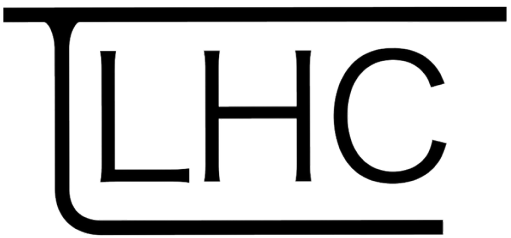
Trinity Journal of Legal and Historical Critique

Volume I



Trinity Journal of Legal and Historical Critique

Volume I

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Foreword *(01/08/25)*

The Trinity Journal of Legal and Historical Critique (TLHC) began in our Trinity Hall apartment during October Reading Week 2023. We wanted to submit articles for publication but felt that our ideas and modes of analysis did not align with the focus of existing Trinity student journals. This was especially true in the case of Law because Trinity Law journals prioritised submissions that focused on blackletter law analysis. Isobel found this focus stifling because she believed that all legal analysis should include consideration of any given law's social repercussions. To interrogate whether legal justice achieves justice, we must embrace the insights of History, Politics, Philosophy, Anthropology, Sociology, Art, and Literature. Such interdisciplinary Law scholarship did not have a home in Trinity. Similarly, the discipline of History as it existed in Trinity was predominantly empiricist in approach and shied away from theoretical critique. If History is to overcome its origins as a post-Enlightenment science, it must abandon its aspirations to 'ontological realism' and the unearthing of singular human experience. This can only be done by encouraging new generations of History students to embrace modes of critical analysis that emerge from other disciplines.

We hope that the TLHC will function as a space for students and prospective academics to experiment at the boundaries of their respective disciplines.

Isobel Houlihan and Áilill Park-Sullivan

Founders and Editors-In-Chief

Editorial Vision *(01/06/24)*

Áilill Park-Sullivan[†] and Isobel Houlihan[‡]

Through integrating a range of theoretical paradigms into fields of study traditionally associated with Law and History, the TLHC confronts the assertion that Law is, or should be, an empirical discipline that can be studied independently of the Humanities. The TLHC is distinguished on the basis that it is not a journal of legal history; it is a journal of legal and historical *critique*. As such, it does not publish articles that descriptively document the historical development of certain laws or institutions. Successful submissions will instead draw on theory to situate and challenge laws, institutions, and norms. TLHC articles are characterised by their use of history, in tandem with theory, to draw context from the past, critique the present, and make statements about the future.

Critical Law is by its nature plural because it emerges from the varying ways in which people appear before the law. The TLHC regards 'Critical Law' as including, but not limited to, Law that engages with Post-Colonial

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Studies, Queer Theory, Feminism, Critical Race Theory, Marxism, Post-Structuralism, Legal Ethnography, Legal Geography, Socio-Legal Studies, Law and Film, and Law and Literature. It is the author's choice to challenge or to be informed by any particular school of thought. However, all submissions are expected to comprehensively and imaginatively engage with theory in some form.

The TLHC construes the fields of History and Law broadly. The question 'What is law?' is therefore left inconclusively unanswered. Historical essays may be regarded as sufficiently legal in nature for publication if they examine questions related to epistemological justice, hegemony, social ontology, ideology, relations of domination and subjugation, or poststructuralist juridical law.[3] This is because the TLHC does not limit the scope of law to that which is binding, coercive, or formally institutional in nature. The critique of social norms and rules as they manifest in historical contexts is considered sufficiently interdisciplinary for publication.

History is the natural companion to studies in Critical Law because, as Emilios Christodoulides observes in *Research Handbook in Critical Legal Studies* (2019), critical theory is 'thinking that locates itself in history'. To locate ideas within history can be understood as the process of revealing

[3] This list is not exhaustive. A good argument may be made for the publication of many other areas of historical critique. The range of possible essay topics is extensive due to the nature of theoretically-informed interdisciplinary research.

contingency beneath the appearance of necessity. For example, to understand why human rights became the hegemonic language of progressive politics at the turn of the twenty-first century, it is necessary to investigate how this language was important to the preliminary stages of the neoliberal project and the post-WWII global order. Without historicization, legal norms and institutions are inaccurately afforded the appearance of inevitability.

Historicization and Critical Theory are urgently needed in the context of legal education. The LL.B. curriculum rarely draws on theory from beyond its own tradition. It is common practice to devalue legal critiques that do not follow from arguments of misapplied precedent, error of law, error of fact, judicial overstepping of the established separation of powers, or public policy concerns. Legal education posits the ideal critique as that which is internally self-referential within the discipline of Law. Consequently, many legal education institutions are averse to an interdisciplinary study of Law. This aversion is due primarily to the politics-law distinction and the purported or envisioned empiricism of Law. Notable resistance to interdisciplinary and critical studies of Law is visible in the following passage by South African jurist W.H. Gravett, who stated in 2018 that:

> “Within the university law school, in their attempts to disavow their identity as 'law teachers', and to convert the faculty of law

> into just another department of the faculty of humanities, the South African critical theorists seek the intellectual annihilation of law as an academic discipline. They are not constructively critical. Their critique is entirely of the destructive, trashing variety. They 'seem to want to completely eradicate what is currently in place', without suggesting a practical alternative to the present legal order[...] A university law school with critical legal theory as its grundnorm is akin to a faculty of theology with atheism as its central tenet[...]"
>
> In "Of 'deconstruction' and 'destruction' — why critical legal theory cannot be the cornerstone of the LLB curriculum", W.H Gravett.

The influence of politics on Law is under-accounted for in the LL.B. education and the wider legal profession on the basis of arguments such as those made by W.H. Gravett. These arguments position politics as an enterprise of ideology and personal preference, while they position law as objective, impartial, and empirical. Consequently, an LL.B. education teaches that the Judiciary's adjudication of justice is apolitical because politics is the jurisdiction of the Executive and Legislature. However, it is clear that politics is implicated in any question of legal justice because this justice is dispensed through politically-constructed institutions.

Law traditionalists such as Gravett similarly understate the influence of the judiciary's personal politics on case outcomes. This is because judges do not recuse themselves from politics when they decline to rule a certain way for fear of 'wading into public policy'. On the contrary, they promulgate the politics of the status quo. The TLHC holds firmly that the politics-law distinction is artificial because the judicial role, and its decisions, are informed by politics. A given legal system cannot be divorced from politics because its construction inevitably requires the prioritisation of certain values and worldviews over others. As such, institutional impartiality is impossible. The TLHC envisions itself as a canvas for authors to critique extant prioritised values and privileged worldviews, as well as to imagine alternatives to our current legal order.

Interdisciplinary analyses of Law are undervalued not just on the basis of the politics-law distinction but also because external fields of study are thought to corrupt the intrinsic empiricism of legal logic and legal critique. The Humanities are viewed as threatening to the empiricism of Law because their very nature is to contend with subjectivity. Engagement with subjectivity is antithetical to the authority of Law because this authority rests largely on the belief that existing frameworks of Law are necessary and objectively formulated. It is the position of the TLHC that any legal education without a corresponding cultural education is superficial because it discourages substantive criticism of the foundations of Law.

Historical and cultural education disrupts false necessities which that go underexamined within the discipline of Law. The study of history is not just the study of the past, but also a reflection of the present and a tool for examining the future. We therefore strongly encourage submissions that take speculative stances on legal and historical studies pertaining to the future of the twenty-first century. Possible avenues of discussion may include climate change, ecological commodification, eco-fascism, colonialism, transhumanism, technological transformation, peak oil, wealth distribution, secular-individualism, theology, and the efficacy of international law in a multi-polar world.

Diving into the Wreck: The Subversive Potential of the 'X' Category

Lois Thomas[†] and Paddy O'Halloran[‡]

"The thing I came for: the wreck and not the story of the wreck. The thing itself and not the myth".[3]

This was the clear-eyed scepticism that Adrienne Rich employed as she began her descent in the poem *'Diving into the Wreck'.*[4] To explore the wreck, Rich understood that she must dive down - beneath the surface, *rung after rung*. It is a wreck of unavowed lives, those drowned by the book *in which our names do not appear.* Rich is inspired to dive, having read the book, because she understands it to be a *book of myths*. Thus, her journey seeks to go beyond what is written – to see for herself the subject behind the pages. *The words are purposes, the words are maps.* Beyond the letter, towards the essence. Our paper begins with a similar descent. It is our case that law and legal classification risks slouching towards becoming a book of myths, obscuring the subjects it purports to

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[3] Adrienne Rich, *Diving into the Wreck: Poems 1971-1972* (W.W. Norton & Company 1973).
[4] ibid.

represent. Our concern here pertains to gender. Namely, the tension that exists between law as a *binary* system of classification, and gender as something fluid that *resists binary classification.* In this paper we will argue that the product of this tension ought not be characterised as dissonance. Rather, it can be understood as a kind of agonistic synthesis, where opposing forces are not overcome but coexist. Our claim is demonstrated by analysing the legal classification of 'stateless' and mapping this analysis onto gender classification in law. In order to unpack this claim however, we must first return to the dive. Our paper proceeds in three parts. Firstly, we will lay bare the inexorable tension that exists when attempting to classify gender in law. Secondly, we turn to unpack the legal classification of stateless persons. Having set this out, we proceed with our core claim – that re-framing this tension as an agonistic synthesis provides a theoretical framework which can productively accommodate gender within legal classifications.

Part I: The Book of Myths

In advance of the dive, some preparation is required. *Loaded the camera. Checked the edge of the knife-blade.* Firstly, our attention is drawn to the role of classification and binaries in law. Law is both structured and organised using classification. We can understand taxonomy as a constitutive element of modern legal systems – Michel Foucault is

instructive on this point. In *Discipline and Punish*, Foucault deconstructs how law uses classification, *inter alia*, as a means of exerting power to *shape* persons.[5] Namely, that legal classification does more than simply reflect norms – it both shapes, and is shaped by norms in a dynamic reciprocal relationship. For example, Ratna Kapur detects this phenomenon in Human Rights frameworks. In *Gender Alterity and Rights: Freedom in a Fishbowl,* Kapur observes the *normalising* function of Human Rights.[6] Rather than contributing to individual *freedom*, Kapur argues that Human Rights risk placing individuals within a competing normative order that disciplines and regulates their actions.[7] Kapur recognises that the merit of Human Rights frameworks is patent – the aim of her critique is rather to highlight the normalising role of rights recognition, and legal classification in general. By relying on classification mechanisms, legal systems also reinforce binary structures.

Binaries inhabit a curious position in law – they are not cited as precedent, nor are they expressly used by legal practitioners to support their arguments or justify their decisions. We understand binaries largely by their *effect*, even when we cannot see them. In this vein, binaries are akin

[5]Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Penguin Books 1991).
[6]Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Edward Elgar Publishing 2018) 60.
[7] ibid 69.

to what some academics have coined 'legal dark matter'.[8] The applicability here is apparent *think* about legal classification is enormous. Binaries are omnipresent – they permeate the very foundations of law. In *Law: a very short introduction*, Raymond Wacks introduces law through a series of binaries: civil versus common, customary versus written, freedom versus order, and so on.[9] Consider once more the example of Human Rights – Makau Wa Matua describes human rights as a "black-and-white construction that pits good against evil".[10] Where we use legal systems which reinforce binary structures, we risk replicating patterns of *inclusion and exclusion* on a micro level - *a book of myths in which our names do not appear.*[11]

The Wreck

We begin our dive, to examine the subjects of these classifications. *The thing itself and not the myth.* Gender Studies scholarship problematizes the notion that gender is some natural fact or sociological reality – in fact,

[8] Carolina Nunez, *'Dark Matter in the Law'* (2021) 62 *BCLR* 1555.
[9] Raymond Wacks, *Law: A Very Short Introduction* (OUP 2008) 2.
[10] Makau Wa Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42(1) *Harvard International Law Journal* 201, 202.
[11] Catherine Turner, *Violence, Law and the Impossibility of Transitional Justice* (Routledge 2016).

it is something that can be made, and remade.[12] While remaining mindful of the rich diversity of scholarship on how gender is produced, for our purposes it suffices to understand gender as something performative – constituted through a series of repeated acts shaped by social norms, including the law.[13] By revealing the contingent and constructed nature of gender, fixed binaries are destabilised. Thus, a tension exists between law as a *binary* system of classification and gender as something fluid that *resists binary classification.* As already established, legal classifications do not simply reflect social realities – they have a normative influence in *shaping* those social realities. Barbara Herrnstein Smith deconstructs the methodology by which 'value' is produced in these social realities, remarking

> "The recommendation of value represented by the repeated inclusion of a particular work… not only promotes but goes some distance towards creating the value of that work."[14]

Applying this deconstruction to law, Judith Resnik writes

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[12] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990).
[13] ibid 21.
[14] Barbara Herrnstein Smith, *Contingencies of Value* (Cambridge Mass Harvard University Press 1988) 10.

> "The question is that of the canon: what (and who) is given voice; who privileged, repeated, and invoked; who silenced, ignored, submerged, and marginalized".[15]

The application here is, we hope, obvious – when we understand that law is a *normative* binary system, attempting to accommodate gender within legal frameworks risks foreclosing certain possibilities in gendered life.[16] Kapur employs Judith Butler's concept of 'grievable lives' to elucidate this issue.[17] She argues that legal frameworks like human rights decide which injuries are worthy of attention, and which are not. Therefore, persons devoid of recognition or classification risk becoming less legible, or even illegible. Persons as precarious subjects – *half destroyed instruments, that once held to a course. The fouled compass.*

Part II

The necessity of classification within legal systems has birthed a striking contradiction – that of statelessness. These are persons entirely devoid of

[15] Judith Resnik, 'Constructing the Canon' (1990) 2(1) *Yale Journal of Law & the Humanities* 221.
[16] Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Edward Elgar Publishing 2018) 60.
[17] Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (Verso 2004) 25.

legal citizenship within any state.[18] On the surface, citizenship appears as a binary mechanism between those who possess it, and those who do not. However, this binary is troubled by the indeterminate and mutable boundaries by which the legality of stateless persons is defined – it is pluralistic and indistinct, a living ambiguity within the law.

