# 2AC UKRR Race 5

## Transition

### Overview---2AC

#### Solving warming is a prerequisite to solving every other impact.

Mittiga 24 – Researcher and Lecturer, Dept. of Philosophy, University of Graz

Ross Mittiga, “Climate Change, Catastrophe, and the Circumstances of Justice,” Ch. 2 in *Climate Change as Political Catastrophe: Before Collapse* *Climate Change as Political Catastrophe: Before Collapse* (Oxford UPress, Feb. 2024), at p. 43

One way to respond is to assert a simple baseline: that justice requires material conditions to be such that all individuals can (continue to) meet their basic needs without having to deny others the ability to do the same.127 While this may be vague, defining a more exact threshold is not essential. It suffices to fix on credible risks of political catastrophe (like those posed by climate change), and structure our action so as to reduce the likelihood and/or potential magnitude of those risks as far as we are reasonably able to do, which is precisely what the PPA prescribes.

### Solvency---2AC

## Case

### Case---2AC

#### D. CRITICAL LEGAL PEDAGOGY: Engaging with the horizons of legal possibility and their details is valuable both as one necessary component of leftist strategy AND as a locus for training students in activism of every kind. That’s a reason they can’t solve their own impacts and a reason our framework link turns their offense.

Klare 11 – Professor, Northeastern Law

Karl Klare, George J. & Kathleen Waters Matthews Distinguished University Professor, Northeastern University School of Law, “Teaching Local 1330—Reflections on Critical Legal Pedagogy,” *School of Law Faculty Publications*, Paper 167, 2011, http://hdl.handle.net/2047/d20002528

