

ŽIŽEK/QUESTIONS/FAILING

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I. INTRODUCTION

The philosopher Slavoj Žižek is known above all for his jokes and his ability to popularize high theory. His much-noted rock star status among graduate students across liberal arts disciplines undoubtedly owes much to his proclivity for explaining difficult theoretical concepts in an accessible and humorous way. This reputation is not at all undeserved. In his hands, French psychoanalyst Jacques Lacan ceases to be an obscure psychoanalytic oracle and becomes a key for unlocking the secrets of innumerable cultural texts.¹

In this article I am primarily concerned with presenting Slavoj Žižek² as a legal theorist. Žižek has been a valuable contributor to critical theory and deserves a place in the pantheon of legal thinkers.

While his diverse writings are often relegated to other disciplines, they also position him as an important contributor to law and public discourse. I seek to illuminate how he mediates and interrogates the law by demonstrating how his scholarship is important to the lives of legal thinkers, questions of success and the law, capitalism, political practice, and terrorism. Because Žižek's work is interdisciplinary and expansive, this article will provide a starting point for further analysis of these subjects with the hope of opening up a broader discursive space where legal scholars might more readily and critically engage Žižek's writings. The article will also be written using Žižekian analysis, showing

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1. Todd McGowan, *Serious Theory*, 1 INT'L J. ŽIŽEK STUD. 58, 58 (2007), available at <http://zizekstudies.org/index.php/ijzs/article/view/23/44>.

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how Žižek can help us better investigate legal theory.

The legal academy must recognize his impact on the many other fields that inform legal analysis: philosophy, sociology, political science, and history. I hope to encourage broader acceptance of Žižek as a legal theorist and to encourage broader application of his work in legal studies. Legal scholars should investigate Žižek's conception of "the Law," his writings on law and (dis)order, and his criticisms of legal thought because without better understanding Žižek, legal scholars run the risk of alienating an ever-increasing number of critically minded law students, activists, and researchers. The study of law is increasingly interdisciplinary, taking into account the social sciences, religion, philosophy, art, history, and more. We must do all we can to not shy away from, but embrace, critical theorists who have influenced an increasing number of law students who come to law school with backgrounds in political theory, philosophy, English, linguistics, and psychology, and who can help inform our understanding of law and society. Lastly, readers must investigate the political to understand how progressive thought from progressive academics may be used to inform political action, something Žižek strongly advocates. In sum, this article will create broader discursive space for the application of Žižek's thoughts in the legal world.

Žižek is a political thinker, someone interested not only in the politics of the day, but also in political process. All law is political and participatory: law does not exist outside of politics. For this reason, Žižek's work is indispensable to legal analysis. Political action is more than voting, more than serving in any office, more than signing petitions. Every action has political implications. Participation within a legal framework is political. We are all political and this political action is manifested both on the micro-political and macro-political levels.

To understand Žižek is to understand the political and to understand the vast array of issues he has analyzed. He is not a legal scholar in the strictest sense of the phrase because his scholarship is much broader in its focus. He is a cultural critic, with broad ranging interests, who has commented powerfully on everything from Alfred Hitchcock³ to terrorism,⁴ media,⁵ and

3. See SLAVOJ ŽIŽEK, *EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT LACAN: BUT WERE AFRAID TO ASK HITCHCOCK* (Verso 1992).

4. Slavoj Žižek, Op-Ed., *Defenders of the Faith*, N.Y. TIMES, Mar. 12, 2006, at

humyn⁶ rights.⁷ Trying to encapsulate Žižek's potential significance to legal theory would be impossible in a text of this length. Instead, I set out to demonstrate, modestly, how some of Žižek's writing can shape current issues of legal import.

Žižek's broad influence and tremendous rise to popularity in the last twenty years makes him an important, although unfortunately misunderstood, voice in legal theory. Even though he may be unknown to many legal scholars, his work has had and should have far-reaching implications on the way we engage in politics and the way we think about current legal issues. By the end of this work, I hope that readers will gain an understanding of Žižek's contribution to legal theory and an appreciation of his critical lens as a tool for critical legal studies.

II. ŽIŽEK, LACAN, PSYCHOANALYSIS, AND POSTSTRUCTURALISM

To appreciate Žižek, one must have rudimentary understanding of the famous 20th-century French psychoanalyst Jacques Lacan.⁸ Lacan was a polymath who contributed significantly to psychoanalysis, literary theory, and philosophy. Lacan profoundly influenced the poststructuralists,⁹ including

A12, *available at* http://www.nytimes.com/2006/03/12/opinion/12zizek.html?_r=1&scp=1&sq=Defenders%20of%20the%20Faith&st=cse; see generally SLAVOJ ŽIŽEK, *TERRORISM AND COMMUNISM* (Verso) (2007) (describing terrorism as state violence).

5. See Slavoj Žižek, *The Family Myth in Hollywood*, 3 *CINEPHILE* 42, 44–46 (2007), *available at* <http://cinephile.ca/wp-content/uploads/2008/10/familymyth.pdf>; Slavoj Žižek, *Jack Bauer and the Ethics of Urgency*, *IN THESE TIMES*, Feb. 2006, at 57, *available at* <http://www.inthesetimes.com/article/2481/>.

6. This spelling is intentional. See Nick J. Scullo, "This Woman's Work" in a "Man's World": A Feminist Analysis of the Farm Security and Rural Investment Act of 2002, 28 *WHITTIER L. REV.* 709, 712 n.10 (2006) (discussing the uses of alternate spellings and why I choose to not use those alternate spellings in book, journal, and article titles).

7. See Slavoj Žižek, *Against Human Rights*, 34 *NEW LEFT REV.* 115 (2005); Slavoj Žižek, *Speech at Bard College: Human Rights and Its Discontents* (Nov. 15, 1999), <http://lacan.com/zizek-human.htm>; Slavoj Žižek, *The Obscenity of Human Rights: Violence as Symptom*, *LACAN*, 2005, <http://www.lacan.com/zizviol.htm>.

8. Jacques Lacan (1901–1981) was a French psychoanalyst who urged a return to the ideas of Sigmund Freud. He made considerable contributions to philosophy, literary theory, and psychoanalysis. See generally *JACQUES LACAN, ÉCRITS* (1966). For the journal *LACANIAN INK*, see *JACQUES LACAN, LACANIAN INK*, <http://www.lacan.com/lacan1.htm> (last visited Sep. 4, 2009).

9. While defining poststructuralism is inherently difficult, it may be useful to have some sort of working description to situate post-structuralism in a larger discursive context of criticism. Radford and Radford offer this description of post-structuralism:

Gilles Deleuze,¹⁰ Michel Foucault,¹¹ and Alain Badiou¹² (all theorists who have found their way into legal scholarship). Žižek is very much a student of Lacan and understanding Lacan is helpful in understanding Žižek.

Lacan's psychoanalysis has been greatly influential and much studied by legal scholars.¹³ Furthermore, psychoanalysis and the field of psychology have become increasingly relevant to legal discourse.¹⁴ Law and psychology courses are taught,¹⁵ texts¹⁶ are

Post-structuralism not only questions, but also continues, the central project of structuralism—the inquiry into the organizing principles of a language system. However, while structuralism posits that the language system can be described in an objective and scientific manner, post-structuralism suggests that such descriptions are themselves always highly contextual. Whereas de Saussure's structuralism was confident that the principles by which language is organized can be fully determined and described, post-structuralism calls into question all such assumptions and suggests that such conclusions are always fragile and open to subversion.

Gary P. Radford and Marie L. Radford, *Structuralism, post-structuralism, and the library: de Saussure and Foucault*, 61 *J. DOCUMENTATION* 60, 61 (2005).

10. Gilles Deleuze (1925–1995) was a French philosopher and a literary, film, and fine art critic. *See generally* GILLES DELEUZE & FÉLIX GUATTARI, *A THOUSAND PLATEAUS* (Brian Massumi trans., Univ. of Minn. Press 1987) (1980); GILLES DELEUZE & FÉLIX GUATTARI, *ANTI-OEDIPUS* (Robert Hurley et al. trans., Univ. of Minn. Press 1983) (1972).

11. Michel Foucault (1926–1984) was a French philosopher who wrote on issues as diverse as mental health, sexuality, prisons, and history. *See generally* MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977); MICHEL FOUCAULT *MADNESS & CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* (Vintage Books 1988) (1965); MICHEL FOUCAULT, "SOCIETY MUST BE DEFENDED": *LECTURES AT THE COLLEGE OF FRANCE 1975–1976* (David Macey trans., Picador 2003) (1997); MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHEOLOGY OF THE HUMAN SCIENCES* (Vintage Books 1994) (1971).

12. Alain Badiou (born 1937) is a French philosopher prominent in the anti-postmodern movement. *See generally* ALAIN BADIOU, *THE CENTURY* (Alberto Toscano trans. 2007) (2005); ALAIN BADIOU, *METAPOLITICS* (Jason Barker trans. 2005) (1998); ALAIN BADIOU, *DELEUZE: THE CLAMOR OF BEING* (Louise Burchill trans. 2000) (1997).

13. Psychology and the law has practically become passé in a wave of new law-and-something scholarship, but psychoanalysis has long flourished in legal theory. Across the socio-legal academy scholars have paid much attention to Freud, Lacan, and the question of mental disease or defect. *See generally* Jeanne Schroeder, *His Master's Voice: H.L.A. Hart and Lacanian Discourse Theory*, 18 *LAW AND CRITIQUE* 117 (2007); DAVID S. CAUDILL, *LACAN AND THE SUBJECT OF LAW: TOWARD A PSYCHOANALYTIC CRITICAL LEGAL THEORY* (1997); David S. Caudill, *Identifying Law's Unconscious: Disciplinary and Rhetorical Contexts*, 54 *WASH. & LEE L. REV.* 1075 (1997); Richard E. Redding, *Socialization by the Legal System: The Scientific Validity of a Lacanian Socio-Legal Psychoanalysis*, 75 *OR. L. REV.* 781 (1996).

14. Although psychology was previously separate from the law, psychoanalysis has become relevant to critically conscious legal minds because of increasing debate in legal circles on issues of responsibility and competence; the prevalence, or at least greater acceptance, of new defenses and psychological traumas (e.g., posttraumatic stress disorder);

consumed, specialized journals are popping up,¹⁷ law and psychology associations are thriving,¹⁸ and psychology majors are increasingly represented in this country's law schools.¹⁹ Jeremy Blumenthal has called the rush toward law and psychology a "craze,"²⁰ perhaps indicating that legal scholars ought to come to grips with this phenomenon if for no other reason than it is difficult to avoid. Žižek's writing, if we are to compartmentalize it, may best be situated into legal discourse through the study of law and psychology because of Lacan's tremendous influence.

Žižek is not a psychoanalyst, however; nor would it be appropriate to group him with the aforementioned poststructuralists. He has, in fact, distanced himself from at least one of these poststructuralists. In his ongoing debate with Judith Butler,²¹ Žižek has taken her to task for her understanding of Foucaultian poststructuralism, universality, gender identity, and

and a resurgent interest in French continental philosophy. See *infra* note 17.

15. A number of law schools offer law and psychiatry or psychology-related classes. These classes, usually simply titled "Law and Psychology," have been taught recently at law schools at University of Connecticut, Arizona State University, Stanford University, University of Miami, University of Southern California, and University of Nebraska-Lincoln.