This ambiguity flows from the absence of positive characteristics constituting the stateless subject. Namely, it purports to document stateless persons using negative characteristics (what they are *not*), while circumventing any positive characteristics (what they *are*). There is nothing inherent or self-evident in being termed 'stateless'. Rather, it exists as an empty placeholder to contrast the affordances of citizenship – and *there is no one to tell me when the ocean will begin.*

The International Covenant on Civil and Political Rights (ICCPR) carves out the permissible rights for a stateless people – determined not by their *entitlements* but their exclusion.[19] The sole distinction offered between citizens and stateless persons arise from political rights exclusively granted to citizens within the public sphere (voting, holding public office, and access to public services). All other rights apply regardless of nationality or statelessness, as set out in the ICCPR and reaffirmed by the

[18] UN Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117.
[19] United Nations, *International Covenant on Civil and Political Rights*, adopted 16 December 1966, UNTS, vol 999, 171.

Committee on the Elimination of Racial Discrimination (CERD) and Human Rights Committee (HRC).[20] This imposition of a legally constructed classification functions to classify persons without endowing them with any substantive characteristics. For example consider *Kurić v Slovenia*, where stateless persons were given standing to litigate the violation of their rights in court as *stateless individuals.*[21] Having been heard in court as if they were full-bodied citizens, and their claim vindicated, the applicants were then returned to the peripheries of legal and territorial space.*[22]* This same tension is evident in Victoria Redclift's research with stateless persons in Bangladesh.[23] Here, Redclift highlights that the individuals were accepted into the nation and legal structures in all substantive respects, with some even having passports that noted their residence as the refugee camp. Yet, they still proved unable to vindicate rights-based claims on the same footing as their citizenship holding counterpart in court.[24]

[20] Vasilka Sancin, 'The ECHR and the ICCPR: A Human Rights-Based Approach to the Protection of the Environment and the Climate System' (2024) 5(2) *European Convention on Human Rights Law Review* 190.
[21] European Court of Human Rights, *Kurić and Others v Slovenia* (Application No 26828/06) (Judgment of 13 July 2010).
[22] ibid.
[23] Victoria Redclift, *Statelessness and Citizenship* (Routledge 2009).
[24] ibid.

Jacques Rancière's discussion of citizenship in *Disagreement* is useful to understand the roots of this ambiguity,

> "The people are nothing more than the undifferentiated mass of those who have no positive qualification… The demos attribute to itself as its proper lot the equality that belongs to all citizens… The mass of men without qualities identify with the community in the name of the wrong that is constantly being done to them by those whose position or qualities have the natural effect of propelling them into the nonexistence of those who have 'no part in anything'".[25]

In Rancière's terms, there is no universal quality that differentiates those who are entitled to citizenship, and those who are not. However this is not what Rancière understands as the 'wrong' done to those 'who have no part' – instead, he identifies the problem as citizenship's *reliance on exclusion*. Statelessness, in this sense, exists to *contrast* citizenship. Thus, a mechanism of mutual interdependence emerges, facilitated by a mechanism of simultaneous inclusion and exclusion. Rancière expands,

> "… it is through the existence of this part of those who have no part, of this nothing that is all, that the community exists as a

[25] Jacques Rancière, *Disagreement: Politics and Philosophy* (Julie Rose tr, University of Minnesota Press 1999) 8–9.

political community – that is, as divided by a fundamental dispute, by a dispute to do with the counting of the community's parts even more than of their rights".[26]

So far, we have argued that stateless persons constitute citizenship, despite being barred from it, and yet through this tension continue to insist on accessing rights that depend on a public space they do not occupy. It is a mechanised 'miscount' of bodies used to justify state boundaries, an *exclusionary inclusion*.[27] The salience of this issue in law emerges when we recognise the illegibility of stateless persons in the public sphere, and thus the difficulty in reconciling the 'wrongs' done against them – consider the kind of rights a stateless person is explicitly excluded from. As already mentioned, all three rights under the ICCPR pertain to the prevention of the engagement in, and enjoyment of, the public sphere. Two questions follow:

1. If a stateless person does not have a legal residence within any given nation, and therefore is denied a full sense of the private sphere, how can they be said to occupy any space other than the public?

[26] ibid 9.
[27] ibid.

2. If the rights which stateless people are explicitly prevented from accessing *only* concern the public sphere, where else might stateless persons use and engage their rights?

The law does not answer these questions. Instead, what emerges are *zone d'attente,* physicalised in the 'camp' where the law enters a 'zone of indistinction'.[29] Here, the law instigates the materialisation of state exceptions within territorial boundaries – *the ribs of the disaster curving their assertion among the tentative haunters.* A condition of *permanent temporality* is set, under the pretence that the camp exists to resolve and re-classify the stateless person.[30]

The notion of 'statelessness' lays bare the disjunction between the legal imperative for binary classification, and the realities of the sovereign-state international order. The stateless person is *de facto* extraterritorial, standing outside the legal framework. Simultaneously however, they are providing the contrast upon which territorial citizenship depends. This is because the delineation between a stateless person and a citizen is constructed by the very binary of *exceptions* and *exemptions*. Our core claim is located in this remarkable contradiction of the international legal order. Within this contradiction is an evident productive potential –

[29] ibid.

[30] Permanent temporality here is used to convey that the use of exceptions and emergency have provided states with refugee / stateless camps as a means of avoiding long term solutions.

namely that of *tolerated ambiguities*, in offering *external* critiques of the law within normative structures that purport to accommodate it.

It is important to address an obvious concern at this point – that recognising the 'productive potential' of statelessness diminishes the real plight and suffering experienced by those living on the peripheries of law and society. It is our position however that by recognising the producing potential of statelessness, one avoids reducing stateless people to mere victims of the international state system, *half-wedged and left to rot.* On the productive potential of statelessness, William Walters argues that statelessness may offer a unique vessel for political-judicial agency and a critique of state sovereignty.[31] Walters highlights that the 'camps' of stateless people in-fact function as spaces where legal contradictions are *re-articulated at a critical distance* – where the tenets of freedom and legal subjecthood can be evaluated.[32] For example, Walters highlights the unassailable force of the question "in what circumstances can a human be illegal?" when voiced by the stateless in his analysis of the 1996 occupation of Saint Ambroise Church in Paris by 324 African deportees.[33]

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[31] Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge 1997).
[32] William Walters, 'Deportation, Expulsion, and the International Police of Aliens' in Nicholas De Genova and Nathalie Peutz (eds), *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement* (Duke UP 2010 University Press 2010) 69-92.
[33] ibid 97.

Returning to Redclift's sociological research in Bangladesh, the productivity of statelessness in offering different modes of legal critique is also evident,

> "Talking of citizenship as if it were a concrete and bounded construct, risks ignoring the much-neglected social processes that include and exclude in subtle but often highly institutionalised ways".[34]

Redclift builds on Agamben's understanding of statelessness as being the grey zone neither inside nor outside the social and legal order.[35] This suggests that the classification cannot be understood as a fixed position. Rather, statelessness should not be seen as an end-product in itself, but a condition that persons move in and out of, with varying degrees of difficulty and privilege and a range of risks and consequences. This productive potential exists in the ability to read legal contradictions without seeking resolution through the elimination of tension. Instead, it tempers the pursuit of legal ubiquity or consensus – which often obscures system exclusion – in favour of a critical perspective that learns from legal ambiguities. *We dive into the hold. I am she; I am he.*

[34] Victoria Redclift, *Statelessness and Citizenship* (Routledge 2009).
[35] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press 1998).

Part III

"It is easy to forget what I came for, among so many who have always lived here"

So far, we have established that statelessness is dissimilar from traditional legal classifications and has unique properties. Firstly, statelessness is devoid of positive characteristics because it exists as an empty placeholder to contrast the affordances of citizenship. Secondly, we have demonstrated that its nature as an empty placeholder creates a hybrid of inclusion and exclusion, functioning as a necessary mechanism for mutual interdependence. Finally, we have observed that the classification of 'stateless' has a productive potential because it facilitates external critique *within* the legal framework of citizenship – rendering it as an agonistic synthesis.

This external critique can be readily mapped onto gender classifications. As set out in Part I, gender classifications in legal frameworks force persons to include themselves by way of an exclusionary social binary, which leverages the normative conventions constructed around gendered life above the person's ubiquitous access to legal frameworks. Put simply, gender classifications as they exist today might prevent a person from filling out legal paperwork whilst retaining their gender identity which either proliferates a systematised dysmorphia, or results in a refusal to conform. Both equate to a denial of free and fair legal access. Therein lies

the contradiction – the act of conforming to binary classifications is rewarded with the affordance of legal freedoms; *you are included by way of your exclusion.*

Of course, gender classifications are an indispensable tool in certain contexts. It is important to acknowledge this, albeit maintaining a critical distance. For example, gender classifications have the potential to function as protective mechanisms to create safe spaces for those affected by patriarchal violence.[36] Thus, a conflict emerges between the necessary preservation of gender classification and the desire to avoid foreclosing certain possibilities of gendered life. An *internal solution* to this tension has been posited by Jessica Clarke. Namely, Clarke proposes to include non-binary persons within a given legal framework – rather than shifting the framework itself. Clarke contends for a solution *within* the law by introducing a third 'X' classification, thereby pursuing the "possibility of inclusion" as an inevitable consequence of a growing discourse around the construction of gender identities.[37]

Contrasting the 'stateless' classification with gender is striking because it reveals a potential for legal frameworks to accommodate ambiguity. It is

[36] Jeanne Linde, Meaghan K M McNulty, Nancy W L McLellan, and Mohamed A Elmi, 'Gender-based Violence and Mental Health in Conflict-affected Settings: A Review of Interventions in Conflict-affected Settings' (2019) 13(1) Conflict and Health 19.
[37] Clarke J, 'They, Them, and Theirs' (2019) 132 Harvard Law Review 894.

our claim that construing the 'X' category as a simple *internal* solution to accommodate non-binary identities within the legal framework inadequately accounts for subversive potential. The 'stateless' legal classification is readily comparable to the 'X' classification, in that it is essentially a catch-all category with no inherent positive characteristics. Further it also follows a similar pattern of inclusion and exclusion, insofar as it both acknowledges those who fall outside the dominant framework and simultaneously reinforces that very framework by marking them as exceptional. By mapping our earlier analysis of 'statelessness' onto the 'X' category, it becomes clear that constructing the 'X' category as an internal solution fails to realise its subversive potential in offering a real *external critique* of the legal framework. Our contention is therefore not with the 'X' category itself, but with how we *construe* it.

The work of An Architektur, a Berlin-based collective of critical architects, offers a compelling entry point for understanding the dynamics of this 'subversive potential' we have identified.[38] For example, The Sangatte Project developed by this collective sought to create a series of maps and diagrams of the Sangatte refugee camp on the north coast of France. The project can be understood as an exercise in counter-cartography, tracing how stateless persons reshaped the terrain in which they were contained,

[38] M Willemsen, *An Architektur: Intervention Inevitable* (2006) http://www2.cascoprojects.org/ accessed 10 December 2024.

> "Suggestive of a topography of escape attempts, this map charts the different routes which the migrants took from the warehouse, showing how some sought to break into the railway terminal and climb onto trains while others targeted nearby service stations in a bid to infiltrate trucks heading for Britain".[39]

In the Sangatte Project, An Architektur shed light on the potential for marginalised groups to demonstrate what William Walters has coined as acts of demonstration,

> "These [acts of demonstration] occur when an injustice is revealed, a relationship of power is contested, or a particular wrong is protested, but when the identity of the subjects at the heart of the protest is left relatively open".[40]

The Sangatte Project offers a way of apprehending the subversive force of the 'X' category – not as a stable identity, but as a tactical ambiguity. Legal critique must become as supple and creative as the systems of power it confronts. To include just enough to classify, but not enough to normalise, is to stage a disruption from within: *a presence that marks the framework while slipping its grip.* In this, the 'X' does not resolve the tension between

[39] William Walters, 'Acts of Demonstration: Mapping the Territory of (Non-)Citizenship' in Isin E and Neilson G (eds), Acts of Citizenship (Zed Books 2008) 196.
[40] ibid 194.

recognition and critique – it sustains it. It is precisely in this sustained tension that its agonistic potential lies. *I have to learn alone; to turn my body without force in the deep element.*

We can further ground this sustained tension in practical contexts. Take for instance *Noborders*, an alliance of groups from several European countries dedicated to protesting against anti-migrant policies and deportations.[41] *Noborders'* strategy is centred on forming encampments at the edge of refugee camps in order to signify the futility of classifying subjects' rights on the basis of state citizenship. As border control increases its power and scope, agonistic actions such as these are essential to countering the limiting and hostile nature of legal binaries. To this end, Yvon van der Pijl provides a useful ethnographic examination of transgender migrants/refugees in the Dutch Asylum System.[42] Van der Pijl's study highlights the productive potential of the queer identity in this context. In the Dutch camps, transgender asylum seekers participate in internally organised advocacy networks, which foster methods of identity assertion by refusing to answer asylum interviewers with narratives that overlook their queer positionality. More radically, some transgender

[41] William Walters, 'No Border: Games With(out) Frontiers' (2006) 33(1) *Social Justice* 21.
[42] Yolande Jansen van der Pijl, Brenda C M Oude Breuil, Lieke Swetzer, Maria Drymioti and Marjan Goderie, '"We Do Not Matter": Transgender Migrants/Refugees in the Dutch Asylum System' (2018) 5 *Violence and Gender* 1.

persons have used sex work to create protective relationships within and outside the refugee centres, subverting the constraints of legal classification through informal community building.[43] The rights of these transgender stateless persons are clearly inadequately vindicated – however, the space of agency generated by the subversive positionality of these women, whilst in a camp whose existence is presupposed on the ubiquity of legal binaries, tells us something crucial about the role of gender classification:

> "[Striving] for control over the boundaries of the nation-state […] turns out to be the flipside of the invisibility of a group that threatens the imaginary character of a society through its inherent transitory character".[44]

The above statement showcases the reality of 'including' marginalised queer communities within a binary-coded space. The inclusion of new gender classifications like 'X' cannot simply be understood as an internal expansion of the existing legal framework to accommodate and 'add' new identities. Like the 'X' classification, these identities which are ulterior in the sense they exist beyond which is admitted, do not seek full recognition on the terms set by the dominant framework – rather, they expose its limits by operating within it just enough to be seen, yet not enough to be

[43] ibid 17.
[44] ibid 5.

contained. The result is not to conform, but to subvert – therein lies its productivity. The burgeoning potential of 'X' classification comes from an instrumentalization of already existing ambiguities in the law, to provide legal shelter for the rights of those whose identities cannot, and do not want to be assimilated within existent, and normative frameworks.