By now it has begun to dawn that one of the subjects of this class session is how lawyers translate their moral intuitions and sense of justice into legal arguments. Most beginning students have found themselves in the situation of wanting to express their moral intuitions in the form of legal arguments but of feeling powerless to do so. A common attitude of Northeastern students is that a lawyer cannot turn moral and political convictions into legal arguments in the context of case-litigation. If you are interested in directly pursuing a moral and/or political agenda, at a minimum you need to take up legislative and policy work, and more likely you need to leave the lawaltogetherand take upgrass rootsorganizing instead. I insist that we keep the focus on litigation for this class period. After the straw poll, I ask the students to simulate the role of Staughton Lynd‟s legal assistants and to assume that the court has just definitively rejected the claims based on contract, promissory estoppel, and the notion of a community property right. However, they should also assume, counter-factually, that Judge Lambros stayed dismissal of the suit for ten days to give plaintiffs one last opportunity to come up with a theory. I charge the students with the task of making a convincing common law argument, supported by respectable legal authority, that the plaintiffs were entitled to substantial relief. Put another way, I ask the students to prove that Judge Lambros was mistaken—that he was legally wrong—when he concluded that there was no basis in existing law to vindicate the workers‟ and community‟s rights. In some classroom exercises, I permit students to select the side for which they wish to argue, but I do not allow that in this session. All students are asked to simulate the role of plaintiffs‟ counsel and to make the best arguments they can—either because they actually believe such arguments and/or because in their simulated role they are fulfilling their ethical duty to provide zealous representation. A recurring, instant reflex is to say: “it‟s simple—the workers‟ human rights were violated in the Youngstown case.” I remind the class that the challenge I set was to come up with a common law theory. The great appeal of human rights discourse for today‟s students is that it seems to provide a technical basis upon which their fervent moral and political commitments appear to be legally required. “What human rights?” I ask. The usual answers are (1) “they had a right to be treated like human beings” or (2) “surely there is some human right on which they can base their case.” To the first argument I respond: “well, how they are entitled to be treated is exactly what the court is called upon in this case to decide. Counsel may not use a re-statement of the conclusion you wish the court to reach as the legal basis supporting that conclusion.” To the second response I reply: “it would be nice if some recognized human right applied, but we are in the Northern District of Ohio in 1980. Can you cite a pertinent human rights instrument?” (Answer: “no.”) The students then throw other ideas on the table. Someone always proposes that U.S. Steel‟s actions toward the community were “unconscionable.” I point out that unconscionability is a defense to contract enforcement whereas the plaintiffs were seeking to enforce a contract (the alleged promise not to close the plant if it were rendered profitable). In any case, we have assumed that the judge has already ruled that there was no contract. Another suggestion is that plaintiffs go for restitution. A restitution claim arises when plaintiff gives or entrusts something of value to the defendant, and the defendant wrongfully refuses to pay for or return it. But here we are assuming that Judge Lambros has already ruled that the workers did not endow U.S. Steel with any property or value other than their labor power for which they were already compensated under the applicable collective bargaining agreements. If the community provided U.S. Steel with value in the nature of tax breaks or infrastructure development, the effect of Judge Lambros‟ ruling on the property claim is to say that these were not investments by the community but no-strings-attached gifts given in the hope of attracting or retaining the company‟s business. At this point I usually give a hint by saying, “if we‟ve ruled out contract claims, and we‟ve ruled property claims, what does that leave?” Aha, torts! A student then usually suggests that U.S. Steel committed the tort of intentional infliction of emotional distress (IIED).15 I point out that, even if it were successful, this theory would provide plaintiffs relief only for their emotional injuries, but not their economic or other losses, and most likely would not provide a basis for an injunction to keep the plant open. In any event, IIED is an intentional tort. What, I ask, is the evidence that U.S. Steel intends the plant shutdown to cause distress? The response that “they should know that emotional distress will result” is usually not good enough to make out an intentional tort. An astute student will point out that in some jurisdictions it is enough to prove that the defendant acted with reckless disregard for the likelihood that severe emotional distress would result. I allow that maybe there‟s something to that, but then shift ground by pointing out that a prima facie requirement of IIED is that the distress suffered go beyond what an “ordinary person” may be expected to endure or beyond the bounds of “civilized behavior.”16 Everyone knows that plants close all the time and that the distress accompanying job-loss is a normal feature of American life. A student halfheartedly throws out negligent infliction of emotional distress, to which my reply is: “In what way is U.S. Steel‟s proposed conduct negligent? The problem we are up against here is precisely that the corporation is acting as a rational profit-maximizer.” A student always proposes that plaintiffs should allege that what U.S. Steel did was “against public policy.” First of all, I say, “public policy” is not a cause of