense of others" affect the workings of rights in such a way that rights to private property as well as those acquired and exercised in areas of law such as contract, credit, succession and labour "function not only as power but as deprivation". For example, "the right to private property is a vehicle for the accumulation of wealth through the production of another's poverty" just as the right of free trade is a vehicle for the control of another's labour power.[110] Let us consider also how the exclusive focus of socio-economic rights and other anti-poverty strategies and mechanisms on benefitting "the poor" and ameliorating *their* condition conceals law's role in enabling the monopolisation of massive wealth and opulence in the hands of the few and as a consequence does not challenge the position of the unjustly enriched and privileged. But as Brown, following Marx, tells us, this may be an inherent feature of rights and of the paradoxes that render their emancipatory credentials so dubious:

> Historically, rights emerged in modernity both as a vehicle of emancipation from political disenfranchisement or institutionalised servitude and as a means of privileging an emerging class within a discourse of formal egalitarianism and universal citizenship. Thus they emerged both as a means of protection against arbitrary use and abuse by sovereign and social power and as a mode of securing and naturalizing dominant social powers ...[111]

This specific feature of the paradox problematises the traditionally liberal view of law and the State as fair and neutral arbiters of injury and legitimate sites of rights protection and welfare security by exposing them as also "invested with the power to injure", as legitimising inequality and domination through their affiliation to specific social powers and their annexation by specific moral, cultural and political interests and values.[112] This then is the fundamental political impasse generated by the use of so-called "in-system" tactics by progressive social movements and lawyers: the effort

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[110]   Brown "Suffering the Paradoxes of Rights" 423.
[111]   Brown *States of Injury* 99, 123-124.
[112]   Brown *States of Injury* 27.

of subaltern social groups and individuals seeking protection and recognition from an institution that actively and passively participates in their oppression amounts to a capitulation to the basic premises of legal liberalism and tacitly gives approval to a cultural order (Western bourgeois individualism) and a politico-economic order (liberal constitutionalism and neoliberal capitalism) that is complicit in their exclusion. On this view, the abandonment or suspension of a more radical vision of justice, transformation and decolonisation is a precondition for the turn to law and rights in addressing political, economic and social injustice. Indeed such abandonment and suspension could also be essential for the legitimacy of liberal regimes and human rights cultures in general. Rights discourse powerfully legitimises law and the state, elevating law's already hegemonic position in society, cementing it as *the* normatively superior mode of action, valuation, and decision-making over, say, civic democracy, ethics and public politics.

Closely connected to the *status quo* affirming and depoliticising reflexes of rights is the conservative nature of its ambitions. As Brown argues, "rights almost always serve as a mitigation – but not a resolution – of subordinating powers".[113] Although rights may attenuate the subordination, anguish and violation to which people living in poverty are rendered vulnerable in a capitalist, white supremacist, imperialist regime, they can neither (nor do they actually promise to) vanquish nor challenge that regime and its mechanisms of reproduction.[114] To be sure, socio-economic rights in general tend to be aimed only towards poverty *alleviation*, that is, minor relief through the provision of the most basic needs, as opposed to comprehensive poverty *eradication*. Thus rights, when mobilised to alleviate rather than eradicate poverty, can only work to make the lives of the poor slightly better, more bearable, without actually eradicating the existence of poverty itself. Consequently, rights run the danger, quite ironically, of being enlisted to the indefinite maintenance of poverty and the normalisation of the positional categories of "rich" and "poor". Tellingly, in seeking to soften the *effects* of poverty rather than aspiring to its elimination as a social and political condition, rights exhibit a stunning tolerance of poverty.

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[113]   Brown "Suffering the Paradoxes of Rights" 422.
[114]   Brown "Suffering the Paradoxes of Rights" 422.