Conclusion

There are indisputable tensions that exist between law as a *binary* system of classification and gender as something fluid that *resists binary classification*. Two resolutions to this tension are typically posited - one internal and one external. Internal solutions are those that seek to mediate tension within the framework by 'including' the excluded identity. However, these solutions risk normalising the subversive potential of inherently anti-normative concepts that had previously been excluded within the law.[45] External solutions, rather, seek to challenge the framework itself by constructing alternative legal positions to combat the dominant framework. *External solutions can overlook the utility of legal space that could provide immediate and applicable solutions for the protection of marginalized identities, in a way that uses the available*

[45] Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Edward Elgar Publishing 2018) 60.

means rather than the ideal.[46] By exploring the phenomenon 'statelessness', this paper has argued that classifications like 'X' have the unique property of validating simultaneous inclusion and exclusion as a legitimate legal positionality, which offers an approach that brings marginalised identities within legal frameworks, while also retaining an external position to critique the framework itself – the result is an agonistic synthesis, which a clear productive potential.

"This is the place.
And I am here, the mermaid whose dark hair
Streams black, the merman in his armoured body.
We circle silently
About the wreck
We dive into the hold.
I am she: I am he"

~ Adrienne Rich*, Diving into the Wreck*

[46] Jeanne Linde, Meaghan K M McNulty, Nancy W L McLellan, and Mohamed A Elmi, 'Gender-based Violence and Mental Health in Conflict-affected Settings: A Review of Interventions in Conflict-affected Settings' (2019) 13(1) *Conflict and Health* 19.

An Stát agus an Ghaeilge: Gaol Coigilteach Conspóideach?

Síofra Ní Dhonnchú[†]

Deir Airteagal 8 gurb í an Ghaeilge an teanga náisiúnta agus príomhtheanga oifigiúil an Stát.[2] Deir sé chomh maith go nglactar leis an mBéarla mar theanga oifigiúil eile.[3] Shílfeá ón bhfoclaíocht sin go bhfuil tosaíocht ag an nGaeilge. Mar a deir an seanfhocal, áfach, ní mar a shíltear a bhítear.[4] Tá stádas na Gaeilge mar cnámh spáirne in Éirinn le fada an lá agus in ainneoin go bhfuil dualgas ar an Stát seirbhísí a chur ar fáil trí mhéain na Gaeilge, ní chuirtear na seirbhísí seo ar fáil ar bhonn rialta.[5] Freisin, dar le Airteagal 38 de Bhunreacht na héireann, nuair a chuirtear cion dáiríre i do leith, tá sé de cheart agat triail a bheith agat os comhair giuiré.[6] San anailís seo, feictear ar cén fáth nach dtugtar tús áite don

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[2] Airteagal 8.1.
[3] Airteagal 8.2.
[4] Le Airteagal 8.3, deirtear go bhféadfaí "socrú a dhéanamh le dlí d'fhonn ceachtar den dá theanga sin a bheith ina haon teanga le haghaidh aon ghnó nó gnóthaí oifigiúla ar fud an Stáit ar fad nó in aon chuid de."
[5] Daithí MacCarthaigh, "Stádas Bunreachtúil na Gaeilge in Éire Aontaithe" Village Magazine, 7 June 2022 <https://villagemagazine.ie/stadas-bunreachtuil-na-gaeilge-in-eirinn-aontaithe-le-daithi-mac-carthaigh/ > cuairt tugtha ar an suíomh ar an 11/01/2025.
[6] Airteagal 38.5.

Ghaeilge agus ceachtanna atá ann ó Ceanada. Mar a dúirt Daithí Mac Cárthaigh "is geall le bogha baistí stádas príomhúil seo na Gaeilge agus na cearta a eascraíonn as mar is minic a ealaíonn siad uait mar a theanann tú leo".[7]

Ár nGaol leis an nGaeilge

Tá gaol coigilteach conspóideach ag muintir na hÉireann leis an nGaeilge- is tír iarchoilíneach muid agus is léir go bhfuil meon iarchóilíneach ag formhór againn.[8] In aimsir muintir na Breataine, d'úsáidtear teanga mar uirlis eile le muintir na hÉireann a choimead faoi bhois an chait, leis na Peindlíthe ach go háirithe agus Béarla a úsáid mar theanga na polaitíochta agus na tráchtála. Go bunúsach, tá teanga, dlí agus coiriúlacht fite fuaite lena chéile- tá dlí breá soiléir trí fhocail, is cuid de riocht an duine í an choireacht agus is cuid ríthábhachtach den phróiséas coiriúil í teanga.[9]

Ar ndóigh, tá ceartanna áirithe ag Gaelgóirí sna cúirteanna i láthair na huaire, ach caithfear ateangaire a úsáid os comhair giuiré. Cuireann Schulman síos ar na deacrachtaí atá bainteach leis seo "Given that juries

[7] Daithí Mac Cárthaigh, *An Ghaeilge sa Dlí* (Leabhar Breac 2020) 12.027.
[8] Róisín A. Costello, 'Law, Citizenship and Linguistic Identity in Irish Macaronic Verse' (2021) DCU Scholarship Repository 1.
[9] Storey, 'The Linguistic Rights of Non-English Speaking Suspects, Witnesses, Victims and Defendants' in Kibbee (ed) language legislation and Linguistic Rights (John Benjamins Publishing 1998).

often determine the defendant's guilt or innocence based on small nuances of language or slight variations in emotion, how can it be fair for the defendant to be judged on the words chosen and the emotion expressed by the interpreter?"[10] Caithfear féachaint ar an argóint a dhéantar i gcoinne giuiré dátheangach- ar cór go mbeadh an lámh in uachtar ag an bprionsabal roghnú randamach i gconaí?

Stádas na Gaeilge sna Cúirteanna i Láthair na hUaire

Ar dtús báire, caithfear sracfhéachaint a thogáil ar stádas na Gaeilge i gcásanna cúirte. Sa chás *Stát (Mac Fhearraigh) v Gamhnia,*[11] rinneadh plé ar na cearta atá ag duine a theastaíonn uathu cás cúirte a thogáil trí mhéain na Gaeilge. Anseo, sholáirigh an Breitheamh O'hAnalúin, in ainneoin gur féidir le duine cás a phleadáil i nGaeilge, an fhianaise a chur isteach i nGaeilge agus crosceistiúcháin a dhéanamh i nGaeilge, ní féidr leis an duine aonair iachaill a chur ar na bpáirtithe eile sa chás cloí leis an nGaeilge amháin.

Sa *chás Ó Cadhla v an tAire Dlí agus Cirt,*[12] cuireadh an bprionsabal seo chun tosaigh arís eile i gcás inár theastaigh ón iarratasóir cás a phleadáil

[10] Michael Schulman, "No Hablo Ingles: Court Interpretation as a major obstacle to fairness for non-English speaking defendants" (1993) *Vanderbilt Law Review* 46, 175 - 177.
[11] *Mac Fhearraigh v Gamhnia* (1990) WJSC-HC 2015.
[12] *Ó Cadhla v an tAire Dlí agus Cirt* (2019) IEHC 503.

os comhair breitheamh le Gaeilge. Sa Chúirt Dúiche, d'fhógair an Breitheamh Kelleher go ndéanfaidh sé níos mó céile an cás a reachtáil i mBéarla, toisc go raibh an iarratasóir líofa sa Bhéarla. San Ard-Chúirt, áfach, rialaíodh go bhfuil dualgas ar an Stát "iarrachtaí reasúnta" a dhéanamh le breitheamh dátheangach a úsaid i gcásanna lán-Ghaeilge.

Mar sin, an féidir a rá go mba chóir go mbeidh an ceart ag duine triail le giúiré dátheangach a fháil? Ar cóir don stat "iarrachtaí reasúnta" a dhéanamh le giúiré dátheangach a chur ar fail, ach go háirithe nuair a bhfeicimid go bhfuil an Ghaeilge anois mar teanga oifigiúil oibre san Aontas Eorpach gan í a mhaolú, cíos, cás ná cathú ó Mí Eanáir 2022?[13] Mar atá luaite cheana, tá teanga, dlí agus coiriúlacht fite fuaite lena cheile agus ag brath ar a chéile, ach cá bhfuil cothrom na Féinne do mhuintir na Gaeilge sna cúirteanna?

An Seasamh in Éirinn i Láthair na hUaire

An seasamh in Éirinn i láthair na huaire ná nach bhfuil duine i dteideal cás cúirte a chur os comhair giúiré dátheangach. Is cinnte go bhfuil airteagal 8 agus airteagal 38 ag teacht go huile is go hiomlán salach ar a chéile

[13] An Roinn Turasóireachta, Cultúir, Ealaíon, Gaeltachta, Spóirt agus Meán "Stádas iomlán oifigiúil ag an nGaeilge san Aontas Eorpach" (31 Nollag 2021), Rialtas na hÉireann <https://www.gov.ie/ga/preasraitis/39d7f-stadas-iomlan-oifigiuil-ag-an-ngaeilge-san-aontas-eorpach/> cuairt tugtha ar an suíomh ar an 15/01/2025.

anseo, átá le feicéail sa chás *MacCárthaigh v Éire.*[14] Cúisíodh MacCárthaigh as trí chion coiriúla a tharla laistigh de cheantar cathrach Bhaile Átha Cliath. Socraíodh é a thriail ar na cúisimh a bhí i gceist os comhair giúiré sa Chúirt Chuarda. Theastaigh uaidh a thaobh féin de na himeachtaí a stiúradh trí mhéain na Gaeilge agus dúirt sé gur i nGaeilge a bheadh aon rud a dúirt sé ina fhianaise nó aon ráiteas ó dhlíodóir ar a shon. Mar aon leis seo, theastaigh giúiré uaidh a bheadh in ann an Ghaeilge a thuiscint, cnámh spáirne i gcúirteanna na tíre.

Cuireadh an triail choiriúil ar atráth le deis a thabhairt do MacCárthaigh imeachtaí athbhreithnithe bhreithiúnaigh a lorg san Ard-Chúirt. Chinn an Ard-Chúirt go mbeadh sé dódhéanta giúiré le cumas oiriúnach sa Ghaeilge a sholáthar, gan teacht salach ar an bprionsabal roghnú randamach ina chuirtear giúiré le chéile. Agus an Breitheamh O'Hanlon ag tabhairt a mbreithiúnas, luaigh sé an cás Meireaceánach *Taylor v Louisiana,*[15] a d'fhógair "Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of a jury". Ar achomharc, d'aontaigh an Chúirt Uachtach le cinneadh na hArd-Cúirte. Dá mbeadh giuiré dátheangach ann, bheadh timpeall 75-90% de dhaonra cheantar cathrach Bhaile Átha Cliath eisiata ón tseirbhís giuiré. Suimiúil go leor,

[14] *Mac Cárthaigh v Éire* (1998) IESC 11 ; (1999) 1 IR 200.
[15] *Taylor v Louisiana* (1975) 419 US 522, 530.

chur an chúirt i MacCárthaigh béim ar chursaí dlí a thuiscint i nGaeilge in ainneoin nach bhfuil a leithéid le riachtanas ann maidir le giúiróirí le Béarla.[16]

Tá daoine áirithe tar éis an cinneadh seo a cháineadh. Mar a luaitear san *Irish Criminal Law Journal,* cén fáth go dtugatr an lámh in uachtar don prionsabal a deirtear go mba chóir go mbeidh giuiré ionadaíoch don daonra, in ainneoin nach bhfuil seo luaite i mBunreacht na hÉireann thar Airteagal 8?[17] Ar an dtaobh eile, aontaíonn an Coimisiún um Athchóiriú an Dlí leis an gcinneadh i MacCárthaigh, ag fógairt nach mbeadh giuiré le Gaeilge ionadaíoch don daonra i mBaile Átha Cliath.[18] Bhí an páipéar comhairliúcháin seo foilsithe i 2010, áfach, sular *tháinig Ó Maicín* chun cinn. Ach, nach bhfuil dualgas ar an Stát tús áite a thabhairt don Ghaeilge - i gCeanada, mar a bheidh pléite agam. I gCeanada, cuirtear an Fhraincís ar chomhchéim leis an mBéarla- léiríonn seo an streachailt a bhí ann go stairiúil idir na teangacha.[19] Mar átá luaite cheana, áfach, tá gaol conspóideach ag Éirinn leis an nGaeilge agus cabhródh an Ghaeilge a chur ar chomhchéim lenar meon iarchóilíneach a stopadh.

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[16] Daithí MacCárthaigh agus Seán Ó Conaill, "Aguisíní le Breithiúnas Hardiman Brmh in Ó Maicín v Éire (2014) 4 IR 477 ; "Aguisíní atá fágtha ar leor ón tuairisc oifigiúil" (2020) 4(2) *Irish Judicial Studies Journal* 150.
[17] Carey G, "Criminal Trials and Language Rights: Part II" (2003) 13(2) *Irish Criminal Law Journal* 8.
[18] Law Reform Commission, *Consultation Paper on Jury Service* (LRC CP61-2010).
[19] Meital Pinto, "Taking Language Rights Seriously" (2014) 25 KLJ 231–254.

Ó Maicín v Éire: Firicí Difriúla, An Chonclúid Chéanna

Tháinig an ceist choigilteach conspóideach seo os comhair na cúirte arís eile le *Ó Maicín v Éire.*[20] Bhí dhá difríocht suntasach idir *Ó Maicín* agus *MacCárthaigh* ach in ainneoin seo, thángadar ar an toradh chéanna. Ar an gcéad dul síos, ba chainteoirí dúchasacha Gaeilge iad na bpáirtithe ar fad in Ó Maicín, murab ionann le MacCárthaigh. Ar an dara dul síos, cúisíodh Ó Maicín sa Chúirt Chuarda i nGaillimh maidir le cor a tharla i Ros Muc, ceantar Gaeltachta. Ar deireadh thiar thall áfach, chinn an Chúirt Uachtarach le tromlach 4-1 nach raibh ceart ag duine triail le giuiré dátheangach a fháil[21]. Agus é ag tabhairt an breithiúnas seo, luaigh an Breitheamh Clarke go rachadh giuiré dátheangach go hiomlán salach ar Airteagal 38, toisc go mbeadh mórchuid den daonra eisiata ón tseirbhís giúiré.