action; it is a backdrop against which conduct or contract terms are assessed. Moreover, what public policy was violated in this case? The student will respond by saying “it is against public policy for U.S. Steel to leave the community devastated.” I point out once again that that is the very conclusion for which we are contending—it is circular argument to assert a statement of our intended conclusion as the rationale for that conclusion. This dialogue continues for awhile. One ineffective theory after another is put on the table. Only once or twice in the decades I have taught this exercise have the students gotten close to a viable legal theory. But this is not wasted time—learning occurs in this phase of the exercise. The point conveyed is that while law and morals/politics are inextricably intertwined, they are not the same. For one thing, lawyers have a distinct way of talking about and analyzing problems that is characteristic of the legal culture of a given time and place. So-called “legal reasoning” is actually a repertoire of **conventional**, **culturally approved rhetorical moves and counter-moves** deployed by lawyers to create an appearance of the legal necessity of the results for which they contend. In addition, good lawyers actually possess **useful**, specialized **knowledge** not generally absorbed by political theorists or movement activists. Legal training **sensitizes us** to the many **complexities** that arise whenever general norms and principles are implemented in the form of rules of decision or case applications. Lawyers know, for example, that large stakes may turn on precisely how a right is defined, **who has standing** to vindicate it, **what remedies it provides, how the right is enforced** and in what venue(s), and so on. We are not doing our jobs properly if we argue, simply, “what the defendant did was unjust and the plaintiff deserves relief.” No one needs a lawyer to make the “what the defendant did was unjust” argument. As Lynd‟s account shows, the workers of Youngstown did make that argument in their own, eloquent words and through their collective resistance to the shut-downs. If “what the defendant did was unjust” is all we have to offer, lawyers bring no added value to the table**.** Progressive students sometimes tell themselves that law is basically gobbledygook, but that you can assist movements for social change if you learn how to spout the right gobbledygook. In this view of legal practice, “creativity” consists in identifying an appropriate technicality that helps your client. But in the Youngstown situation, we are way past that naïve view. There is no “technicality” that can win the case. In this setting, a social justice lawyer must use the bits and pieces lying around to generate **new legal knowledge** and **new legal theories**. And these new theories must say something more than “**my client deserves to win**” (although it is fine to commence one‟s research on the basis of that moral intuition). The class is beginning to get frustrated, and around now someone says “well, what do you expect? This is capitalism. There‟s no way the workers were going to win.” The “this-is-capitalism” (“TIC”) statement sometimes comes from the right, sometimes from the left, and usually from both ends of the spectrum but in different ways. The TIC statement precipitates another teachable moment. I begin by saying that we need to tease out exactly what the student means by TIC, as several interpretations are possible. For example, TIC might be a prediction of what contemporary courts are most likely to do. That is, TIC might be equivalent to saying that “it doesn‟t matter what theory you come up with; 999 US judges out of 1,000 would rule for U. S. Steel.”17 I allow that this is probably true, but not very revealing. The workers knew what the odds were before they launched the case. Even if doomed to fail, a legal case **may still make a contribution to social justice** if the litigation creates a focal point **of energy around which a community can mobilize, articulate moral and political claims, educate the wider public, and conduct political consciousness-raising**. And if there is political value in pursuing a case, we might as well make good legal arguments. On an alternative reading, the TIC observation is more ambitious than a mere prediction. It might be a claim that a capitalist society requires a legal structure of a certain kind, and that therefore professionally acceptable legal reasoning within capitalist legal regimes cannot produce a theory that interrogates the status quo beyond a certain point. Put another way, some outcomes are so foreign to the bedrock assumptions of private ownership that they cannot be reached by respectable legal reasoning. A good example of an outcome that is incompatible with capitalism, so the argument goes, is a court order interfering with U.S. Steel‟s decision to leave Youngstown. This reading of the TIC comment embodies the idea that legal discourse is encased within a deeper, extra-legal structure given by requirements of the social order (capitalism), so that within professionally responsible legal argument the best lawyers in the world could not state a winning theory in Local 1330. Ironically, **the left and the right in the class often share this belief.** I take both conservative and progressive students on about this. I insist that the claim that our law is constrained by a rigid meta-logic of capitalism—which curiously parallels the notion that legal outcomes are tightly constrained by legal reasoning—is just plain wrong. Capitalist societies recognize all sorts oflimitations on the rights of property owners. Professor Singer‟s classic article catalogues a multitude of them.18 The claim is **not only false**, **it is a** dangerous **falsehood**. **To believe** TIC in **this** sense **is to limit in advance our aspirations for what social justice lawyering can accomplish**. Now the class begins to sense that I am not just playing law professor and asking rhetorical questions to which there are no answers. The students realize that I actually think that I have a theory up my sleeve that shows that Judge Lambros was wrong on the law. If things are going well, the students begin to feel an emotional stake in the exercise. Many who voted in the straw poll that the plaintiffs deserved to win are anxious to see whether I can pull it off. Other students probably engage emotionally for a different reason—the ones who have been skeptical or derisive of my approach all term hope that my “theory,” when I eventually reveal it, is so implausible that I will fall flat on my face. I begin to feed the students more hints. One year I gave the hint, “What do straying livestock, leaking reservoirs, dynamite blasting, and unsafe products have in common?”