16. See generally CURT R. BARTOL & ANNE M. BARTOL, *PSYCHOLOGY AND LAW: THEORY, RESEARCH, AND APPLICATION* (Cengage Learning 3d ed. 2003); ANDREAS KAPARDIS, *PSYCHOLOGY & LAW: A CRITICAL INTRODUCTION* (Cambridge Univ. Press 2d ed. 2003); ROGER J. R. LEVESQUE, *THE PSYCHOLOGY AND LAW OF CRIMINAL JUSTICE PROCESSES: CASES AND MATERIALS* (Nova Science Publishers 2006).

17. E.g., INT'L J.L. & PSYCHIATRY, available at <http://www.ialmh.org/template.cgi>; J. AM. ACAD. PSYCHIATRY & L., available at <http://www.jaapl.org/>; LAW & PSYCHOL. REV., available at <http://www.law.ua.edu/lawpsychology/>.

18. E.g., American Psychological-Law Society and Association for Scientific Advancement in Psychological Injury and Law.

19. See Shelly K. Schwartz, *Working Your Degree*, CNNMONEY.COM, Dec. 8, 2000, http://money.cnn.com/2000/12/08/career/q_degreespsychology/ ("With more than 40 percent of undergraduates in the field [of psychology] eventually going on to law school, business school or some other professional program, the social sciences major ranks among the highest in post-graduate academic attainment.").

20. Jeremy A. Blumenthal, *Law and Social Science in the Twenty First Century*, 12 S. CAL. INTERDISC. L.J. 1, 1 (2002).

21. The circuitous and often confusing debate between these prominent theorists is best represented in JUDITH BUTLER, ET AL., *CONTINGENCY, HEGEMONY, UNIVERSALITY: CONTEMPORARY DIALOGUES ON THE LEFT* (Verso 2000) (containing dialogues on politics and philosophy between Judith Butler, Ernesto Laclau, and Slavoj Žižek). See also Claudia Breger, *Response to Slavoj Žižek*, 31 DIACRITICS 105, 105 (2001) (alluding to this debate when she describes the flow of ideas into German intellectual culture as "like the long-term fight over postmodernist concepts, with one of its climaxes in the ferocious debate on Judith Butler's *Gender Trouble* in the early 1990s").

performance.²² This is not to say that Foucault has not influenced Žižek, but that Žižek does not shy away from critiquing significant poststructuralist theorists and rejecting the urge to be labeled.

So what of Žižek's relationship with Lacanian psychoanalytic theory? Describing his understanding of Lacan and Lacanian theory's ability to serve critical pursuits, Žižek writes:

The Lacanian thesis according to which truth has the structure of a fiction: in those confused months of the passage of 'really existing socialism' into capitalism, the fiction of a 'third way,'²³ was the only point at which social antagonism was not obliterated. Therein lies one of the tasks of the 'postmodern' critique of ideology: to designate the elements within an existing social order which—in the guise of 'fiction,' that is, of Utopian narratives of possible but failed alternative histories—point towards the system's antagonistic character, and thus 'estrangle' us to the self evidence of its established identity.²⁴

By forcing the critic/reader to pull away from the locus of criticism, Žižek suggests the establishment of a non-identity based critical position. Through estrangement, the critic is able to interrogate the social order that constantly seeks to re-entrench its own identity. Criticism can occur within a system. Thus, the law may be critiqued from within, but to do so requires a special kind of estrangement, and the production of a criticism that lives beyond itself. The critic's position must not be so tied up in a parasitic reliance on the social movement that it loses its potential to remain a viable rebellious strategy, which opens up discursive space by thoughtful analysis of the social order's jagged edges. These jagged edges are the rough borders not yet fully accepted as doctrinal truth. From the margins, the center is the target, and through criticism at the margins, the doctrinal truths of law stand to be challenged. Here Žižek demonstrates the importance of Lacanian psychoanalysis to critical interpretations of the law—an

22. SLAVOJ ŽIŽEK, in BUTLER, ET AL., *supra* note 22, at 101-6, 235-41.

23. Rex Butler & Scott Stephens, *Editors introduction: Slavoj Žižek's 'Third Way,'* in SLAVOJ ŽIŽEK, *THE UNIVERSAL EXCEPTION* 1, 18 (2006). By the Third Way, Žižek is generally referring to social movements that accept capitalism as necessary and or inevitable. The Third Way grants this as an *a priori* circumstance in its contemplation of progressive measures.

24. *Id. Accord* SLAVOJ ŽIŽEK, ET AL., *MAPPING IDEOLOGY* 7 (Verso 1994).

ability to critique the system from within while pushing the boundaries of what is accepted in the legal academy.

Žižek is not solely influenced by Lacan: He is an interesting mix of Lacanian devotee and Marxist rabble-rouser.²⁵ One ought to be careful when calling Žižek a Marxist,²⁶ however, because the term carries a very fluid meaning and labels are often targets of Žižek's criticism. He has an affinity for popular culture,²⁷ not often seen among those regarded, for better or worse, as part of the intellectual elite. Although Žižek is a Lacanian, to simply describe him as such does not begin to grasp the fullness of his character. To relegate him to only law and psychology or psychoanalytic discussions risks closing off the importance of his writing.

Žižek as Lacanian has been the standard trope in legal literature, which although important gives only a glimpse of his significance to legal theory. Drucilla Cornell engages the Lacanian Žižek to critique binary gender representations, to challenge the fallibility of law, in a thought-provoking article entitled *Rethinking the Beyond of the Real*.²⁸ This use of Žižek in legal literature is increasing.²⁹ Because of Žižek's reliance on Lacan, it is difficult to separate out his psychoanalytic thinking from his multitude of other interests. But, I do believe that one may talk of Žižek without fully engaging Lacan. This is to say, there is a Žižek the non-psychoanalytically inclined legal mind might embrace.

25. See Carlin Romano, *The Wild Seinfeldian Philosopher*, PHILADELPHIA INQUIRER, Dec. 1, 2005, at E1.

26. Žižek argues:

I sincerely don't believe that you can simply isolate a certain type, for example, who is a Marxist today. Is Fred Jameson a Marxist? I doubt it, even the latest Fred Jameson position is that the notion of ideology is totally useless and everything is just a narrative and so on. The last time I was shocked, he sounded practically like a kind of a vulgar version of Lyotard so my answer would be here very simple; I don't know if I'm Marxist or not. What I try to do is to reinvent what would have mattered to be a Marxist today.

Slavoj Žižek & Ian Parker, *Conversations with Slavoj Žižek About Slavoj Žižek: A Critical Introduction*, 2 INT'L J. ŽIŽEK STUD. 1, 3 (2008).

27. See Romano, *supra* note 26.

28. Drucilla Cornell, *Rethinking the Beyond of the Real*, 16 CARDOZO L. REV. 729 (1995).

29. See Mariana Valverde, *Justice as Irony: A Queer Ethical Experiment*, 14 LAW & LITERATURE 85, 94 (2002) (discussing the gender binary with reference to Žižek); M. M. Slaughter, *Fantasies: Single Mothers and Welfare Reform*, 95 COLUM. L. REV. 2156, 2187 (1995) (reviewing MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (Routledge 1995)) (engaging in a Lacanian investigation of fantasy with reference to Žižek).

Lacan was very much concerned with language and reality, firmly rooted in the French psychoanalytic tradition.³⁰ As he reinterpreted Freud, so too did Lacan create a new path of psychoanalytic theory that blended the poststructuralist concern with language to Freud's well-established concern with the individual.³¹ France was of course not the locus of psychoanalytic development, but it is where a tremendous amount of psychoanalysis³² and, later, poststructuralism³³ became increasingly relevant in the ideological currents of Europe. Out of this intellectual explosion came Lacan and from Lacan came Žižek. Psychoanalysis turns a mirror on traditional subject-versus-the-world critical theory projects because it recognizes that the subject is in conflict with itself.³⁴ It is therefore important for the legal community as well because it shifts the focus from the process and the results to the individual—it recreates the individual as wholeness in its fragmentation.

Lacanian psychoanalysis encourages finding the contradictions in our world systems.³⁵ Through this lens, legal scholars and activists might become more aware of the conflicting, if not contradictory, notions in our criminal and civil laws and in our public policy decisions. Theory matters, profoundly, to pragmatic understandings of law as theoretical considerations help shape the pragmatic actions of decision-makers. Without theory, pragmatism is a boat set adrift at sea without a sail. Too often the contradictions of law are glossed over because law is a consensus-building project. To wit: Look at the footnotes of your favorite law review articles. How many “but for” signals or others demonstrating conflict or difference are present? This clearly

30. See David S. Caudill, *Lacan's Social Psychoanalysis: Religion and Community in a Pluralistic Society*, 26 CUMB. L. REV. 125, 127 (1995–96).

31. Eli Zaretsky, *Psychoanalysis and Postmodernism*, 8 AM. LITERARY HIST. 154, 163–64 (1996).

32. See generally LÉON CHERTOK & ISABELLE STENGERS, A CRITIQUE OF PSYCHOANALYTIC REASON xv (Martha Noel Evans trans., Stanford Univ. Press 1992) (1989) (describing the breadth of French critiques of psychoanalysis as symptomatic of its development in France).

33. See generally GLYN WILLIAMS, FRENCH DISCOURSE ANALYSIS 63–99 (Routledge 1999) (discussing poststructuralism as a precursor to French Discourse Analysis).

34. See generally Cornell, *supra* note 29.

35. JACQUES LACAN, THE SEMINAR OF JACQUES LACAN, BOOK III 29 (Jacques-Alain Miller ed., Russell Grigg trans., Norton 1993) (1981). Lacan writes of the “flagrant and permanent contradictions that are brought into play whenever basic concepts [of psychoanalysis] arise.”

illustrates that differing viewpoints are often dismissed in favor of cohesion, in favor of pursuing accepted scholarly ideas about the law.

Žižek's theories build on Lacan and provide an important bridge to understand contradictions and conflict. How many law students are really willing to take their professors to task as opposed to restating their perception of the professor's desired correct response? Of course, psychoanalysis's reliance on interrogating contradictions has its roots in psychoanalysis's founder, Sigmund Freud,³⁶ who significantly influenced Lacan. It is always important to remember Freud's influence in order to more fully appreciate the trajectory of psychoanalytic thought. Understanding Žižek, then, as a continuation of applied Freudian thought, helps the reader to understand Žižek as a continuation of the psychoanalytic tradition.

Lacanian theory is centered on the idea that a void is the center of signification,³⁷ around which the symbolic world is weaved.³⁸ Lacanian psychoanalysis encourages finding the contradictions in our world systems. Through this lens, legal scholars and activists might become more aware of the conflicting, if not contradictory, notions in our criminal and civil laws and in our public policy decisions. This nothingness is a placeholder for a constructed, symbolized self.³⁹ Because the center of our symbolic world is a void, our world shifts quite easily as symbols assume different values.⁴⁰ The shifting terrain of significance is mirrored in the work of Gilles Deleuze. Žižek, though, takes the Lacanian Deleuze and critiques him thoroughly in Lacanian terms.⁴¹ The result is an excoriation of Deleuze while maintaining a thorough admiration for one of the most widely read poststructuralists of our time. This encounter could be, and has been, the subject of whole

36. See Caudill, *supra* note 31, at 129.

37. Douglas Litowitz, *The Corporation as God*, 30 J. CORP. L. 501, 519 (2005).

38. SLAVOJ ŽIŽEK, THE SUBLIME OBJECT OF IDEOLOGY 87, 95, 124 (Ernesto Laclau & Chantal Mouffe eds., Verso 1989).

39. See Ernesto Laclau, *Why Do Empty Signifiers Matter to Politics?*, in EMANCIPATIONS 36–46 (Verso 1996).

40. See Litowitz, *supra* note 38 (“In other words, power struggles are manifest themselves in street fights and in contests for the control of symbols and meaning, on a stage where meaning is fluid.”).