Níor aontaigh gach breitheamh leis an cinneadh seo, áfach. Rinne an Breitheamh Hardiman roinnt pointí sainiúla a léirigh nach mbeadh sé dódhéanta giuiré dátheangach a chur le chéile[22]. Ar dtús báire, chur an Chúirt an-bhéim ar de *Búrca v Attorney General,*[23] agus iad ag teacht ar chinneadh sa chás seo. Bhain an cás áirithe seo le ról na mban i ngiúiré. I

[20] *Ó Maicín v Éire* (2014) IESC 12 ; (2014) 4 IR 583.
[21] Mark de Blacam, "Official Language and Constitutional Interpretation" (2020) 52 *The Irish Jurist* 99.
[22] Ibid, féach ar breithiúnas Hardiman.
[23] *De Búrca v Attorney General* (1976) IR 38.

de Búrca, chinn an Chúirt Uachtarach go raibh *Acht na nGiuiréithe 1927* míbhunreachtúil toisc nach raibh an giúiré ionadaíoch den sochaí agus as sin, tháinig an reachtaíocht *d'Acht na Giuiréithe 1976*. Léirítear le halt 6 d'Acht na Giuréithe go bhfuil gach saoránach atá os cionn ocht mbliana déag d'aois agus a bhfuil a (h)ain mar chlár toghthóirí na Dála cáilithe le haghaidh seirbhís giúiré, ach amháin i gcásanna eisceachtúla.[24] Anuas ar seo, deir alt 11 gur cheart painéal giúróirí a chur le chéile ar shlí randamach agus ar shlí a mbeadh ionadaíoch don sochaí.[25] Dúirt an Breitheamh Clarke go sárófaí de Búrca agus an riachtanas bunreachtúil go mbeadh giuiré ionadaích de gach gné den sochaí dá mbeadh giuiré dátheangach ann.[26] Leis seo a bhreagnú, áfach, léirigh an fhianaise ón Dochtúir Colm Ó Giollagáin nach rachadh giúiré dátheangach i gcoimhlint leis an bprionsabal go mbeadh giúiré ionadaíoch don sochaí i nGaillimh mar gheall ar an céatádáin ard de chainteoirí Gaeilge i nGaillimh.

Léiríonn na staitisticí is déanaí go labhraíonn 66.6% de dhaonra an Gaeltacht i nGaillimh an Ghaeilge ar bhonn laethúil agus tá 49% de dhaonra na Gaillimhe reasúnta líofa sa Ghaeilge.[27] Leis na bhfíricí seo, dá dtabharfaí giúiré dátheangach don iarratasóir, ní rachadh sé seo i

[24] Juries Act 1976, s.6.
[25] Ibid s.11.
[26] *Ó Maicín v Éire* (2014) IESC 12 ; (2014) 4 IR 583.
[27] Central Statistics Office "Census of Population 2016- Education, Skills and the Irish Language Database" https://www.cso.ie/en/releasesandpublications/ep/p-cp10esil/p10esil/ilg/ cuairt ar an suíomh ar an 12/01/2025.

gcoimhlint leis an bprionsabal i de Búrca nó ionadaíochas an giúiré. Dar leis an abhcóide Daithí MacCárthaigh, tá an cinneadh i *Ó Maicín* míréasúnta toisc mura bhfuil Gaeilge ag an ngiúiré agus tá cás á reachtail trí mhéain na Gaeilge, beidh daoine "i do choinne"[28] mar go bhfuil Gaeilge á labhairt. Má tá ateangaire in úsáid, dar le Michael Shulman ina alt "No Hablo Ingles: Court Interpretation as a major obstacle to fairness for non-English speaking defendants", bheadh giúiré claonta i do choinne ón gcéad lá riamh. Dar leis, an bhunús a bhaineann leis seo ná "The words attributed to the defendant are those of the interpreter. No matter how accurate the interpretation is, the words are not the defendant's, nor is the style, the syntax or the emotion".[29]

Bíonn sé níos deacra dul i ngleic le bacainní teanga do chosantóir nach bhfuil i dteideal trialach ina rogha teanga. Cuireadh síos ar an seasamh seo, i gcomhthéacs Stát Aontaithe Mheiricéa mar "gan chiall", "doitéan dothuigthe" agus "falka-like" nuair a úsáidtear ateangaire toisc go mbíonn brí éagsúil ag tearmaí áirithe i dteangacha éagsúla.

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[28] Daithí MacCárthaigh, "Tá níos mo cearta ag cainteoirí Gearmáinise i dTuaisceart na hIodáile ná ag muintir na Gaeltachta" (21 Aibreán 2021) tuairisc.ie <https://tuairisc.ie/ta-nios-mo-cearta-teanga-ag-cainteoiri-gearmainise-i-dtuaisceart-na-hiodaile-na-ag-muintir-na-gaeltachta/> cuairt tugtha ar an suíomh ar an 14/01/2025.

[29] Michael Schulman, "No Hablo Ingles: Court Interpretation as a major obstacle to fairness for non-English speaking defendants" *Vanderbilt Law Review* (1993) 46, 175 ag 177.

R v Beaulac: Cás a Léiríonn Seasamh Cheanada

In ainneoin go bhfuil cearta cainteoirí Gaeilge agus Briotanach curtha in iúl go breá soiléir sa dlí, mar atá pléite, níl cothromaíocht iomlán i gceist. Ar an dtaobh eile, is léir gur stát dátheangach amach is amach í Ceanada toisc go dtugtar cothrom na Féinne do chainteoirí Fraincíse i ngach slí.[30] Déantar gach iarracht le cinntiú go bhfuil cearta teanga á cur chun tosaigh, agus go bhfuil giúiré dátheangach ar fáil dóibh siúd a theastaíonn uathu a gcás a phleadáil trí mheáin na Fraincíse. Go luath tar éis don Chúirt Uachtarach in Éirinn a bhreithiúnas a thabhairt i *MacCárthaigh v Éire,*[31] thug Cúirt Uachtarach Ceanada breithiúnas ríthabhachtach do chearta teanga *in R v Beaulac*[32]. Anseo, dheimhnigh an Chúirt Uachtarach i gCeanada gur cheart go mbeadh duine i dteideal triail le giúire dátheangach a bheith acu i British Columbia, cé nach bhfuil ach mionlach cainteoirí Fraincíse sa Chúige sin.

> "The objective of protecting official language minorities, as set out in s.2 of the Official Languages Act, is realized by the possibility for all members of the minority to exercise independent, individual rights which are justified by the existence of the community. Language rights are not negative rights; or

[30] Gwynned R. Parry, "An important obligation of citizenship: language, citizenship and jury service" (2007) 27(2) Legal Studies 188 - 199.
[31] Mac Cárthaigh v Éire (1998)
[32] *R v Beaulac* (1999) 1 SCR 768.

> passive rights; they can only be enjoyed if the means are provided".[33]

Is é *ratio decidendi* an cás ná gur cearta ar leith iad cearta teanga agus go bhfuil tús áite ag cearta teanga thar aon ní eile.[34] Sa bhreithiúnas, mar a luann Daithí MacCárthaigh agus Seán Ó Conaill, is príomhghné den fhéiniúlacht chultúrtha í an teanga agus má theipeann ar an Stát cearta teanga na saoránach a dheimhniú, ta siad ag déanamh beag is fiú de na cearta sin.[35] Le breganú a dhéanamh ar an argóint go bhféadfaidh cosantóir an uirlis seo a úsáid le moill a chur ar cúrsaí, caithfear a chur chun tosaigh go bhféadfaidh giuiré dátheangach a bheith diúltaithe do iarratasóir nach bhfuil proifisiúnta sa Fhraincis, toisc go mbeadh seo ag déanamh beag is fiú d'Airteagal 2 den Acht um Teangacha Oifigiúla. Bhí an meon seo soiléir sna cásanna Ontario (Attorney General) v Fleet Rent a Car Ltd,[36] agus Children's Aid Society of Toronto v WF. [37] Sna cásanna seo, rinne iarratasóirí nach raibh cumas acu sa Fhraincis a seacht ndícheall le

[33] ibid, féach ar mír 20.
[34] Féach ar Reference *Re Secession of Quebec* (1998) 2 SCR 217 agus *Arsenault-Cameron v Prince Edward Islan*d (2000) SCR 3 a luann an *ratio* seo arís.
[35] Daithí Mac Cárthaigh agus Seán Ó Conaill, "Aguisíní le Breithiúnas Hardiman Brmh in Ó Maicín v Éire (2014) 4 IR 477, Aguisíní atá fágtha ar leor ón tuairisc oifigiúil" (2020) 4(2) *Irish Judicial Studies Journal* 160.
[36] *Ontario (Attorney General) v Fleet Rent-A-Car Ltd* (2002) CPC (5th) 315.
[37] *Children's Aid Society of Toronto v W.F* (2014) ONCJ 480.

giuiré dátheangach a chur le chéile agus iad ag déanamh iarracht moil cuimsitheach a chur ar cúrsaí - ag déanamh ceap magaidh d'Airteagal 2.

Samplaí ó Cheanada: An Mithid Dúinn Iad a Leanúint?

Dar leis an Canadian Criminal Code, ba chóir go dtarlóidh trialacha dátheangacha sa cheantar ina tharla an cor.[38] Sa chás nach bhfuil sé seo indéanta, áfach, bogtar an cás go ceantar eile, a chinntíonn go bhfuil an giúiré i gceist ionadaíoch agus nach bhfuil i gcoimhlint leis an bprionsabal roghnú randamach a bhaineann le giuiré a chur le chéile.[39]

Tá modhanna difriúla ag gach Cúige a chinntíonn go bhfuil cothrom na Féinne á thabhairt do chainteoirí Fraincíse. Mar shampla, i British Columbia, tarlaíonn gach triail le giuiré dátheangach i New Westminster, toisc go bhfuil líon ard cainteoirí Fraincíse sa chathair áirithe seo, murab ionann is áiteanna eile sa cheantair.[40] I gCúige Saskatchewan, faoi fhorálacha reachtúla, tá liosta ar leith acu chun giúiré le Fraincís a chur le

[38] Canadian Criminal Code, S.530.
[39] Ibid.
[40] British Columbia Prosecution Service, 'French and Bilingual Trials' (May 20,2022) <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/fre-1.pdf> cuairt tugtha ar an suíomh ar an 14/01/2025.

chéile, in ainneoin nach bhfuil móramh daoine ina bhFrainciseoirí.[41] Cinntíonn sé seo go dtugtar aitheantas cuí go chearta teanga, gan prionsabal an roghnú randamach atá lárnach i ngiuiré a chur le chéile a thréigean.

Anuas ar seo, tá córas suimúil i bhfeidhm i gCúige Nova Scotia. Anseo, cuirtear ainmneacha muintir na háite ar bhunachar, ag baint úsáide as córas áirithe ar a dtugtar "Jury Selection Software".[42] Leis seo, tá sé breá soiléir cé hiad na daoine le hainmneacha i mBéarla agus cé siúd le hainmneacha Fraincíse agus de réir seo, is féidir giuiré dátheangach a chur le chéile. Sílim go mbeadh ligeachtaí suntasach sa chóras seo dá mbeadh sé i mbeidh in Éirinn mar is sochaí ilchultúrtha í Éire sa lá atá innú ann. I mo thuarimse, déanfadh seo steireitíopáil orthu siúd le hainmneacha iasachta cé go bhfuil an seans ann go bhfuair said a gcuid oideachas trí mhéain na Gaeilge.

Conclúid

Léiríonn seasamh Ceanada i leith an Fhraincís an tábhacht a bhaineann le cothrom na Féinne a thabhaitrt do Fhrainciseoirí tar éis an streachailt

[41] Province of Ontario, 'Jury duty in Ontario' <https://www.ontario.ca/page/jury-duty-ontario> cuairt tugtha ar an suíomh 14/01/2024.
[42] Juries Act of Nova Scotia 2002, c.10 ss.5.6.

stairiúil idir Béarla agus Fraincís. Mar a luann an Breitheamh Gerard La Forest i gCeanada, tá an teanga lárnach mar “a well-known species of human rights”.[43]

Dar leis an mBunreacht, is stát dátheangach í Éire. Dar le roinnt feachtasóirí cearta teanga, áfach, is stát aonteangach í Éire.[44] Déantar an argóint go bhfuil níos mó cearta ag cainteoirí Gearmáinise i dTuaisceart na hIodáile ná atá ag muintir na Gaeltachta,[45] a d’fhéadfadh a bheith fíor i gcás *Ó Maicín v Éire.* Ní folóir ach comparáid a dhéanamh idir stádas na Gaeilge in Éirinn agus stádas na bhFraincise i gCeanada. Cinnte, tá Airteagal 8.1 agus Airteagal 38.5 ag teacht go huile is go hiomlán salach ar a chéile ach cén fáth go dtugtar an lámh in uachtar d'Airteagal 38.5 i gcónaí?

[43] *R v Mercure* (1988) 1 SCR 234, 237.
[44] John Walsh, “An Phaindéim agus an Stát Aonteangach” (2020) 80(6) *Comhar* 11-14.
[45] Daithí MacCárthaigh, “Tá níos mó cearta teanga ag cainteoirí Gearmáinise i dTuaisceart na hÍodáile ná ag muintir na Gaeltachta” (21 Aibreán 2021) tuairisc.ie <https://tuairisc.ie/ta-nios-mo-cearta-teanga-ag-cainteoiri-gearmainise-i-dtuaisceart-na-hiodaile-na-ag-muintir-na-gaeltachta/> cuairt tugtha ar an suíomh ar an 14/01/2025.

The Need For A Constitutional Right to Housing

Cormac Ó Fearghail[†]

In Ireland, we love our rights: the right to freedom of speech,[2] private property,[3] establishing a gentlemen's golf club,[4] and even the right to travel to apartheid regimes to play rugby.[5] The list is long. Yet, despite our love of rights, unusually there are no substantive housing rights in Ireland. Though we proudly proclaim in our Constitution to "respect, and, as far as practicable […] defend and vindicate the personal rights of the citizen",[6] as of May 2025, over 15,700 people were homeless.[7] This stark reality raises serious questions about whether our legal system adequately provides for the personal rights it claims to uphold. How can anyone meaningfully exercise their right to liberty, expression, assembly, association, bodily integrity, privacy, or life when the State has not facilitated the material conditions essential for such rights?

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[2] Article 40.6.1˚

[3] Article 43.