—but that made it too easy. Usually my hints are more oblique, as in “does anything you learned about accident law ring a bell?” Whatever the form, the students take the hints, and some start cooking with gas. Over the next few minutes, the pieces usually fall into place. The legal theory toward which I have been steering the students is that U.S. Steel is strictly liable in tort for the negative social effects of its decision to disinvest in Youngstown. I contend that that is what the law provided in Ohio in 1980, and therefore a mechanism was available for the District Court to order substantial relief. A basic, albeit contested theme of modern tort law, which all students learn in first year, is that society allows numerous risky and predictably harmful activities to proceed because we deem those activities, on balance, to be worthwhile or necessary. In such cases, the law often imposes liability rules designed to make the activity pay for the injuries or accidents it inevitably causes. For more than a century, tort rules have been fashioned to force actors to take account of all consequences proximately attributable to their actions, so that they will internalize the relevant costs and price their products accordingly. The expectation is that in the ordinary course of business planning, the actor will perform a cost/benefit analysis to make sure that the positive values generated by the activity justify its costs. Here, I remind the students of the famous Learned Hand Carroll Towing formula19 comparing B vs. PL, where B represents the costs of accident avoidance (or of refraining from the activity when avoidance is impossible or too costly); and P x L (probability of the harm multiplied by the gravity of the harm) reflects foreseeable accident costs.20 The tort theory that evolved from this and similar cost/benefit approaches is called “market deterrence.” The notion is that liability rules should be designed to induce the actor who is in the best position to conduct this kind of cost/benefit analysis with respect to a given activity to actually conduct it. Such actors will have incentives to make their products and activities safer and/or to develop safer substitute products and activities.21 Actors will then pass each activity‟s residual accident costs on to consumers by “fractionating” and “spreading” such costs through their pricing decisions. As a result, prices will give consumers an accurate picture of the true social costs of the activity, including its accident costs. Consumers are thus enabled to make rational decisions about whether to continue purchasing the product or activity in light of its accident as well as its production costs. In principle, if a particular actor produces an unduly risky product (in the sense that its accident costs are above “market level”), that actor‟s products will be priced above market, and he/she will be driven out of business.22 Tort rules have long been crafted with an eye toward compelling risky but socially valuable activities or enterprises to internalize their external costs. My examples—to which the students were exposed in first year—are the ancient rule imposing strict liability for crop damage caused by escaping livestock;23 strict liability under the doctrine of Rylands v. Fletcher for the escape of dangerous things brought onto one‟s property;24 strict liability under Restatement (Second) § 519 for damage caused by “abnormally dangerous activities” such as dynamite blasting;25 and most recently, strict products liability.26 Of course, there are many exceptions to this approach. For example, “unavoidably unsafe” or “Comment k products” are deemed non-defective and therefore do not carry strict liability. And of course the U.S. largely rejected Rylands. Why was that? Because, as was memorably stated in Losee v. Buchanan: “We must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of all our civilization.”27 In assuming that entrepreneurial capitalism would be stymied if enterprises were obliged to pay for the harms they cause, the Losee court accepted a strong version of TIC. Time permitting, I touch briefly on the debate about whether the flourishing of the negligence principle in the U.S. subsidized 19th century entrepreneurial capitalism,28 the possible implications of the Coase Theorem for our discussion of Local 1330,29 and the debate about whether it is appropriate for courts to fashion common law rules with an eye toward their distributive as well as efficiency consequences.30 With this as background, I argue that the District Court should have treated capital mobility—investors‟ circulation of capital in search of the highest rate of return—as a risky but socially valuable activity warranting the same legal treatment as straying cattle and dynamite blasting. Capital mobility is socially valuable. It is indispensable for economic growth and flexibility. Capital mobility generates important positive externalities for “winners,” such as economic development and job-creation at the new site of investment. However, capital mobility also predictably causes negative external effects on “bystanders” (the ones economists quaintly label “the losers”). We discussed some of these externalities at the outset of the class—the trauma associated with income interruption and pre-mature retirement, waste or destruction of human capital, multiplier effects on the local economy, and social