41. See Daniel W. Smith, *The Inverse Side of the Structure: Žižek on Deleuze on Lacan*, 46 CRITICISM 635, 635–50 (2004) (weaving Žižek, Lacan, and Deleuze into a complex critical paradigm).

articles⁴² and will (un)fortunately be a part of this text. What legal minds can garner from this Deleuzian pursuit is again that the shifting nature of law is not only worthy of study, but instructive in understanding the way the law functions.

In conclusion, this sketch of Lacanian psychoanalysis should help inform an appreciation of Žižek's approach to legal analysis through critiques of capitalism, psychoanalytic criticism, and general investigation of the structures and systems that operate just below the surface of legal reasoning and action. Next, this article will demonstrate the usefulness of Žižek's thought to several pressing legal discussions.

III. ŽIŽEK, FAILURE, NORMATIVITY, AND INCONSISTENCY

Reading Žižek is a stimulating experience. One is simultaneously informed, edified, and entertained. His courage, his willingness to criticize leftist conventions and common sense, is attractive, even when he is wrong, even when his political judgment is questionable, even when his taste is "bad."⁴³

Next, it is important to understand the concept of "the Real," because this concept characterizes not only Žižek's thought, but also the thought of many poststructuralists who have found their way into legal reasoning. "Reality" and "the Real" are buzz words in poststructuralist camps.⁴⁴ But much confusion underlies these words and prevents any careful applications and critiques of these concepts. Parsing out the meanings of each theorist's use of "the Real" and its derivatives is likely best left for a more traditional philosophy or theory text, but at least a cursory node to this discussion can benefit legal minds.

"The Real" is the structure of power relations in a given environment, legal or otherwise. Power relations are of course very important to lawyers, politicians, and activists. Understanding "the Real" is important because it allows legal minds to think more critically about power. This becomes

42. See Robert Sinnerbrink, *Nomadology or Ideology? Žižek's Critique of Deleuze*, 1 PARRHESIA 62 (2006) (fully discussing Žižek's encounter with Deleuze with emphasis on SLAVOJ ŽIŽEK, *ORGANS WITHOUT BODIES* (Routledge 2004)).

43. William David Hart, *Slavoj Žižek and the Imperial/Colonial Model of Religion*, 3 NEPANTLA: VIEWS FROM THE SOUTH 553, 556-57 (2002), <http://muse.jhu.edu/journals/nepantla/toc/nep3.3.html>.

44. See Brown *infra* note 54, at 311 (discussing the complex uses of "real" and "Real" in Žižek's work).

foundational in understanding Žižek as well as critiquing him.

When attempting to indict a theorist it has become almost commonplace to first seek out inconsistencies. The more one writes and the greater the breadth of one's writing, the greater likelihood of the writer producing inconsistencies. Theory and perfection are incompatible. Law and legal community members are likewise no strangers to inconsistency, but accepting inconsistency and even failure is problematic in the legal community.

Žižek's views on inconsistency ought to open up a broader discursive space for action on legal theory and for the acceptance of life's failures and pitfalls. Inconsistency is suffering and suffering is acceptable in prevailing normative logic.⁴⁵ To engage, we must err; to succeed, we must fail; and to realize our progress, we must accept the suffering of life. In error, there is suffering, and according to Søren Kierkegaard,⁴⁶ suffering is the path to God.⁴⁷ This suffering might be conceived of as a new way to grapple with inconsistency and failure. Embracing suffering can be the means by which legal professionals, activists, and thinkers can move forward. In suffering, an acceptance of all that our condition is in its success and failure, might we then find something sublime, something enriching?

Accepting inconsistencies, understood through Žižek, can help legal scholars develop more attenuated arguments and stay "on their toes" as they critically engage the legal world. It can also help us embrace the imperfect nature of the legal world. Accepting inconsistencies may divert attention from mechanistic understandings of thought so that it may be refocused on

45. See Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990) (critiquing normativity in law); Symposium, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991) (providing the fullest explanation of normative legal thought).

46. Søren Kierkegaard (1813–1855) was a Danish philosopher and theologian. See generally SØREN KIERKEGAARD, *EITHER/OR* (Victor Eremita ed., Alastair Hannay trans., Penguin Books 1992) (1843); SØREN KIERKEGAARD, *FEAR AND TREMBLING* (Stephen Evans & Sylvia Walsh eds., Sylvia Walsh trans., Cambridge Univ. Press 2006) (1843); SØREN KIERKEGAARD, *THE CONCEPT OF DREAD* (Walter Lowrie trans., Princeton Univ. Press 1957) (1844).

47. See CLARE CARLISLE, *KIERKEGAARD: A GUIDE FOR THE PERPLEXED* 20 (2006) ("He [Kierkegaard] suggests that in order to love God one has to accept suffering, to sacrifice one's expectation of happiness for the sake of a higher spiritual life."); see also Sylvia Walsh, *Standing at the Crossroads: The Invitation of Christ to a Life of Suffering in Practice*, in 20 CHRISTIANITY IN PRACTICE 125 (Robert L. Perkins ed., 2004) ("Suffering constitutes the crowning mark of Christian existence in Kierkegaard's thought.")

substantive theory.

This discussion portends the notion that Žižek is criticized as being inconsistent.⁴⁸ Žižek reframes this argument. He suggests that Lacan, again, his biggest influence,⁴⁹ constantly updated his theories and that such a process was important to Lacan and Lacan's work.⁵⁰ Those well-versed in Žižek may raise this question, but we ought not reject Žižek for his desire to constantly revise and often double back on his philosophical agenda. Indeed this seems to be the path of law as decisions are clarified as new cases are decided, overturned on appeal, or modified by regulatory law.

The legal world might argue that inconsistency attaches a negative connotation to the process of change or evolution. If we challenge this connotation we might be able to more constructively engage inconsistency as a process of legal evolution.

Žižek also positions himself not as an answerer of questions,

48. Often times the argument that he is inconsistent is conflated with the argument that he lacks focus or direction. He is so prolific that he is often difficult to tell where he's going or where he's been. But, one clear example of this argument—that Žižek is inconsistent—is relayed in Rebecca Mead's story in *The New Yorker*:

James Miller, of the New School, says of Žižek's lectures, "You would sit through these torrents of verbiage, and you had this post-structuralist and relativist aura on the one hand, and then he would be defending something like democratic socialism. The first time I talked with him, I said, 'But Slavoj, this is inconsistent.' He listened to my criticism and ignored it. When he talks, he has such a good time that he just keeps going."

Rebecca Mead, *The Marx Brother: How a Philosopher from Slovenia Became an International Star*, *THE NEW YORKER*, May 5, 2003, at 38, 46.

49. Christopher Hanlon & Slavoj Žižek, *Psychoanalysis and the Post-Political: An Interview with Slavoj Žižek*, 32 *NEW LITERARY HISTORY* 1, 3–4 (2001) (discussing Žižek's reliance on Lacan).

50. Žižek and the consistency debate is best described by Bowman: "Eclectic" is how Ernesto Laclau characterizes Žižek's approach in general. Laclau uses this term as a criticism, because to his mind, Žižek's lack of fidelity to one rigorously conceived approach produces inconsistencies and incoherence. Given Laclau's famous insistence on the importance of "logic" and "rigour", Žižek's promiscuity would "logically" seem to mean that Žižek's position is incoherent and must fall apart. Judith Butler agrees with Laclau on this. But Ian Parker has suggested that there is no real inconsistency, because Žižek's apparently inconsistent approach to any and every topic is an effect of his strategy of lining up and applying different and discrete paradigms to his subject matter, one at a time and one after another. In other words, Žižek's "position" isn't necessarily incoherent because it isn't 'one' position. Moreover, because Žižek deliberately doesn't look for coherence or consistency, there may be little point expecting him to be coherent or consistent himself.

Paul Bowman, Book Review, *CULTURE MACHINE* (2006) (reviewing SLAVOJ ŽIŽEK, *INTERROGATING THE REAL* (Rex Butler & Scott Stephens eds., Continuum 2005)), <http://www.culturemachine.net/index.php/cm/article/view/175/156> (citations omitted).

but as a purveyor of criticism.⁵¹ Žižek provides “a series of theoretical interventions which shed mutual light on each other, not in terms of the *progression* of the argument, but in terms of what we could call the *reiteration* of the latter in different discursive contexts.”⁵² This theoretical position, if adopted by scholars and activists, can help both engage the law more effectively.

This ability to see arguments from different positions and dissect them from different angles provides a tremendous analytical tool for legal scholars. Why look at a case from only a plaintiff’s perspective or only the perspective of a largely Black jury? Why call into question the judge’s political ideology? Why not defend the courts while seeking to dismantle them at the same time? The philosopher is not so much a producer of answers, but a producer of questions and criticism. Žižek provides a way to embrace inconsistencies in the law, pursue new perspectives, and increase legal questioning.

What does the legal community have to lose from this opening up of discursive space? It seems clear that we (scholars, practitioners, politicians, activists) benefit from a space in which dialogue is fostered. Consider geometry: if we cut a cube in half, we no longer have a six-sided object; we have two six-sided objects. This geometrical analogy is not intended to be profound, but serves to illustrate a valuable point. The surface area of the geometrical mass multiplies as it is cut—transgressed. So too does the transgression of discursive space open up the possibility for increased rhetorical actions. Žižek’s argument, that he is a purveyor of criticism, may then be interpreted as an attempt to expand space and allow for broader discursive communities. Such inclusion ought to be at the center of any scholarly project. The broader discursive space Žižek offers ought to afford a deeper acceptance of new theories about law.

Understanding the role of the critic in legal theory is important because too often we desire to undermine our colleagues by pointing out their foibles and follies, ignorant of the importance that the problematic has to our legal discourse. The differences

51. *See id.* This idea of critic as critic as opposed to critic of theorists lends credence to the counter-argument to “Žižek is inconsistent.” To be sure, Žižek is no philosophical hack, but if the reader values him as critic and not as philosopher, then his work becomes all that more accessible and useful.

52. Ernesto Laclau, *Preface* to SLAVOJ ŽIŽEK, *THE SUBLIME OBJECT OF IDEOLOGY*, at ix, xii (1989).

and discrepancies of legal theory are space where we may continue to critique and ultimately better understand our legal world. If all we can do is deride difference and parse terms, then we are failing to honestly engage the law. Every inconsistency is an opportunity to extend the discussion just a little longer, and perhaps it is part of a larger consistent project—revolution.⁵³ We could sulk and point fingers or we could advance to the next stage of critical reasoning and hope for discussion. Žižek allows us to do just this. If we can embrace our inconsistencies, then we can encourage an environment of open critical conflict and genuine reflection.