[4] See *Equality Authority v Portmarnock Golf Club* [2010] 1 IR 671 (SC) [97].

[5] See *Lennon v Ganly* [1981] ILRM 84 (HC).

[6] Article 40.3.1˚

[7] Focus Ireland, "Homelessness Statistics and Figures in Ireland," <https://www.focusireland.ie/knowledge-hub/latest-figures/> accessed 23 July 2025.

Many scholars have argued the 'personal rights' of the citizen does not or should not compel the State to act to secure some standard of material wellbeing for all. Against this narrow conception of personal rights, it is herein argued that the proper defence of constitutional personal rights for every citizen requires an enforceable, substantive right to housing. Whilst such a right would not guarantee that all persons could automatically demand a house, it would require the Government to commit to a housing programme and be held accountable for unreasonable shortcomings. Judicial supervision is a powerful tool which could help bring an end to decades of incompetency, laxness, and wasteful expenditure regarding social housing. Such supervision is needed because the Executive has long refused to tackle socioeconomic problems head-on, instead outsourcing the issues and relying on external actors to provide housing. With the bait of tax incentives, governments have cast their line in hopes of reeling back massive investors to provide for the people. Unfortunately, for each investor enticed, the next gets hungrier, looking for bigger and bigger bait. And before long, the people became the bait for the very fish intended to feed them.

The Irish people have no direct means of holding the Government accountable for such neglect. Our system of governance was designed so that the Oireachtas is dominated by the Government, leaving opposition parties with little power to challenge the Government's delivery on housing. Therefore, the Judiciary is the only branch of the State currently

capable of holding the Government accountable. Ireland's Judiciary once spearheaded the recognition and enforcement of socioeconomic rights. However, they have since become afraid that such actions intrude upon the Government and Oireachtas' jurisdiction. Thus, it is argued that the recognition of a right to a home would reaffirm the courts' power and democratic legitimacy to supervise the Government's management of the housing crisis. Through this, the courts can ensure that the State reasonably adheres to its plans and timelines for social housing. Without such basic oversight and accountability, the perils of Irish housing policy will remain and citizens will be left without the foundational stability needed to properly exercise their personal rights.

This article will first draw on the importance of a private dwelling for human dignity, wellbeing, autonomy, and relationships. It will then analyse the Government and Oireachtas' historical approach to housing, alongside the Judiciary's refusal to hold the State accountable in relation to this. This refusal manifested in a series of cases concerning adequate housing and care facilities for disabled children and others experiencing behavioural difficulties. Finally, it will consider the ideal means of codifying a right to housing and what it would entail in practice for citizens and the branches of State.

The Importance of Housing

Before analysing the continued failure of the State to solve the housing issue, we should first consider why provision of housing should be a fundamental duty of the government. Ireland is a liberal democratic state, and the traditions of such states are rooted in the idea of autonomy – citizens are free to determine their own path within the boundaries of collective laws.[8] According to Kantian liberal democratic theory, all individuals ought to be autonomous.[9] Though external factors may influence how a person decides to act, it is essential that the individual retains capacity to make independent decisions.[10] Of course, societal realities and private property ownership limit the degree of freedom a person enjoys in the public sphere.[11] For instance, a customer would likely be removed from a shop if they began decorating it without the owner's consent. Recognising such constraints on autonomy, Kant argues that

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[8] Sanford Lakoff, "Autonomy and Liberal Democracy" (1990) 52(3) *The Review of Politics* 378, 389

[9] See, for example: Mark White, *Kantian Ethics and Economics: Autonomy, Dignity and Character* (Stanford University Press 2011) 19; Christian F. Rostbøll, "Kant, Freedom as Independence, and Democracy" (2016) 78(3) *The Journal of Politics* 792, 794; Gunnar Beck, "Immanuel Kant's Theory of Rights" (2006) 19(4) *Ratio Juris* 371, 374.

[10] Mark White, *Kantian Ethics and Economics: Autonomy, Dignity and Character* (Stanford University Press 2011) 20.

[11] Christian F. Rostbøll, "Kant, Freedom as Independence, and Democracy" (2016) 78(3) *The Journal of Politics* 792, 794.

individuals need a space of their own where they can live life more consistently with their values.

Such ideas remain relevant to the modern Irish context, where secure and adequate housing is not just a social good but a prerequisite for meaningful freedom. People consider a home to be a space of privacy, safety, and self-expression.[12] In a society centred around private property, a lack of a home leaves individuals completely exposed to the whims of those who control the spaces around them.[13] Accordingly, housing in a liberal democratic state cannot be regarded as a luxury.

Without a right to housing, the failure of society to achieve equality of freedom and rights becomes clear. The lived experiences of rough sleepers expose this most starkly. Rough sleepers struggle to complete the most basic activities such as cooking, sleeping, and going to the toilet. Even where it might be possible for them to engage in these activities, rough sleepers are criminalised for doing so, as many such activities are not allowed to be done in public by law.[14] For instance, public urination is a crime in many parts of the world - effectively banning the existence of the homeless. Gardaí often order homeless individuals to move from

[12] Cameron Parsell, "Home is Where the House is: The Meaning of Home for People Sleeping Rough" (2012) 27(2) *Housing Studies* 159, 160.
[13] Jeremy Waldron, "Homelessness and the Issue of Freedom" (2019) 1 *Journal of Constitutional Law* 27, 32.
[14] ibid.

certain streets, insisting they are loitering. The existence of the homeless is only tolerated insofar as they are unseen. These examples show how meaningful exercise of personal legal rights and general freedoms requires a private space. In addition, the lack of an abode also deeply harms the unhoused beyond immediate physical needs. Rough sleepers often feel so ashamed of having no home that they cannot form or maintain existing relationships, and their compelled reliance on charities reduces their sense of self-worth.[15] Furthermore, their constant exposure to the elements deprives them entirely from enjoying leisure or comfort. For the homeless, much of their life is dictated by fear of and reliance on outside forces, reducing their autonomy to even survive, never mind live as fully realised individuals. The unhoused do not enjoy personal freedoms and are among the greatest victims of State failures.

Undoubtedly, the significance of housing for individual autonomy and, by extension, liberal personal rights is clear. A house offers a space where a person can feel at ease and, as shown by the experiences of rough sleepers, has a fundamental role in supporting the meaningful exercise of personal rights, such as life, liberty, and freedom of association. Accordingly, it would be negligent for the State to ignore the need to develop a long-term, sustainable, and accessible means of housing.

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[15] Cameron Parsell, "Home is Where the House is: The Meaning of Home for People Sleeping Rough" (2012) 27(2) *Housing Studies* 159 165.

Out of Sight, Out of Mind

Unfortunately, 'long-term', 'sustainable', and 'accessible' are not adjectives that can be associated with Ireland's socioeconomic policies. As noted by Niamh Hardiman, Ireland "commits a relatively small proportion of aggregate wealth to support income transfers and social services", relying on the private market to provide for essential services.[16] Such has been the case since the 1950s, where governments turned to foreign investment to address major economic underperformance, offering tax-breaks to attract wealth as a 'quick fix' rather than considering economic reform.[17] This pattern repeated itself in the Financial Crash of 2007-2008. Drowning in debt, the Irish State beckoned vulture funds and equity investors by selling properties at massive discounts.[18] It was official State policy to encourage vulture funds to buy the country's insecure real estate.[19] By selling property portfolios to large private investors, the State brought in hundreds of millions worth of revenue.[20] Since 2013, real

[16] Niamh Hardiman "Introduction: profiling Irish governance" in Niamh Hardiman (ed.), *Irish Governance in Crisis* (Manchester University Press 2012) 3.
[17] Conor McCabe, "Apple and Ireland, 1980-2020: A Case Study of the Irish Comprador Capitalist System" (2022) 143 *Radical History Review* 141, 145.
[18] Rory Hearne, *Housing Shock: The Irish Housing Crisis and How to Solve It* (Policy Press 2020) 133.
[19] Valesca Lima, Rory Hearne and Mary P. Murphy, "Housing financialisation and the creation of homelessness in Ireland" (2023) 38(9) *Housing Studies* 1695, 1700-1701.
[20] ibid 1701.

estate investment trusts became a key aspect of housing policy, enticed by favourable tax exemptions.[21] And it was at this time that Ireland began experiencing a new wave of housing crises.[22]

The post-Financial Crash housing crises were a direct result of investment entities being permitted to purchase swathes of new property.[23] This trend continues, with large landlords owning over 100 properties each. The number of landlords with property portfolios above 100 increased from 10.16% to 12.5% of the entire private property market between 2023 and 2024 alone.[24] As a result, large landlords have secured significant dominance over the Irish housing market, enabling them to charge prices that most citizens struggle to afford. Furthermore, with their grip on the supply pipeline, these investment funds can artificially inflate prices by leaving properties vacant, driving up demand, and enabling them to charge even more.[25]

Another consequence of the shift to market-dominated policies is felt at interpersonal and societal levels. Ireland's tradition of homeownership

[21] ibid.
[22] ibid 1702.
[23] ibid.
[24] Residential Tenancies Board, "Research and Data Bulletin" (December 2024) <https://www.rtb.ie/about-rtb/news/residential-tenancies-board-marks-20-years-as-regulator-of-irelands-rental-market-and-releases-new-data-on-state-of-rental-sector> accessed 26 March 2025.
[25] ibid 1703-1704.

declined from 77% in 2006 to 68% by 2016.[26] The inaccessibility of housing fosters increased inter-generational reliance and societal stratification because only those from financially advantaged households can access the property ladder, whilst persons from disadvantaged backgrounds face increasing prices and barriers.[27] Even for those who manage to access the rental market, stratification continues. The socio-economically disadvantaged are forced into lower and lower quality housing by the affordability demands imposed by the market.[28]

By refusing to address the housing needs of Ireland's citizens themselves, the Government has entrusted the country's wellbeing into the hands of private investors. In doing so, they display unwarranted confidence in trickle-down economics and the goodwill of private actors. The Government has allowed investors to shift the orientation of housing development from 'build-to-sell' to the 'build-to-rent' model', wherein investors purchase large blocks of property. This profit-maximisation strategy precludes citizens from having an option to buy. The consequent decrease in properties for sale combined with high rental costs makes it

[26] Richard Waldron, "Generation Rent and Housing Precarity in 'Post Crisis' Ireland" (2023) 38(2) *Housing Studies* 181, 188.
[27] ibid, 185.; Mark Tsun On Wong, "Intergenerational Family Support for 'Generation Rent': The Family Home for Socially Disengaged Young People" (2019) 34(1) *Housing Studies* 1, 2.
[28] Richard Waldron, "Generation Rent and Housing Precarity in 'Post Crisis' Ireland" (2023) 38(2) *Housing Studies* 181, 195.

difficult for citizens to secure a sale and save for a mortgage deposit. Citizens are thereby confined to predatory long-term tenancies.[29]

Many argue that we ought to welcome our investors with palm fronds. A mentality persists that the housing crisis will naturally resolve itself because 'the market hits the target'. Yet, such claims are at best a post-hoc justification against potential economic regulation. The rise of the current property culture, where vulture funds have become integral to economic growth and housing supply, was not in fact caused by a well-reasoned decision to trust the market. There was no coherent adoption of a neoliberal, market-driven ideology.[30] Rather, as financial difficulties emerged from the 1980s to the 2008 Crash, the State increasingly turned to the private sector to address shortcomings in housing delivery.[31] In other words, Government failures created shortfalls and when the Government were caught with their trousers down they scrambled for the nearest belt. The private sector was the belt the Irish government grabbed first, but out of convenience rather than connivance.

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[29] Rory Hearne, *Housing Shock: The Irish Housing Crisis and How to Solve It* (Policy Press 2020) 150.
[30] Michael Byrne and Michelle Norris, "Housing Market Financialization, Neoliberalism and Everyday Retrenchment of Social Housing" (2022) 54(1) *Environment and Planning A: Economy and Space* 182, 187.
[31] ibid 188-189.

Compelling the State?

Given the failures of the Oireachtas and Government regarding housing policy, one might consider turning to the courts to advance housing rights. Indeed, this seemed viable for a period in the 1990s where the High Court offered robust remedies in respect of the accommodation and educational needs of children.[32] The High Court cases of *FN, DB, and TD* carved out a narrow opening in the jurisprudence. A minor and exceptional entitlement to housing for certain children was recognised, which had the potential to evolve into a broader, robust right to housing for all. Yet, this avenue for advancing socioeconomic rights was closed off in 2001. The Supreme Court slammed the door on housing rights by stating the Judiciary was too inexperienced to adjudicate on socioeconomic policy through rights recognition and that they lacked the democratic legitimacy to impose mandatory economic orders on the Government.[33] Despite these concerns, the Judiciary's approach in *FN, DB,* and *TD* show that the courts ***are capable*** of recognising and adjudicating socioeconomic rights. It is important for any proposal in favour of housing rights in Ireland to analyse these cases. *FN, DB, and TD* not only show how the Judiciary could enforce a codified right to housing,

[32] Gerard Hogan and others, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) [7.7.293].
[33] Caoimhe Stafford, "The Case for a Judicially Enforceable Right to Housing" (2017) 16 *Hibernian Law Journal* 42, 45.

but also highlight the failures of the Government, characterised by undue delays and clear administrative incompetency. Thus, they prove even further the need for inter-branch supervision to achieve access to housing for all.

The socioeconomic rights saga began with *FN v Minister for Education,*[34] concerning a child in State care with hyperkinetic conduct disorder. To meet the child's needs, it was recommended that he be provided with a secure unit to contain him and address his behaviour. However, no suitable educational facilities were available due to the State's failure to update its list of certified industrial schools. Thus, the child had to be placed in an institution for housing children experiencing behavioural difficulties. Although the court accepted that placing this child in the institution was temporarily necessary, it rejected the State's argument that the State owed no further obligation to provide for the child.[35] The court held that where a child's parents or guardians are unable to meet a child's special needs, the State had a constitutional duty to meet such needs. The court deemed it unacceptable for the State to rely on existing services to care for the child.

