

# The Next Dada Utopian Visioning Peace Orchestra: Constitutional Theory and the Aspirational

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THE NEXT DADA UTOPIAN VISIONING PEACE  
ORCHESTRA: CONSTITUTIONAL THEORY AND THE  
ASPIRATIONAL

—MCGILL LAW JOURNAL ANNUAL LECTURE—

*Mari Matsuda\**

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## I. I Made An Orchestra

*Someone is trying to make music somewhere,  
with a pair of wooden spoons on an oil drum.*  
—Elizabeth Alexander<sup>1</sup>

*But there are many other things  
that are still lying around the house,  
endeavoring to be developed historically.*  
—Ernst Bloch<sup>2</sup>

I made an orchestra out of objects from the waste stream: household items relegated to the trash bin, pieces of buildings left in the junk yard, scraps of wood and metal, a broken guitar, a sewing machine, glass lamp shades, and a library card file drawer. The goal was to transform so-called post-consumer waste into instruments that could play Bach.<sup>3</sup>

Along the way I met people who were not afraid of odd, creative endeavors and I invited them to join the orchestra as musicians.<sup>4</sup> I recruited Professor Charles Lawrence, a critical race theorist, to conduct our public performance.<sup>5</sup> A poet in the audience penned a poem about the experience, valorizing the struggling instruments that she said

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<sup>1</sup> *Praise Song for the Day* (Saint Paul, Minn: Graywolf Press, 2009) (this line is from a poem read at President Barack Obama's first inauguration).

<sup>2</sup> *The Utopian Function of Art and Literature: Selected Essays*, translated by Jack Zipes & Frank Mecklenburg (Cambridge, Mass: MIT Press, 1988) at 59. Bloch refers here to the relationship between the material world and the socially determined human practice of making and knowing art. My primary attraction to this quotation is to the imagery of things “lying around the house,” perhaps waiting to become art. The quote also acknowledges Bloch's theoretical reach for “the conscious and known activity within the not-yet-conscious, the utopian function” which he shares with the peace orchestra (*ibid* at 103).

<sup>3</sup> Specifically, Johann Sebastian Bach, Suite in G Minor, BWV 995 (Fourth movement: Sarabande).

<sup>4</sup> The scrapyard Re-use Hawai'i yielded one orchestra member, who heard me tapping on glass and caught the reference to the experimental composer Harry Partch. My surprise that a reclamation wrangler was a student of musical composition gave way to deeper knowledge: any given stranger might actually be a dreamer-ally eager to join a utopian project. I took down his phone number, and he became the Peace Orchestra harpist.

<sup>5</sup> Charles R Lawrence III is a Professor of Law at the William S Richardson School of Law, the University of Hawai'i, Mānoa Centennial Professor and a lifelong musician who learned to sight-read music in church choirs; BA, Haverford College, 1965; JD, Yale Law School, 1969. For work relevant to the Orchestra, see Charles R Lawrence III, “The Word and the River: Pedagogy as Scholarship as Struggle” (1992) 65:5 S Cal L Rev 2231 at 2291–97 (see Part D, “The Gift of the Dream: Embracing Utopia”).

“gave complaint.”<sup>6</sup> “It is hard,” the instruments seemed to say, “but we will do it, we will transcend our declared status and send beauty into the world.”

A young filmmaker volunteered to make a short video of the performance and the manifesto reading that went along with it.<sup>7</sup> Would you like to see it?

This lecture includes the first showing of this video, the world premiere, right here at McGill. The filmmaker, Chris Kahunahana, is an Indigenous Hawaiian who is making his first feature film.<sup>8</sup>

Mesdames et Messieurs, may I present the Next Dada Utopian Visioning Peace Orchestra and Manifesto of Radical Intersubjective Collectivity and Imagined Possibility.

*[At this point, the lecture stopped for a video of the performance. The video is available online.]*<sup>9</sup>

## II. There Are Two Kinds of People

There are two kinds of people in the world when it comes to the Next Dada Utopian Visioning Peace Orchestra:

1. The ones who say “Cool!”, and;
2. The ones who say “Why?”

Actually, there is probably a third group of negative, doubting haters, but we will not address them in this lecture. I will use the rest of my time to

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<sup>6</sup> The poem is titled “the library sounds” (reprinted with permission of author, J Vera Lee). It reads as follows:

for Mari

All the sounds  
were strange and gave complaint to  
age and condition, even if they were  
not vain. They had cleaned  
themselves, just like animals,  
such as a lens would bring to life —  
if it were not buried. And still the  
sounds collected, a memory of water

<sup>7</sup> See Mari J Matsuda, *Manifesto of Radical Intersubjective Collectivity and Imagined Possibility* (2015) (reproduced in the Appendix, below).

<sup>8</sup> See *Waikiki: The Film*, online: <[www.waikikithemovie.com](http://www.waikikithemovie.com)>.

<sup>9</sup> See Mari Matsuda, “Next Dada Utopian Visioning Peace Orchestra”, *Mari Matsuda*, online: <[www.marimatsudapeaceorchestra.com](http://www.marimatsudapeaceorchestra.com)>.

answer the “why” and to suggest that idiosyncratic utopian gestures are relevant to constitutional theory, law, and justice.

### A. *The Personal is the Political*

A basic tenet of feminism, “the personal is the political,”<sup>10</sup> is the first part of the “why”. Feminists start with the experience of women in order to ground theory in the lived reality of a group whose perspective and insight is cordoned off and called irrelevant by the gatekeepers of received wisdom.<sup>11</sup> As a feminist, therefore, I do not discount my own experience.

I am the daughter and granddaughter of makers.<sup>12</sup> All my life, I have known people who use their hands, who use tools to grow food, to make, to fix, to transform discards into useful things. I heard laughing stories about the pages of the Sears catalog used as toilet paper, and the fabric from old rice bags turned into underwear. My mother grew up on a sugar plantation where anything bought came at a high price from the company store, and therefore, almost nothing was bought.

My father lost seven jobs for his politics during the McCarthy era, but we never went hungry because Dad could fix things and people would pay for repairs.<sup>13</sup> He had tool boxes, and voltmeters, and oscilloscopes. He taught me to respect tools, and to always, when taking something apart, have a container for the little pieces so I could find them when I needed to put the thing back together.

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<sup>10</sup> The origin of the phrase “the personal is political” is sometimes traced to the title of a 1970 essay by Carol Hanisch: see Carol Hanisch, “The Personal is Political” in Shulamith Firestone & Anne Koedt, eds, *Notes from the Second Year: Women’s Liberation, Major Writings of the Radical Feminists* (New York: Radical Feminism, 1970) 76.

<sup>11</sup> See Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, Mass: Harvard University Press, 1989) (describing consciousness raising as “the collective critical reconstitution of the meaning of women’s social experience, as women live through it” at 83). MacKinnon also provides an extensive discussion of consciousness raising as feminist method (see *ibid* at 83–105).

<sup>12</sup> See Mari Matsuda, “Japanese American Progressives: A Case Study in Identity Formation” in Yasuko Takezawa & Gary Y Okihiro, eds, *Trans-Pacific Japanese American Studies: Conversations on Race and Racializations* (Honolulu: University of Hawai’i Press, 2016) 342 [Matsuda, “Japanese American Progressives”] (discussing artistic production and left organizing in the lives and community of Jinkichi and Tsuyuko Matsuda at 347–50).

<sup>13</sup> See Charles R Lawrence III & Mari J Matsuda, *We Won’t Go Back: Making the Case for Affirmative Action* (Boston: Houghton Mifflin, 1997) (“[t]he family survived on the money Don earned doing small repair jobs. He was of the generation who knew how to fix things, back in the days when most things were made to fix rather than be thrown out” at xvii).

My father's mother was a working-class painter.<sup>14</sup> For her, the only good thing about the World War II internment of Japanese-Americans was that she had time to paint. She died before I was born, but I have always had her paintings to tell me who she was: she loved the soft-edged landscapes of Jean-François Millet, and the images of bodies bent in toil. She read Karl Marx. She valorized labour, and there are often figures at work in the paintings she left.<sup>15</sup>

When I was a law student, the building next to mine caught fire and I had to evacuate in a hurry. I grabbed my grandmother's painting and ran, and in that instance I learned what object I would protect without thinking.

With this inheritance of art making in my family, I might have become an artist. In the first metal-working class I took in college, the department chair<sup>16</sup> said: "You have talent. Have you considered changing your major?"

Instead, another inheritance called. My father and his parents were Marxist internationalists.<sup>17</sup> They believed in a specific ideology that envisioned a better world, and defined a good life as one spent working for that world. In my limited imagination as a temperamentally cautious, straight-A student in the seventies, my version of this vision was becoming a people's lawyer, someone who could use the rules and rhetoric of the system to change it and fight it. Art was the unserious, self-indulgent path; law the hard-edged tool to wield against empire.

I walked away from art, and for forty years, carried regret. An art professor said I had talent, and I did nothing with it. This may happen to you: one day you might wake up and realize you are not going to live forever. The marriage I had made with the law—or more specifically to the

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<sup>14</sup> See Josephine Fowler, *Japanese and Chinese Immigrant Activists: Organizing in American and International Communist Movements, 1919–1933* (New Brunswick, NJ: Rutgers University Press, 2007) at 176, n 19 (discussing the formation of the *Puroretaria Geijutsu* [Proletariat Arts], the journal of the Proletarian Arts Society, in 1928–1929 by a group of artist-activists in Los Angeles that included the author's paternal grandparents, Jinkichi and Tsuyuko Matsuda).

<sup>15</sup> The author's grandmother's painting, *View from Heart Mountain Internment Center, Wyoming* was recently featured in an exhibition at The University of Hawai'i Art Department. See "Mari Matsuda", *Ways of Looking?*, online: <waysoflookinguhm.wordpress.com/the-exhibit/mari-matsuda>.

<sup>16</sup> Dave Pimentel was an Arizona State University art professor and metalsmith. See Kathleen Browne, "Moving Metal: An Exhibition of Contemporary Metalsmiths" (1999) 19:1 *Metalsmith* 46 at 47.

<sup>17</sup> See Fowler, *supra* note 14 at 176, 253, n 19; Matsuda, "Japanese American Progressives", *supra* note 12 at 345–50 (discussing the Matsuda family's participation in the International Labor Defense).

intellectual work of deconstructing the subordinating, hegemonic functions of the law—suddenly felt unsatisfying. The small regret from closing a door on a promising romance with art grew to a heavy, saddening load. My possible talent lay in the graveyard of life’s unfulfilled intentions, waiting for my body to expire and join it.

Luckily, a sabbatical appeared, and I became a full-time B.F.A. student.<sup>18</sup> A bit before this, I had stumbled upon a Dada exhibition at the National Gallery.<sup>19</sup> For the first time, reading the manifestos and background notes, I realized that Dada was not nihilism and absurdity—the vague legacy I had gleaned from urinals on gallery walls. Dada was despair, it was a *cri de cœur* for a generation that had watched so many peers—fellow art students, classmates—march off to senseless slaughter in the First World War. The radical refusal to conform to anyone’s conception of what art is was a part of a larger refusal, a rejection of the entire project of modernity and its lie of rationality. It was a refusal of bloated young bodies lying in blood, mud, and mustard gas. It was a refusal of anyone’s paltry effort to explain why it all made sense.

One of the classes I teach is peacemaking. When I ask students what World War I was about, they have a hard time explaining it. The reasons offered, by world leaders then and by historians after the fact are muddled,<sup>20</sup> which is why you might be fruitlessly searching your well-educated brain right now to see what you have filed for “causes of World War I.” Imagine living in that time, when an unexplainable war was killing so many of your friends.

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<sup>18</sup> B.F.A. refers to a Bachelor of Fine Arts, a degree typically requiring studio production and exhibition.

<sup>19</sup> For descriptions of Dada exhibitions in the 2000s, see e.g. Anne Umland, “Dada in the Collection: A Permanent Paradox” in Anne Umland & Adrian Sudhalter with Scott Gerson, eds, *Dada in the Collection of the Museum of Modern Art* (New York: Museum of Modern Art, 2008) at 35 (describing the Dada exhibition that premiered in the United States at the National Gallery); US, National Gallery of Art, *Dada*, online: National Gallery of Art <[www.nga.gov/content/ngaweb/exhibitions/2006/dada.html](http://www.nga.gov/content/ngaweb/exhibitions/2006/dada.html)> (describing the 2006 Dada exhibition); Leah Dickerman et al, *Dada: Zurich, Berlin, Hannover, Cologne, New York, Paris* (Washington, DC: National Gallery of Art, 2005) (a catalogue of the Dada exhibitions).

<sup>20</sup> See generally Margaret MacMillan, *The War That Ended Peace: How Europe Abandoned Peace for the First World War* (London: Profile Books, 2013) at xxx–xxxii:

The great war was nobody’s fault or everybody’s. ...

The search will probably never end and I will myself argue that some powers and their leaders were more culpable than others. Austria-Hungary’s mad determination to destroy Serbia in 1914, Germany’s decision to back it to the hilt, Russia’s impatience to mobilise, these all seem to me to bear the greatest responsibility for the outbreak of the war.

Of course, I would be remiss if I did not acknowledge that unexplainable war is, in fact, what life looks like to people in some regions of our world right now. They are holding broken bodies of loved ones killed in conflicts they did not create, and for which no one has offered a good case of necessity. The pain of loss cuts. The pain of loss unexplained is a second wound, and I proclaim here outrage that this is happening as I speak.

This outrage was part of the artistic toolkit of the Dada crew, and I came to see the original Dadaists as among my many teachers. For anyone who thinks a peace orchestra is ridiculous, the retort was given in Zurich, before I was born.<sup>21</sup> My task was not to explain, but to refuse false explanation.