Contrast this with Žižek's own acceptance of, if not subtle admiration for, consistency. "With regard to this radical chic, our first gesture towards Third Way ideologists and practitioners should be one of praise: at least they play their game straight, and are honest in their acceptance of the global capitalist coordinates."⁵⁴ Perhaps here, Žižek carves out a decidedly non-postmodern position where he begins to value some sort of ethical consistency. Perhaps he is simply being humorous, although the full context of the quote does not bear this notion out. How does this fit with his reliance on questioning? How does this fit with an acceptance of inconsistency? It seems that the consistent ethic of questioning is in keeping with Žižek's admiration of consistency. Even if the critic diverges, at least she remains critical. Legal minds may be best served by embracing this ethic of questioning.

Another pervasive problem in legal thought is the inability to understand fault or failure. Perhaps this is not a uniquely legal problem, but it does seem that often clients blame their lawyers; lawyers blame the judge or jury; and judges blame society. Žižekian theory allows us to embrace these possibilities and possibly develop a more livable standard of legal failure and success. I want to explore fault in two instances: that of *a fault* or defect in a thing, thought, or person, and that of the *taking of fault* as in *something is my fault*. Both of these constructions are problematic in the legal world. It is easy to find fault in others, but not so easy to find fault in ourselves. Subsequently, when fault is

53. Nicholas Brown, *{Ø,\$} {\$}?: Or, Alain Badiou and Slavoj Žižek, Waiting for Something to Happen*, 4.3 THE NEW CENTENNIAL REV. 289, at 317 (book review) ("The only fully consistent leftist ethical position is revolutionary. Žižek has this right, but currently this position is easier to endorse than to occupy.").

54. V.I. LENIN, REVOLUTION AT THE GATES: SELECTED WRITINGS OF LENIN FROM 1917 172 (Slavoj Žižek ed., Verso 2002) (1917).

found, who bears the burden of accepting *that* fault as *my* fault?

Legal scholars do not have the language to admit fault or seldom to find fault in their actions or writings.⁵⁵ We have heard, “No one likes to be wrong,” but too often we neglect to engage this idea. The court may rule against an attorney or a law review author’s article may attack another’s ideas. You may meet me in the street and say, “I believe you to be wrong.” I may think to myself, “You are wrong. What you have said is in need of change.” I may think that I am wrong in my own normative⁵⁶ psychosis. The wrong is abhorrent in its difference from the correct. Wrongness is sick, perverse. Only the good, the correct, can be right. Normativity⁵⁷ is sickness.

This is the trap that is set for young legal minds in law school, the reliance on normative principles and the inability to accept failing as a path for development. This is the paradox of normative legal thought. It assigns correctness and wrongness with passion, but does not equip society for articulating or embracing wrongness. Normative legal thought thus defeats itself because rightness has no anchoring connection to that which is not right. Žižek allows us to consider the full spectrum of fault, of rightness and wrongness.

What vocabulary is there for wrongness in law? The legal lexicon refuses the wrong, refuses the very normativity it demands. What can we do to embrace failure? I conceive of this wrongness as all the things that the legal community frowns upon, and also those things that broader society generally derides, including, but not limited to, losing cases, answering questions poorly on a law school exam or in a class, or making poor public policy decisions. We must recapture it, not to embrace normative legal thought, but to unmask its power. If we can understand the power of rightness, we can turn it on its head in the liberating practice of failure. We must accept failure as a part of success, as a path toward liberation.

55. This is closely related to Žižek’s assertion that “we lack the very language to articulate our unfreedom.” SLAVOJ ŽIŽEK, WELCOME TO THE DESERT OF THE REAL 2 (2002). See generally SORAJAKOOL, *infra* note 67 (It is extremely difficult to articulate conditions you refuse to believe or accept).

56. See generally CHRISTINE M. KORSGAARD, ET AL., THE SOURCES OF NORMATIVITY (ONora O’Neill, ed. Cambridge 1996) (providing the most thorough discussion of normativity across the philosophical spectrum); NORMATIVITY (Jonathan Dancy ed., 2000) (collecting analyses of leading philosophy scholars on normativity).

57. See generally Smith *supra* note 42; Pierre Schlag, “*Le Hors de Texte, C’est Moi*”: *The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631 (1990).

Failure is a way out of or away from normative legal reasoning.

This normativity is evidence of capitalism's infiltration of legal reasoning. Capitalism fetishizes success and accumulated wins. When I interned at the City of Norfolk, Virginia's Public Defender's office, I was applauded for winning three times against the Commonwealth's Attorney. I understand that a win may have meant the vindication of a defendant's rights in this scenario, but we did not speak of that. We spoke of wins.

This is capitalism's power, to engage in a not so subtle subterfuge that leaves very little trace of its origins. By lauding the win, we lose our ability to question what this winning paradigm means. Theorists Gilles Deleuze⁵⁸ and Félix Guattari⁵⁹ put it this way: "[C]apitalism has haunted all forms of society, but it haunts them as their terrifying nightmare, it is the dread they feel of a flow that would elude their codes."⁶⁰ Capitalism is inextricably tied to society.⁶¹ We cannot passively escape its grasp. More specifically, capitalism has infiltrated legal reasoning.⁶² We win cases; we get a verdict. We are rewarded. But we cannot own law, nor possess rightness. This is the obscenity of law: we fight against possession, against objectification, so we can fetishize the object of winning.⁶³ The law fools us into acceptance of truth—

58. Gilles Deleuze (1925-1995) was a French philosopher associated with continental philosophy and post-structuralism. He frequently wrote about philosophy, fine art, and film. While increasingly popular in academic circles, he is not yet as widely known as other French philosophers like Foucault or even Baudrillard.

59. Félix Guattari (1930-1992) was a psychotherapist and philosopher from France. He became a psychoanalyst by training under Jacques Lacan and later worked under Lacan's student Jean Oury. Guattari is most often associated with poststructuralism and semiotics. He was a frequent collaborator with Gilles Deleuze.

60. GILLES DELEUZE & FÉLIX GUATTARI, *ANTI-OEDIPUS: CAPITALISM AND SCHIZOPHRENIA* 140 (Robert Hurley et al. trans., Univ. of Minn. Press 1983) (1977).

61. See Sinnerbrink, *supra* note 43, at 77 ("For Žizek, capitalism is the all-encompassing concrete universal of our historical epoch, which means that, while it is a particular formation, 'it overdetermines all alternative formations as well as all non-economic strata of social life.'") (citations omitted).

62. See generally TODD GORDON, *COPS, CRIME AND CAPITALISM: THE LAW AND ORDER AGENDA IN CANADA* (Fernwood 2006) (describing law enforcement as a tool of capitalist state power); MICHAEL E. TIGAR WITH MADELEINE R. LEVY, *LAW AND THE RISE OF CAPITALISM* (2d ed. Monthly Review Press 2000) (evaluating the impact of capitalism on the rise to power of the European bourgeoisie).

63. The win becomes a commodity, something to cherish, preserve, and count. Marx's famous passage about a kitchen table comes to mind:

The form of wood, for instance, is altered, by making a table out of it. Yet, for all that, the table continues to be that common, every-day thing, wood. But, so soon as it steps forth as a

truth as object. Winning is the reaffirmation of truth after all in a capitalist system. We must accept truth, again because we do not have the vocabulary for failure. The law teaches us there can be no failure in the quest for truth.

Žižek teaches us that our vocabulary has indeed failed us. Lacan knew this in 1974.⁶⁴ Some 35 years later, this observation has fallen by the wayside. We cannot claim truth in the absolute because language fails us. We must embrace divisions, recognize failures, and move forward with the inefficiencies of life.⁶⁵ This brings us back to a central question: If we fail to fail, how can we claim to succeed?

We can embrace this lack of language for what it is. Žižek tells us to stop teaching, stop lecturing. Be comfortable with nothing.⁶⁶ Oscar Wilde famously quipped, “To do nothing is the most difficult thing in the world.”⁶⁷ Do not let language pass us by, but do not sweep it away. Reject politics. Reject partisan folly. Reject the silver bullet of the New Left,⁶⁸ the notion that a concerned group of supposedly liberal thinkers will solve all. Embrace difference and the crippling failure we have been institutionalized to avoid. Reject the capitalistic jurisprudence of victory for the well-placed failure of life. Ask questions and ignore answers. Žižek can allow us to move beyond this capitalist understanding of society so that we may embrace the inherent success of failure, not as abstract abandoning of the system, but as a radical reconstruction of the system as it crumbles from within.

I am concerned and appalled by our failure to fail because it is a failure to accept a good portion of our life. It is a failure to deal

commodity, it is changed into something transcendent. It not only stands with its feet on the ground, but, in relation to all other commodities, it stands on its head, and evolves out of its wooden brain grotesque ideas

KARL MARX, *COMMODITIES AND MONEY* (1867) *THE NINETEENTH-CENTURY VISUAL CULTURE READER* 42–43 (Vanessa R. Schwartz & Jeannene M. Przyblyski eds., Routledge 2004).

64. See JACQUES LACAN: *LA PSYCHANALYSE* (The Office de Radiodiffusion Television Francaise 1974); see ŽIŽEK! (Zeitgeist Films 2006).

65. Jodi Dean, *Why Žižek for Political Theory?*, 1 *INT’L J. ŽIŽEK STUDIES* 18, 19 (2007), available at <http://zizekstudies.org/index.php/ijzs/article/view/18/41>.

66. See generally SIROJ SORAJJAKOOL, *DO NOTHING: INNER PEACE FOR EVERYDAY LIVING* (2009) (discussing embracing nothingness to liberate oneself).

67. JASON MERCHY, *VALUES OF THE WISE: HUMANITY’S HIGHEST ASPIRATIONS* 279 (2004).

68. See Sinnerbrink, *supra* note 43, at 83.

with life's difficulties, with setbacks, and ultimately rejection of the potential education associated with "learning from our mistakes." Žižek can help us understand language's failings and in this understanding, we can allow for his inconsistencies and difference. This path may lead us to claim failure, may encourage others to suggest, that we have failed. They surely will, and so inconsistency is a bridge to consciousness—a bridge to understanding failure in any language, no matter how deficient, so that we can live. Inconsistency begets life. It is how we live, what we see daily, but also what we fail to allow into our legal thought. Law kills us; it takes away our ability to accept inconsistency and error. Law kills subjectivity.⁶⁹ We are no longer positioned to accept the ramifications of change. There is but one option. Law kills us with success and with the quest for success.⁷⁰ It becomes easier to live for victory than for the idealized notions of justice, truth, freedom, etc. We are divorced from the ideals supposedly fostered in the legal system. Profit replaces purpose and wins replace self-worth. Success masks a deeper uneasiness with the contradictions of victory.

Žižek posits an ethic of questioning in response to capitalism and an inability to grasp inconsistencies and failure. What do we get from questions? More questions. I have posed this idea before.⁷¹ Law school does not teach questions. It teaches answers in the form of questions.⁷² It teaches you to answer.⁷³ Thought is

69. See James Boyle, *Is Subjectivity Possible?: The Post-Modern Subject in Legal Theory*, 62 U. COLO. L. REV. 489, 517 (1991). "Who gets to be a subject? What qualities or attributes about them are included in the box of subjectivity and what attributes are excluded?" *Id.* at 511. "My thesis . . . is that we should concentrate on the constitution of legal subjectivity in another sense as well: in the creation and maintenance of the 'purified' fantasy persona that confronts and receives legal knowledge." *Id.* at 517. See generally Katherine Kong, *Guilty as Charged?: Subjectivity and the Law in La Chanson de Roland and "Lanval,"* 17 ESSAYS IN MEDIEVAL STUDIES 35 (2000) (discussing law and subjectivity in medieval French literature).