There is one more novelty to Brown's account of the "paradoxes of rights" and it pertains to the role of rights-based legal reform in the construction and production of identity. Brown phrases it thus: "rights that entail some specification of our suffering, injury and inequality lock us into the identity defined by our subordination, and rights that eschew this specificity not only sustain the invisibility of our subordination but potentially even enhance it".[115] Throughout most of this discussion so far, I have expanded on the second side of the paradox and so I turn immediately to only the first side, namely how the insertion of a rights claim based on class, gender and racial identity, among others, "fixes the identities of the injured as social positions"[116] and "reifies a historical condition as an ontological one, naturalizing rather than redressing it".[117] And while Brown initially developed these concerns primarily with reference to sexuality, gender and race, I will suggest that her thoughts are applicable here, since dominant tropes of "the poor" in South Africa as they are represented in legal and political discourse also coalesce in varying combinations around the identity categories of race, sex, gender, class, ethnic origin, HIV status, motherhood, disability, nationality, age: the head of the childheaded household, the grandmother of orphaned children, the dying HIV patient, the homeless man, the refugee mother, the disabled patient, the unemployed person without Matric, the menial labourer, the disenfranchised community, the inhabitants of informal settlements, or the evicted occupiers made up of destitute families – all of whom are poor, the majority of whom black, and whose apex figures of vulnerability are the woman, the elderly and the child (particularly the infant).

The shift from a Marxist to a Foucauldian formulation of power is central to Brown's concern with politicised identity. She argues from the point of view that subjects and identity are historically and discursively *produced* by power and not simply politically, economically and socially suppressed and positioned by systems of power.[118] That is to say, that the subjects of racial, sexual and class domination are not simply marked, exploited and degraded by white supremacy, patriarchy and capitalism, but they are

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115   Brown "Suffering the Paradoxes of Rights" 423.
116   Brown *States of Injury* 27.
117   Brown *States of Injury* 111.
118   rown *States of Injury* 117.

also *formed* by regimes, discourses and formations of race, sexuality and political economy.[119] Oppression in such a formulation is both a matter of constructed subjectivities as well as material social positionality. From this insight that politicised identity is not only *positioned* within totalizing systems of power but in in fact a partial *effect* of that power,[120] Brown develops two powerful lines of critique.

The first deals with the question of whether politicised identity through its inscription in law (through rights-based claims) does not thereby reiterate its own Othering.[121] Given that identity-based claims proceed through an identity category which historically emerged as a term to enact subordination, the codification of that identity may resubordinate its subjects even as it claims to eviscerate the conditions of injury attached to that identity. Brown's theory of "wounded attachments" conceives of subject formation as constituted by "logics of pain" that incite politicised identity to invest excessively in its own history of suffering, need and paralysis to the point of subverting its own pursuit of an emancipatory democratic project.[122] In her analysis, when politicised identity seeks to articulate its desire within liberal juridical and bureaucratic regimes, it forecloses its own freedom and instead develops the "impulse to inscribe in law and in other political registers its historical and present pain rather than conjure and imagine the future of power to make itself".[123] Because politicised identity, especially that of those marked as "poor", operates through a claim to legal recognition not really as difference but as injury, exclusion and powerlessness, it thereby installs, ontologises and naturalises that injury *as* an identity – where historical injury in the form of poverty is no longer something that happens to and is imposed on particular persons or groups but something that is endemic to that person or group, a core property of their identity. In this process, the injury becomes a precondition for the politicised identity's self-definition, its very *raison d'etre*. This is what I take to be

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[119]   Brown *States of Injury* 119-120.
[120]   See Foucault *Society Must Be Defended* 29-30; Foucault *History of Sexuality*; Foucault *Power/Knowledge*. Also see Brown "Power After Foucault" 65-84; Lynch "Foucault's Theory of Power" 13-26.
[121]   Brown *States of Injury* 54.
[122]   Brown *States of Injury* 55.
[123]   Brown *States of Injury* 66.

the force of Brown's argument about how politicised identity comes to be constituted by "wounded attachments":

> In its emergence as protest against marginalisation or subordination, politicized identity thus becomes attached to its own exclusion both because it is premised on this exclusion for its very existence as identity and because the formation of identity at the site of exclusion, as exclusion augments or "alters the direction of the suffering" entailed in subordination or marginalisation by finding a site of blame for it. But in so doing, it installs its pain over its unredeemed history in the very foundation of its political claim, in its demand for recognition as identity … Politicized identity thus enunciates itself, makes claims for itself, only by entrenching, restating, dramatizing, and inscribing its pain in politics … .[124]