### ***B. The Tool in Your Hand***

A word about tools: making large-scale art requires space, equipment, and help. I had these things because I was working in a university. I came to see how the university is a functioning model of a collective, communal space for mutual encouragement of art and knowledge. Perhaps I already knew this, but I learned it in the body when I had to move something bigger than myself and I could call out the studio door, and anyone in hearing distance would come to my aid because we were all artists, and artists help artists. I used MIG welders, table saws, and hydraulic lifts that I could not afford to purchase and maintain on my own, deeply grateful for the investment my community had made in the art department. I amassed a precious collection of second-hand tools that gave me great joy just by sitting, well-honed, in a handmade tool holder, waiting for use.

I learned, as the socialist artist William Morris tried to tell us years ago, that holding the right tool in your hand to make a pleasing object will complete your soul and bring you back to the defining joy of human life on planet Earth.<sup>22</sup> We make things, we create beauty, we always have. Tool

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<sup>21</sup> Swiss Dada began at the Cabaret Voltaire in 1916 as an artistic anti-art, anti-war movement and literary phenomenon (see generally Hans Richter, *Dada: Art and Anti-Art* (London: Thames and Hudson, 1965) at 11–80). Hans Arp, an artist and member of the Cabaret Voltaire, described his experience as follows:

Revolting by the butchery of the 1914 World War, we in Zurich devoted ourselves to the arts. While the guns rumbled in the distance, we sang, painted, made collages and wrote poems with all our might. We were seeking an art based on fundamentals, to cure the madness of the age, and a new order of things that would restore the balance between heaven and hell (*ibid* at 25).

<sup>22</sup> See William Morris, *Political Writings of William Morris*, edited by AL Morton (London: Lawrence and Wishart, 1984) at 36–37:



in hand, I was infinitely happy, making art, all day, every day, for the nine months of my sabbatical year. My fellow sculpture BFA students were all women—strong, optimistic women who were not afraid of fire or power tools. What does their choice of maker culture have to do with constitutional theory?

### III. Art and Constitutional Theory: Who Is This *Constitution* For?

*Whoever does not hope for the un hoped-for will not find it.*  
—Ernst Bloch<sup>23</sup>

Some people think a constitution is a pact that allows us to live together without killing one another. It keeps us at bay from one another, by creating a state apparatus to mediate our life together in a limited space with limited resources, and then, having created the state, it restrains the state, keeping it at bay from us. In the logic of modern constitutions, we cannot trust each other so we create the state. We cannot trust the state either, so we restrain the state. It is as though we are nation of stingy, snarling dogs. Thank goodness, we have a sturdy piece of paper keeping us all on a leash. The fiction is that any piece of paper could do that.

This is the constitution of negative rights. It says who can do what, and what the state cannot do. It says nothing about what human beings need to flourish, nothing about joy or beauty, nothing about our obligations to one another.<sup>24</sup> It says nothing about our obligations to future gen-

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These arts, I have said, are part of a great system invented for the expression of a man's delight in beauty: all peoples and times have used them; they have been the joy of free nations, and the solace of oppressed nations; religion has used and elevated them, has abused and degraded them; they are connected with all history, and are clear teachers of it; and, best of all, they are the sweeteners of human labour, both to the handicraftsman, whose life is spent in working in them, and to people in general who are influenced by the sight of them at every turn of the day's work: they make our toil happy, our rest fruitful.

Morris also wrote that: "To give people pleasure in the things they must perform *use*, that is one great office of decoration; to give people pleasure in the things they must perform *make*, that is the other use of it" (*ibid* at 33 [emphasis in original]).

<sup>23</sup> Jack Zipes, "Introduction: Toward a Realization of Anticipatory Illumination" in Bloch, *supra* note 2, xi at xxv (quoting Ernst Bloch from his 17 November 1961 lecture titled "Can Hope Be Disappointed?").

<sup>24</sup> See Robin West, *Progressive Constitutionalism: Reconstructing the Fourteenth Amendment* (Durham, NC: Duke University Press, 1994). West rejects the negative rights limitation:

The progressive interpretation rests on a very different moral vision. The ideal constitutional state envisioned by the Fourteenth Amendment un-

erations, except in its beautiful, vague, and promising interstices. For example, in the United States *Constitution's* preamble, stating the intent to secure the blessings of liberty for ourselves and our posterity.

Frederick Douglass believed that the preamble was ground enough to demand the end of slavery,<sup>25</sup> and I believe it is ground enough to say there is a right to art. To develop this thesis, I return to what, in the art department, they call “process”.

The giddy joy of a late night bronze pour with women buried under layers of protective gear, the whoops of delight when the moulds cracked open and a successful casting emerged, taught me something about what human beings need to flourish: shared endeavour, communal space, creative process, and collective triumph. Sweat and laughter, the cool night air, and relief after pulling off leather gear made for someone twice our size. Bringing the object into the world, a world once without that object now changed by it, is nothing any of us would rather have been doing. Anyone who could have that experience would choose it over ... well, you name your poison:

- Consumption of inane popular culture;
- Endless acquisition of high status schlock;
- Exploitation of the labour of others;
- Killing animals for fun;
- Killing people for any reason.

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der a progressive interpretation also has three overriding characteristics: (1) the state protects each citizen and all citizens equally against not only the criminality and brutality of each other but also the ravages and dangers of the natural world; (2) individuals enjoy and states guarantee the “positive liberties” of civic participation, meaningful work, and unthreatened intimacy; and (3) government quite generally—courts as well as legislatures—acts in concert to ensure to each citizen freedom from and protection against those natural, social, or private conditions that threaten to enslave her (*ibid* at 2–3).

<sup>25</sup> Frederick Douglass argued that the Constitution, including the Preamble and the Bill of Rights, contained a ringing indictment of slavery. In his speech at Rochester, New York on 5 July 1852, titled “The Meaning of July Fourth for the Negro”, Douglass noted: “[T]he Constitution is a glorious liberty document. Read its preamble, consider its purposes. Is slavery among them? Is it at the gateway? or is it in the temple? it is neither” (Frederick Douglass, *Frederick Douglass: Selected Speeches and Writings*, edited by Philip S Foner (Chicago: Lawrence Hill Books, 1999) at 204). See also Mari J Matsuda, “Looking to the Bottom: Critical Legal Studies and Reparations” (1987) 22:2 Harv CR-CLL Rev 323 at 334 [Matsuda, “Looking to the Bottom”]; Waldo E Martin, Jr, *The Mind of Frederick Douglass* (Chapel Hill, NC: University of North Carolina Press, 1984) at 174.

The secret kernel of true joy that is known to makers in non-exploitive, communal settings is the world's best-kept secret, and the elixir that could turn all of us into celebratory, productive pacifists. Or so I posit, in my demand for a constitutional right to a creative commons. For those who need a semblance of a syllogism, it goes like this:

1. The Constitution establishes a democracy intended to promote the well-being of all citizens through a form of government requiring the effective participation of all citizens.
2. Citizen well-being and effective citizen participation requires maximizing the talents and abilities of all citizen contributors.
3. The consumption and production of art are significant factors in citizen well-being and in developing the means of effective participation in self-governance.
4. The Constitution, therefore, requires art.

In talking to students about a right to participate in artistic production, it is common that they confess to me that they actually have a significant creative practice somewhere in their past.<sup>26</sup> They quickly add, "But I'm not good." A research assistant told me she had studied opera singing, "But I'm not good", she replied.

"Who decides who is good?" I raged, "You can sing arias, you must sing better than I, does that mean I should stop singing?" Some imposed, meritocratic ideal decrees that those who are "good" should sing, and the rest of us should pay to watch them, and go to law school.

"But I am REALLY not good."

Why not have both, a system of recognition for the rare and stunning talent, and a way for the less-talented to participate also? Why not a centre for choral singing in every neighbourhood, with free lessons for those who want to improve? As my utopian exegesis grew more heated, another unsuspecting student stopped by the office.

"Liz," I said, "didn't you once tell me you play the piano?" My research assistant, her eyes growing bigger, tried to warn Liz not to say what Liz said next:

"Oh, I play, but I'm not good."

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<sup>26</sup> Indeed, after delivering this address at McGill University, many in the audience came up to reveal their own second life as an artist or musician.

“NOT GOOD,” I mock shouted, “Who told you you’re not good? Why is ‘good’ the criterion by which we decide whether you can share your talent with us?” By the time this conversation ended, I had convinced both law students that we should have a centre for performing and creative arts in every neighbourhood, with tools, supplies, teachers, and both amateur and expert performances and exhibitions. We brainstormed add-ons—a sewing room, a tool library, a system to drop off children or elders to do art with safe supervision, allowing caregivers a respite. Theatrical productions, a costume shop. A concert series with picnic dinner provided for harried working families. This centre would improve mental health, community relations, public safety, educational attainment, and family well-being. It would cost, I pointed out—as students are always too quick to point out to me—“but look at what it would save,” they pushed back, if it really did reduce things like crime and domestic violence.

This colloquy with students echoes years of classroom teaching in which I ask students to consider utopian possibilities, and they respond with small dreams and lots of reasons why the rest of the world will tell us we cannot have bigger dreams. With push and shove, I have watched dreams grow in dimension.

The sweet and small dreams of my students stay with me over the years: “mandatory two-sided copying”; “giving teachers affordable housing in the neighborhoods where they teach”; “healing gardens next to public buildings”; “chicken tractors”; “a mental health centre at the law school”; and “more bike paths.”

Students, at least until recently, were much less likely to come up with sweeping utopian demands like “guaranteed minimum income”; “free, quality childcare on demand”; or “no prisons”. One legacy of the Cold War and McCarthyism, at least in US universities, is that students are reluctant to make any demand that sounds like socialism. Not so much for fear of political persecution, but for fear of intellectual derision. From the Right will come scolding reminders of statism, gulags, moral hazard, and wasteful social programs; and from the denatured Left, a sense that clear-eyed demands for redistribution lack nuance, complexity, and consideration of all the theoretical and empirical objections that students, of course, do not have at their disposal. The reason students do not have the intellectual tools at their disposal is that since the purge of the Marxists from the academy, any discussion of alternative conceptions of property and work, and the challenges of the actual implementation of socialism, are not discussed. As a result, my students can recite all of the reasons why we should not forgive student loans, but have a hard time articulating a demand for free, quality education as a lifelong right.

In teaching *Organizing For Social Change*, I have found that most law students have a poorly developed utopian-visioning muscle. This class us-

es project-based learning to introduce the toolkit of social transformation. Students take on an actual issue in their community, and organize others to join them. At every step in organizing, from choosing an issue to developing a time-line and tactics, students are asked to consider the question of where, ultimately, they want us to go.

I ask students to describe in specific terms the world they would like for themselves and future generations. I have found that my students, who can list easily and with conviction everything that they think is wrong and lacking in the world, hesitate when it comes to asking for concrete change. They are particularly hesitant about change that will require upending the apple cart called “the way things are,” an apple cart they have already told me is broken and decaying under the weight of rotting fruit. In class, we interrogate this hesitancy. Why, if the problem is houselessness, don’t we build more housing and give people the social services they need to come in from the cold? And while we are at it, what would quality affordable housing look like? What amenities? What design? With a little prodding, students realize that they know what kind of house they want to live in.

The great Marxist theorist, Edward Thompson, called this “the education of desire.”<sup>27</sup> Thompson rehabilitated the work of William Morris, seeing Morris’s romantic vision as something more than sentimental Victorian dreaming. Envisioning a world so much more humane and delightful than the one we currently inhabit is theory, is criticism, is politics. It is strategic.

Standard strategy-making requires a vision of where we want to go, in order to select interim goals.<sup>28</sup> If students cannot articulate a vision, they have no means of evaluating whether their current strategy and tactics help them get there. A utopian end-goal is a pre-condition of strategic social change formation.

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<sup>27</sup> Edward Thompson, “Romanticism, Moralism and Utopianism: The Case of William Morris” (1976) 99 *New Left Rev* 83 at 97 [Thompson, “Utopianism & William Morris”] [emphasis omitted].

<sup>28</sup> See Kim Bobo, Jackie Kendall & Steve Max, *Organizing for Social Change: Midwest Academy Manual for Activists*, 4<sup>th</sup> ed (Santa Ana, Cal: Forum Press, 2010) at 26 (on the consistency of values and vision: “The issues we choose to work on must reflect our values and our vision. Yes we do want money for more police, but is an endlessly increasing number of police and prisons the direction in which we want our society to go, or might education, housing and jobs be better investments?”). See also *ibid* at 32 (on setting long-term goals: “It is important to set a goal that will get you to what you want to achieve, not set goals and strategies based on what you think can be accomplished according to insider assessments or conventional wisdom or past history. If you don’t know where you want to go, you will never get there”).

My demand for utopian vision, however, is not just strategic, it is the historical imperative of this particular moment.

#### IV. The Imperative of Big Change

*Call it the elemental earth  
Bursting the clasp of too-long winter.*  
—Pauli Murray<sup>29</sup>

The ascendancy of ideologies of austerity, tax cuts for the rich, free markets, slashing social services, defunding public education, parsimonious versions of liberalism, trickle-down economics, deregulation, union-busting, and mocking of the poor began the year I graduated from law school and Ronald Reagan was elected president of the United States. This radical experiment resulted in an extraordinary transfer of wealth to the rich, and a growing chasm between the very richest and the rest of us.<sup>30</sup> It has completely captured our political system, such that money and politics are inseparable, and it has reduced public discourse to name-calling, gossip, and science denial. In the meantime, the scientists tell us, it is too late to stop devastating climate events and coming food scarcity.<sup>31</sup> The best we can hope for now is to have some plan of amelioration in place. You may have noticed, there is no plan.<sup>32</sup>

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<sup>29</sup> “Without Name” in Arna Bontemps, ed, *American Negro Poetry*, revised ed (New York: Hill & Wang, 1974) at 106.

<sup>30</sup> See generally Joseph E Stiglitz, *The Price of Inequality* (New York: WW Norton, 2012) (discussing the growth of the wealth gap).