This judgement is a clear example of how the Judiciary can recognise and enforce robust socioeconomic rights. Crucially, in *FN* the court balanced

[34] *FN v Minister for Education* [1995] 1 IR 409 (HC).
[35] ibid 415.

the rights of the child and the realities of politics by not insisting on an absolute duty, acknowledging there could be exceptional circumstances involving a prohibitively expensive need for which the State could not be expected to provide.[36] This judgement is an example of what the Judiciary should be expected to do for citizens. It must ensure that the Government effectively implements their plans to facilitate the provision of essential needs. Whilst there may be economic or reasonable circumstantial barriers to achieving their plans, the State must nonetheless prove *why* it is not reasonably feasible to achieve these goals and show how it plans to resolve the issue. As such, this judgement proves that the Judiciary has the knowledge and capacity to adjudicate socioeconomic rights disputes. Specifically, it shows that the Judiciary can take a supervisory role that respects the jurisdiction and expertise of the Government while also enforcing socioeconomic rights. Such an approach could similarly be applied to a right to housing.

Building on this, the case of *DB v Minister for Justice* further demonstrates how the Judiciary is capable of adjudicating socioeconomic rights whilst respecting the jurisdiction and expertise of the Government.[37] The case similarly involved a child in need of secure accommodation. In its judgment, the High Court pointed out that no progress had been made by

[36] ibid 416.
[37] *DB v Minister for Justice* [1999] 1 ILRM 93 (HC).

the Executive to provide for children in need of secure accommodation since it had been put on notice three years prior.[38] The Government presented development proposals to the Court after the *FN* judgment but subsequently deviated from these plans without notifying the Court. Significant delays were caused by both dramatic policy changes and disputes over who should be responsible for the implementation of the developments.

Ultimately, the Court issued an injunction requiring that the Minister grant the relief sought. In doing so, four factors were considered: whether declaratory relief had already been granted regarding the State's obligations, the requirement of expediency in the interest of affected minors, the risk of harm to the lives of the minors, and whether all reasonable efforts had been made to deal with the problem by the Minister. Regarding these factors, some may argue that the Court still stepped too far by violating the separation of powers that dictated the Minister's policy. Yet, we should consider what the Court actually did in this case which was to insist the Minister comply with his own proposals.

It must be emphasised that the government *had* been entrusted to solve this issue in whatever way they saw fit.[39] However, the Government still dithered despite the fact that it was both informed of its socioeconomic

[38] ibid 103.
[39] ibid.

rights obligations and given an opportunity to flexibly tackle the issue. Through administrative incompetency, last minute decisions forced the process to start and stop repeatedly. If all reasonable efforts had been made to deal with the problem, and if the Minister's response had been proportionate regarding the relevant rights, then no injunctive order would be made. However, the Minister for Health's efforts were far below what was reasonably expected and demonstrated a lack of effort or willingness to commit to his own proposals.[40] Consequently, the court ordered an injunction which required the facilities to be completed within the latest timeframe proposed. In essence, the Court's socioeconomic order was not a dictated demand, but rather an anchor to keep a flighty Executive on track with policies that it had itself decided to enact. Even then, there was scope for ministerial discretion. For example, the Minister could still vary the agreed timeframe by way of judicial permission. Undoubtedly, such supervision would be ideal for a codified right to housing because it would help cement clear social housing projects within a definite timeline, rather than permitting excessive delays.

[40] ibid 104.

A Spanner in the Works

In *T.D and Others v Minister for Education*,[41] a case was again brought regarding various minors who demonstrated behavioural problems. The High Court assessed the issue regarding the four criteria established in *DB*. Although the High Court acknowledged that substantial progress had been made since *DB*, it was nevertheless clear that there was much culpable delay regarding the provision of children's rights that could not be excused. As such, the High Court imposed an injunction for the completion of the developments within the new timeframes that were presented by departmental officials. However, this decision was subsequently appealed to the Supreme Court.[42] The majority at the Supreme Court allowed the appeal and quashed the High Court injunction on the grounds that it violated the separation of powers stating that:

> [A] rubicon has been crossed… in which [the High Court was] moving to undertake a role which is conferred by the Constitution on the other organs of State, who are also entrusted with the resources necessary to discharge that role in the interests of the common good.[43]

[41] *TD and Others v Minister for Education* [2000] 3 IR 62 (HC).
[42] *TD and Others v Minister for Education* [2001] 4 IR 259 (SC).
[43] ibid Keane CJ, 288.

It was further noted that, apart from education,

> there are no express provisions [in the Constitution]… which impose an express obligation… to provide… any other form of socio-economic benefit for any of [Ireland]'s citizens, however needy or deserving.[44]

The decision marked the end of the courts' promising tradition of enforcing socioeconomic rights - and by extension, precluded substantive enforcement of housing rights. However, the reasoning behind the decision is questionable. To rule that the State has no obligation to provide any socioeconomic benefits for its citizens no matter how dire their needs merely on grounds of the lack of express constitutional provision ignores:

1. The right to legal aid in criminal proceedings,[45] requiring socioeconomic benefit in paying for counsel.
2. The right to adequate food for persons in State care,[46] requiring socioeconomic resources to be reserved for such.

[44] ibid Murphy J 316.
[45] *State (Healy) v Donoghue* [1976] IR 325 (SC).
[46] *T.A. v Minister for Justice* [2021] 2 IR 250 (SC) [172-173].

3. The right to humane conditions of detention,[47] which implies a socioeconomic entitlement whereby the State must provide funding for appropriate living facilities.

Evidently, there is a clear contradiction between the claim that the State, on one hand, has constitutional duties to protect rights such as the dignity of its citizens, yet, on the other hand, has no corresponding obligation to spend money in the furtherance of such duties.

The practical result of *TD* is that even where the State has capacity to provide for the material needs of its people, and expressly promises to do so, such provision cannot be enforced. The decision was founded in fears of intruding upon areas entrusted to the other organs of the State, who the Court declared to be tasked with "furthering the common good… [by allocating] the common stock."[48] The Judiciary trusts that the Government and Oireachtas will address the needs of the people via just distribution of resources. However, the Supreme Court showed a level of faith in the Government that was not supported by the Government's record of failure to deliver crucial support for its citizens.

The Irish courts' withdrawal from enforcing housing rights is all the more disappointing in light of the blatant inefficacy of the Government's housing policies. A healthy democracy requires a Judiciary that conflicts

[47] *Kinsella v Governor of Mountjoy Prison* [2011] IEHC 235.
[48] *O'Reilly v Limerick Corporation* [1989] ILRM 181 (HC) 194.

regularly with the other branches of State in order to secure pre-established rights for individuals.[49] It is anti-democratic to refuse to enforce existing socioeconomic rights against the government. As such, if a right to housing is codified, the Judiciary must re-engage with socioeconomic rights in the way previously done by the High Court in *FN*, *DB*, and *TD*. Ineffective housing policy will only persist if the Judiciary defers to a Government that has continuously played pass-the-parcel with the task of securing the housing needs of its citizens.

A Way Forward?

To break the cycle of Government policy failure, housing rights must be codified to build a foundation for long-term improvement. The question then remains: how should such a right be codified? It has been noted that "a qualified, un-enumerated right to housing may yet be found to be extant within and under our living and versatile Constitution."[50] It is argued that such a right, if recognised, would oblige the State to provide housing to its citizens in accordance with clear standards of protection. However, we should not rely on the unenumerated rights doctrine as the basis for a right to housing. This doctrine, which concerns rights 'implied'

[49] Aharon Barak, "The Role of a Judge in Democracy" (2005) 88(5) *Judicature* 199.
[50] *EBS v Kenehan* [2017] IEHC 604 [14].

into the Constitution,[51] previously led to legal incoherence through ad-hoc invocation.[52] Additionally, the fickle nature of the doctrine raised fears of jurisdictional overreach by the courts.[53] An express constitutional right to housing, achieved by popular referendum, would thus be the best approach. This would confirm a strong endorsement of the right by the entire nation, creating an explicit democratic mandate for all branches of State. In turn, the Judiciary would be galvanised by their newfound mandate and legitimacy to take a more active role in oversight and enforcement against violations by the Government and Oireachtas.

Conclusion

The Irish State has long neglected the needs of its people in the context of housing rights. Until they are held to their agreed plans, there is no reason to expect that they will improve their provision and facilitation of housing. The Judiciary in *TD* firmly stepped aside for fear of overreaching their authority. It is therefore unlikely a revolutionary judgment will be handed down anytime soon. The change must first be catapulted by the people. For too long, we have simply shrugged our shoulders at feckless

[51] For further elaboration on the doctrine's history, see: Desmond Clarke, "Unenumerated rights in constitutional law" (2011) 34 *Dublin University Journal* 101.
[52] Gerard Hogan et al, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) [7.3.76].
[53] ibid [7.3.87].

government devolution to the private market. By enshrining a renewed commitment to housing rights in the Constitution, the courts will be obligated to shift the tide towards the Government and ensure they deliver on their housing commitments to citizens.

It is submitted that the Irish people must campaign for the explicit inclusion of a constitutional right to housing via referendum. The passage of such a referendum would embolden the courts to take a stronger approach towards socioeconomic rights in the context of housing, allowing citizens to hold the State accountable for its failures and demand for clearer, more coherent, and demonstrably effective policies. Failure to do so allows the State to excuse its shortcomings on grounds that their promises cannot be enforced. The luckiest will have the constant fear of rising rent and eviction hanging over their heads. For others, their earliest and their last memories will be of living in the streets.

Criminology and Enlightenment Understandings of Human Nature in the Work of William Godwin

Jack Synnott[†]

While best known for his development of early anarchist ideas, political theorist, author, and activist William Godwin (1756 - 1836) wrote extensively on the criminal law, pioneering a unique approach to criminological theory. This essay will consider the relationship between Godwin's theory and the work of Cesare Beccaria (1738 - 1794), the latter of whom was one of the most influential criminologists of the Enlightenment. Godwin and Beccaria shared an intellectual context but produced strikingly divergent analyses of crime and, by extension, human nature. Their legacies continue to reverberate in contemporary discourse. It will be argued that while Godwin and Beccaria appear to propose completely different understandings of crime, their core disagreement is over the singular issue of whether to conceptualise human nature as inherently positive or negative. This difference, it will be submitted, explains how these theorists reached different conclusions on various subpoints of their criminological arguments, despite agreeing on

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the majority of key premises and drawing on the same body of Enlightenment literature.

Godwin's Relation to the Beccarian Position

The Competing Theories Outlined

Only by understanding the exact nature of these theorists' positive visions of law can their dispute be adequately characterised. A preliminary matter thus involves outlining the precise contours of their competing conceptions of Criminology. In *On Crimes and Punishments*, Beccaria outlines the core tenets of 'classical Criminology'. He primarily held that all human beings are equal and that crime is the expression of individual free will.[2] The implication of these premises is that criminals hold individual responsibility for their actions.[3] Beccaria takes a proto-utilitarian approach to the criminal justice system by arguing that punishments should be designed to change the hedonistic calculus of individuals and reduce crime for society's benefit.[4] He proposes a number of reforms on the basis of these theories, including a reduction in the

[2] Cesare Beccaria, *On Crimes and Punishments* (first published 1764, Cambridge University Press 1995).
[3] Mario De Caro, 'Utilitarianism and Retributivism in Cesare Beccaria' (2016) 2 Italian Law Journal 1.
[4] Beccaria (n 1) 64-65 ; Hedonistic calculus is the calculation of the sum total pleasure and pain produced by an act. This calculation allows individuals to consider certain consequences of a particular act.

amount of opportunities for legal interpretation given to judges,[5] the abolition of secret accusations, torture and the death penalty,[6] and the application of proportionality in criminal punishment.[7]

It should be noted that theorists subsequently inspired by Becarria contributed much to the mainstream classical school of Criminology. For instance, Voltaire and Helvetius advocated for similar reforms to those outlined by Beccaria and amplified the importance of his treatise through their endorsement.[8] Jeremy Bentham (1748 - 1832) expanded the utilitarian scheme in Beccaria's thought by building a comprehensive understanding of a legal system based on principles of happiness maximisation.[9] Bentham's work clarifies the classical criminological position as a programme for action, but its ideological and jurisprudential core is most comprehensively sketched in Beccaria's text. As such, Godwin's radical ideas are better compared to those of Beccaria than Bentham.

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[5] Ibid 14-15.
[6] Ibid 99.
[7] Ibid 62.
[8] Graeme Newman and Pietro Marongiu, 'Penological Reform and the Myth of Beccaria' (1990) 28 Criminology 325 327.
[9] See discussion of the relationship between Beccaria's thought and Bentham's utilitarian schema in: HLA Hart, 'Bentham and Beccaria', *Essays on Bentham* (Clarendon 1982).

Godwin departs from Beccaria's emphasis on free will and characterises criminal acts as pseudo-deterministic acts. In other words, Godwin expounds a view of criminality as strongly shaped by external forces and socio-economic circumstances. He further argues that individuals who commit crime have limited control over the forces and circumstances that led them to do so.[10] Accordingly, Godwin's analysis suggests that punishment should only be used when absolutely necessary because crime is not the result of personal moral failure but rather a product of systemic conditions. Godwin problematises the Beccarian view of the state as an entity capable of maximising utility because he views the state as fundamentally opposed to individual interests. Godwin instead argues that the state exists solely as a means to further the interests of the powerful, rather than to promote social cohesion.[11] Unlike classical Criminology, this analysis suggests the penal apparatus of the state should be heavily curtailed.[12] Godwin's interpretation of human nature rests on the belief that human societies can only achieve their 'full potential' in the absence of interventionist government and private property.[13]

Although this appears to be a point-for-point refutation of the Beccarian position, the underlying ideological dispute between Godwin and

[10] Godwin, *Political Justice* (n 9) 731.
[11] Ibid 631.
[12] Ibid 644.
[13] Ibid 75, 497.

Beccaria is not self-evident. Despite their seemingly radically different approaches, both authors drew on a number of parallel sources. Furthermore, as Jenkins notes, Godwin wrote thirty years after Beccaria and did not intend to directly refute Beccaria's work.[14] Although these theorists diverge on only a few core assumptions, their ultimate jurisprudential positions diverge starkly. Understanding the source of this divergence requires an analysis of the wider intellectual currents that gave rise to the development of classical Criminology. These currents include Enlightenment philosophy of the eighteenth century and emerging understandings of the state through the lens of social contract. This essay makes the case that Godwin, although heavily influenced by Enlightenment thought, rejected the underlying logic of the social contract.