Thus the consequence of installing politicised identity in the universal discourse of liberal jurisprudence, of translating political demands against historical injustice into generic harms or injuries, is to hypostasise the condition and reality of "the poor", so that poverty becomes the only medium for the recognition and legibility of impoverished people, "resulting in the eternal repetition of pain".[125] To remedy this, Brown suggests a shift in the character of political identity from the ontological ("being") to the political ("wanting") and from a moralising discourse centred on pain and suffering to a politicizing discourse centred on the assertion of an alternative, more just, political and social future.[126] Here we are returned to the limits of law, and to the question of whether law and rights discourse can facilitate this more extravagant political assertion without law, rights-based politics and liberal constitutionalism being called into question in the process.

The second line of critique Brown develops in relation to the juridical instantiation of politicised identity-based claims through rights discourse stems from the more obvious Foucauldian concern with the modes of discipline, governmentality, and biopolitical regulation set in motion by such instantiation. She asks:

> [W]hen do rights sought by identity for itself become in themselves a means of administration? When does identity articulated through rights become the production and regulation of identity through law and bureaucracy? When does legal recognition become an instrument of regulation, and political recognition become an instrument of subordination.[127]

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124   Brown *States of Injury* 74.
125   Brown *States of Injury* 76.
126   Brown *States of Injury* 76.
127   Brown *States of Injury* 99.

Brown explains the problem of the regulatory powers of identity and of rights based on identity as follows: To have rights as a Black person, or a woman or as an impoverished person, is not yet to be free of being designated and subordinated by race or gender or indigence. "Rather though it may entail some protection from the most immobilizing features of that designation, it reinscribes the designation as it protects us, and thus enables our further regulation through that designation".[128] Given the insight stated earlier that "law *produces* the subjects it claims to emancipate and protect",[129] and also that rights are a specific (normative) mode of signifying injury and political resistance to that injury, what subject is produced by a definition of "the poor" as needy, vulnerable, dependant, and helpless – especially when coupled with the obviously racialised character of poverty and the pervasive stigma of moral weakness associated with it? To be clear, when poverty is constructed through metonymic associations with blackness and immorality, how are impoverished black people *interpellated* not only by the law but also by other institutions such as social security agencies, government officials, NGOs, social workers, clinics, employers, philanthropists, the police, legal, economic and political discourse, mass media and so on?

The regulatory and disciplinary dimension of rights discourse primarily plays itself out in two discrete ways. First, rights are themselves central to the State's disciplinary apparatus - they produce impoverished and victimised subjects and encode particular identities whose permanent need for rights and welfare provision makes them vulnerable to numerous techniques of juridical disciplinary domination in the form of registration, statistical monitoring, econometric calculation, data gathering and surveillance. Rights and the welfare institutions through which they are implemented wield economic discipline over impoverished people by defining their need, setting the terms of their survival and establishing rules for continued access and entitlement to those rights and to related goods and services. Secondly, in addition to being forms of regulation and disciplinarity themselves, socio-economic rights and other rights-based poverty alleviation approaches also co-exist with other violent disciplinary

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[128]   Brown "Suffering The Paradoxes of Rights" 422.
[129]   Brown *States of Injury* 131.

practices and discourses through which those marked as poor are governed, administered and controlled, namely: neoliberal managerialisms which promulgate discourses of "development"; police surveillance and harassment of the homeless and informal street traders, media campaigns and spectacles where people in need are paraded on national television, municipal by-laws that regulate the space and movement of poor city dwellers in urban areas, urban renewal programmes requiring the eviction and evacuation, displacement and relocation of poor occupiers, theological and psychological discourses of responsibilisation whereby impoverished people are encouraged to develop a positive work ethic and attitude or impelled to restore their faith in god, to name but a few forms of the control to which they are subjected.