70. This can be taken quite literally. Reports of attorneys abusing everything from alcohol to sex abound. Suicide rates are astounding. Countless movies demonstrate the quest for the corner office, the partnership, and the power.

71. See Nick J. Sciullo, *A Whale of a Tale: Postcolonialism, Critical Theory, and Deconstruction: Revisiting the International Convention for the Regulation of Whaling Through a Socio-Legal Perspective*, 12 N.Y. CITY L. REV. 29, 31 n.9 (2008); Nick J. Sciullo, *Atlantean Prose and the Search for Democracy*, 2 THE CRIT: A CRITICAL LEGAL STUDIES. J. 130, 142 (2009) ("The answer is not as important as the questioning process.").

72. Think of the Socratic Method. At its purest, the method is designed to move the discussion toward the appropriate answer, not toward questioning. Sure, the method may be dialectical, but that does not equate to a pursuit of questioning. When taught the Socratic

commodified into answers, but we do not learn from answers; we learn from questions. When we forget to ask the questions that motivated our answers, we forget what we really want is, in fact, questions. Answers are passive and questions are active. Without questions, answers lose their importance. Questions encourage thought. Legal questions encourage legal thought. Žižek's questioning allows us to reinvigorate our critical consciousness so that we might be more active participants in socio-legal discourse.

The problems I have outlined are indeed complex and interrelated. Žižek would argue that placing blame on solely normativity, solely capitalism, or solely neo-liberalism⁷⁴ is not beneficial. The insidious combination of the three is the problem and this problem is manifested in legal discourse. Legal analysis is truncated, recycled, and striated to death. Answers are anathema to knowledge. Knowledge is brought about not by hoarding answers, but by freely giving out questions. Questions are possibilities. Žižek's ethic of questioning positions us in power where we are better able to interrogate the legal system.

If we begin to view the law as inconsistent or as amenable to inconsistency then we open up discursive space. If we can afford ourselves the possibilities for failure then we can open up the possibilities of success, not to mention a better quality of life. We

Method, there's much highfalutin "do-goodery" involved. That is naive at best, destructive to the educational experience of students at worst. This is not to say the Socratic Method does not encourage critical thinking, but instead to suggest that it subtly solicits answers masquerading as questions. See Norman H. Patnode, *The Socratic Method: Leveraging Questions to Increase Performance*, PROGRAM MANAGEMENT AND LEADERSHIP, Nov.-Dec. 2002, at 48, 48 ("The Socratic Method is a way to help people see when they need to move, and where they need to move to."). But see *The Socratic Method: What It Is and How to Use It in the Classroom*, SPEAKING OF TEACHING, Fall 2003, at 1, 1-4, available at http://www.stanford.edu/dept/CTL/Newsletter/socratic_method.pdf (describing the Socratic method in an idealistic light).

73. The LSAT, Bar Exam, and MPRE are largely multiple choice tests. Some law school courses continue to utilize multiple choice tests. The Socratic method may encourage you to think, but with the pressure of law school bearing down on you, it's surely not designed to encourage you to question your professor. Many legal research and writing programs are filled with dogmatic rules that often contradict prevailing English and rhetorical scholarship. But that tends not to matter when one simply needs to pass one's first year course load. Thinking, yes. But thinking about questions, no.

74. Many post-structuralist theorists (and conservatives, of course) across disciplines have begun to challenge the nature of neoliberalism. See generally HENRY A. GIROUX, *THE TERROR OF NEOLIBERALISM: AUTHORITARIANISM AND THE ECLIPSE OF DEMOCRACY* (Paradigm Publishers 2004); *NEOLIBERALISM: A CRITICAL READER* (Alfredo Saad-Filho & Deborah Johnston eds., 2005); *POST-NEOLIBERALISM IN THE AMERICAS* (Laura McDonald & Anne Ruckert eds., 2009).

enrich our political position by appreciating change. Politic action is inconsistent as is legal practice. A lack of inconsistency renders the political subject inactive.⁷⁵ To succeed politically and legally we must fail, double back, and adapt.

The tendency to view the law as apolitical is flawed. Law is never apolitical.⁷⁶ The notion that politics must be filled with answers and that legal thought must fill the void of legal understanding is detrimental. Legal reasoning cannot fill the void and be substitute for the positive politics of nothing.⁷⁷ This is what politics and law are missing: the void of answers—the power of nothingness. Questions can fill these spaces; answers will not lead to our liberation, but instead create a deeper void. We can learn from our inconsistencies and failures, and we do a disservice to ourselves, our causes, and our clients, if we do not.

What we need then is a more thorough understanding of “the Real,” which serves as a central focus for Žižek’s thought. “The Real” is a starting point from which we might better be able to understand the law.

IV. ŽIŽEK, THE REAL, AND ORIGINS OF LAW

Kambiz Behi describes “the Real” as “that which is the traumatic kernel at the core of subjectivity.”⁷⁸ Žižek describes a different type of reality when describing, for example, the media:

The problem of the contemporary media does not reside in its enticing us to confound fiction with reality, but rather in its “hyperrealist” character, by means of which it saturates the void that occupies the space for symbolic fiction. The symbolic order

75. Politics is by its very nature an evolving, changing practice. Inconsistency is the byproduct of change, evolution, evaluation, and progress. This stems from people’s consistent inconsistency in what they value. See Kent Koppelman and Robert Richardson, *What’s in It for Me?: Persuading Nonminority Teacher Education Students to Become Advocates for Multicultural Education*, in PRACTICING WHAT WE TEACH 146 (Renée J. Martin ed., 1995). Because our values change, or perhaps more accurately, the way we articulate our values changes, inconsistency is much more the norm than might be assumed.

76. This is because so many lawyers and professors are so politically active. It’s why many government affairs professionals are law school graduates. This is also why Supreme Court confirmation hearings are viciously partisan.

77. “Nothing” is not nihilistic, but is a positive political choice to not engage, to refrain from action. When we talk about “doing nothing,” we fail to recognize the value of the verb “to do.” “Nothing” is the subject of our “doing.” To do “nothing” is to do “something.”

78. Kambiz Behi, *The “Real” in Resistance: Transgression of Law as Ethical Act*, 4 UNBOUND 30, 31 (2008).

can only function by maintaining a minimum distance from reality, on account of which it ultimately gains fictional status.⁷⁹

Here we see that reality does in fact evolve, in small part due to the media's representation of reality. This is "the Real" being spawned by simulation. The void is the hollow knowledge of the law's power apparatus. It is the self-reaffirming nature of law, the need for more, better, and stronger language, motions, appeals, and revisions. If this saturating-of-the-void analogy is loosely applied to legal practice, what can be said of the attorney who files motions just to file them? What about the judge that orders countless pre-trial meetings and settlement talks despite the fact that both sides have been adamant about their desire to see the matter through? How many legal dramas grace network television? How many "reality" shows on law and order flood the airwaves? The void is often filled in legal practice and this has an altogether unfortunate eroding effect on the value of the law. As saturation increases so does fiction and the law becomes fictional in its hyperrealist folly. Understanding "the Real" is then an exercise in understanding the power relations in a legal environment.

Poststructuralists of all shapes and sizes articulate methods of resistance to and investigation of "the Real." Žižek is no different. Žižek argues, rather persuasively, that performative acts are not enough to displace "the Real" because these strategies accept the terrain of "the Real."⁸⁰ Legal performative acts are everything from speaking at trial or in the chambers of government to writing law review articles and exams to positioning oneself as an advocate or judge. Performative acts need not be spoken nor do they need to comply with pedestrian notions of theater. "Since the very field of such 'transgressions' is already taken into account, even engendered, by the hegemonic form,"⁸¹ mere performative resistance is not enough to actually change "the Real." It is therefore impossible to do away with "the Real" while implicitly accepting the ideological foundations upon which it rests.⁸² I conceive of linguistic and performative resistance as a necessary

79. SLAVOJ ŽIŽEK, *Law in the Postmodern Mind: Superego by Default*, 16 CARDOZO L. REV. 925, 938 (1995).

80. See SLAVOJ ŽIŽEK, *THE TICKLISH SUBJECT* 264 (Verso 1999).

81. *Id.*

82. *Id.*

step to disrupt the foundation of “the Real.”

Legal minds can disrupt this foundation through critical legal thought and political practice. Without performativity, “the Real’s” foundation will continue to accumulate silt. Unless we can continue to dredge “the Real,” we are relegated to dig through the same sedimentary layers at every critical junction as it constantly erodes toward our critical point of departure from “the Real.” Through law we can engage in this metaphorical dredging if we are informed by a critical ethic of questioning as Žižek posits. Understanding this notion of “the Real,” it is then possible to more thoroughly consider Žižek’s views on law.

Žižek does not reject the law wholesale however. He is critical of law, but also embraces it as a tool for change.⁸³ This ought to encourage scholars, students, and activists who have shied away from critical theory and the law to re-evaluate their stance.

Žižek also does something which is unusual to many legal scholars: he embraces the law in its fluidity. He thinks of law as a sociological construct and not as a self-generating legal construct.⁸⁴ Understanding law as fluid can help legal scholars to develop a more nuanced view of the law and legal change.

Zizek’s views on the law are complex. He views it as a traumatic mash-up of violence and order. The creation of law is itself a crime against the old order—the old law.⁸⁵ Creating new law, which overthrows existing law, is an act of violence and criminality against the old law, masquerading as original law.

“[F]or Žižek, the rule of law conceals an inherent unruliness which is precisely the violence by which it established itself as law in the first place. . . .”⁸⁶ The original law presupposes that transgressions are criminality. Because law is founded on criminality and in criminality the demand for laws greater in number and strength increases, transgressions are assumed to foster a strengthening of the law. The violent act of the criminal is to debase law’s power, to challenge its authority, but often law’s power is simply reinforced. Criminality becomes legal in this example. Because criminality is at the basis of law, there is a

83. Jodi Dean, *Žižek on Law* 4 (Nov. 11, 2002) available at http://jdeanicite.typepad.com/i_cite/files/zizek_on_law_2.doc (unpublished manuscript).

84. TONY MYERS, *SLAVOJ ŽIŽEK* 53-54 (Routledge 2003)..

85. See Dean, *supra* note 84, at 7.

86. See Myers, *supra* note 85, at 53.

disjuncture between law and what might be differentiated as legality.⁸⁷ Jodi Dean calls this law's "traumatic identity."⁸⁸ Put more simply, "[F]or Žižek, the rule of law conceals an inherent unruliness which is precisely the violence by which it established itself as law in the first place . . ."⁸⁹

Law has its origins in criminality. This "founding crime," which need not be a specific act of criminality, has set every law and every system of order into being; without the founding crime there would be no system of law or order anywhere.⁹⁰ A law against murder does not arise unless society has seen murder and condemned it. To outlaw theft makes no sense unless society has experienced theft and abhors it. Žižek describes the lurking presence of criminality in law: It "haunts the public legal order as its spectral supplement."⁹¹ Understanding law in this way, it is easy to see how "the Real" becomes saturated with law.