pathologies and community decline of the kind experienced in Youngstown. The plaintiffs should have argued that capital mobility must internalize its social dislocation costs for reasons of economic efficiency, and that this can be accomplished by making investors strictly liable in tort for the social dislocation costs proximately caused by their capital mobility decisions. An investor considering shifting capital from one use to another will compare their respective rates of return. In theory, the investment with the higher return is socially optimal (as well as more profitable for the individual investor). The higher-return investment enlarges the proverbial pie. But investors must perform accurate comparisons of competing investment opportunities in order for the magic hand of the market to perform its magic. A rational investor bases her analysis primarily on price signals reflecting estimated rates of return on alternative investment options. This comparison will yield an irrational judgment leading to a socially suboptimal investment decision unless the estimated rate of return on the new investment reflects its external effects, both positive and negative. Investors often have public-relations incentives to tout the positive economic consequences promised at the new location. To guarantee rational decision making, the law must force investors contemplating withdrawal of capital from an enterprise to also carefully consider the negative social dislocation costs properly attributable to the activity of disinvestment. This can be achieved by making capital mobility strictly liable for its proximately caused social dislocation costs.31 This approach erects no inefficient barriers to capital mobility, nor does it bar all disinvestment decisions that may cause disruption and loss in the exit community. Other things being equal, if the new investment discounted by the social dislocation costs of exit will generate a higher rate of return than the current use of the capital, the capital should be disinvested from the old use and transferred to the new use. However, if investors are not forced by liability rules to take into account the social dislocation costs of disinvestment, the new investment opportunity will appear more attractive than it really is in a social sense. The situation involves a classic form of market failure. The market is imperfect because investors are not obliged to take into account the negative social dislocation costs proximately caused by their decisions. Inaccurate price signals lead to the overproduction of capital movement and therefore to a suboptimal allocation of resources. Apart from any severance and unemployment benefits received by workers at the old plant, the social dislocation costs of disinvestment are almost entirely externalized onto the workers and the surrounding community. Strict tort liability will induce investors and their downstream customers to fractionate and spread the dislocation costs of capital mobility when pricing the products of the new activity. This will provide those who use or benefit from the new activity at the destination community more accurate signals as to its true social costs and oblige them to fractionally share in the misfortunes afflicting the departure community. Suppose, for example, that U.S. Steel invested the money it took out of Youngstown toward construction of a modern, high-tech steel mill in a Sunbelt state. The price of steel produced at the new mill should fractionally reflect social dislocation costs in Youngstown. According to legal “common sense” and mainstream economic theory, the movement of capital from a lesser to a more profitable investment is an unambiguous social good. Allowing capital to migrate to its highest rate of return guarantees that society‟s resources are devoted to their most productive uses. Society as a whole is better off if capital is permitted freely to migrate to the new investment and there to grow the pie. In short, the free mobility of capital maximizes aggregate welfare. We are all “winners” in the long run, even if some unfortunate “losers” might get hurt along the way. It follows as an article of faith that any legal inhibition on the mobility of capital is inefficient and socially wasteful. This is why mainstream legal thinking refuses to accord long-term workers or surrounding communities any sort of “property interest” in the enterprise which a departing investor is obliged to buy out before removal.32 An unwritten, bed-rock assumption of US law is that capital is not and should not be legally responsible for the social dislocation costs occasioned by its mobility.33 Such costs are mostly externalized onto employees and the surrounding community, even if the exit community had subsidized the old investment with tax breaks and similar forms of corporate welfare. The legal common sense about capital mobility is mistaken. It is not a priori true that the movement of capital toward the greatest rate of return unambiguously enhances aggregate social welfare. Free capital mobility maximizes aggregate welfare and allocates resources to their most productive uses only in a perfect market; that is, only in the absence of market failure. The claim that free capital mobility is efficient is sometimes true, and sometimes it is not. It all depends on the particular facts and circumstances on the ground. Voilà. Judge Lambros was wrong. In 1980, a mechanism did exist in our law to recognize the plaintiffs‟ claims and afford them substantial relief for economic, emotional, and other losses.34 All that was required was a logical extension of familiar torts thinking. Had Judge Lambros correctly applied well-known and time-honored torts principles, he would have treated the social dislocation costs of the plant closure as an externality that must be embedded in U.S. Steel‟s calculations regarding the relative profitability of the old and new uses to which it might put its capital. This would close the gap between private and social costs, thereby tending to perfect the market. Notice an important rhetorical advantage of this theory—its