<sup>31</sup> The leading source of statistical and scientific evidence of the effects of climate change was formerly the databases maintained by the government of the United States. Since 20 January 2017, the sources have been removed and made unavailable to the public as part of the Trump administration’s assault on science (see Chris Mooney & Juliet Eilperin, “EPA Website Removes Climate Science Site From Public View After Two Decades”, *The Washington Post* (29 April 2017), online: <[www.washingtonpost.com](http://www.washingtonpost.com)>). The next two lines in this footnote are left intentionally blank by the author to represent the scientific data that is no longer available to readers.

<sup>32</sup> See Coral Davenport, “With Trump in Charge, Climate Change References Purged From Website”, *The New York Times* (20 January 2017), online: <<https://www.nytimes.com>> (“[w]ithin moments of the inauguration of President Trump, the official White House website on Friday deleted nearly all mentions of climate change”); US, National Centers for Environmental Information, “Global Climate Change Indicators” (6 April 2017), *National Oceanic and Atmospheric Administration*, online: Global Climate Change Indicators <<https://www.ncdc.noaa.gov/monitoring-references/faq/indicators.php>> (analyzing data and statistics showing a “clear long-term global warming trend”). See also Naomi Klein, *This Changes Everything: Capitalism vs. The Climate* (New York: Simon & Schuster, 2014) at 449–66 (discussing climate change, re-

Without radical, world-changing plans, you will wake up one day and turn the spigot in the bathroom sink. It will sputter and spurt, and then stop still. Or you will go to the grocery store and find a long line outside, moving slowly, as people strip the shelves and pay—cash only—for the last available food in your city. I am not a writer of dystopian fiction, I am simply a world citizen hoping to survive in the coming season of scarcity and climate disruption. If enough of us keep talking about this emergency, perhaps we will come to see how real it is, and do something about it.

That required “something” is large and visionary. Right now, there are big fights in my country about the regulation of coal, about whether to make coal less harmful.<sup>33</sup> As many of you in Canada know, we are well past the hour of regulating fossil fuels to make them less harmful. We have to leave them in the ground, or else we, in effect, offer our grandchildren’s bodies up as collateral against our continued extraction.<sup>34</sup>

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sistance movements, and the barriers to taking on the climate crisis). Naomi Klein stresses that climate change is not a future problem: “And it’s too late to stop climate change from coming; it is already here, and increasingly brutal disasters are headed our way no matter what we do” (*ibid* at 28). She suggests, however, that we can change the path we are on:

Put another way, only mass social movements can save us now. Because we know where the current system, left unchecked, is headed. We also know, I would add, how that system will deal with the reality of serial climate-related disasters: with profiteering, and escalating barbarism to segregate the losers from the winners. To arrive at that dystopia, all we need to do is keep barreling down the road we are on. The only remaining variable is whether some countervailing power will emerge to block the road, and simultaneously clear some alternate pathways to destinations that are safer. If that happens, well, it changes everything (*ibid* at 450).

Klein sees the hesitance of politicians to challenge free-market orthodoxy as a concern:

There is just enough time, and we are swamped with green tech and green plans. And yet ... we are afraid—with good reason—that our political class is wholly incapable of seizing those tools and implementing those plans, since doing so involves unlearning the core tenets of the stifling free-market ideology that governed every stage of their rise to power (*ibid* at 459–60).

<sup>33</sup> See e.g. Hiroko Tabuchi, “Republicans Move to Block Rule on Coal Mining Near Streams”, *The New York Times* (2 February 2017), online: <[www.nytimes.com](http://www.nytimes.com)> (discussing the Republican vote to repeal Obama-era environmental regulations, including the Stream Protection Rule, which sought to protect waterways from coal mining debris generated by surface mining); Jeff Turrentine, “Coal Is Literally Killing Us”, *OnEarth* (30 June 2016), online: <[www.nrdc.org/onearth](http://www.nrdc.org/onearth)> (discussing the public health benefits of phasing out of coal-fired power plants and switching over to clean energy).

<sup>34</sup> See e.g. *Juliana v United States*, 46 ELR 20175 (D Or 2016), 2016 US Dist Lexis 156014 (QL) (D Or) (a class action against the United States government for failure to protect future generations from the harm of global warming brought by a group of plaintiffs largely consisting of children).

For the first time in my career as a law teacher, I feel not only the pedagogical need, but the moral imperative to push utopian visions, hard. The whole system of greed-driven decision-making passing as constitutional interpretation has to come down, now, or we will die.

## V. The Utopian *Constitution*

... *There are no magics or elves*  
*Or timely godmothers to guide us. We are lost, must*  
*Wizard a track through our own screaming weed.*  
 —Gwendolyn Brooks<sup>35</sup>

*A Constitution is SOMETHING WE DO.*  
*A constitution can be seen as activity—as political struggle.*  
 —Charles R Lawrence III<sup>36</sup>

Utopian method, for purposes of Constitutional theory, means that we reach for a better interpretation, describe it, and send it into the world to meet its fate in the democratic melee. The Peace Orchestra's manifesto attempts to state a set of aspirations once thought beyond the reach of the law. What would a constitution that took human needs seriously look like?

To begin it would retain the protection of the individual and constraint of state power necessary to keep the democratic conversation lively and literally alive. There is scarcely a nation on this planet without its version of McCarthyism.

I preface this analysis of utopian visioning in constitutional theory with the premise that the basic norms of democracy and the rule of law are required scaffolding. They are needed no matter what social or political structures evolve around us. I see no justification, ever, for gulags.

Traditional interpretation of the United States *Constitution* focuses on restraint of the state, seeing no need to journey forward to what Robin West calls progressive constitutionalism, one charged with upholding and promoting citizen well-being.<sup>37</sup> What people obviously need, is not obvious-

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<sup>35</sup> *Selected Poems* (New York: Harper & Row, 1963) at 66.

<sup>36</sup> "Promises to Keep: We Are the Constitution's Framers" (1987) 30:4 *How LJ* 937 at 943 [Lawrence, "Promises"].

<sup>37</sup> See West, *supra* note 24 at 246–53. West notes that,

[F]or some progressives, the meaning of the good and hence the content of the good life that should be the goal of state action should be understood by reference to a set of ideals that derive from the experiences and aspirations of the relatively disempowered. These progressives, whom I call *idealistic progressives*, identify the content of their progressive politics—the meaning of



ly relevant to traditional constitutional interpretation. For classical Marxist observers, this interpretation is obviously what capitalism generates, and utopian complaints are pointless.

Thus, while I begin by elevating rights that Frederick Engels saw as temporary expediencies of the transition out of feudalism, I do follow him beyond those rights. Engels, in his deep dive into utopian thought, began with a different premise. For Engels, the rule of law developed under capitalism was superstructural.<sup>38</sup> It was a predictable and hard-won progression designed to bring order to the anarchy of unrestrained markets on the one hand, and unjustly entitled nobility on the other.<sup>39</sup> The regime of law developed in one particular time might not work in another, he believed, as history and all the ways in which humans organize themselves are a process, understood through scientific observation.

Perhaps I am a product of the twentieth century, well aware of my own country's all-too-frequent departures from basic human rights—the Palmer Raids,<sup>40</sup> COINTELPRO,<sup>41</sup> Guantánamo<sup>42</sup>—and thus hyper-

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the “good life” that citizens must have the right to pursue and that the state has an obligation to encourage—by reference to a particular utopian vision of social life which is, in turn, grounded in those experiences: a world in which each individual enjoys some degree of meaningful individual autonomy, some degree of life-fulfilling rather than life-threatening connection to others and freedom from fear of oppression, want, violence, or subordination (*ibid* at 247 [emphasis in original, footnote omitted]).

<sup>38</sup> See Frederick Engels, *Socialism: Utopian and Scientific*, translated by Edward Aveling (New York: International Publishers, 1972) at 32:

We know today that this kingdom of reason was nothing more than the idealised kingdom of the bourgeoisie; that this eternal right found its realisation in bourgeois justice; that this equality reduced itself to bourgeois equality before the law; that bourgeois property was proclaimed as one of the essential rights of man; and that the government of reason, the *Contrat Social* of Rousseau, came into being, and only could come into being, as a democratic bourgeois republic. The great thinkers of the eighteenth century could, no more than their predecessors, go beyond the limits imposed upon them by their epoch.

<sup>39</sup> See *ibid* at 74, where Engels's summary of law under the contradictions of rising capitalism reads: “Growing predominance and increasing effectiveness of the laws governing the production of commodities. Unbridled competition. *Contradiction between socialized organisation in the individual factory and social anarchy in production as a whole*” [emphasis in the original].

<sup>40</sup> For a description of the scale and swiftness of the raids, see Sonia Kaross, “The Palmer Raids: The Deportation Mania Begins” in Bud Schultz & Ruth Schultz, eds, *It Did Happen Here: Recollections of Political Repression in America* (Berkeley: University of California Press, 1989) 159 (“[i]n an operation directed by Hoover and Palmer, upwards of ten thousand persons in thirty cities were seized—most without warrants—in one simultaneous action. Citizens and aliens alike were caught in the massive roundup that hit meeting places, pool halls, bowling alleys, and cafés” at 161).

attached to the rule of law. Read enough about the twentieth century, and feel the desperate absence of legality, fear the coming of bodysnatchers. Watching a scene, in the film *Neruda*,<sup>43</sup> of union organizers herded into holding pens in the Chilean desert, I know I never want to live in a land without *habeas corpus*. That, however, is the minimum. It is the platform from which we can ask questions about thriving, meaning, and the good.

Before reading what Engels actually said about utopians, I assumed he was disdainful.<sup>44</sup> Dreamers, after all, are not scientists, and to Marx

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<sup>41</sup> For a description of the massive 1970s FBI program, see David Cole & James X Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*, 3rd ed (New York: New Press, 2006) at 8 [footnotes omitted]:

COINTELPRO, a set of secret investigations and disruptive actions against political activism across a wide ranges of issues. A special Senate committee ... found that the FBI had conducted a wide-ranging campaign of monitoring and disrupting political groups that were not engaged in any illegal conduct. At the peak of its efforts, the FBI was investigating all major protest movements, from civil rights activists to Vietnam war protesters to women's liberation advocates. Standard FBI methodology included bugging of homes and offices, wiretapping, break-ins, and informants.

See also Bud Schultz & Ruth Schultz, "A Final Word" in Schultz & Schultz, *supra* note 40, 409 at 410–11.

<sup>42</sup> For a description of Guantánamo as legal limbo, see Cole & Dempsey, *supra* note 41 at 183–84:

For much of the world, Guantánamo Bay has become a symbol of the Bush administration's dismissive attitude toward the rule of law. The administration chose to hold prisoners at Guantánamo precisely to avoid the limits of law. The administration claimed that it could warehouse there any person it labeled an "enemy combatant," or as President Bush put it, "a bad guy." It maintained that it could hold them until the war on terrorism ends.

See also Anthony D Romero & Dina Temple-Raston, *In Defense of Our America: The Fight for Civil Liberties in the Age of Terror* (New York: William Morrow, 2007) ("[h]oping to create a legal black hole where neither international law ... nor domestic law ... would apply, the American government picked Guantánamo as the site of its prison camp for the 'war on terror.' ... The purpose was not to give terrorism suspects a fair trial, but rather to set up a process to convict them" at 142–43).

<sup>43</sup> See *Neruda*, directed by Pablo Larraín (2016).

<sup>44</sup> Marx and Engels are associated with criticism of utopians in part because of the actual political choices on the table when they wrote, which included fomenting proletarian uprisings or withdrawing to bucolic communes. This may explain the somewhat overly-determined view of Engels the Anti-Utopian. On the view of later Marxists as anti-utopian, see Barbara Taylor, *Eve and the New Jerusalem: Socialism and Feminism in the Nineteenth Century* (Cambridge, Mass: Harvard University Press, 1993) at xvi, citing Thompson, "Utopianism & William Morris", *supra* note 27 at 98:

The whole problem of the subordination of the imaginative utopian faculties within the later Marxist tradition: its lack of a moral self-consciousness or even a vocabulary of desire, its inability to project any images of the future or

and Engels, scientific analysis was all-critical. While Engels does note the pre-scientific status of early socialist dreamers, he does not disparage them.<sup>45</sup> He situates them in a history of displacement—first of peasants, then of workers—that generated moments of realization and coming to terms with human misery.<sup>46</sup> A natural response to misery was the human capacity to imagine a way out:<sup>47</sup> not yet scientific, not fully realizing the shape of the forces compelling concentration of wealth and throwing lives of ordinary folk into chaos, but suggesting the outlines of an alternative. From Sir Thomas More,<sup>48</sup> to St. Simon,<sup>49</sup> to the Owenites,<sup>50</sup> to the Communards,<sup>51</sup> to the Chartists,<sup>52</sup> to the artist-dreamers like William Morris,<sup>53</sup>

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even its tendency to fall back in lieu of these upon the utilitarian's earthly paradise—the maximization of economic growth.

<sup>45</sup> See Engels, *supra* note 38 at 36. Engels, in fact, made fun of theorists who took the easy path of trashing utopians, stating that:

We can leave it to the literary small fry to solemnly quibble over these phantasies, which today only make us smile, and to crow over the superiority of their own bald reasoning, as compared with such 'insanity.' For ourselves, we delight in the stupendously grand thoughts and germs of thought that everywhere break out through their phantastic covering, and to which these philistines are blind (*ibid*).

<sup>46</sup> See *ibid* at 64–75. Discussing the human misery that accompanied the transition to wage labor and the utopians' attempted response, Engels states:

The capitalistic mode of production ... is never able to get out of that "vicious circle," which Fourier had already discovered. What Fourier could not, indeed, see in his time is: that this circle is gradually narrowing; that the movement becomes more and more a spiral, and must come to an end, like the movement of the planets, by collision with the centre (*ibid* at 61).