Joining this with Žižek's reading of Badiou regarding the Event, we come to a significant analytical thread that may help us better understand law. Žižek writes:

An Event is thus circular in the sense that its identification is possible only from the standpoint of what Badiou calls "an interpreting intervention," if, that is, one speaks from a subjectively engaged position, or—to put it more formally—if one includes in the designated situation the act of naming itself: the chaotic events in France at the end of the eighteenth century can be identified as the "French Revolution" only for those who accept the "wager" that such an Event exists. Badiou formally defines intervention as "every procedure by means of which a multiple is recognized as an event"—so "it will remain forever doubtful if there was an event at all, except for the intervener who decides that he belonged to the situation. Fidelity to the Event designates the continuous effort of traversing the field of knowledge from the standpoint of the Event, intervening in it, searching for the signs of Truth."⁹²

87. See Dean, *supra* note 84, at 8-9.

88. See Dean, *supra* note 84.

89. See Myers, *supra* note 85, at 53.

90. See Dean, *supra* note 84, at 6-14.

91. SLAVOJ ŽIŽEK, *THE FRAGILE ABSOLUTE, OR, WHY IS THE CHRISTIAN LEGACY WORTH FIGHTING FOR?* 97 (Verso 2000).

92. See ŽIŽEK, *supra* note 81, at 135.

Law, from this perspective, occupies a much less stable space than most in the legal academy would be willing to concede. But it also means that, as interveners in legal situations, intellectuals and activists have a unique ability to create the Event by originating the standpoint from which the Event is evaluated. To traverse the “field of knowledge” is to understand the law—to appreciate and to take a stand in the law’s production. Applied more directly to legal settings, being able to offer a standpoint from which to view an event can create new perceptions about the law and its effects.

Law may then be conceived not as a response to some ephemeral claim to justice, but as being born of itself.⁹³ This is an important rift in legal theory, which often imagines some grand narrative of law heroically redressing some perceived injustice. People do not decide to break the law; rather, as Žižek puts it, such action is always mediated by a desire to transgress the law.⁹⁴ If viewed as a mediator of desire, law then becomes a much more interesting creation. Law demands enjoyment, makes it so the ability or freedom to enjoy becomes the obligation to enjoy.⁹⁵ An obligation to enjoy is no joy. Law then, while claiming to better our lives, takes away the very notion of enjoyment.

Furthermore, Žižek argues that transference is the process by which we push truth into the law, so we believe that truth somehow resides in the law.⁹⁶ It then becomes more difficult to transgress the law because such an action would transgress truth. This is the law’s dirty little trick. Žižek writes:

[T]ransference is this supposition of a Truth, of a Meaning behind the stupid, traumatic, inconsistent fact of the Law. In other words, ‘transference’ names the vicious circle of belief: the reasons why we should believe are persuasive only to those who already believe.⁹⁷

Law and law-abiding behavior become an infectious malady. We believe in truth; we are taught to do so by parents, elders,

93. See Behi, *supra* note 79, at 54.

94. MARCUS POUND, ŽIŽEK: A (VERY) CRITICAL INTRODUCTION 131 (Wm. B. Eerdmans 2008).

95. *Id.* at 129 (emphasis in original).

96. See ŽIŽEK, *supra* note 39, at 38.

97. *Id.*

friends. We must therefore believe in law because the reason law is valuable to society is because it protects truth.⁹⁸ We then desire law and law-abiding behavior solely because of the transference of truth into the law, without thought about how that truth value came to be.⁹⁹ Žižek affords us ways to critique the law while not assuming that the law is necessarily indicative of truth, understanding fully that the law is not sacrosanct.

V. ŽIŽEK AND CRITIQUES OF IDENTITY POLITICS

Although I am a proponent of Žižek's work on legal theory, I am not completely sold on his discussion of identity politics as problematic. What concerns me most about Žižek is that he concludes that postmodern identity politics entails an abandonment of class politics.¹⁰⁰ I do not intend to blindly support nor violently excoriate Žižek, but what we must do is appreciate the nuances of his arguments. Even where he may misstep in his approach to identity politics, he still offers important considerations for scholars of race, class, and gender issues as well as less established identity politics pursuits. Furthermore, the acceptance of some of Žižek's thought with a rejection of other aspects may be a fulfillment of the appreciation for his inconsistency. It seems that many postmodern identity politics scholars are acutely aware of the intersections between class and race. Žižek argues:

[C]ertain questions—like those concerning the nature of relationships of production, whether political democracy is really the ultimate horizon, and so on—these questions are simply no longer asked. And what I claim is that this is the necessary consequence of postmodern identity politics. You cannot claim, as they usually do, that “No, we don't abandon those other aspects, we just add to politics proper.” No, the abandonment is always implicit.¹⁰¹

We, identity politics theorists, do in fact ask questions about the mode of production, and this is where Žižek and I differ. In a proto-Marxist framework, one might view concerns of capital as a

98. *See id.*

99. *Id.* at 37-8.

100. *See* Hanlon, *supra* note 50, at 10.

101. *Id.*

priori, more so than class, but I argue that a Marxist framework ought to appreciate the interconnectedness of race and class and that recognizing class does not divert attention from macro-socio-political problems.¹⁰² When we talk about class though, have we just completed a project of identity politics? Are not the poor—urban or rural—a creation of identity politics? Do not unions create a class of workers that bond together because of similar identity markers? Have we failed to question the actual politics of production? I think not. While not explicitly critiquing the oppressive tradition of the capitalist machine, identity politics does make inroads to a larger Marxist critical project. Keep in mind that the oppression of the proletariat and of racial and ethnic minorities often shares similarities. Žižek would seem to argue, however, that shifting our critical gaze from capitalism to identity politics allows capitalism to pursue “its triumphant march.”¹⁰³

The question is not how we recognize, tolerate,¹⁰⁴ or revere the Other—the constructed different populations or individuals—but how we understand the complex picture that makes the Other. There is no reason why identity politics must subvert, question, or destroy the space upon which Marxist dialogue can take place. Here Žižek seems to miss the interconnectedness of issues of production and populations. Capitalism has enabled corporatization, globalization, slavery, and death.¹⁰⁵ We can trace this throughout modern history from the earliest mercantile political units¹⁰⁶ to today’s global superpowers.¹⁰⁷

102. *But see id.* at 11 (“The moment you start to talk this way [about gender/race/class], this ‘class’ becomes just one aspect within an overall picture which already mystifies the true social antagonisms.”).

103. Slavoj Žižek, *Ideology Between Fiction and Fantasy*, 16 CARDOZO L. REV. 1511, 1532 (1995).

104. *See generally id.* at 1518 (arguing that our lack of tolerance towards the Other is rooted in fantasy).

105. Perhaps the ultimate expression of such a condition is the colonial experience of African peoples with their oppressors, the corporate nation-states of Europe.

106. *See* Edward Mead Earle, *The New Mercantilism*, 40 POL. SCI. Q. 594, 596 (1925) (“Perhaps never before has there been such widespread disregard of the fundamental fact that production exists for [people], not [people] for production.”); Harald B. Malmgren, *Coming Trade Wars? (Neo-Mercantilism and Foreign Policy)*, 1 FOREIGN POL’Y 115, 120 (1971) (“Today, we are seeing a resurgence of mercantilism, whereby governments meet domestic economic demands with conscious policies of manipulation, passing the costs of these policies as much as possible onto other countries. This neo-mercantilism is a profoundly disruptive force in international relations. It takes many forms.”). *See generally* Allan Pred, *Manufacturing in the American Mercantile City: 1800–1840*, 56 ANNALS ASS’N AM. GEOGRAPHERS 307 (1966) (discussing mercantilism in Philadelphia, New York, Boston, and

Capitalism can be rejected while still interrogating the deleterious impacts of racism, classism, and sexism.¹⁰⁸ This is not a situation where critical projects are mutually exclusive. Might we miss questions along the way? Of course, but no movement has ever been so totalizing that it has solved all problems. If it were to be so totalizing, then it would become the proto-fascist regime it likely sought to destroy. I call into question Žižek's views on the interconnectedness of issues as they relate to identity politics and suggest that his form of Marxist inquiry might peacefully co-exist with a more postmodern identity-based project.

Furthermore, the personal politics of critical race theory are very much questions of Marxist inquiry. Critical race theory seeks to address the pervasive inequalities of race, which are almost always undergirded by perceived differences in socio-economic class. How do we produce the Black, Asian, or Latina/o political body? What are the mechanisms for such production? Who leads this production? What is or who becomes the product? To the extent that we allow ourselves to apply Marxist analysis in a rudimentary sense to the questions of identity politics, we might be able to engage in a discourse of creation and not a discourse of abandonment, as Žižek posits.

Žižek also regards some feminist movements with suspicion, particularly those of the upper-middle class.¹⁰⁹ One might interpret this as a fear that capitalism has co-opted certain feminist agendas. With respect to genuine grassroots feminism, Žižek is quite warm. He writes: “[T]hat’s formidable, I die for that.”¹¹⁰ There is a clear split between a feminism of the margins and feminism from above.¹¹¹ In practice, of course, this division may be harder to see.

Baltimore).

107. I use the term “superpower” loosely, but note that superpower status seems to follow movements towards capitalism. The United States, Japan, Great Britain, France, Germany, Brazil, China, and India are all, to varying degrees, capitalist. Each country has an interesting history which encompasses significant periods of repression (often by other capitalist countries), involvement in slavery (as slave and/or master), incentivizing corporatization, and an increasingly large role in globalization (both cultural and economic).

108. *But see* Hanlon, *supra* note 50, at 11 (“What I’m saying is that with this new proliferation of political subjects, certain questions are no longer asked. Is the state our ultimate horizon? Is capitalism our ultimate horizon? I just take note that certain concerns have disappeared.”).

109. *See* Žižek & Parker, *supra* note 27, at 6.

110. *Id.*

111. *See id.*

To be sure, with elite or Western feminism, Žižek states: “Here, I think I don’t feel any solidarity.”¹¹² Žižek, then does not completely abandon identity politics, but because his criticism of identity politics is thoroughly informed by criticisms of capitalism, he remains suspicious of identity politics relationship to critiques of capitalism.

VI. ŽIŽEK, VIOLENCE, AND TERRORISM

More recently, Žižek has devoted much time to questions of terrorism. As we continue to fight against the legacy of the Bush administration, we are saddled with the threat of this thing called “terror.”¹¹³ Many of us continue to grapple with the concept of terror. When September 11, 2001, occurred, the Left (politicians, theorists, pundits, etc.) was afraid to critically engage September 11, but Žižek stood out as a clear voice.¹¹⁴ It was as if the Left stood still, while Žižek took up critical opposition.

Legal scholars hotly debate the scope and power of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act,¹¹⁵ the legality of detentions at Guantanamo Bay,¹¹⁶ and the domestic violence of contravening the Foreign

112. *Id.*

113. We fear terror even though we struggle to define it, even though we cannot grab it with our hands, let alone wrap our minds around such a concept. Žižek describes this kind of perpetual fear of the disruption of our phantasmal peace. See Žižek, *supra* note 102 at 1527. “Real violence is a kind of acting out that emerges when the symbolic fiction that guarantees the life of a community is in danger.” *Id.* at 1517.

114. Slavoj Žižek, *Welcome to the Desert of the Real!*, 101 S. ATLANTIC Q. 385, 386 (2002) (“[On September 11, U.S.] citizens were introduced to the ‘desert of the real’—to us, corrupted by Hollywood, the landscape and the shots we saw of the collapsing towers could not but remind us of the most breathtaking scenes in the catastrophe big productions.”).

115. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified at 8 U.S.C. § 1226(2006)); see generally John W. Whitehead & Steven H. Aden, *Forfeiting “Enduring Freedom” for “Homeland Security”: A Constitutional Analysis of the USA Patriot Act and the Justice Department’s Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081 (2002).