All of this indicates that even when they are indubitably necessary due to certain institutional contexts and constraints, rights-based legal mobilisation strategies (specifically when deployed by movements asserting an oppositional left politics) can only ever be "effective" or "successful" as a strategic move (forcing government to deliver services or averting state repression), an emergency course of action (preventing evictions, demolitions or disconnections of water and electricity supplies), or a functionalist/instrumental means of achieving immediate ends or fulfilling urgent needs (e.g. for housing, ARV treatment) – *but never as the expression or actualisation of a radical, democratic, emancipatory politics.* This is to say that rights (in their universal idiom), even as they travel under the banner of freedom, equality, dignity, justice and peace, cannot (in their particular local effect) concretely bring about substantive versions of each of these ideals. They cannot confront and challenge the social powers, subjugating practices and power imbalances that produce precarity, poverty, inequality, misery and extreme deprivation in part because they are brokered through a truce with and accommodation of those powers, practices and imbalances. When realised in their most progressive and effective form, they can only improve and minimally relieve the position and condition of impoverished people without transforming that position or abolishing that condition. In this sense then, human and socio-economic rights activism, mobilisation and litigation is a cohesive moral discourse and political project, with its own autonomous logic, that ideologically

configures the legal and political culture in very specific ways.[130] Consequently, it is likely to stand in tension with if not usurp alternative justice projects that are aimed towards the radical transformation of the broader economic, political and social structure of society. As a language, rights discourse also overshadows both the articulation and the coming into being of other registers, vocabularies and grammars of political and social expression. For those on the critical legal left, this poses a dilemma worth considering, even as we all accept (to some degree) law's indeterminacy and hence, its *potential*, however limited.

Responding to the oft-heard rejoinder that rights are the most we can hope for or the best we can do at the present moment,[131] Brown counsels that we interrogate this complacent attachment to "interest-bound reformism"[132] and reclaim instead the "ambition to refigure political possibility against the seeming givenness of the present".[133] These are her last words:

> Is the prevention or mitigation of suffering promised by human rights the most that can be hoped for at this point in history? Is this where we are, namely, at a historical juncture in which all more ambitious justice projects seem remote if not utopian by comparison with the task of limiting abuses of individuals? Is the prospect of a more substantive democratization of power so dim that the relief and reduction of human suffering is really all that progressives can hope for? If so, then human rights politics probably deserves the support of everyone who cares about such suffering. *But if there are still other historical possibilities, if progressives have not yet arrived at this degree of fatalism*, then we would do well to take the measure of whether and how the centrality of human rights discourse might render those other political possibilities more faint.[134]

5   Conclusion: critical imaginings of alternative futures

> The world suffers under a dictatorship of no alternatives. Although ideas all by themselves are powerless to overthrow this dictatorship we cannot overthrow it without ideas.[135]

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130   See eg Mutua *Human Rights*; Baxi *Future of Human Rights*; Douzinas *Human Rights and Empire.*
131   The pragmatist and sanguine yet ultimately fatalist logic that undergirds the claims of most defenders of rights and law reform is typified in the South African context by, among many others, Kok 2006 *PULP Fictions* 25-30; Woolman 2007 *Stell LR* 508-525.
132   Brown *Edgework* 110.
133   Brown *Edgework* vii.
134   Brown 2004 *SAQ* 462.
135   Unger *What Should the Left Propose?* 1.

Spurred on by an upsurge in scholarly interest on the relationship between law and poverty in the post-apartheid South African context, Sanele Sibanda ingeniously suggests that rather than thinking of poverty through rights discourse, as a question of rights violation, we should instead think of it as an index of the eventual success or failure of the project of post-apartheid constitutional transformation.[136] In their intervention Danie Brand, Stephan de Beer, Isolde de Villiers and Karin van Marle have taken this sentiment further by arguing that discourses on poverty should eschew the language of "development", "relief" and "aid" and instead frame poverty in terms of justice, transformation and liberation.[137] In both contributions the authors respond well to bell hooks' challenge to those interested in economic justice that they should "think against the grain" and seek out new ways to "end oppressive and exploitative hierarchies" in pursuit of a "world where we can all have enough to live fully and well".[138] This concern with asserting the ideal, the possibility that the current order of things is patently unjust and should (and *can*) be changed against the widespread complacency of liberal democracy, the passivity of formal legal guarantees and the security of advanced capitalist life forms the underlying core spirit of my argument.