Enlightenment Thought

Godwin's connection to Enlightenment thinking is clear from a historical survey of his intellectual development. Godwin was deeply influenced by the Protestant Rational Dissent community, an intellectual successor to Enlightenment ideals.[15] Additionally, he based much of his thought about

[14] Philip Jenkins, 'Varieties of Enlightenment Criminology' (1984) 24 The British Journal of Criminology 112 122.
[15] Anthony Page, 'Rational Dissent, Enlightenment, and Abolition of the British Slave Trade' (2011) 54 The Historical Journal 741.

the role of nature in shaping individuals on the arguments of Anglican reformist Joseph Priestley.[16] Private letters written alongside Godwin's major works also indicate his support for Thomas Paine and the French Revolution.[17] Historian Mark Philp even draws a connection between Godwin and John Locke on the basis that both propose conceptions of a liberal society and attribute high value to individual liberty.[18]

Godwin's relationship to Enlightenment thought is most crucial in the content of his views about private judgement. Godwin outlines his conception of private judgement at length in *Political Justice* and, as Pamela Clemit has argued, Godwin's novels not only provide examples of how private judgement can be employed in practice, but use their ambiguous structure to challenge the reader's own private judgement.[19] Private judgement idealises the individual's capacity for reason to make their own moral decisions.[20] Godwin's faith in individual private judgment motivates his criticism of legal control by the state. Godwin argues that for the State to make moral decisions on the behalf of its people deprives

[16] For discussion of Godwin's connection to Priestley, see: William Godwin, 'Autobiography' in Mark Philp (ed), *Collected Novels and Memoirs of William Godwin*, vol 6 (Taylor & Francis 1992) 22; On Priestley's connection to Enlightenment thought, see: JG McEvoy and JE McGuire, 'God and Nature' (1975) 6 Historical Studies in the Physical Sciences 325.
[17] Ian Ward, 'A Love of Justice' (2004) 25 The Journal of Legal History 1 3-4.
[18] Mark Philp, *Godwin's Political Justice* (Cornell 1986) 73-79.
[19] Pamela Clemit, *The Godwinian Novel* (Clarendon 1993).
[20] Godwin, *Political Justice* (n 9) 156.

them of the chance to exercise their own judgment and thus their capacity for personal fulfilment.

Political Justice, Godwin amended his view of private judgment. For example, he began to write about the idea of 'sentiment', which became popular in the late eighteenth century.[21] 'Sentiment' refers to a complex interplay between the individual's passionate feelings and rational determination.[22] Godwin's commitment to understanding human relationships can be found in the second edition of *Political Justice* and in his 'confessional novels', such as *St. Leon* and *Fleetwood*. It was in these texts that he developed a synthesis of rationality and emotion, known as 'political imagination'.[23] This concept even finds expression in Godwin's more dry academic work, such as his biography of Chaucer which sought

[21] Mary Wollstonecraft, *A Vindication of the Rights of Woman* (first published 1792, Penguin 2020) 154. See also a letter from Coleridge to Godwin, encouraging him to consider the role of sentiment in his thought, reproduced in: Lewis Patton and Peter Mann, *The Collected Works of Samuel Taylor Coleridge*, vol 1 (Princeton 1971) 46.

[22] See: Isabelle Bour, 'Sensibility as Epistemology in "Caleb Williams", "Waverley", and "Frankenstein"' (2005) 45 Studies in English Literature, 1500-1900 813.

[23] Gary Kelly, *The English Jacobin Novel 1780-1805* (Clarendon 1976) 232-236. See: William Godwin, 'An Enquiry Concerning Political Justice: 2nd edition' in Mark Philp (ed), *Political and Philosophical Writings of William Godwin*, vol 4 (Pickering & Chatto 1999) 55; *St. Leon* (first published 1799, Broadview 2006) 51; *Fleetwood* (first published 1805, Broadview 2001) 59.

to discover what Chaucer 'felt'.[24] Godwin's emphasis on sentiment and feeling reflected his belief that society should be organised not only to maximise rational efficiency, but to encourage compassion.

This marks a point of departure between Godwin's engagement with the Enlightenment and that of Beccaria, with Beccaria's *On Crimes and Punishments* championing a utilitarian ethos of pure rationalism. I submit, however, that this departure is best understood as an implication of the broader dispute between these theorists about the core ontology of human nature. Whether a theorist is receptive to theories based on sentiment requires a fundamental belief in the value of human emotions, human experience, and the positive impact these can have on a society. This core ontology is deeply contested by the mainstream classical criminologists. The clash over how human nature should be conceptualised profoundly affects criminological positions of the Enlightenment theorists and will now be discussed.

Human Nature

The classical criminological position relies on a conception of human nature as something to be controlled and regulated, lest it return society to Hobbe's state of nature. The Hobbesian perspective of human egoism

[24] William Godwin, *Life of Geoffrey Chaucer* (first published 1803, Creative Media 2018) xi.

characterises individuals as liable to harm each other in the pursuit of their own selfish ends. As such, Hobbesians believe that the most rational course of action is that which short-sightedly maximises the utility to the individual.[25] Like many other Enlightenment thinkers, Hobbes believed that a fundamental human unsociability renders decentralised cooperation impossible. A social contract that handed control to a powerful state was therefore viewed as both necessary and justified.[26] Beccaria makes his subscription to the Hobbesian perspective clear in his discussion of the contractual nature of laws. He compares the state to a body that is designed "to prevent the despotic spirit, which is in every man, from plunging the laws of society into its original chaos".[27] Although Beccaria advocates for a level of state power that is less absolute than Hobbes' Leviathan, Beccaria views the necessity of the state's emergence on grounds that are distinctly Hobbesian.

As twentieth-century Criminologist George Vold notes, however, the Hobbesian view of human nature is not the only one that has been adopted in political thought. Indeed, much of the naturalist thought of classical Criminology defines itself in opposition to the spiritual account

[25] See: Robert Shaver, *Rational Egoism* (Cambridge 1999).
[26] George Vold, Thomas Bernard and Jeffrey Snipes, *Theoretical Criminology* (4th ed, Oxford 1998) 16.
[27] Beccaria (n 1) 12.

put forward by Aquinas, which views individuals as inherently good.[28] Even within the social contractarian tradition, distinct lines of analysis exist. This is highlighted in Thomas Bernard's discussion of the distinction between various forms of consensus and conflict theories of social organisation.[29] Bernard defines Hobbes as a 'sociological consensus theorist' because Hobbes views consensus as a necessary feature of social organisation but regards humans as inherently conflictual.[30] Hobbes is thus contrasted against other social contractarians such as Rousseau, who view human beings as naturally cooperative, but encouraged into conflict by specific aspects of the social order.[31] Consequently, these latter 'radical theorists' sought to develop societal schemas that would "allow the natural human consensus to (re)emerge".[32]

Godwin, it is submitted, can be conceptualised as just such a radical theorist. As Historian Philip Jenkins notes, Godwin goes beyond even Rousseau in his support for humanity's natural benevolence.[33] This is because Godwin synthesised his early religious beliefs with Enlightenment idealism to form a theory of societal progress that

[28] Vold, Bernard and Snipes (n 30) 16.
[29] Thomas Bernard, *The Consensus-Conflict Debate* (Columbia 1983).
[30] Ibid ch 4.
[31] Ibid ch 5.
[32] Thomas Bernard, 'A Response to Paternoster' (1985) 76 The Journal of Criminal Law and Criminology 519 521.
[33] Jenkins (n 16) 123.

envisioned constantly-improving humans at its centre.[34] For Godwin, humans are perfectible and capable of accessing an ideal state under certain forms of social organisation.[35] Godwin elevated the role of sympathy in all of his political and literary works. Most notably, his celebrated legal-political novel *Caleb Williams* – a novel in which Godwin describes sympathy as a 'magnetic virtue'.[36] This term encouraged the reader to sympathise with criminal characters , along with a first-person account of the prison experience.[37]

The aforementioned theorists disagree on both the nature of humanity *and* the ideal method of social organisation. However, it is submitted that their crucial disagreement revolves around the question of human nature. It is this prior condition, after all, that constrains what can be done within political society, with state organisation deriving from the needs of the underlying structure of human relations. These constraints also affect what can be achieved within the legal system and how the legal system's core components should be conceptualised. This dimension of the Godwin-Beccaria criminological dispute will now be considered.

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[34] Ward (n 19) 14. See also Philp, *Godwin's Political Justice* (n 21) 21.
[35] Godwin, *Political Justice* (n 9) 28.
[36] William Godwin, *Caleb Williams* (first published 1794, Oxford 2009) 414.
[37] See generally: Sarah Higinbotham, 'Things as They Are: William Godwin on Sympathy and Punishment'; Lynn Hunt, *Inventing Human Rights* (Norton 2007) 56-57.

The Implications of the Human Nature Dispute

Human Nature and Free Will

The role of free will in the manifestation of crime is typically cited as a key disagreement between Beccaria and Godwin.[38] However, this point of disagreement between Godwin and Beccaria is better understood as an implication of their prior disagreement on the nature of humanity.

The dichotomy between deterministic and free will conceptions of Criminology in Enlightenment legal thinking is at risk of being overstated. Piers Beirne, a professor in Sociology and Legal Studies, presents forceful evidence that Beccaria accepted the belief that human actions were influenced by their surroundings and displayed a sympathy for scientific conceptions of human action as contingent on external forces.[39] This is borne out directly in Beccaria's writing, which outlines individuals as pushed towards crime by external forces.[40] Beccaria views individuals as morally responsible for their actions *in spite of external forces* and he is therefore willing to punish even those coerced into crime. Although free will is an element of Beccaria's theory, it is thus not the only understanding of human action put forward in his seminal text *On Crimes and Punishments*.

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[38] Jenkins (n 16) 113
[39] Piers Beirne, 'Inventing Criminology' (1991) 29 Criminology 777.
[40] See Beccaria (n 1) 93.

Godwin, similarly, cannot be classified as an uncomplicated determinist. As George Woodcock explains, Godwin's 'necessitarian' view of action as controlled by natural laws of the universe is balanced by his faith in the achievability of absolute acts of the will in ideal circumstances.[41] This tension is discussed in detail in Godwin's *Thoughts on Man*, where he devotes an entire essay to the discussion of the nature of free will, concluding that, although human choice is limited, its exercise is possible and "an integral part of the science of man".[42] A core aim of Godwin's political project is thus to bring society to a position where this modicum of freedom can be routinely exercised, even if it has little possibility of being accessed in present society.

What is therefore at issue between Beccaria and Godwin is not whether free will exists, but *what part of human nature free will represents*. According to Beccaria, free will represents the active participation of the criminal in wrongdoing, even when circumstances could excuse the criminal's actions. For Godwin, free will is the aspirational part of human beings that present society hides from us. It is submitted that this divergence constitutes an evaluation of the core merit of human beings – when the contingencies and controls of the social world are stripped

[41] George Woodcock, *Anarchism* (Broadview 1962) 70-73.
[42] William Godwin, *Thoughts on Man* (first published 1831, Blurb 2019) 226.

away, Beccaria sees an inherent deviance that motivates crime, whereas Godwin sees an ideal morality and justified freedom.

Human Nature and the Causes of Crime

Beccaria and Godwin's antithetical perception of how individuals will use their free will has clear implications for a key criminological concern: the causes of crime. The cause of crime is a hotly contested issue throughout the history of criminological thought. Beccaria's position encourages a view of crime as something naturally occurring in the competition between selfish individuals to satisfy their own interests. This perspective naturally shifts the focus of criminological investigation away from institutions or situations in society which could breed crime and focuses instead on fine-tuning the legal system to mitigate humans' natural urges. It is contended that this impulse motivates Beccaria's well-documented reluctance to reject the institution of private property, despite his recognition that poverty and social inequality can spur people towards crime.[43] For Beccaria, such abolition would do nothing to resolve the underlying problem of humans being motivated towards crime as a consequence of their nature.

[43] Beccaria (n 1) 43.

In sharp contrast, Godwin's position implies a much more systemic view of the underlying causes of crime. Godwin considers the social inequality of his time to be criminogenic because the institution of property moves human beings away from the ideal state in which their inherent justice can be exercised. [44] Moreover, he believes that any state response to criminality that does not address its underlying, social-materialist causes merely increases the likelihood of crime because such responses maintain obstacles to human flourishing and encourage resentment.[45] Notably, both Godwin and Beccaria agree that social inequality and excessive hoarding of property can lead to injustice and deprivation, but only Godwin considers it an analytically important motivator towards crime. The forces that compel humans to cruelty, and the likelihood of cruelty to manifest in specific social conditions, are defined differently by Godwin and Beccaria on the basis of their oppositional views of human nature. Godwin's benevolent conception implies a view of property as harming the natural kindness of humanity, whereas Beccaria views property as merely substantiating an existing societal trend towards crime.

[44] Godwin, *Political Justice* (n 9) 78.
[45] Ibid 673.

Human Nature and Punishment

This consideration of the role of individual motivation in causing crime has crucial implications for the theorists' overall visions of how the penal system should operate. The specific programmes they advocate clearly derive from their judgement on human nature. Although Beccaria's overall scheme employs principles of utilitarianism to generate an ideal society, it is important to note that his arguments scale down this utilitarian calculus to the individual level. This conceptual distinction is important because Beccaria's understanding of *how that individual calculus occurs* is intimately connected to his view of individuals as acting in their own egoistic self- interest. The punishments Beccaria would mete out serve to primarily change the dial of individual incentives, moving their egoistic calculus away from crime to achieve social harmonisation through precise legal control. This impulse is especially clear in Beccaria's famous critique of capital punishment, which is motivated less by humanitarian concerns for the sanctity of human life and more by the belief that the fear of death would not effectively change individuals' likelihood of committing crime.[46] For Beccaria would-be criminals only view the death penalty as a return to their "natural state of independence".[47]

[46] Newman and Marongiu (n 7) 338.
[47] Beccaria (n 1) 49.

Crucially, Godwin's view of the justice system also considers the role of punishment in relation to the internal calculus of individuals. Where he differs from Beccaria is in the capacity of the individual to make that calculus in an adequate and morally permissible way without intervention from the state. Godwin uses his view of humankind to justify an idealistic vision for the dismantling of government control mechanisms.[48] Through being instructed to subordinate their own individual moral views to those of the state through the fear mechanism of punishment, Godwin argues that individuals will be debased and lose touch with their own perfectible selves. This capacity for punishment to undermine the moral character of individuals persists even in penal systems with a rehabilitative edge, as the same state impulse to improve the individual without regard to their own judgment is at play.[49] Unquestionably, this disagreement reduces to a question about the nature of persons: if humans are inherently good, their internal calculus will find the right answer unaided, and may even be harmed by interference. If, on the other hand, they are inherently cruel or self-serving, their default incentives will have to be substantially altered to ensure a peaceful and cooperative society.