<sup>47</sup> See *ibid* at 36: "The solution of the social problems, which as yet lay hidden in undeveloped economic conditions, the utopians attempted to evolve out of the human brain. Society presented nothing but wrongs; to remove these was the task of reason."

<sup>48</sup> See Vincent Geoghegan, *Utopianism and Marxism* (London: Methuen, 1987) at 1 ("Thomas More's *Utopia* (1516), with its pun 'utopia' ('no-place') 'eutopia' ('good-place'), created the word for, and most celebrated example of, an alternative society").

<sup>49</sup> See *ibid* at 8–13 (discussing Henri Saint-Simon and his visions of an alternative society, noting that "Saint-Simon sensitively registered the social tendencies of his time; his work both harmonizes the interests of the proletariat and bourgeoisie and lays bare the tensions of early industrial capitalism" at 12–13).

<sup>50</sup> See *ibid* at 13–17 (discussing utopian socialist Robert Owen's strategy of establishing alternative communities or "villages of co-operation" to "co-exist with older structures until the manifest advantages of the co-operative system caused the old to disappear naturally" at 15). See also Taylor, *supra* note 44 at 19–56 (discussing women in Owenite communities); Robert Owen, "Manifesto, 1840" in Timothy Patrick McCarthy & John McMillian, eds, *The Radical Reader: A Documentary History of the American Radical Tradition* (New York: New Press, 2003) 69.

<sup>51</sup> See Kristin Ross, *Communal Luxury: The Political Imaginary of the Paris Commune* (London: Verso, 2015) at 39 (describing generally the vision of the Paris Commune).

those impatient with contemporary injustice dared to offer up specifics of what life could look like under different arrangements. While Marx added a grand political economic analysis of alienation and surplus value, Morris understood through his own hand what it felt like to produce and use the beautiful tray that held your home-baked daily bread. He wanted workers to grow their own food and own their own tools for dignified work, because he had watched too many hungry children going off to toil in sooty factories.<sup>54</sup> He was not a scientific Marxist, but he was, in his way, a materialist. His dreams came out of what he saw.

Engels does not disparage these thinkers, he simply adds what, in his view, they left out. He acknowledges them as forerunners of scientific so-

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<sup>52</sup> For an appreciative historical explanation of the Chartists, see generally Stephen Roberts, ed, *The Dignity of Chartism: Essays by Dorothy Thompson* (London: Verso, 2015); Dorothy Thompson, *The Chartists: Popular Politics in the Industrial Revolution*, (New York: Pantheon Books, 1984).

<sup>53</sup> The definitive biography of Morris as a utopian thinker is EP Thompson, *William Morris: Romantic to Revolutionary* (London: Lawrence & Wishart, 1955). See also Morris, *supra* note 22. Morris envisioned a world without class division or private property, with work shared and ennobled, with art and nature celebrated at every turn, and no bad design. In Morris's vision: "Wealth is what Nature gives us and what a reasonable man can make out of the gifts of Nature for his reasonable use. The sunlight, the fresh air, the unspoiled face of the earth, food, raiment and housing necessary and decent; the storing up of knowledge of all kinds, and the power of disseminating it" (*ibid* at 91). Morris described a system under which the unpleasant—say sewage maintenance—tasks were valorized, shared, and short. Each able person would contribute a share, proudly, and then go on to more pleasant endeavors. Education, instead of "fitting people to take their places in the hierarchy of commerce" would help each person find work they were good at and enjoyed (*ibid* at 101).

Morris also described a world liberated by art:

Then having leisure from all these things, amidst renewed simplicity of life we shall have leisure to think about our work, that faithful daily companion, which no man any longer will venture to call the Curse of labour: for surely then we shall be happy in it, each in his place, no man grudging at another; no one bidden to be any man's *servant*, every one scorning to be any man's *master*: men will then assuredly be happy in their work, and that happiness will assuredly bring forth decorative, noble, *popular* art.

That art will make our streets as beautiful as the woods, as elevating as the mountain-sides: it will be a pleasure and a rest, and not a weight upon the spirits to come from the open country into a town; every man's house will be fair and decent, soothing to his mind and helpful to his work: all the works of man that we live amongst and handle will be in harmony with nature, will be reasonable and beautiful: yet all will be simple and inspiriting, not childish nor enervating; for as nothing of beauty and splendour that man's mind and hand may compass shall be wanting from our public buildings, so in no private dwelling will there be any signs of waste, pomp or insolence, and every man will have his share of the best (*ibid* at 55–56 [emphasis in original]).

<sup>54</sup> See *ibid* at 735ff.

cialism. He cites them as examples of the immanent revolutionary potential residing in our actual lived experience under the unstable and contradictory structures of inequality.<sup>55</sup>

Similarly, the great organizer and Marxist theorist Mother Bloor, from the United States, is commonly thought of as one who disparaged utopians.<sup>56</sup> Her great break with Eugene Debs came from her belief that his attempt to fund and build actual utopian colonies was a waste of resources and a diversion from the task of organizing workers.<sup>57</sup> In her autobiography, she speaks of Debs with deep respect and affection, although she says of his colony plan: “I simply could not stay with anything so unscientific.”<sup>58</sup>

Marx, Engels, and Mother Bloor pushed science, which for them meant a scientific socialist knowledge of history, dialectical materialism, and the conditions necessary for progress. They railed against religion, idealist philosophers, and any theorizing that happened without empirical knowledge of history and political economy: how did we get here, what are the forces at play, where is the power, where is the contradiction? They never said “have no dreams.”

This lecture suggests that utopian visions have value to constitutional interpretation. By deploying utopian visioning as both theoretical method and practice of politics, I draw on the long tradition Engels cites, as well as Engels himself, who dreamt of workers controlling the factories, with the transition to worker control being the first and last job of the state under socialism, before the sunset of the state. In lieu of defining the ultimate “utopian vision”, this lecture suggests simply that we ought to begin a conversation about one, or many, such visions. We should dare to deploy what Thompson called the “vocabulary of desire” to conceive of

<sup>55</sup> See Engels, *supra* note 38 at 43–44. Engels admired, for example, Owen’s courage in risking “his whole social position” in challenging capitalism, noting that: “Every social movement, every real advance in England on behalf of the workers links itself on to the name of Robert Owen.” Yet, Engels saw inevitable limitations to Owen’s ideal—as opposed to scientific—approach, which inevitably provided an “eclectic, average socialism”.

<sup>56</sup> See Ella Reeve Bloor, *We Are Many* (New York: International Publishers, 1940) (“[f]rom the outset I told the members of my group that this [utopian] colonization scheme was unsound, not real socialism at all” at 53).

<sup>57</sup> See *ibid* (“I felt it was unfair to collect money for something that did not yet exist. People were already selling out businesses to join the colony”).

<sup>58</sup> *Ibid* at 53. Bloor describes Debs’ brilliance, militance, and magnetism in the following words: “He was sure and happy and full of life. Debs had wonderful personal magnetism. In speaking he used powerful similes and illustrations. He spoke like an evangelist, using his whole body to drive his points home, leaning far over the platform, and stretching out his long lean arm toward his audience” (*ibid* at 52).

something lovely that would make our lives better.<sup>59</sup> We should send that conception out into the democratic conversation for responses of affinity and criticism. In making an orchestra, I attempted to create a little piece of the world I want to live in, in which people make art and music and performance together and share their aspirations. Touch this instrument made out of discards. I believe it is worth giving life to, to make us rethink our relationship to the waste stream, and to one another. What do you believe, when you touch it? Does this sound ridiculous—either the music or the intended utopian claim? Suggesting this conversation also points out its general absence from our usual political discourse. I made an orchestra, and discovered it had an audience of many, ready to consider the utopian.<sup>60</sup>

Without big ideas of what the world could look like—for example, if art were a right—we risk asking for too little. This is particularly true in times of retrenchment. When protestors are in the streets over Muslim bans in my country,<sup>61</sup> when children are growing up without homes, when rape culture means that no woman feels free to wander the streets and parks of her city at night enjoying the moonlight, we are living in a siege state. Our first job, the one that had lawyers rushing to courtrooms on a Saturday to file those *habeas corpus* petitions, is resisting immediate harm.<sup>62</sup> When Immigration and Customs Enforcement raids are rounding

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<sup>59</sup> See Thompson, “Utopianism & William Morris”, *supra* note 27 at 98.

<sup>60</sup> In premiering the Peace Orchestra video at McGill University, I was delighted to meet faculty and students, such as the Women of Colour Collective of McGill Law, who welcomed a non-traditional approach to jurisprudence: see e.g. Aliah El-houni, “A State of the Union: The 3L Edition” (7 October 2016), *A Legal Education* (blog), online: <[www.alegaleducation.ca/a-state-of-the-union](http://www.alegaleducation.ca/a-state-of-the-union)> (a student’s reaction to seeing the Peace Orchestra presented at McGill University Faculty of Law). See also Thy Anne Chu Quang, “Mari Matsuda, in Sharing her Utopia” (8 October 2016), online: *Instagram* <<https://www.instagram.com/p/BLTiVUyA6yP/?taken-by=ennayht>>.

<sup>61</sup> See e.g. Peter Baker, “Travelers Stranded and Protests Swell Over Trump Order”, *The New York Times* (29 January 2017), online: <[www.nytimes.com](http://www.nytimes.com)> (“[i]n Washington, protestors gathered by the thousands outside Mr. Trump’s front lawn to denounce his order and show solidarity with Muslim Americans. ‘Shame,’ they chanted, hoisting homemade signs toward the executive mansion, where Mr. Trump was scheduled to host a private screening of the movie ‘Finding Dory’”).

<sup>62</sup> See Charlie Savage, “Liberal Lawyers Plan Wave of Resistance to Trump Policies”, *The New York Times* (30 January 2017), online: <[www.nytimes.com](http://www.nytimes.com)>. The author describes one response to President Trump’s executive order issued on 27 January 2017:

The effort was primarily drafted by lawyers at the [International Refugee Assistance Project] and at the National Immigration Law Center, and by law students at Yale’s Worker and Immigrant Rights Advocacy Clinic overseen by Profs. Michael J. Wishnie and Muneer I. Ahmad. Then it was argued at an emergency hearing by an American Civil Liberties Union lawyer.

up parents while their children stand by in terror,<sup>63</sup> it hardly seems the time to suggest the right to music making. Stop, take a breath, while I tell you it is perhaps exactly the time.

While we do the exigent work, we should also do the other work, the visioning and the theorizing of alternatives. Siege happens because change is possible. All over the world, “this can’t be happening” political events are the new normal. Engels said to use science, know where you stand in history:

[T]he final causes of all social changes ... are to be sought ... in the *economics* of each particular epoch. The growing perception that existing social institutions are unreasonable and unjust, that reason has become unreason, and right wrong, is only proof that in the modes of production and exchange changes have silently taken place, with which the social order, adapted to earlier economic conditions, is no longer in keeping.<sup>64</sup>

The changes wrought by technology, globalization, and neoliberalism have rendered the current system unsustainable. We are fighting under emergency conditions because of this instability. This is precisely the moment when a grand vision offers exactly what we need. To ask for too little would lose the moment.

First, think big lest you think too small at the historical crossroad.

Second, know that the utopian imaginary is an organizing tool. Utopian thinkers have always attracted an audience because they fulfill a human need. Like religious prophets, they offer a salve—an opiate, if you will—for existing pain, but also something worth living for: the dream of a

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See also Jonah Engel Bromwich, “Lawyers Mobilize at Nation’s Airports After Trump’s Order”, *The New York Times* (29 January 2017), online: <www.nytimes.com>.

<sup>63</sup> See e.g. Matthew Rozsa, “Brain Tumor Patient Removed From Hospital, Detained by Immigration and Customs Enforcement”, *Salon* (23 February 2017), online: <www.salon.com>. Sara, a Salvadorean immigrant with a brain tumour, was taken from hospital to a detention centre. Her situation is not extraordinary, however:

Sara’s experience is part of what’s being described as a growing climate of fear among many undocumented immigrants. Undocumented agricultural workers in California have been keeping their children home from school, according to *The New York Times*. ...

This anxiety has been caused not only by President Donald Trump’s election in November, but by reports that the Department of Homeland Security is developing a mass deportation plan in the near future.

<sup>64</sup> Engels, *supra* note 38 at 54 [emphasis in original].

better life. The best organizers I know<sup>65</sup> understand that people need more than bread, they need roses too.<sup>66</sup> They need dignity.<sup>67</sup> The workers who were willing to die for a dream, from the Paris commune<sup>68</sup> to the hunger march protesters in Detroit,<sup>69</sup> were not risking their lives for a

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<sup>65</sup> See e.g. Ai-jen Poo with Ariane Conrad, *The Age of Dignity: Preparing for the Elder Boom in a Changing America* (New York: New Press, 2015) (writing on the movement to bring quality of life and dignity to the lives of both caregivers and those they care for).

<sup>66</sup> See Ardis Cameron, "Bread and Roses Revisited: Women's Culture and Working-Class Activism in the Lawrence Strike of 1912" in Ruth Milkman, ed, *Women, Work and Protest: A Century of US Women's Labor History* (Boston: Routledge & Kegan Paul, 1985) 42 at 42:

The 1912 strike of immigrant textile-workers in Lawrence, Massachusetts, has generally been viewed by feminist labor historians as illustrative of the vast potential for female workers' militancy ... the Industrial Workers of the World ... put forward demands which reached far beyond the narrow, economic orientation of the craft unions. It was a strike, as James Oppenheim's famous song put it, for 'bread and roses.

See also Ardis Cameron, *Radicals of the Worst Sort: Laboring Women in Lawrence, Massachusetts, 1860-1912* (Urbana: University of Illinois Press, 1993) ("[c]alling for a 'fair days wages for a fair days work,' female strikers also asserted their right to clean water, proper health care, decent housing, schools, even time 'which belonged to us'" at 3).