116. See Omar Akbar, Comment, *Losing Geneva in Guantanamo Bay*, 89 IOWA L. REV. 195, 220-28 (2003) (arguing that the U.S. violates the Geneva Convention in its actions at Guantanamo Bay); John R. Pariseault, Comment, *Applying the Rule of Law in the War on Terror: An Examination of Guantanamo Bay Through the Lens of the U.S. Constitution and the Geneva Conventions*, 28 HASTINGS INT’L & COMP. L. REV. 481, 493-501 (2005) (utilizing both the Geneva Convention and the U.S. Constitution to critique practices at Guantanamo Bay); but see Morris D. Davis, Comment, *In Defense of Guantanamo Bay*, 117

Intelligence Surveillance Act (FISA).¹¹⁷ We are at once safe from terror and more full of terror because our safety is couched in a regime of greater terror. Terror has been so perverted that we are now present in a time of continual terror as opposed to continual peace.¹¹⁸ Terror is all the more likely in a world where the United States acts as trigger-happy overlord of the world. Žižek notes:

In a similar way, Saddam Hussein's regime was an abominable authoritarian state, guilty of many crimes, mostly toward its own people. However, one should note the strange but key fact that, when the United States representatives and the Iraqi prosecutors were enumerating his evil deeds, they systematically omitted what was undoubtedly his greatest crime in terms of hum[an] suffering and of violating international justice: his invasion of Iran. Why? Because the United States and the majority of foreign states were actively helping Iraq in this aggression.

And now the United States is continuing, through other means, this greatest crime of Saddam Hussein: his never-ending attempt to topple the Iranian government. This is the price you have to pay when the struggle against the enemies is the struggle against the evil ghosts in your own closet: you don't even control yourself.¹¹⁹

By now conflating Iraq and Iran, the United States continues this politics of terror as it addresses the specter of an unstable Iran. The War on Terror and the Invasion of Iraq became one. Now the pursuit of nuclear disarmament or deterring Iran from producing nuclear materials is conflated with the War in Iraq. Soon will we see an invasion in Iran which becomes conflated with an invasion of North Korea? International politics do not happen in a vacuum and Žižek is not suggesting that they do (nor am I). But in order to properly understand policy options and effectively reflect upon

YALE L.J. POCKET PART 21, 33-35 (2007) (offering a more positive perspective on prisoner treatment at Guantanamo Bay).

117. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-11 (2000)); *see generally* Peter P. Swire, *The System of Foreign Intelligence Surveillance Law*, 72 GEO. WASH. L. REV. 1306 (2004) (reviewing the nature of U.S. foreign surveillance law).

118. Cf. Žižek, *supra* note 104, at 1532.

119. Slavoj Žižek, Op-Ed., *Denying the Facts, Finding the Truth*, N. Y. TIMES, Jan. 5, 2007, at A17, available at <http://www.nytimes.com/2007/01/05/opinion/05zizek.html>.

policy outcomes, we must view distinct policy actions *as distinct* or we risk the proliferation of aggression.

Furthermore, the tragedy of 9/11 has served as a distracting force from the politics of the developing world. Whereas the United States was at least partially focused on providing aid to developing nations (and that is not to say that aid has not been and is not riddled with colonial dominance), the United States now plays the victim on the world stage, effectively ignoring the systemic violence that has decimated, destroyed, and murdered populations across the developing world. Žižek continues:

After 9/11, the United States was given the opportunity to realize what kind of world it was part of. It might have used the opportunity—but it did not, instead opting to reassert its traditional ideological commitments: out with the responsibility and guilt with respect to the impoverished third world—we are the victims now!¹²⁰

Such willful blindness to world affairs and such focus on personal (nationalistic) concerns is dangerously myopic. Myopic vision by nation-states or activist groups is quite often destructive. The United States has failed to reassert itself by submitting to the terror that brought this country tragically down. Here, Žižek is indispensable to political theory because he argues for a radical rethinking of the Left, of neoliberalism, or both.¹²¹ These currents run deep in the legal academy and Žižek's critique of these ideologies may provide answers to myopic worldviews.

As a result of this rise to popularity and in response to, what I believe was a particularly productive time for Žižek, criticism mounted. Normally, I would be disinclined to differentiate poststructuralism and postmodernism because such distinctions often entail antagonism and obscure the critical gaze.¹²² But A.C. Grayling's recent criticism of Žižek, dealing with Žižek's views on violence, makes clear why a distinction is necessary in order to answer the sophomoric blanket rejections of postmodern theory. Grayling states:

120. *Id.*

121. *See generally* Hanlon, *supra* note 50.

122. *See* SORAJAKOOL, *supra* note 67, at 213 (describing the need to stop hair-splitting and focus more intently on criticism).

WHO [sic] are the most contented people on earth? . . . And finally, I am morally certain, the cultural critics, as they are called, the self-selected radical quasi-philosophers (usually trained as sociologists or literary theorists) who enjoy the unaccountable, responsibility-free luxury of being able to criticise everything and everyone, to sneer and accuse, to blame and complain, to analyse, anatomise, judge and condemn, without fear of being asked to do better themselves.¹²³

This analysis sounds angry, more vitriolic than virtuous. What is meant by “quasi-philosopher” and why are “sociologists” or “literary theorists” unable to engage in criticism? If this was true, much legal criticism would be in question. This failure to engage occurs in the legal academy as well, as some more traditional thinkers seek to root our critical theories important influence.

Grayling finds particular fault with what he alleges is Žižek’s call to do nothing in the face of violence.¹²⁴ I do not know how Grayling interprets Kierkegaard’s nothing, or more appropriately, his acceptance of suffering,¹²⁵ but I would venture that he would not regard Kierkegaard highly. Although there is no crime in disagreeing with Kierkegaard or with Žižek, it is problematic to resist the power of reflection and acceptance as a way to embrace the possibility of one’s present, which moves people beyond static understandings of death, violence, and despair.

To be sure, Žižek abhors the non-acting academic Left—”pseudo-radical academic Leftists who adopt an attitude of utter disdain towards the Third Way, while their own radicalism ultimately amounts to an empty gesture which obliges no one to do anything definite.”¹²⁶ But, Grayling’s criticism seems to deny Žižek’s important analysis of violence on the basis of *ad hominem* attack.

Grayling acknowledges that, “[y]ou can, and should, complain

123. A.C. Grayling, *The Wild Man of Pomo*, THE AUSTRALIAN, June 28, 2008, <http://www.theaustralian.news.com.au/story/0,25197,23915460-16947,00.html>.

124. *Id.*

125. See Blumenthal, *supra* note 21, at 1.

126. See LENIN, *supra* note 55, at 172.

vociferously about the harms and wrongs perpetrated by capitalism,¹²⁷ but he asks that those criticisms stop at a certain point. He suggests that to criticize capitalism too greatly would muddle the argument.¹²⁸ Of course, extremism has its flaws, but a careful analysis of capitalism's ills is a requisite part of even embracing capitalism. Grayling continues:

[B]ut to describe them all as violence makes it impossible to distinguish between what happens when a multinational oil company raises its prices and when it pays to have people bullied off land above an oil deposit. Being paid a low wage and being shot in the head are two different things. If you use the same word for both you are muddling, weakening and misdirecting your argument.¹²⁹

This argument is victim to the bloodlust of much current political discussion. There must be a body count for a tragedy to be truly tragic. Imagine such bloodlust infiltrating the way domestic violence claims are evaluated. It mocks the value of law and justice and perpetuates the very violence that Grayling claims is delegitimized by Žižek's analysis. In law, if domestic violence could only be adjudicated if every victimized individual had a black eye or a hand mark, we would leave many covert offenders unpunished. When law increases the burdens of proving that a violent act legally took place, it becomes increasingly easy for violent acts to fly under the legal radar. Individuals would become more violent if they knew they could avoid detection.

Žižek offers a further compelling argument against post-September 11 policy, namely that George Bush positioned himself as a classic authoritarian leader.

Every totalitarian leader claims that, in [herself or] himself, [(s)he] is nothing at all: His [or her] strength is only the strength, of the people who stand behind him, whose deepest strivings only he [or she] expresses. The catch is, those who oppose the leader by definition not only oppose [her or] him, but they also oppose the deepest and noblest strivings of the

127. See Grayling, *supra* note 124, at 8.

128. See generally *id.*

129. *Id.*

people.¹³⁰

Žižek's arguments are useful to legal scholars wishing to understand the politics of persuasion. Be it an attorney, public intellectual, student, or layperson, the construction of opposition forces is integral to the successful presentation of an argument. The ability to analyze this construction is even more useful so that individuals can understand what or whom they argue against. The oppressor is always wont to characterize the oppressed as against the people, out of step with society, or as an affront to truth and virtue. Žižek's criticism of national security policy, his crisp writing on Iraq, and his critical engagement of the Left afford countless opportunities for continued critical inquiry and are applicable to those in the legal world wishing to further engage ideas or national security and terror.

VII. ŽIŽEK'S LESSONS, OR THE VALUE OF PUBLIC DISCOURSE

I want my books to be taken seriously. I make fun of myself and maybe it doesn't work, but this is my attitude. My absolute horror is fake intellectuals who [pose] as turning out "big thoughts" or whatever. For me, there is something so ridiculous about it. My message is simply, "Don't take me seriously, take ideas seriously."¹³¹

Žižek provides a compelling argument for intellectuals to engage the public sphere—to be political. Žižek states: "Political issues are too serious to be left only to politicians We need intellectuals—not to make decisions, but to make clear what the issues are about."¹³² When Žižek uses the term "intellectuals," I believe strongly that it can and should encompass legal scholars and lawyers. Legal intellectuals ought to embrace this sort of

130. Slavoj Žižek, *Iraq's False Promises*, 140 FOREIGN POLICY, 2004, 42, 45.

131. Damon Smith, *For Žižek, Clarity Rules Film, Philosophy*, BOSTON GLOBE, Feb. 26, 2006, at N13 (quoting Slavoj Žižek), available at http://www.boston.com/news/globe/living/articles/2006/02/26/for_zizek_clarity_rules_film_philosophy/.

132. Frances Stonor Saunders, *What Have Intellectuals Ever Done for the World?*, THE OBSERVER, Nov. 28, 2004, at 29, available at http://observer.guardian.co.uk/comment/story/0,6903,1361235,00.html#article_continue.

public discourse. Why, however, do so many legal scholars seem to avoid civic engagement? Much of this stems from the lack of critical engagement with the world beyond academia's ivory tower. Sure there's campaign work and conference organizing, but why not more public criers and activists? Legal scholars are too often disengaged from politics—tacit accepters of the way and the truth of the status quo.¹³³ Our ability to engage in discourse has been limited not only by rigid rules we endured as students and educators, not only by fear of reprisal and apathy, but by the sudden turn of public discourse from the intellectually enriching to the vulgar and void.¹³⁴ Public discourse in its disuse has atrophied, has become banal.

In order to address the banality of our discourse we must engage it directly. We must embrace Žižek's ethic of questioning to invigorate our own critical drive. In order to sustain the public sphere we must sustain public discourse. We must act out and against the mass media news clips, streaming feeds, simulated stories, and pop discourse to develop a larger political project of active resistance. This requires a movement beyond the university or office walls.¹³⁵

As intellectual thought has been commodified, intellectuals find themselves increasingly limited in the ability to pursue their interests.¹³⁶ The rise in university managerialism and corporatized media has worked to commodify intellectualism.¹³⁷ The commodification of intellectual expression has disastrous consequences. It relegates activism to passively articulated and abrasively scrubbed sound bites and computer bytes.¹³⁸ It replaces inquisitiveness with complacency and hinders intellectual growth, all the while being portrayed as an effort to increase critical engagement.