[48] See Nicole Pohl, 'Utopianism after More' in Gregory Claeys (ed), *The Cambridge Companion to Utopian Literature* (Cambridge 2010) 70-72.
[49] Godwin, *Political Justice* (n 9) 668.

Conclusion

Minor disputes between Beccaria and Godwin can be reduced to their core ideological divergence about human nature. As has been shown, this divergence has an impact on their views about free will, criminal occurrence, and the justice of punishment. It also mediates their engagement with wider Enlightenment literature. The views taken by Godwin and Beccaria on core units of societal arrangement had a greater influence on their overall criminological positions than the influence of their intellectual peers.

Towards Ecologies of Happiness

Paddy O'Halloran[†]

Nettle, bramble, shepherd's purse –

refugees from the building site

that was once the back field,

my former sworn enemies

these emissaries of the wild

now cherished guests.

~ Paula Meehan, 'Not Weeding'.[2]

For most gardeners, weeding is a basic tenet of the craft – to do away with the unwanted, and make space for the ones we choose. It is an exercise in *ecological curation*. In the above lines however, Paula Meehan sort of *teases* the practice of weeding – for her, the garden is a site to embrace, and to allow. *Not Weeding*. The same can be true when we ask, what

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[2] Paula Meehan, 'Not Weeding' in *Painting Rain* (Carcanet Press 2009).

makes us happy? I want to suggest that the answer to this question is often shaped - and constrained – by a singular way of knowing: the scientific model of happiness. Namely, what science says makes us happy, and what does not. It is my claim that this model of happiness *weeds out* important aspects of our embodied existence, thereby narrowing the ways in which happiness can be understood and experienced. To demonstrate this claim, I will draw on postcolonial critique to put forward a theory of how this scientific model of happiness emerged, and why it is worth seeking an alternative understanding of happiness. I call this alternative *ecologies of happiness* – an approach that nurtures a polyculture of complementary epistemological and ontological understandings of what makes us happy.[3]

Part I – What Is Happiness?

Since antiquity, there have been attempts to capture what exactly it means to be *happy* – take Aristotle's eudaimonia for example or Epicurus' ataraxia.[4] When we start to examine the diverse ways happiness can be

[3] Polyculture as the practice or system of growing multiple different species or varieties together in the same space, in contrast to monoculture.
[4] Aristotle, *Nicomachean Ethics* (Roger Crisp tr, Cambridge University Press 2000). For Aristotle, eudaimonia is the highest human good, achieved through a life of virtuous activity in accordance with reason.; Epicurus, *The Extant Letters* (Cyril Bailey tr, Oxford University Press 1926). For Epicurus, ataraxia is a state of tranquillity obtained through simple pleasures and minimal desires.

understood, we begin to realise that 'happiness' is not a fixed or stable notion - Jacques Derrida's theory of *Différance* is useful to unpack this.[5] In *Différance*, Derrida highlighted the impossibility of accessing any *inherent* meaning in language – rather, he argued that the meaning of a word arises by virtue of its difference from other words. Thus, it is impossible to arrive at some final or complete meaning.[6] Using Derrida's theory, we can understand the term 'happiness' as necessarily lacking any stable universal essence – instead, we can understand any notion of 'happiness' as *constructed* to pursue some normative goal. This constructed and normative nature of happiness can be compared to a sort of 'happiness script' that will lead us to some highly normative ideal of what the 'good life' might look like – for example, heteronormative family structures, material wealth, and financial prosperity.[7]

Probing this idea of the 'happiness script' a little further, we can quickly discern how the concept of 'happiness' has come to function as a sort of ideological super-structure. In *The History of Sexuality,* Michel Foucault introduces his concept of biopower – a mechanism of power that takes effect through institutions and norms.[8] This concept offers a compelling

[5] Jacques Derrida, *Margins of Philosophy* (Alan Bass tr, University of Chicago Press 1982).
[6] ibid 25.
[7] Sarah Ahmed, *The Promise of Happiness* (Duke University Press 2010).
[8] Michel Foucault, *The History of Sexuality, Volume 1: An Introduction* (Robert Hurley tr, Pantheon Books 1978).

framework to trace how 'happiness' can function as an ideological superstructure – for example, consider Human Rights frameworks as a kind of happiness script. On gender and sexuality, some critics such as Ratna Kapur have identified how Human Rights frameworks often create a *particular kind of happiness* for its subjects. Kapur writes that,

> "Human Rights as freedom simultaneously transforms 'unhappy queers' into 'happy queer subjects' in a scheme of neoliberal rationality, where economic imperatives… are identified as the source of general well-being… and personal affirmation".[9]

Here, Kapur is highlighting how the 'happy queer' subject promoted by Human Rights frameworks is often informed by particular and contestable sources of happiness, such as economic prosperity. The transformation of 'unhappy queers' through Human Rights frameworks is a clear example of how institutions and norms can shape people's lives by promoting specific notions of happiness that are informed by broader ideological goals. Such processes of transformation tell us something important about the *teleological* function that notions of 'happiness' can perform. In this instance, Kapur argues that the construction of the 'happy queer' subject advances certain neoliberal ideals like thriving markets and the rise of

[9] Kapur, Ratna, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Edward Elgar
Publishing 2018) 70.

consumer-citizens.[10] Notions of 'unhappiness' can perform a similar normative function. Sara Ahmed points to the unhappy feminist, who is deemed a 'killjoy' for challenging certain gender norms that are justified on the basis that they bring happiness to their subjects.[11] Thus, what is included and excluded in the 'happiness' script has profound sociological consequences – Ahmed writes

> "How better to justify an unequal distribution of labour than to say that such labour makes people happy? How better to secure consent to unpaid or poorly paid labour than to describe such consent as the origin of good feeling?".[12]

In light of this, it becomes increasingly apparent that 'happiness' is not always seen as valuable *in and of itself*. Instead, the contents of happiness are often moulded to advance a particular normative goal. Just as a gardener weeds out certain species to cultivate a particular vision of a 'good' garden, dominant institutions define and delimit happiness in ways that exclude alternative ways of flourishing. Returning to Derrida's theory of *Différance*, we can begin to recognise that any attempt to define 'happiness' is *inherently exclusionary* – a kind of epistemological weeding. It is a definition that cuts and divides. Thus, any *definition* of happiness

[10] ibid.
[11] See Foucault (n 7) 53.
[12] ibid 50.

materialises as a binary which persons can be mapped across, from unhappy to happy or vice versa. We are left with a tremendously potent ideological super-structure that can be readily employed to advance particular agendas.

Part II – A Monoculture of Happiness

Happiness as an ideological superstructure can be likened to an uncultivated field – fertile ground, ripe for ideological planting. Now, I want to trace how this fertile ground was enclosed and cultivated to facilitate colonialism in the British Empire. The fabrication of 'British Happiness' into a universal and tangible model is key to understanding this process.[13] We can understand the British model as being constructed along two paradigms. Firstly, different aspects of British culture were synthesised to produce what is essentially a "conflation of moral and national character" – namely, what was understood to make British people happy.[14] Secondly, thinkers like John Stuart Mill located certain 'defects' in how the subjects of colonisation perceived the world – *a kind of epistemological weeding*.[15] Colonialism was largely justified and consolidated on these grounds - it was regarded as necessary not just to

[13] See Foucault, (n 7) 123.
[14] ibid.
[15] ibid 127.

increase human happiness, but to *teach the natives how to be happy* by mapping them across a binary that distinguished happy from unhappy subjects.[16] The utilitarian justifications underpinning Mill's project are essentially predicated on the idea that the benefits of colonialism outweigh any harm associated with colonial processes.[17]

At this point, I want to highlight two particularly important features of the happiness monoculture. Firstly, the creation of a 'universal' conception of happiness. Secondly, the idea that we can use this universal conception of happiness to move persons across a binary from unhappy subjects to happy subjects. Both features demonstrate how happiness has been employed as a mechanism to serve a nation-building function to bolster an *empire* that promotes a singular way of being.

It is my claim that this particular utilisation of happiness has persistently mutated and continues to shape society today. Migration offers a powerful site through which to trace these ongoing effects. In *The Promise of Happiness,* Sara Ahmed opens her discussion on 'melancholic migrants' by dissecting the claim that the root cause of unhappiness in society can be identified as a *lack of cohesiveness.*[18] In light of this, migration is portrayed as an unhappy narrative, where integration based on *shared*

[16] ibid 128.
[17] John Stuart Mill, *Utilitarianism* (first published 1863, Batoche Books 2001) 396.
[18] ibid 121.

values and loyalties is presented as the only way forward. The argument goes like this,

> "This [unhappiness] is exactly what happens when people who look very different, and think they are very different, never touch or interact".[19]

According to this statement, in order to be 'happy' we must be the same. However, it is clear that the particular nature and appearance of this sameness is not universal – here, the idea of universal 'sameness' is simply a call to emulate the idealised happy British citizen. Going further, consider how even the mere *memory* of empire as something 'happy' can become a form of nation-building for the British Empire. Ahmed writes that "To become well-adjusted is to be adjusted to colonial history".[20] Popular memories of the colonial past are multiple, fluid, indeterminate and fragmentary – particular conceptions of happiness play a clear and deliberate role in *fixing* memory and institutionalising a particular view of the empire that evokes pride and wards of shame. It is a vision evincing a view that "there is nothing to be mourned".[21] As monoculture is cultivated to maximise efficiency and control, this universal model of 'happiness' served to create a cohesive and manageable identity across its vast and

[19] ibid 122.
[20] ibid 132.
[21] ibid.

diverse territories. This imposed ideal of 'British happiness' functioned like a cultural monoculture – streamlining disparate experiences and histories into one dominant narrative that could be more easily promoted and sustained. Encouraging its subjects to emulate this standardised version of contentment allowed the British empire to promote a shared vision minimising complexity and difference in favour of unity and control – what better way to rally the empire together?

So far, I have argued that notions of 'universal' happiness facilitate colonial projects by mapping persons across a binary from unhappy to happy. In order to advance any case towards dismantling a universal vision of happiness, it is necessary to identify how exactly this binary is maintained today. I want to suggest that hegemonic science is instrumental in such maintenance because it has emerged as a dominant epistemology to determine what makes us happy and what does not.[22] In 1620, Sir Francis Bacon asserted epistemological dominance as the duty of the scientific method – to assemble and organise knowledge, enabling

[22] Here, the term 'hegemonic science' is used in the same sense as Boaventura de Sousa Santos, who critiques the dominant epistemology of hegemonic science as one that claims neutrality, cultural indifference, and a monopoly on valid knowledge, while playing a central role in sustaining colonial and epistemic hierarchies. See Boaventura de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (Routledge 2014) 188-193.

humanity to strive for a better world.[23] Joan Vitterso reemphasises this claim in a 2014 edition of *The Oxford Handbook of Happiness*, when she writes that:

> "I can think of no domain better suited to fulfill this call from the Enlightenment than the scientific study of happiness".[24]

The scientific method is an attractive mechanism here for a few reasons – primarily, its purported neutrality, indifference to culture, and positivistic characteristics.[25] Boaventura de Sousa Santos remarks,

> "The dominant epistemology continues to be heavily dependent on positivism and its belief in the neutrality of modern science, its indifference to culture, its monopoly of valid knowledge, and its alleged exceptional capacity to generate the progress of humanity".[26]

Thus, we can understand scientific methodology as a mechanism that preserves the 'universal happiness' constructed to facilitate colonial

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[23] Francis Bacon, *The Instauratio magna Part II: Novum Organum and Associated Texts*, eds. Graham Rees and Maria Wakely (Oxford University Press 2004),
[24] Joar Vittersø, 'Introduction to Psychological Approaches to Happiness' in Susan David and others (eds), *Oxford Handbook of Happiness* (Oxford University Press 2014) 11.
[25] Boaventura de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (Routledge 2014) 188-193.
[26] ibid.

expansion in the British Empire. While I am not suggesting that the scientific method seamlessly mirrors the colonial instincts outlined above, it is nonetheless not entirely divorced from colonial hegemony.

Part III – Ecologies of Happiness

In ecology, 'monoculture' signifies the cultivation of one species alone – a practice that sidelines the richness of plurality. The model of happiness, sustained by science, resembles a kind of monoculture – narrow, singular, and resistant to plurality. I think that framing this model of happiness in ecological terms as a monoculture sharpens our insight into its resistance to plurality. The monoculture of happiness produced by science is immediately problematised when framed as an epistemicide of certain happiness practices.[27] Science often prioritises empirical and measurable data by sidelining traditional, spiritual and cultural understandings of happiness, the latter of which often resist quantification.[28] Understanding science as one epistemological framework among many allows us to more clearly delineate its limits – these limits are evident in the language of science itself;

[27] The term 'epistemicide' was coined by Boaventura de Sousa Santos to describe the systematic destruction or suppression of non-Western knowledge systems through colonialism and dominant scientific paradigms.
[28] See Santos, (n 24).

> "in scientific language our terminology is used to define the boundaries of our knowing. What lies beyond our grasp remains unnamed".[29]

Attempting to understand happiness through a sole epistemological approach risks painting an incomplete picture. Writing on this issue, Lara A. Jacobs critiques the *extractionist* tendencies of the scientific method – its habit of isolating and removing knowledge from its broader cultural and relational context, overlooking the holistic nature of Indigenous wellbeing.[30] Shedding light on the *extractionist* tendencies of the scientific method enables scholars to elucidate how particular happiness practices may become *diluted* when imported into different contexts. Consider meditation, for example. Miguel Farias and Catherine Wikholm highlight that the 'benefits' associated with meditation primarily exist as part of a larger cultural framework for living.[31] In light of this larger context, attempts to isolate meditation using the scientific method are problematic. This is because one singular epistemology cannot.

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[29] Robin Wall Kimmerer, *Braiding Sweetgrass* (Penguin 2013) 49.
[30] Lara A. Jacobs, *Indigenous Critical Reflections on Traditional Ecological Knowledge* (OSU Press 2025).
[31] Miguel Farias and Catherine Wikholm, *The Buddha Pill: Can Meditation Change You?* (Watkins Media 2015).