<sup>67</sup> My favorite film on the role of the quest for dignity in class struggle is *Salt of the Earth*, directed by Herbert J Biberman (1954).

<sup>68</sup> See Ross, *supra* note 51 ("[b]ecause the Commune struck at the very heart of the state, social and economic system, the European middle class rallied against the insurrection in a movement resembling a religious ... massacre that occurred in the heart of 'civilized' Europe: the mass shootings of tens of thousands of Communards in May 1871" at 81). William Morris saw the legacy of the communards as a lasting vision of hope: see Morris, *supra* note 22 at 175:

[W]e feel as though the Paris workman had striven to being the day-dawn for us, and had lifted us the sun's rim over the horizon, never to set in utter darkness again: of such attempts one must say, that though those who perished in them might have been put in a better place in the battle, yet after all brave men never die for nothing, when they die for principle.

<sup>69</sup> See Fatimah Hameed, "Unemployed Detroit Auto Workers Conduct Hunger March to Protest Ford Motor Company's Policies, United States, 1932", *Global Nonviolent Action Database* (3 March 2013), online: <nvdatabase.swarthmore.edu/>:

After the stock market crash of 1929, around 80 percent of the industry was no longer producing and by 1932 large numbers of Detroit's citizens were dying of starvation. The Ford Motor Company, one of the richest employers, had laid off two-thirds of its employees. The Unemployed Councils, United Auto Workers, and communist union-organizing groups decided to organize a march against the Ford Motor Company and its employment policies.

...

... The Dearborn police launched tear gas against the marchers, some of whom began throwing stones and dirt clods at the police in response. ... The



simple pay raise, although they needed one. They were risking their lives for their human dignity and the love and community they found in their cause. Bread was the spark, dreams were the fuel.

An inspiring example of this comes from the new generation of social change makers, such as Black Lives Matter, who have added self-care and mutual care to their practice. Attention to mental and physical health, care in how we resolve conflicts within our movements, incorporation of art, healing, music, dancing, and joy in all we do, allows us to remain strong as we struggle. More importantly, it is the work of living the future we want as we make it, showing ourselves and everyone watching that we are making something worth fighting for.

Third, utopian long-term goals are strategic guides in developing short-term goals. Determining what constitutional core we will bring, or what social norm we will inscribe, or how we will divide chores at the art commune, all happen best if immediate responses are tied to long-term goals, visions, and values. The shape of our first step on the path is determined by where the path is going. If we want a world without gulags, we might want to begin socializing ourselves for empathy, kindness, and non-violence now, as we do our organizing.

Finally, for lawyers, utopia is an interpretive tool. Originalism aside, our task as constitutionalists is to see to it that our foundational, constitutive legal documents promote our collective well-being. If the rule of law, legalism, and rights are worth preserving, the question we have to answer, again and again in each era, is “why?” Why preserve a polity and its rules? The answer comes from the quality of our lives, both present and future. The *Constitution* lives on because it helps us to thrive together in peace.

In the hardest times, as in the Great Depression, we expected the government to ameliorate economic disruption and help people get what they needed to thrive. The populist artist Norman Rockwell captured this shared sense of need in his Four Freedoms series, which depicted ordinary Americans enjoying their constitutional rights in tangibly familiar settings: the Thanksgiving table, the town hall meeting.<sup>70</sup> The Four Free-

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police and Ford security began to shoot at the crowds of marchers, killing four marchers and injuring over sixty more.

<sup>70</sup> See Stuart Murray & James McCabe, *Norman Rockwell's Four Freedoms: Images that Inspire a Nation* (Stockbridge, Mass: Berkshire House, 1993) at ix–x:

As the Second World War raged in 1942, Norman Rockwell painted four images that were to become enduring national symbols. His inspiration was President Franklin Delano Roosevelt's 1941 address to Congress which set out the four fundamental freedoms enunciated by the Allied powers on behalf

doms made no distinction between substantive rights to food and procedural rights to political participation.

Rockwell understood that we are all interpreters of our constitution, and that in our lives and practices, we give life to notions like “free speech”. David Cole has argued that citizen participation in constitution making is, essentially, the constitutional history in the United States.<sup>71</sup>

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of people everywhere. Eventually, in the minds of many, Rockwell’s images became interchangeable with Roosevelt’s concepts. ...

... The Freedoms remain no less compelling or relevant today. ...

... Both [President Roosevelt and Norman Rockwell] rose above propaganda or appeals to a nationalism fueled by hatred and sought, instead, to define values which would unite citizens and could bind nations to each other.

Murray and McCabe provide samples of letters addressed to Rockwell, pointing out that “Americans might be vague on the politics of the war, but they clearly understood and appreciated Rockwell’s *Four Freedoms*, and they wrote about it to him” (*ibid* at 62–63). One such letter reads:

You paid much attention to detail in drawing that wrinkled gray jacket (in “Speech”). Being a New Englander myself, I can appreciate that touch. It represents to me a part of America, as definite a part as the town meeting. Nowhere is there a type of government as democratic as the town meeting, where all rules, laws and restrictions can be argued and thrashed out by those who will be immediately affected by them.

I am indeed thankful that I am able to help defend that right.

Richard Morrison

U.S. Army Air Corps Maxwell Field, Alabama (*ibid* at 65).

See also Katharine G Young, “Freedom, Want, and Economic and Social Rights: Frame and Law” (2009) 24:1 Md J Intl L 182 at 184–88 (“[t]he interpretation of ‘Freedom from Want’ by popular artist Norman Rockwell provides a sense of completion to the aspiration that guides economic and social rights” at 184). Young discusses how “Freedom from Want,” a part of the “Four Freedoms” series, became a reflection of President Roosevelt’s “central justification for his proposed ‘second bill of rights,’ which would recognize the right to a job, to trade, to a family home” (*ibid* at 186). She also argues that Norman Rockwell’s depiction of “Freedom from Want” does not, in contemporary times, deliver “the inclusion that it promises. ... In celebrating the material comforts brought about by this freedom, it takes for granted a now caricatured celebration of patriarchy, consumerism, and cultural uniformity” (*ibid* at 187).

<sup>71</sup> See David Cole, *Engines of Liberty: The Power of Citizen Activists to Make Constitutional Law* (New York: Basic Books, 2016) (“[t]he argument of this book is that civil society groups play an equally important part in shaping constitutional law. At their best, they are the catalysts of constitutional change—the engines of liberty” at 6). More specifically, Cole argues: “Lawyers, judges, and legal scholars often speak of the ‘living Constitution’ to underscore that constitutional law is not static, but a work in progress. But the Constitution is ‘living’ in another sense, too. The Constitution lives in each of us—and in the groups we create to safeguard and advance what we view as important constitutional values” (*ibid* at 10–11).

Charles Lawrence makes a similar argument in “Promises to Keep: We Are the Constitution’s Framers.”<sup>72</sup>

The *Constitution of the United States* was not originally written for all the people.<sup>73</sup> Built right into it are the contradictions of slavery and native displacement.<sup>74</sup> The carnage of chattel slavery, ending in the carnage of the Civil War, was the price paid for that contradiction. The amendments bringing equality to the *Constitution* were the result. Equality was fought for, in blood, and not just once, and it is not yet over. A fight continues to finally make explicit that equality really means equality, for everyone.

In the United States, that is our particular challenge. The richest and most powerful nation to emerge from the twentieth century is the product of slavery and genocide, and efforts to inscribe equality without acknowledging this history have meant continued and deepening inequality.<sup>75</sup>

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<sup>72</sup> See Lawrence, *supra* note 36 (“[i]f the Constitution has any unfulfilled promises they are those which we and others like us, who have gone before, have made to ourselves. It is we who must fight to give the due process and equal protection clauses a meaning that reflects our values” at 945). See also Charles R Lawrence III, “Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)” (2005) 114:6 Yale LJ 1353 at 1397–98 (arguing that citizens, not judges, are ultimately “the Constitution’s framers”).

<sup>73</sup> See Derrick Bell, *Race, Racism and American Law*, 4th ed (Gaithersburg: Aspen Law & Business, 2000) at 25 (“[t]he recognition, maintenance, and protection of slavery were the essential quid pro quo for the establishment of the world’s first constitutional government committed to the protection of basic rights of liberty. As historian David Brion Davis put it, ‘Americans bought their independence with slave labor’”).

<sup>74</sup> See e.g. US Const art I, § 2, cl 3 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons”); US Const art I, § 8, cl 3 (“To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes”). The commerce clause, in giving Congress the power to negotiate with Indian tribes, acknowledges the sovereignty and existence of the original inhabitants of the United States territory (see *ibid*). American expansionism has thus existed in uneasy tension with the acknowledgement of native sovereignty since the birth of the United States as a nation (see US Const art I, § 9, cl 1: “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person”). See also Derrick Bell, *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform* (Oxford: Oxford University Press, 2004) at 32 (recognizing that the delegates drafting the aforementioned articles of the Constitution “hypocritically avoided the word ‘slaves,’ referring instead to ‘persons’ whom the states shall think it proper to import, or ‘persons’ bound to the service of labor”).

<sup>75</sup> See Lawrence & Matsuda, *supra* note 13 at 5, where Charles Lawrence and I note that: [affirmative action] is not an idea cooked up in the abstract. It is an idea born of a struggle—the same struggle that made our parents radicals. But the af-

From “forty acres and a mule”<sup>76</sup> to Black Lives Matter,<sup>77</sup> from the Iroquois Confederation<sup>78</sup> to Standing Rock,<sup>79</sup> alternative visions of how we could live together in equal dignity in the United States have emanated from outside elite discourse in constitutional interpretation. At every step, outsider constitutionalists have brought their claims, and exploited contradictions, to bring a brighter vision of mutual care to our interpretive work.

This work, giving full meaning to equality, happens not just because we fight against our chains, but because we imagine the fullness of a life without chains. That is the utopian project. It is not a substitute for science, organizing, or law school. It is a practice of using what we know from our lives to bring richer versions of human possibility to the work of constitution-making.

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firmative action debate, as it is largely presented, focuses on abstract ideas outside of social context ...

Our work is about context and history and acknowledgement of culture. We are where we are, with the huge bloody problem delicately referred to as “race relations,” because of a history.

<sup>76</sup> In the history of the United States, “forty acres and a mule” is shorthand for what was promised and never delivered to the formerly enslaved after the Civil War. On the role of Black Americans in keeping alive the dream of reconstruction, see Eric Foner, *Reconstruction: America’s Unfinished Revolution, 1863-1877* (New York: Harper & Row, 1988) at xxiv–xxv:

Rather than passive victims of the actions of others or simply a “problem” confronting white society, blacks were active agents in the making of Reconstruction. During the Civil War, their actions helped force the nation down the road to emancipation, and in the aftermath of that conflict, their quest for individual and community autonomy did much to establish Reconstruction’s political and economic agenda. Although thwarted in their bid for land, blacks seized the opportunity created by the end of slavery to establish as much independence as possible in their working lives, consolidate their families and communities, and stake a claim to equal citizenship.

<sup>77</sup> See *Black Lives Matter*, online: <blacklivesmatter.com>. For an excellent account of the Black Lives Matter movement in Ferguson, Missouri from the perspective of actual participants, see Patrisse Khan-Cullors & asha bandele, *When They Call You a Terrorist: A Black Lives Matter Memoir* (New York: St. Martin’s Press, forthcoming in 2018); *Whose Streets?*, directed by Sabaah Folley (2017).

<sup>78</sup> See Donald S Lutz, “The Iroquois Confederation Constitution: An Analysis” (1998) 28:2 *Publius* 99 (“[t]he Iroquois Confederation was based on an oral ‘text’ that was a true constitution in our meaning of the term today. As a result, the Iroquois can lay claim to the first constitutional system in the geographical region that is now the United States of America” at 100 [footnote omitted]).

<sup>79</sup> See Sierra Crane-Murdoch, “Standing Rock: A New Moment for Native-American Rights”, *The New Yorker* (12 October 2016), online: <www.newyorker.com> (describing the struggle to protect the water supply and stop the construction of the Dakota Access oil pipeline); Saul Elbein, “These Are the Defiant ‘Water Protectors’ of Standing Rock”, *National Geographic* (26 January 2017), online: <news.nationalgeographic.com>.

Working among artists, I met many who know in their bones that creative participation is essential to human well-being. The evidence of their lives could help us find our way to a right to art.

## VI. Art as a Right

What would a right to art look like? The reason I know it is not entirely crazy to envision a collective, constitutionally constituted decision to alter radically the terms of engagement between capital and art is that it happened, once. The reason I know it is not entirely crazy to envision the state funding neighbourhood art centres producing theatre, dance, fine arts, crafts, at the amateur and professional level, with paid staff, across the land, is that it happened, once. In the United States, it was called the New Deal. It responded to the Great Depression, and it remade constitutional interpretation and citizens' reasonable expectations of mutual aid.

Since so many of my students do not know the story of the Works Progress Administration (WPA),<sup>80</sup> I will tell part of it here. Once, in the United States, lying, cheating, and unregulated speculation in banking and finance brought down the economy, throwing millions into poverty. In response, we created new rules regulating capitalists, and we gave workers new rights and economic protections—including social security, unemployment insurance, and the right to join a union. We created massive jobs programs to put people to work. In a stroke of genius, it was decided that the solution to unemployment was to give people jobs.<sup>81</sup> The United States, like much of the world, faces a similar crisis today. Unfortunately, the lie that direct government employment does not work sets aside a much-needed remedy, leaving us only wobbly solutions like reducing interest rates and cutting corporate taxes in the hopes that businesses will stop hoarding their cash and start hiring.

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<sup>80</sup> See generally Jeff Hill, *The WPA: Putting America to Work* (Detroit: Omnigraphics, 2014) (providing an overview of the Works Progress Administration (WPA), the centerpiece of the New Deal programs put in place by President Franklin D Roosevelt to combat the Great Depression).