In this article I have endeavoured to conceptually/theoretically explore an alternative critical political approach to poverty that radically departs from legalist, technical, scientific and economist approaches. Following Young, Cornell and Butler, I have made the case for an understanding of poverty as a form of structural oppression whose mode of deprivation and denigration extends to both the "body" and the "heart" and whose fundamental modality is to expose the lives of poor people to conditions of precarity and destitution, thereby rendering them unreal. I also considered, through Brown, how this new understanding of poverty raises critical questions about the utility, impact and emancipatory force of rights. It goes without saying that the inverse of poverty as oppression would be freedom, both in the sense of liberating people from the harsh conditions of poverty and its resultant depredations but also in the sense of a world and social order free of poverty. And it was here that a serious tension

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[136]   Sibanda 2011 *Stell LR* 482-483.
[137]   Brand *et al* 2013 *LDD* 276-277, 293.
[138]   Hooks *Where We Stand* 156-164.

could be discerned between rights as a *legal* remedy for the *political* problem of poverty and a more ambitious emancipatory project: whereas rights seek remedies and services from power (the State, the courts, the media, the wealthy, international human rights agencies, NGOs, sympathetic citizens), true emancipation would require claiming and sharing that power; and whereas rights offer protections, true emancipation would seek collective freedom.

Michel Foucault's critical insight that freedom is a practice rather than a final achievement or legal guarantee, and that the "liberty of men is never assured by the institutions and laws that are intended to guarantee them"[139] provoked the explicit focus on the ways in which race still permeates and shapes the reality of poverty in South Africa. The continuation and intensification of poverty and inequality along the axis of race needs to be understood in the context of the failures and "misadventures" of the post-1994 project of reconstruction and nation-building, and specifically the failure to place racial justice, restitution, reparation(s) and redistribution at the heart of the legal and political transformation of the nation.[140] Moreover, the structural inertia of the inequalities, disadvantages and exclusions generated by almost four centuries of successive systems of white supremacist terror must be attributed as well to the national government's embrace of a global neoliberal capitalist economic framework.[141] Because of this, the *Constitution*'s promise of dignity, equality and freedom for all as well as any legal progress made in the area of equality, socio-economic rights and access to justice are negated and rendered facile and irrelevant in the face of an unaccountable economic system that has generated huge inequalities while also deepening and leaving those of the past intact. For this reason, it is no exaggeration to say that poverty eradication is inseparable from the realisation of racial justice, which in turn is inseparable from the abolition of capitalism.

Indeed, it will not be possible to truly change the reality and situation of the oppressed without changing the world itself.[142] Current approaches focused on alleviating and

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139   Foucault "Space, Knowledge and Power" 245.
140   See Terreblanche *Lost in Transformation*.
141   See eg Madlingozi 2011 *JLS* 77-98; Bond *Elite Transition*.
142   Cornell *Beyond Accommodation* xv.

reducing poverty and on providing "basic" needs and services to "the poor" cannot deliver such change; they cannot dismantle the ever-expanding boundaries between rich and poor. In conceiving of poverty eradication as a project of changing the world, and in considering the role of law and rights in this project, we should always heed the limits of law, its incapacity and violence, and ultimately its own "poverty". Rather than pursuing justice solely through legal and rights-centred institutions and discourses, we must be prepared to "defatalize the present" and work towards the creation of radical alternatives.[143]

> Whether through a door needing to be opened or a beckoning window already raised, what would happen if you entered? What would be on the other side? What on earth would it be? What on earth?[144]

> … Perhaps paradise.[145]

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[143] Agathangelou and Killian 2011 *InTensions* 1-51.
[144] Morrison *Paradise* 305.
[145] Cornell *Moral Images of Freedom* 163.

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LIST OF ABBREVIATIONS

Buff L Rev	Buffalo Law Review
CLS	Critical legal studies
Con L Rev	Connecticut Law Review
CRT	Critical race theory
Dev South Afr	Development Southern Africa
GLR	Griffith Law Review
Howard LJ	Howard Law Journal
JLS	Journal of Law and Society
LDD	Law, Democracy and Development
Rutgers L Rev	Rutgers Law Review
SA Public Law	Southern African Public Law

SAQ	South Atlantic Quarterly
Stan L Rev	Stanford Law Review
Stell LR	Stellenbosch Law Review
Syd LR	Sydney Law Review
U Ill L Rev	University of Illinois Law Review
Wm & Mary L Rev	William and Mary Law Review