133. See, e.g., SLAVOJ ŽIŽEK, *ORGANS WITHOUT BODIES: ON DELEUZE AND CONSEQUENCE* 132, n.23 (2004) (describing Francis Fukuyama as “a fully pledged apologist for the existing order”).

134. Richard D. Parker, *Taking Politics Personally*, 12 *CARDOZO STUD. L. & LITERATURE* 103, 103 (2000).

135. See generally Paul A. Taylor, *Why Žižek? Why Now?*, 1 *INT'L J. ŽIŽEK STUD.* 4, 4–5 (2007), available at <http://zizekstudies.org/index.php/ijzs/article/view/33/93>.

136. *Id.*

137. *Id.*

138. See Parker, *supra* note 135, at 103 (“Packaged in sound bites and images, it is superficial.”).

Civic participation is a fantasy.¹³⁹ The value of civic participation has consistently been eroded and now suffers from the violence of symbolism, of fantasy. Civic discourse has been replaced by phantasmagorical imagery, all the while relegating actual engagement to something akin to playing politics on one's Playstation.¹⁴⁰ When everything is sensational,¹⁴¹ very few sensations are aroused. But, Žižek can help us rally our collective energies and do something.

The benefits of public discourse, considered from both an academic and political perspective, have been well documented in the writings of Gordon R. Mitchell,¹⁴² who helps to illuminate the ideas Žižek is driving at without embracing Žižek. Mitchell echoes Žižek's above quoted notion when he and his colleagues write, "Dodging questions in public debates has become stock-in-trade for American politicians."¹⁴³

Furthermore, the political has often been misappropriated to obscure the social. Political discourse has moved away from participation and toward highfalutin soliloquy. Kenneth L. Karst notes:

Public discourse on the social issues has been largely supplanted by the mass distribution of emotion-laden symbols. Discourse, after all, means more than talk; it also means paying attention—and for at least three decades, the practitioners of cultural politics on our national stage have done far more shouting than listening.¹⁴⁴

Žižek helps illuminate a space that is not "emotion-laden" and

139. *Id.*

140. The Playstation is a Sony-made video game system. Many games involve simulations of everything from World War II battles to National Football League playoff games. See, e.g., PLAYSTATION@NETWORK, <http://us.playstation.com> (last visited Oct. 23, 2010).

141. See Parker, *supra* note 135, at 103.

142. Gordon R. Mitchell is Associate Professor of Communications and Director of the William Pitt Debating Union at the University of Pittsburgh. See RESEARCH BY GORDON MITCHELL, <http://www.pitt.edu/~gordonm/> (last visited Sep. 3, 2009).

143. Gordon R. Mitchell et al., *Navigating Dangerous Deliberative Waters: Shallow Argument Pools, Group Polarization and Public Debate Pedagogy in Southeast Europe*, 4 *CONTROVERSIA* 69, 69 (2006).

144. Kenneth L. Karst, *Local Discourse and the Social Issues*, 12 *CARDOZO STUD. L. & LITERATURE* 1, 1–2 (2000).

is decidedly political.

In order to more effectively assure the possibility of productive social movements, we must encourage intelligence, debate, and public discourse on all issues. Žižek's call for making issues intelligible is a constituent part of social movement theory. A social movement does not start if the movement's goals are not articulated. Taking ideas seriously and understanding what issues mean are the building blocks for radical political action. Žižek takes criticism from paper to pavement. He gives criticism the "activist turn" that scholars have long sought.¹⁴⁵

But discourse is not always the cure to society's ills. Language can be used to bring about glorious things: friendship, peace, romance, agreement, and understanding, to name a few. But, as Žižek artfully argues in response to Walter Benjamin,¹⁴⁶ language can be the medium of violence.¹⁴⁷ Language constructs both non-violence and violence. It is the very essence of division.¹⁴⁸ To think of public discourse, debate, or protest as the solution to all that ails the world is intellectually dishonest. It is a call to inactivity. Discourse must be utilized because it is language that marks the chains of oppression and language that will file away at oppression's chains. This does not mean that discourse ought to be discouraged. Ultimately, discourse will set us free as long as we reject passive acceptance of language.

Law is not devoid of language's oppressive politics. Does law become so wrapped up in its own language that language exerts control over law? How, after all, did the Holocaust occur?¹⁴⁹ The masses milling about Main Street are not at all aware of the legal world. Fewer yet could competently discuss how laws come to be.

145. Gordon R. Mitchell, *Public Argument Action Research and the Learning Curve of New Social Movements*, 40 ARGUMENTATION & ADVOCACY 209 (2004).

146. WALTER BENJAMIN, *Critique of Violence*, in 1 WALTER BENJAMIN: SELECTED WRITINGS: 1913-1926 236, 243-245 (Michael W. Jennings et al. eds., Harvard Univ. Press 2002) (1996).

147. Slavoj Žižek, *Language, Violence and Non-Violence*, 2 INT'L J. ŽIŽEK STUD. 1, 2-3 (2008), available at <http://zizekstudies.org/index.php/ijzs/article/view/154/240>.

148. *Id.* at 2.

[P]erhaps, the fact that *reason* (*ratio*) and *race* have the same root tells us something: language, not primitive egotistic interests, is the first and greatest divider, it is because of language that we and our neighbors (can) "live in different worlds" even when we live on the same street.

Id.

149. *Id.* at 2-6.

The public debates we need in order to see justice are lacking. Legal knowledge evades the public. Legal language helps the public neglect legal awareness.

Legal minds might learn from this approach by being more active engagers of the law. Of course civic discourse is not limited to, or only beneficial for, the elite (nor should it be conceptualized that way).¹⁵⁰ As opposed to accepting the law for what it is or merely taking a case to court, perhaps practicing lawyers might engage in micro-political action: attend a protest, start a discussion group, etc. Criticism must take an activist turn, even if the turn is incremental. It may seem self-evident why public discourse is important, but to make sure the point is clear: public discourse is necessary for a liberated public.¹⁵¹ Without discursive practice the public sphere deflates like a child's punctured balloon. Žižek's call to intelligent discourse is a call to the protection of the public sphere—a public sphere he more than embraces in his talks.¹⁵² A loss of the public sphere and of discursive power results in political apathy, which leads to oppression. Without public discourse the world collapses into authoritarian rule, but legal theorists and activists have the ability to inflate the public sphere once again.

When public discourse flourishes, so too does democracy.¹⁵³ Žižek has actually spoken of an affinity for democracy despite his Marxist orientation.¹⁵⁴ But, in the same ideological breath, he critiques democracy's legitimization of actions.¹⁵⁵ Democracy

150. See Parker, *supra* note 135, at 125 (“[P]ublic discourse is not (and should not be) the discourse of academia or a profession or a high-toned club.”).

151. See ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 7, 141 (Harvard Univ. Press 1995); Karst, *supra* note 145, at 2.

152. Guy Mannes-Abbott, *The Books Interview: The Giant of Ljubljana Slavoj Žižek, Slovenia's Superstar Philosopher, Backs the War Against His Ex-Bosses*, *THE INDEPENDENT*, Apr. 24, 1999, at 12 (“To witness a lecture by Žižek is rather like watching matter exploding in space.”).

153. See Karst, *supra* note 143, at 27.

A concern for political democracy, then, is matched by another constitutional goal every bit as important to American society, and that is cultural democracy, the broadest possible participation in the cultural processes that define and redefine the sort of society we shall be. This form of life—an ideal not yet fully realized—demands not only a public discourse that nourishes political democracy, but also a healthy local discourse that nourishes cultural democracy.

Id.

149. See ŽIŽEK!, *supra* note 65.

155. Slavoj Žižek, *Legal Luck*, 4 *UNBOUND* 1, 11 (2008).

Even some Lacanians praise democracy as the “institutionalization of the lack in the Other:”

normalizes the lack of the Other so that the Other begins to exist inside the shroud of democracy.¹⁵⁶ It becomes acceptable to otherize. This ideological position is true to Žižek's spirit. Ideas and events do not warrant blanket acceptance or rejection. Instead democracy, or any other idea, must be critiqued, reevaluated, and pursued anew. The process of critical investigation must be ongoing so that we do not tacitly accept democracy or any other idea.

Democratic dreaming is both beneficial and dangerous. To idealize a utopia is dangerous, but to appreciate the journey toward utopia is a productive endeavor because it demands the participation of the subject. Achieving democracy and striving toward democracy are dramatically different creatures. Žižek appreciates this distinction when he condemns the abstraction of democracy.¹⁵⁷ I argue similarly that confusing the abstract ideal of democracy with the rhetoric of democracy wraps an insidious cloak around a most distressing enemy.¹⁵⁸ Public discourse may encourage great things, but we cannot let ideals blind us to our present.

the premise of democracy is that no political agent is *a priori* legitimized to hold power, that the place of power is empty, open to competition. However, by institutionalizing the lack, democracy neutralizes—normalizes—it, so that the big Other is again here in the guise of the democratic legitimization of our acts—in a democracy, my acts are “covered” as the legitimate acts which carry out the will of the majority.

Id.

156. *Id.*

157. SLAVOJ ŽIŽEK, *LOOKING AWRY: AN INTRODUCTION TO JACQUES LACAN THROUGH POPULAR CULTURE* 163 (MIT Press 1992).

158. See Scullo *Atlantean Prose and the Search for Democracy*, *supra* note 72, at 137.

The rhetoric of democracy is of the highest importance. The rhetoric of democracy is more concerning than the practice of democracy. Indeed, one of the greatest criticisms of our democracy is that the words we use to describe the ideal democracy are masking the insidious injustices of the democracy we live. Words are powerful, and the words that constitute our ideas of government are all that much more important. Let us not confuse the rhetoric of democracy with the actual form of government connoted. The rhetoric of democracy is the tool used by those in power to mask the un-democratic nature of our government. The more we hear from our leaders that the system works, rights are being protected, and liberties are everyday more entrenched, the less rhetorical space we have to critique the government for its public image as that of a functioning democracy—born out of the rhetoric of democracy.

Id.

VIII. CONCLUSION

Why do I resort so often to examples from popular culture? The simple answer is to avoid a kind of jargon, and to achieve the greatest possible clarity, not only for my readers but also for myself. That is to say, the idiot for whom I endeavor to formulate a theoretical point as clearly as possible is ultimately myself.¹⁵⁹

The legal academy, students, and practitioners should consider a more careful reading of Slavoj Žižek as a theorist deeply important to many legal discussions. The breadth of his writings, his sharp wit, and his interdisciplinary prose, all lend themselves to consideration in larger legal theory discussions. This article has argued for the importance of Žižek in a number of current legal problems from questions of terrorism to capitalism's influence, public discourse and critical engagement, to legal theory and politic. Hopefully, this article will spur further research on Žižek and the law. Whether viewed as radical activist, cultural critic, public intellectual, or popular culture theorist, legal minds owe it to themselves to consider Žižek's work and the ways in which it might inform their thoughts and actions.

159. SLAVOJ ŽIŽEK, INTERROGATING THE REAL 56 (Rex Butler & Scott Stephens eds. & trans., Continuum 2005).