<sup>81</sup> On the vast scale of the WPA, see Greta Berman, *The Lost Years: Mural Painting in N.Y. City Under the WPA Federal Arts Project, 1935–1943* (New York: Garland Publishing, 1978) at 15:

The Works Progress Administration was unprecedented in both size and range. According to notes from a Conference on the Arts programs of the WPA at the Library of Congress on October 8, 1941, eight and one half million people had worked on the WPA since its inception in 1935. Approximately one out of every five able bodied workers had worked on the WPA at some time.

Part of putting people back to work under the WPA was funding jobs for artists. Overnight, artists, musicians, directors, writers, and photographers suddenly had good jobs and a mandate to go out and make art and teach others.<sup>82</sup> Some of the best public art we have—including the famous mosaic subway designs in New York City, and beautiful murals and sculptures in schools and parks across the United States<sup>83</sup>—are WPA legacies.

Congress fretted that the WPA was infiltrated by communists.<sup>84</sup> In part, they were right, because most artists and creatives in that period were in some way sympathetic to the idea of socialism. There was no Marxist orthodoxy, however, as artists are notoriously hard to corral. In Harlem, a debate raged among Marxist critics over whether “swing” was an authentic expression of the Black experience, deserving promotion, or a commercialized vulgarization that demeaned the proletariat.<sup>85</sup> Swing

<sup>82</sup> See Tess Thackara, “What We Can Learn from the Brief Period When the Government Employed Artists”, Editorial, *Artsy* (1 February 2017), online: <[www.artsy.net](http://www.artsy.net)> (“[a]rtists were employed with specific goals in mind: to help the government communicate with the rest of the country, to inspire pride in a nation that had been brought to its heels, and to document the country’s recovery effort. In exchange, each artist received \$24 per week (approximately \$400 per week in today’s dollars)”).

<sup>83</sup> See Berman, *supra* note 81 at 22–23 (documenting 2,566 WPA murals produced between 1935 and 1943 and 17,144 free standing and architectural sculptures); Hill, *supra* note 80 (“[a]pproximately 2,500 public murals were produced during the life of [the Federal Art Project]” at 73).

<sup>84</sup> See Thackara, *supra* note 82:

In the 1930s as is the case today, partisan politics resulted in plenty of opposition to the Federal Art Project from Republican Congressmen such as Representative Dewey Short. Short told Congress that good art was the product of suffering artists while “subsidized art is no art at all,” as DeNoon notes in *Posters of the WPA*. Further fueling the fire, the leftist inclinations of this period, particularly among those engaged in the WPA and other alphabet agencies, led to a belief that the Federal Art Project was a hotbed for Communists.

<sup>85</sup> See Mark Naison, *Communists in Harlem During the Depression* (Urbana: University of Illinois Press, 1983) at 211–13 (“[u]nlike previous Communist critics, who saw virtue primarily in protest songs or rural black music undiluted by ‘commercialism,’ these young turks displayed their greatest interest in black musical idioms which were commercially successful—swing and hot jazz” at 211). Naison further notes that:

The Harlem [Communist Party] founded an interracial “swing club,” and encouraged “jitterbugging” at its social affairs (“She could dance like a dream, and she was a Communist,” Mike Gold commented about a black social worker he met at a Harlem benefit for the *Daily Worker*); the [Young Communist League] sponsored a “Swing America” pageant at its 1939 convention, and the *Daily Worker* began printing regular reviews of jazz albums that were remarkably free of didacticism and extraneous political commentary (*ibid* at 213).

won—because, well, how could it not—and WPA-funded productions featured packed shows of the swiftest rhythms.<sup>86</sup>

Traditional Marxist cultural critics preferred drama that valorized labour. One such play, Orson Welles's *The Cradle Will Rock*, was shut down by censors on opening night.<sup>87</sup> The entire cast, crew, and audience marched down the street to an empty theatre, and performed from the seats, the stage being off limits because of union rules that required bond protection for actors before they took the stage. The stage manager called out cues, and actors rose in the audience to recite their lines. Those present remember it as a great act of theatre civil disobedience that only added to the liberatory message of the script.<sup>88</sup>

Not all of the WPA drama was in New York. In little towns all over the country, debates raged about whether nudes and social themes were appropriate, but everywhere the WPA set up shop, it was met with eager crowds of ordinary people who wanted to see and make art. Four million visitors filed into art centres in North Carolina.<sup>89</sup> In the tiny town of Helper, Utah (population 2,700), the opening exhibition of the Art Center recorded an attendance of 3,017 in the first week, which meant that residents came more than once or visitors rode in from beyond the town limits.<sup>90</sup>

In addition to art centres for instruction and exhibition, the WPA paid artists simply to make art. These grants led to interesting conflicts between the artist's lifestyle of inspired all-night studio sessions followed by periods of recovery. To make sure government funds were not "wasted", artists were required to "check in" at an office every morning at nine, then

<sup>86</sup> See *ibid* at 212 (describing works affiliated with the WPA negro theatre).

<sup>87</sup> See Hill, *supra* note 80 at 78 ("[a]gency officials blamed budget cutbacks for the cancellation, but many observers believed that *The Cradle Will Rock* was shut down because of its clear support for unions and its hostile characterization of American corporations").

<sup>88</sup> See Hiram (Chub) Sherman, "The Fina and Lively Arts" in Studs Terkel, *Hard Times: An Oral History of the Great Depression* (New York: Pantheon Books, 1970) 413 at 415–17 (Hiram Sherman recalling the staging of *The Cradle Will Rock*).

<sup>89</sup> See Ola Maie Foushee, "North Carolina's Community Arts Centers" in John Franklin White, ed, *Art in Action: American Art Centers and the New Deal* (Metuchen, NJ: Scarecrow Press, 1987) 158 at 161.

<sup>90</sup> See Dan E Burke, "The Utah State Art Center", in White, *supra* note 89, 145 at 148 (noting that citizens of Price, a small town located near Helper, were so impressed with Helper's commitment to the arts they invited the Director of the Helper Art Center to speak to their city commission about affordable ways to develop their own art centre).

go off to make art, their whereabouts monitored by spot checks.<sup>91</sup> Despite the conflicts between bureaucracy and art, some of the most iconic art of this period, like the photographs of Dorothea Lange, were made on the federal payroll.<sup>92</sup>

As a baby boomer growing up in the world the New Deal left us, I was offered art, dance, drama, and music instruction free of charge, in school and at neighbourhood recreation centres. I performed on stages that were literally built by workers employed by the WPA, creating a sense of entitlement: healthy communities provide access to the arts to all people, regardless of age, ability, or wealth. I played Persephone before I ever understood that she was part of a canon of the classics. I learned to plié before I knew French was a language. I walked to ballet lessons at the recreation centre on Queen Anne Place in Los Angeles, on my own second grade legs, and I signed up without any parent involved. The New Deal made it normal to do this. Reaganomics and neoliberalism replaced it with a new norm of slashing public services and moving to privatization. If my post-Reagan children were to have dance, or music, or art in second grade, I had to find it, enroll them, pay, and chauffeur.

When we moved to Hawai'i, one of my children went to a public school with an experimental curriculum that included art and music for every child, every day.<sup>93</sup> How sad that the arts have gone from entitlement to experiment. Sadder still, I report to you this experiment is a resounding success. The students at this school outperform their income-matched peers in schools with the traditional curriculum, in test scores, academic achievement, matriculation to college, and, not surprisingly, lifelong commitment to the arts.<sup>94</sup> We have data that shows keeping art in children's lives makes them less likely to make the dreaded bad choices, and

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<sup>91</sup> See Hill, *supra* note 80 (“[i]n New York City, in the first years of the Project, an artist was required to go from his home each day to a central location and sign in by 9 a.m.” at 197).

<sup>92</sup> See *ibid* at 76–77 (stating that another government agency known as the Farm Security Administration hired photographers, including Dorothea Lange, to “record the lives of agricultural workers, including sharecroppers of the South and migrant families who had been uprooted from their ancestral homes by drought and economic hardship” at 76); George P Elliott, “On Dorothea Lange” in *The Museum of Modern Art, New York, Dorothea Lange* (Garden City, NY: Double Day, 1966) (noting that Dorothea Lange did her most iconic photography while working for the FSA at 8).

<sup>93</sup> For a description of the academic program, see University Laboratory School, “About ULS”, online: <[universitylaboratoryschool.org/about](http://universitylaboratoryschool.org/about)> (“[a]ll students enroll in a common curriculum by grade-level cohort that includes daily instruction in English language and literature, history and social science, natural science, mathematics, visual arts and performing arts”).

<sup>94</sup> See *ibid*. See also “Hawai'i Public School Chart 2017”, *Honolulu Magazine* (April 2017), online: <[www.honolulumagazine.com](http://www.honolulumagazine.com)>.



increases neurons available for things like calculus and literature.<sup>95</sup> But art is now in the private realm. You get it if you pay for it.

An alternative vision has existed for as long as the fetish of the free market has existed: communal luxury. Kristin Ross's book by that title discusses the ideology emanating from the lived experience of the Paris Commune.<sup>96</sup> The artisan, the artist, and the farmer, in this view, are all entitled to do their work at the level of art, imbuing the hand's labour with dignity. The work, collectively supported, and collectively consumed

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<sup>95</sup> See generally Katharine Smithrim & Rena Upitis, "Learning Through the Arts: Lessons of Engagement" (2005) 28:1-2 *Can J Education* 109 at 121–23 (finding that students in a Learning Through the Arts program had a positive effect on mathematics test achievements); Jayne M Standley, "A Meta-Analysis on the Effects of Music as Reinforcement for Education/Therapy Objectives" (1996) 44:2 *J Research Music Education* 105 at 124 (finding music as a highly effective motivator for increasing positive behaviour and decreasing negative behaviours); Swathi Swaminathan & E Glenn Schellenberg, "Arts Education, Academic Achievement and Cognitive Ability" in Pablo PL Tinio & Jeffrey K Smith, eds, *The Cambridge Handbook of the Psychology of Aesthetics and the Arts* (Cambridge: Cambridge University Press, 2014) 364 (reviewing literature documenting positive effects of arts training on academic achievement, general cognitive ability, language processing, and visuospatial skills and noting that positive effects are observed even when IQ and socioeconomic status are controlled for). For literature supporting the connection between art education and improved performance in mathematics, see generally Richard Allen Baker, Jr, *The Relationship Between Music and Visual Arts Formal Study and Academic Achievement on the Eighth-Grade Louisiana Educational Assessment Program (LEAP) Test* (PhD Thesis, Louisiana State University, 2011) [unpublished]; James S Catterall, Richard Chapple & John Iwanaga, "Involvement in the Arts and Human Development: General Involvement and Intensive Involvement in Music and Theatre Arts" in Edward B Fiske, ed, *Champions of Change: The Impact of the Arts on Learning* (Washington DC: Arts Education Partnership, 1999) 1; Barbara H Helmrich, "Window of Opportunity? Adolescence, Music, and Algebra" (2010) 25:4 *J Adolescent Research* 557.

<sup>96</sup> See Ross, *supra* note 51 at 39, 50–51 ("[a] lived experience of 'equality in action,' the Commune was primarily a set of dismantling acts directed at the state bureaucracy and performed by ordinary men and women" at 39). Ross describes how the Commune broke down social divides:

More important than any laws the Communards were able to enact was simply the way in which their daily workings inverted entrenched hierarchies and divisions—first and foremost among these the division between manual and artistic or intellectual labor. The world is divided between those who can and those who cannot afford the luxury of playing with words or images. When that division is overcome, as it was under the Commune, or as it is conveyed in the phrase "communal luxury," what matters ... are the capacities set in motion (*ibid* at 50).

The Commune also demonstrated a marked departure from the state's influence over artistic expression: "The Federation envisaged liberty for the arts as the autonomy of art and artists vis-à-vis state power: it instituted total freedom from state subsidy, which had been used throughout the Second Empire as a means of promoting a particular artist or a particular theater over another" (*ibid* at 51).

was owned by no one and everyone at once. From this work, beauty would surround us in all things—beautiful tools, beautiful orchards, beautiful tables, beautiful chairs, beautiful knives, and beautiful forks. This idea—of beauty in the items ordinary people use in their lives, and elaborate art in the places where they gather, reflecting nature and honoring the hand—has pulled my eye all my life. It is the amazing tea rooms of MacIntosh,<sup>97</sup> the curvaceous metal work of the Glasgow Girls,<sup>98</sup> the handmade books of William Morris,<sup>99</sup> the swirls of the Vienna Secession.<sup>100</sup> We are entitled to beautiful spaces, and no academy will dictate to us what art is. A teapot is art. A garden is art.

An orchestra made from the waste stream is art. And what it is singing to you, with its complaining voice, is a version of constitutionalism.

The orchestra says yes to those portions of the liberal ideal that protect individual expression and the dream of each person valued and shielded from the worst impulses of statism. Long ago, I started my journey as a theorist in the little corner known as the critique of the critique of rights.<sup>101</sup> Then, as now, the primary call of subordinated communities

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<sup>97</sup> See Perilla Kinchin, *Taking Tea with Mackintosh: The Story of Miss Cranston's Tea Rooms* (San Francisco: Pomegranate, 1998) at 49. Kinchin describes the tea rooms:

They became important meeting places, especially the smoking rooms where businessmen came for their morning coffee, a habit long believed to be crucial to wealth production in Glasgow. Every clerk had his favorite retreat where he could read the papers and play dominoes or billiards, all for the price of a twopenny coffee. The only danger was encountering his employer—for the tea rooms were in general remarkably democratic places (*ibid*).

<sup>98</sup> See e.g. Jude Burkhauser, “The Glasgow Style” in Jude Burkhauser, ed, “*Glasgow Girls*”: *Women in Art and Design, 1880–1920* (Edinburgh: Canongate, 1993) 81 at 85, 102–05 (examining the influence of the conventionalized female form on the Glasgow Girls and the “geometric stylised flower form” that was incorporated into articles such as metalwork, at 102).

<sup>99</sup> See e.g. Morris, *supra* note 22. Morris describes the “decorative arts” as:

A very great industry indeed, comprising the crafts of house-building, painting, joinery and carpentry, smiths’ work, pottery and glass-making, weaving, and many others: a body of art most important to the public in general, but still more so to us handicraftsmen; since there is scarce anything that they use, and that we fashion, but it has always been thought to be unfinished till it has had some touch or other of decoration about it (*ibid* at 32–33).

<sup>100</sup> See e.g. Victoria Charles & Klaus H Carl, *The Viennese Secession* (New York: Parkstone International, 2014) (discussing the shock Gustav Klimt’s “exotic ornamentation” garnered at the 14<sup>th</sup> exhibition of the Secession in 1902, at 117).

<sup>101</sup> See Matsuda, “Looking to the Bottom”, *supra* note 25. This volume of the *Harvard Civil Rights-Civil Liberties Law Review* (Volume 22, titled “Minority Critiques of the Critical Legal Studies Movement”) represents the origin of critical race theory, then located as an intervention into the deconstructionist left analysis presented by the critical legal

in my country was “stop killing us”, and it remains the ultimate negative right.<sup>102</sup> I support the demand that the state may not take a life, and continue to support basic rights claims that subordinated people, out of their experience, make. This support is not intended as a valorization of rights talk,<sup>103</sup> but as a recognition that vulnerable humans need protection, and law is potentially constitutive of a culture of protection. I would also like to add a new footnote: the way to really make all citizens entitled right-holders, protected from the state, is to embed, through lived practice, aspirational definitions of full citizenship into the *Constitution*.<sup>104</sup> The New Deal practice of providing jobs and support for the arts, lifted some of the least advantaged citizens, allowing them to walk and live as rights-holders, and to self-present as creative, intelligent selves entitled to respect. Elites have never worried about things like police killings because their elite status automatically warns state actors against overreaching. The aspirational goal of economic justice is linked to the goal of effective rights-claiming for all.

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studies movement. I would like to say here: both sides, critical legal studies and critical race theory, were right. It was a dialectical relationship.

<sup>102</sup> See Laura Hayes, “Black Lives Matter Leader Recounts Group’s Beginnings”, *Furman News* (18 September 2015), online: <news.furman.edu> (“[p]eople were just fed up,’ [Al-icia] Garza said ‘and wanted to do something about it... [we came up with] an idea whose time had come with a basic demand, stop killing us’”).

<sup>103</sup> On the experience and approach of lawyers challenging the status quo of rights and power, see Matsuda, “Looking to the Bottom”, *supra* note 25 at 338 [footnotes omitted]:

Non-white lawyers have passionately invoked legal doctrine, legal ideals, and liberal theory in the struggle against racism. Their success is attributable in part to the passionate response that conventional legalisms can at times elicit. These lawyers recited the Bill of Rights and demanded their participatory share of the American polity. At the same time, however, they maintained disrespect for claims of legality that accompanied oppressive acts. Such lawyers needed no reminder that the Constitution is merely a piece of paper in the face of the monopoly on violence and capital possessed by those who intend to keep things just the way they are.

How could anyone believe both of the following statements?

- 1) I have a right to participate equally in society with any other person.
- 2) Rights are whatever people in power say they are.

One of the primary lessons CLS can learn from the experience of the bottom is that one can believe in both of those statements simultaneously, and that it may well be necessary to do so.

<sup>104</sup> See Frank I. Michelman, “The Constitution, Social Rights, and Liberal Political Justification” (2003) 1:1 *Intl J Constitutional L* 13 at 22 (“I suggest there exists at least one appealing argument to the conclusion that a *constitution* ought, as a moral matter, to affirm the claims of individuals to be assured of satisfaction of certain material needs, by the state if necessary, on reasonable conditions of effort and cooperation”). See also West, *supra* note 24.

The peace orchestra, therefore, says no to an impoverished *Constitution* with no room for positive rights.<sup>105</sup> Effective participation in the liberal ideal of self-governance requires literacy, internet access, and basic needs of survival met. It requires that citizens possess a sense of their self-worth, and the skills and habits of self-expression. The great artist activists in US history—Paul Robeson, Nina Simone, Harry Belafonte, Ruby Dee, Ossie Davids come to mind as examples—used their artistic training to help them stand on the stage of history as compelling advocates for freedom. I am inspired by their lives to adopt a New Deal vision of liberty that includes the right to meaningful labour, a living wage, artistic participation, and lifelong learning.

The ultimate process failure is that we all die. We stumble along for another decade or two with small, reformist goals in lieu of visionary, utopian ones, until we render this planet uninhabitable. The rights-based goals of liberalism—orderly state functioning, due process, rule of law—require drastic intervention to end wealth inequality and unrestrained markets, or we lose it all—the rights, the dreams, the courts, the habitable planet—in one fell swoop.

Enter, the visionaries. It is no accident that environmentalists have decided to start chaining themselves together to block the pipelines at the same time that Black Lives Matters brothers and sisters are chaining themselves together to shut down freeways.<sup>106</sup> It is no accident that the

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<sup>105</sup> While typically understood as non-substantive, I believe an empirical understanding of what human beings as social animals require in order to exercise the full rights-holding personhood envisioned in the *Constitution* points to a right to supported expression, including support for the exercise of artistic expression. For those who require specific doctrinal citation supporting a right to art in the US *Constitution*, the most obvious is the First Amendment right to expression, and the Fourteenth Amendment right to due process and equality (US Const amends I, XIV). Also relevant are the penumbra of rights to personhood and privacy found to reverberate throughout the *Bill of Rights*. See Const amends I–X. See e.g. *Roe v Wade*, 410 US 113 at 152, 93 S Ct 705 (1973):

The Constitution does not explicitly mention any right of privacy. In a line of decisions ... the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in ... the penumbras of the Bill of Rights.

See also *Griswold v Connecticut*, 381 US 479 at 483–84, 85 S Ct 1678 (1965) (“the First Amendment has a penumbra where privacy is protected from governmental intrusion. ... [S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance”). See also Samuel D Warren & Louis D Brandeis, “Right to Privacy” (1890) 4:5 Harv L Rev 193 at 199.

<sup>106</sup> See Christopher Brennan, “Black Lives Matter Protest Shuts Down Bay Bridge, Leads to 25 Arrests”, [*New York Daily News* (19 January 2016), online: <[www.nydailynews.com](http://www.nydailynews.com)>.

Leap Manifesto<sup>107</sup> and the Black Lives Matter Platform<sup>108</sup> came out in the same year, both providing radically reformulated visions of our relations to capital and to the state. The lunatics are the ones who think we can get by with small adjustments and paltry concessions to a worldwide demand for justice. The clear-headed ones are the visionaries with bold demands.<sup>109</sup>

They are doing this now, out of radically different experiences, because global capital has globalized our pain. Whether it is Indigenous peoples fighting to protect sacred lands, migrants fighting for legal recognition, Black citizens in the United States facing extra-judicial killings, or climate scientists panicking about polar ice melts, we all face the same corporate capture of our governments that has made state actors unresponsive to clear citizen demands. Thus, our visions are converging. Compare, for example, the Leap Manifesto and the Black Lives Matter proposals:

Redistribute wealth through progressive taxation: *Black Lives Matter* and *Leap Manifesto*.

End capital punishment: *Black Lives Matter*.

100% clean economy: *Leap Manifesto*.

Invest in community-based sustainable energy: *Black Lives Matter*.

Universal basic income: *Black Lives Matter* and *Leap Manifesto*.

Remove corporate money from politics: *Black Lives Matter* and *Leap Manifesto*.

Bring back local agriculture: *Leap Manifesto*.

Full funding for lifelong learning: *Black Lives Matter*.

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<sup>107</sup> See “The Leap Manifesto: A Call for a Canada Based on Caring for the Earth and One Another” in Naomi Klein, *No Is Not Enough: Resisting Trump’s Shock Politics and Winning the World We Need* (Chicago, IL: Haymarket Books, 2017) at 267–71; “The Leap Manifesto: A Call for a Canada Based on Caring for the Earth and One Another”, *Leap Manifesto*, online: <<https://leapmanifesto.org/en/the-leap-manifesto>>.

<sup>108</sup> See “Platform”, *The Movement for Black Lives*, online: <<https://policy.m4bl.org/platform/>>.

<sup>109</sup> Indeed, the Leap Manifesto rejects characterization of its plan as utopian. See “Frequently Asked Questions about The Leap Manifesto”, *Leap Manifesto*, online: <<https://leapmanifesto.org/en/faq/>> (“[a]re the policies advocated in the Leap Manifesto ‘utopian’? Hardly. Many of the policies—like a speedy transition to renewables, massive green job creation, and more democratic control over our energy—are already being implemented in other countries”).

Renegotiation of trade agreements to prioritize interests of workers and communities: *Black Lives Matter*.

End all trade deals that interfere with our attempts to rebuild local economies: *Leap Manifesto*.

We could create jobs while we relearn how to feed ourselves locally and repair our broken planet. We could end the endless war and send new armies of teachers, doctors, engineers, and—yes—lawyers, out into the world to create places of solidarity instead of places of deepening rupture. A trillion dollars into the endless war on terror and we are less, not more, safe. There is another way.

I found it easier to say this in an art performance than in a law review article. Law is the profession of doubters who poke holes in rhetoric and point out gaps in evidence: “How do we know that after spending a trillion dollars on your arbitrary idea of a peace army, we would end up in a better place?”

A critical move we learn in law school is to respond to a destabilizing question with a more incisive question. I do not have a formula to prove to you my idea is better, but I have a trillion dollars in sunk costs, a disgraceful pile of bodies, and the daily news to prove that we are not safer under your plan. The certainty in the voices that took us to war barely covered the reality that there was no plan for success. You have no argument that their way worked, are you suggesting we continue it?

There is no requirement that we have a complete blueprint of what one hundred percent clean energy, or restorative justice, or aid before bombs, or neighborhood art centres for all, or any other utopian suggestion will look like. The defenders of the status quo have no alternative blueprint. It is enough that we start the hard work of the blueprint, looking at past models for ideas and self-criticism.

## VII. Problematizing Art as a Right

A utopian project is an invitation to critique. Imagining creative futures invites risk-taking, best accompanied by tales of caution. Rather than pretending one has all the answers, the better course is to admit that this is a collective journey, inviting challenge and self-criticism, so that we can dream smarter and implement dreams with appropriate humility.

Let me close with a self-critique of the idea of art as a right. Art as a right opens a slew of post-modern inquiries: what is art, who is an artist, who gets to decide? I start with the notion of respect for communities—communities of artists, communities of art learners, and art consumers. I trust artists to hold a generous view of “what is art,” and to work through

the bitter fights over legitimacy. I have met talented and passionate artists whose work almost never ends up in museums: those who carve duck decoys, those who paint hotrods, those who quilt by hand. All of these art practices have known champions and standards of excellence. I would include all these practices, and say we are better off for it. The divide between high and low might fade, or we might decide, collectively, that some art really belongs in the vaults that preserve them for the ages. We might include the lowrider in the treasures exalted for display, as the Smithsonian once did in an exhibit I will never forget.<sup>110</sup>

I trust viewers to know what they want, but I also know, historically, that people change their minds. Early art education and exposure to making, viewing, criticizing, thinking critically, and situating historically might stave off the problem the WPA had with some rural communities flocking to “[p]aintings from New England,” and bitterly rejecting “modern art.”<sup>111</sup>

Another challenge is waste and quality control. Handing out arts grants will mean that some artists will produce amazing work and others will not. For the most part, the history of art funding has shown significantly less waste than, say, military contracting.<sup>112</sup> Most artists report,

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<sup>110</sup> See *Dave's Dream*, Washington DC, Smithsonian Collection (1999.0567.01).

<sup>111</sup> See Nicholas A Calcagno & Barbara K Scott, “The Federal Gallery System in Oklahoma: A Successful Experiment” in White, *supra* note 89, 37 at 50–51:

Extension galleries in the smaller communities presented an exaggerated version of the educational problems of the larger galleries, particularly Oklahoma City: taste was rather provincial and unsophisticated by the standards of the East Coast and the public was unable to cope with the ‘modernity’ of some of the circulating shows. ...

...

One of the most popular shows in the WPA circuit was “Paintings from New England” (WPA #487).

<sup>112</sup> See Martha Minow, “Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy” (2005) 46:5 Boston College L Rev 989 (observing that, and providing examples of how, the United States government’s recent practice of privatizing military functions without effective oversight not only leads to waste and corruption, but also compromises democratic norms, and providing specific examples of military waste scandals involving private contractors in the United States government’s response to the 9/11 terrorist attacks: e.g., “Congressional and media sources charge the Halliburton Company ... with overcharging \$61 million worth of gasoline and for charging \$186 million for meals not actually served as part of its \$10 billion worth of contracts with the Department of Defense” at 990). See also Deborah D Avant & Renée De Nevers, “Military Contractors & the American Way of War” (2011) 140:3 *Daedalus* 88 (“[i]nadequate contract staffing and oversight have been important complaints in both Iraq and Afghanistan and have been tied to numerous problems—from poor performance to waste, fraud, and abuse” at 94); Juanita M Rendon & Rene G Rendon, “Procurement Fraud in the US Department of Defense: Implications for Con-

with a body of work to support it, a felt imperative to make art. They cannot stop. It is their breathing. The danger that we will pay them to hang out in bars is overstated. The possibility that we might not like what we pay for is real, and democratic systems for selection and oversight, with strong emphasis on artistic freedom, have worked through this issue in the programs of public funding that do exist. The big fights over unappreciated monoliths, like Richard Serra's iron wall in the plaza,<sup>113</sup> are part of our democratic work as artists and art-consuming citizens, to dive into pluralism and contested aesthetics. The fights themselves are valuable practice.<sup>114</sup>

Universal art education will change how we wade into the roiling art waters. When workers are artists too, with experience with art exhibitions and art history, the battle over elite versus non-elite notions of artistic value will shift. The current art world affrays over appropriation and blackface, for example, reflect an investment-driven art market and historic structures of racial exclusion in the curatorial ranks more than they

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tracting Processes and Internal Controls" (2016) 31:6-7 *Managerial Auditing J* 748 ("[t]he Government Accountability Office (GAO) has identified DoD contract management as a high risk area ... due to its greater vulnerabilities to fraud, waste, abuse and mismanagement" at 749); US, Commission on Wartime Contracting in Iraq and Afghanistan, *Transforming Wartime Contracting: Controlling Costs, Reducing Risks: Final Report to Congress* (Washington, DC: CWC, August 2011) ("[a]t least \$31 billion, and possibly as much as \$60 billion, has been lost to contract waste and fraud in America's contingency operations in Iraq and Afghanistan" at 1); US, Government Accountability Office, *Contract Management: DOD Vulnerabilities to Contracting Fraud, Waste, and Abuse* (GAO-06-838R) (2006) ("DOD continues to face vulnerabilities to contracting fraud, waste, and abuse due to weaknesses in the areas of sustained senior leadership, capable acquisition workforce, adequate pricing, appropriate contracting approaches and techniques, and sufficient contract surveillance" at 6).

<sup>113</sup> See Patty Gerstenblith, *Art, Cultural Heritage, and the Law: Cases and Materials*, 3rd ed (Durham, NC: Carolina Academic Press, 2012) at 204–05:

In 1981, the General Services Administration (GSA) commissioned the sculptor, Richard Serra, to create a sculpture for the Federal Plaza in lower Manhattan. ... Serra's sculpture consisted of an arc of steel 120 feet long, twelve feet tall, and several inches thick that cut across the plaza concealing part of a decorative stone pavement and making passage among the federal buildings difficult. The sculpture became a matter of considerable controversy both among the public and among those who worked in the buildings. The GSA decided to remove the sculpture barely four years after its installation. Serra sued the government for violation of his First Amendment right to free expression and his right to due process.

<sup>114</sup> For my response to some recent examples of contested aesthetics, see Eunsong Kim & Gelare Khoshgozaran, "Mari Matsuda: Founding Critical Race Theorist, Activist and Artist", *Contemporary* (30 April 2017), online: <contemporary.org>.



reflect any competing concepts of artistic value.<sup>115</sup> The more equality we bring to the arts, the more interesting and useful our aesthetic conflicts will become. Fights over artistic value, once we overcome maldistribution of power, are enlightening fights. You will want to grab a front-row seat.

Next, there is the debate over what actual form these shared spaces of artistic production will take. Autonomous, local, communal, and spontaneous? Funded, promoted, and regulated by some larger federation? National? International? And what will become of the State? Who, if anyone, will enforce safety and accessibility at the local art centre, and does it make sense to train a cadre of teachers and organizers in the specifics of maintaining safe workspaces and teaching to all levels of talent? Will the local art centre become a precious and isolated harbor of escape, or will it have a connection to a broader struggle to remake the world into a beautiful and just place? And how will we do this if we spend all our time arguing about the chore chart in the shop?

Anyone who has worked with others to accomplish a major collective project knows that danger of sinking deep into the weeds of making it go. When I was twenty years old, my father fixed up a broken offset press and turned it over to young organizers who used it for pamphlets, newsletters, posters, and notices for everything from land struggles to ads for the local food co-op. I spent hours volunteering on the press, happy as the youngest one allowed to hang out with the doers and intellectuals the press attracted, but I watched the main printer become exhausted from the actual work of printing and negotiating task distribution. Years later, I heard he had dropped out of movement work. Perhaps doing everything collectively, by hand, with no revolution anywhere on the horizon, took the fight out of him. Discernment between wheel-spinning and world-making is required.

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<sup>115</sup> See generally Chin-tao Wu, *Privatising Culture: Corporate Art Intervention Since the 1980s* (London: Verso, 2002) (discussing corporate entanglement and profiteering in the art world); Doreen St Félix, “The Lenny Interview: Kimberly Drew, aka @MuseumMammy”, *Lenny* (27 November 2015), online: <[www.lennyletter.com/culture/interviews/a173/meet-the-instagram-star-elevating-black-contemporary-art](http://www.lennyletter.com/culture/interviews/a173/meet-the-instagram-star-elevating-black-contemporary-art)> (“[t]here’s all this art history that I missed, there’s all this art history that has been erased, there’s all this art history that has been inaccessible...”); WITW Staff, “Kimberly Drew’s Curation Brings Black Artists to the Forefront”, *The New York Times* (30 November 2015), online: <[www.nytimes.com](http://www.nytimes.com)>; Eunsong Kim, “Susan Cahan’s Mounting Frustration: The Art Museum in the Age of Black Power”, *Contemporary* (30 June 2016), online: <[contemporary.org](http://contemporary.org)>; Claire Voon, “Dispute Over Asian American Stereotypes Gives Way to Dialogue at an Art Fair”, *Hyperallergic* (3 March 2017), online: <[hyperallergic.com](http://hyperallergic.com)>; Robin Pogrebin, “It’s a Diverse City, but Most Big Museum Boards Are Strikingly White”, *The New York Times* (22 August 2017), online: <[www.nytimes.com](http://www.nytimes.com)>.

Whatever little oasis we create has to remain tied to the big vision, shared commitments, and openness to a wider world. I am a tentative federalist. I like local control, but also believe in the knowledge and practical applications of scale and of standards. I have seen how in one's comfortable local shop, it is easy to go lax on safety rules, since it has been a long time since the last explosion. The traveling inspector who has seen multiple sites of carnage is much more attuned to the dangers and can remind us about spark suppression. There are thoughtful students of planning, design, and bureaucracy who have ideas about how to keep true to a wider vision, while still maintaining the discovery, love, and spontaneity that arise at the local commune.

There are many specificities of implementation we will confront as we ask how to teach and bring art to every corner, and as with any ambitious endeavour, we will work through the specific challenges, preferably with intelligence and generosity. As constitutional theorists our job is to point out complexities and suggest possible responses, weaving between identification of the challenges and exaltation of the beautiful possibilities.

And finally, one can ask why make an orchestra, when what we need is a revolution. Why art, when Rome is burning? I am reminded of Grace Lee Boggs, student of C.L.R. James, and herself a classically trained philosopher, who could argue base and superstructure until she took you down.<sup>116</sup> At the end of her life in her beloved Detroit, she was immersed in bike co-ops and community gardens. A wicked theorist with a commitment to revolutionary class struggle was teaching children how to raise their own food. She was no advocate of self-help, charity, or one-step-at-a-time, but there she was handing out shovels. When the city is broken, and people are hungry, giving them the means to feed their neighbours and themselves, is the chance to live the imaginary. From the artists, and from Grace, I learned this:

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<sup>116</sup> See Grace Lee Boggs, *Living for Change: An Autobiography* (Minneapolis: University of Minnesota Press, 1998), ch 3. For an example of the depth of Boggs's theoretical understanding, consider this anecdote from her autobiography:

I will never forget the day that Raya came back from the library with the news that she had found a Russian translation of the *Economic and Philosophic Manuscripts* written by Marx in 1843–44 when he was twenty-four years old. Unknown in the United States at the time, these essays make it unmistakably clear that Marx's overriding concern was the human essence of the workers, not property relations. Subsequently, I translated three of the essays from the original German into English, and in 1947 the Johnson-Forest Tendency published the first English translation in the United States (*ibid* at 58–59 [footnote omitted]).

See also *American Revolutionary: The Evolution of Grace Lee Boggs*, directed by Grace Lee (2013) (a biographical film showing, *inter alia*, Grace Lee Boggs's participation in community gardening amidst the ruin of a post-industrial city).

If you make a revolution by tasting it, feeling it, loving it, you enter knowing what you are fighting for. You enter with love.

### VIII. Make Your Revolution with Art in Your Hand

A pacifist once said: “if you make your revolution with a gun in your hand, you will have a gun in your hand after the revolution.”<sup>117</sup>

I am a constitutionalist because I want to make a revolution with law in my hand. I am an artist because I want to make a revolution with art in my hand. And after the revolution, I want both law and art in my hand.

This is what I learned by spending nine months in the world of artists: they are natural-born revolutionaries. They have already chosen the call of something outside the market, or more typically, had that experience of having something outside the market choose them.

I sat next to a young man and watched him start sketching in a notebook before class began. He sketched the desks, the people, anything he saw.

“Have you always done that?” I asked.

“Always,” he said, grinning.

Among the artists, I read aloud a Dada manifesto of revolutionary tenor, and not one of them thought it was silly. “I sent it to my mother, and she loved it,” one told me. Mom, and her artist child, are members of a growing tribe of the aspirationally willing. From the Leap Manifesto to Black Lives Matter, to uprisings and wellsprings all over the planet, a new world emerges of those who say: “we choose love over war, sharing over greed, and making over taking.”

Whether in the community garden, the bike co-op, or the circle of art students gathered for critique, we have in this paltry world real experiences of a better one. My body learned the feeling of anxiously putting the product of one’s hand before others and seeing their amazed, expletive-tinged responses. “[expletive], Mari, you made that?” It is a feeling better than anything, anything the market offers. I believe anyone who could feel it—that moment when something you made brings gasps of delighted amazement to someone who encounters it—would choose it over acquisitive hoarding, war, or hate. Give them all the creative commons.

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<sup>117</sup> A note from the author: After an exhaustive search, I could not find attribution for this statement found in my lecture notes for the class Peacemaking for Lawyers. I have come to the conclusion that I am the author. It is possible that I am mistaken, and that I am failing to attribute another speaker. If anyone does have a citation to offer, the editors would love to hear from you.

## IX. A *Constitution* of Aspiration

The documents—your country’s and mine’s—that form the rules of engagement for politics have a lot of work coming their way. My commitment to doing the work through the available documents does not reflect deluded acculturation to the superstructure of empire. The documents themselves contain the contradictions and exploitable fault lines of empire. I choose to mine those fault lines because I do not want my dream of art collectives to end with thousands of artists lined up against walls and shot by someone they considered a fellow citizen.

In my hometown, the American Civil Liberties Union (ACLU) fought a battle to force the city to notify the unhoused before destroying their cardboard homes and worldly goods.<sup>118</sup> Every week, the city now announces, in writing, planned “sweeps” so people have notice before their tents and hovels are cleared. The ACLU has not, thus far, been able to win a claim of the right to shelter.<sup>119</sup> The absence of housing rights creates a

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<sup>118</sup> See *Martin v Honolulu (City and County of)* (16 September 2015), D Hawaii 1:15-cv-00363 (class action complaint), online: ACLU <[https://acluhawaii.files.wordpress.com/2015/09/martinvc\\_complaint.pdf](https://acluhawaii.files.wordpress.com/2015/09/martinvc_complaint.pdf)>; *Martin v Honolulu (City and County of)* [Settlement Agreement], (18 May 2016), D Hawaii, 1:15-cv-00363-HG-KSG, online: ACLU <<https://acluhawaii.files.wordpress.com/2016/09/final-martin-settlement-english-with-signatures.pdf>>. The settlement arose from a class action lawsuit brought by homeless individuals against the City and County of Honolulu. The class action alleged that the City disposed of property belonging to unhoused citizens during enforcement of “Sidewalk Nuisance Ordinances” or “sweeps”. Plaintiffs alleged such sweeps violated their Fourth Amendment rights against unreasonable seizures of property and Fourteenth Amendment rights against deprivation of property without due process of the law.

<sup>119</sup> On the prospects of a right to housing, see Eric S Tars & Déodonné P Bhattarai, “Opening the Door to the Human Right to Housing: The Universal Periodic Review and Strategic Federal Advocacy for a Rights-Based Approach to Housing” (2011) 45:3 *Clearinghouse Rev J Poverty L & Society* 197 at 197 [footnote omitted]:

While the reality for the millions of Americans facing foreclosure, eviction, or homelessness remains grim, these policy statements are more than rhetorical changes. They reflect a recognition that the right to housing, based on the Universal Declaration of Human Rights ... is relevant to domestic issues ranging from our response to the foreclosure crisis to the criminalization of homelessness. A growing movement for the human right to housing made up of lawyers and grassroots advocates worked for this recognition as the groundwork for a new kind of housing policy, one based on our obligations to realize housing as a fundamental right.

See also Michelman, *supra* note 104 at 22:

There is something about the particular moral point or purpose of *constitutions*, from which it follows that a constitution, in particular, is morally defective—it fails of its moral purpose—by reason of its lack of social-rights guarantees; and that this is so regardless of what any of us individually, outside

contradiction so wide that we can write a positive rights constitution comfortably within it. If you aren't learning to do that as a lawyer, you are not ready for the revolution that is coming, with or without you.

We, the people, created these governments, as the *Constitution of the United States* says, to secure the blessings of liberty for ourselves and our posterity. Liberty was the goal, and liberty has to mean more than the right to receive written notice before the only place you have to sleep is cleared from the sidewalk.

There is a bounding majority of us ready to ask for more: for the liberty to thrive and flourish in a community of mutual care and creative production.

I made an orchestra so outside of what is normally presented on this stage at the venerable McGill University, that I was worried I could not bring it to you. This is the season, however, of rewriting the possible. We did come, the instruments and I, to ask you to consider great, balletic leaps of constitutional interpretation, that will stop human extinction by inscribing, in our foundational texts, our capacity for love.

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Appendix: Mari Matsuda, *Manifesto of Radical Intersubjective Collectivity and Imagined Possibility* (2015).