core value is economic efficiency. The plaintiffs can get this far along in their argument without mentioning “fairness,” “equity,” or “justice,” let alone “human rights,” values that are often fatal to legal argument in U.S. courts today.35 I now brace myself for the “you gotta be kidding me” phase of the discussion. Objections cascade in. The progressive students want to be convinced that this is really happening. The mainstream students want to poke holes and debunk. A few of them are grateful at last for an opportunity to show how misguided they always knew my teaching was. Always, students assert that my summary discussion of the cost/benefit analysis omitted various costs and benefits. For example, one year I omitted to say that the social dislocation costs in the exit community must be discounted by ameliorative public expenditures such as unemployment insurance benefits. My response to this type of objection is always the same: “you are absolutely right, that cost or benefit should be included in the analysis. And here are a few more considerations we would need to address to perfect the cost/benefit analysis which I left out only in the interest of time.” But I learn from this discussion; not infrequently, students contribute something I had not previously considered. A frequent objection is that the task of quantifying the social dislocation costs associated with capital mobility is just too complicated and difficult. I concede that it is a complex task and that conservative estimates might be required in place of absolute precision. I ask, however, whether it is preferable to allow investors to proceed on the basis of price-signals we know to be wrong or to induce them to use best efforts to arrive at fair estimates. Separation of powers always comes up, as it should. I go through the usual riffs. Yes, I concede, these problems cry out for a comprehensive legislative solution rather than case-by-case adjudication. But standard, well-known counter-arguments suggest that Judge Lambros should nevertheless have imposed tort liability in this case. For one thing, determining the rules of tort liability has always been within the province of courts. Deferring to the status quo (that those who move capital are not legally responsible for negative externalities) is every bit as much a choice, every bit as much “activism” or “social engineering,” as altering the status quo. Legal history is filled with cases in which the legislature was only prompted to address an important public policy concern by the shock value of a court decision. Particularly is this so in cases involving the rights and interests of marginalized, insular, and under-represented groups like aging industrial workers. I note that Congress eventually responded to the plant closing problem with the WARN Act, a modest but not unimportant effort to internalize to enterprises some of the social dislocation costs of capital disinvestment. The statute liquidates these costs into a sum equal to sixty days‟ pay after an employer orders a plant closing or mass layoff without giving proper notice.36 I call the students‟ attention to the provision of WARN barring federal courts from enjoining plant closings37 and ask why Congress might have included that restriction. Another common objection concerns causation. A student will say: “The closedown of the mills, let alone the shutdown of any particular plant, could not have caused all of the suicides, heart failures, domestic violence, and so on, in Youngstown. Surely many such tragedies would have occurred anyway, even if U.S. Steel had remained. It isn‟t fair to impose liability on U.S. Steel for everything bad that happened in Youngstown during the statute-of-limitations period.” I immediately say that this is a terrific point, and that I was hoping someone would raise it. I compliment the student by saying that the question shows that he/she is now tapping legal knowledge. Typically, the class is concerned with causation-in-fact or “but for” causation. Their question is, how do we know that a plant shutdown caused any particular case of heart failure or suicide in Youngstown? Problems of causal uncertainty are a familiar issue, and I remind students that they were exposed to several well-known responses in Torts. A time-honored, if simplistic device is to shift the burden of proof regarding causationinfact to the defendant, when everyone knows full well that the defendant has no more information than the plaintiff with which to resolve the problem of causal uncertainty.38 In recent decades, courts have developed more sophisticated responses to problems of causal uncertainty as, for example, in the DES cases. As the court stated in Sindell:39 In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs. Just as Justice Traynor in his landmark concurring opinion in Escola . . . recognized that in an era of mass production and complex marketing methods the traditional standard of negligence was insufficient to govern the obligations of manufacturer to consumer, so should we acknowledge that some adaptation of the rules of causation and liability may be appropriate in these recurring circumstances . . . .40 At this point, some of the progressive students are beginning to salivate. They came to law school with the hope that legal reasoning would provide them a highly refined and politically neutral technology for speaking truth to power. The first semester disabuses most of them of that crazy idea. They have learned that they will not find certainty or answers in legal discourse, and that legal texts are minefields of gaps, conflicts, and ambiguities with moral and political implications. I can tell from the glint in their eyes that they are beginning to ask themselves whether this economics stuff, which they formerly shunned like the plague, might provide a substitute toolbox of neutral technologies with which to demonstrate that redress for workers and other subordinated and marginalized groups is legally required. I cannot allow them to think that. Therefore, unless an alert student has spotted it, I now reveal my Achilles‟ heel. The weak link in my argument is the age-old question of proximate causation. Assume we solve the causation-in-fact problem. For example, assume that by analogy to the Sindell theory of market-share liability, the court arrives at a fair method of attributing to the plant shutdown some portion of the social trauma and injuries occurring in the wake of U.S. Steel‟s departure from Youngstown. How do we know whether the plant closing proximately caused these harms? What do we mean by “proximate causation” anyway, and why does it matter? These questions present another exciting, teachable moment. Naturally, the students haven‟t thought about proximate cause since first year. They barely remember what it is and how it differs from causation-in-fact. Some 3Ls shuffle uncomfortably knowing that the Bar examination looms, and they are soon going to need to know about this. I provide a quick review of proximate causation which addresses the question, how far down the chain of causation should liability reach? I illustrate my points by referring to Palsgraf v. Long Island R.R,41 which all law students remember. Perhaps U.S. Steel might fairly be held accountable for the suicide of steelworkers within ninety days of the plant closing, but we might draw the line before holding U.S. Steel liable for a stroke suffered by a steelworker‟s spouse five years later. Now keyed in to what proximate cause doctrine is about, the students eagerly wait for me to tell them what the “answer” is, that is, where proximate causation doctrine would draw the line in the Youngstown case. That‟s when I give them the bad news. I explain that proximate causation doctrine does not provide a determinate analytical method for measuring the scope of liability. We pretend that buzzwords like “reasonable foreseeability” or “scope-of-the-risk” give us answers, but ultimately decisions made under the rubric of proximate causation are always value judgments.42 The conclusion that “X proximately caused Y” is a statement about the type of society we want to live in. At this juncture, the 3Ls grumpily realize that I am not going to be much help in preparing them for their bar review course. I now distribute a one-page hand-out on proximate causation prepared in advance. The handout reprints Justice Andrews‟ remarkable observation in his Palsgraf dissent: What we . . . mean by the word „proximate‟ is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics . . . . It is all a question of expediency. There are no fixed rules to govern our judgment. There are simply matters of which we may take account.43 I point out that causation-in-fact analysis, too, always involves perspective and value judgments.44 Why assume that water escaping the reservoir diminished the value of the neighboring coal mining company‟s land? Why not assume that the coal company‟s decision to dig close to the border diminished the value of the manufacturer‟s land (by increasing the cost of using the type of reservoir needed in its production process)? For that matter, why assume that the cattle trample on the neighbors‟ crops? Why not assume that the crops get in the way of the cattle? My handout also contains my variation on Robert Keeton‟s famous definition of proximate cause45: When a court states that „the defendant‟s conduct was the proximate cause of (some portion of) the plaintiff‟s injuries,‟ what the court means is that (1) the defendant‟s conduct was a cause-in-fact of that portion of plaintiff‟s injuries; and (2) the defendant‟s conduct and the plaintiff‟s specified injuries are so related that it is appropriate, from the moral and social-policy points of view, to hold the defendant legally responsible for that portion of the plaintiff‟s injuries. What we mean when we ask whether the social dislocation costs associated with the shutdown of the steel plant were proximately caused by capital mobility is whether these costs are, in whole or in part, properly attributable from a moral/political point of view to U.S. Steel‟s decision to disinvest. Economic “science” does not and cannot establish in a value-neutral manner that the social dislocation costs of the plant shutdown are a negative externality of capital mobility. A conclusion of that kind requires a value judgment that we disguise under the rubric of “proximate causation,” a value judgment about whom it is appropriate to ask to bear what costs related to what injuries. The lesson is that in legal reasoning **there is no escape** **from moral and political choice**. If things have gone according to plan, time conveniently runs out, and the class is dismissed on that note. What am I trying to accomplish in a class like this? What are the objectives of critical legal pedagogy? Legal education should **empower students**. It should put them in touch with their own capacity to take control over their lives and professional education and development. It should enable them to experience the possibility of participating, **as lawyers,** **in transformative social movements**. But all too often classroom legal education is deadening. The law student‟s job, mastering doctrine, appears utterly unconnected to any process of learning about oneself or developing one‟s moral, political, or professional identity. Classroom legal education tends to reinforce a sense of powerlessness about our capacity to change social institutions. Indeed, it often induces students to feel that they are powerless to shape and alter their own legal education. Much of legal education induces in students a pervasive and exaggerated **sense of the constraint of legal rules** and roles and the students‟ inability to do much about it. In capsule form, the goals of critical legal pedagogy are— • to disrupt the socialization process that occurs during legal education; • **to** unfreeze entrenched habits of mind and deconstruct the false claims of necessity which constitute so-called “legal reasoning”; • to urge students to see their life‟s work ahead as an opportunity to unearth and challenge law‟s dominant ideas about society, justice, and human possibility and to infuse legal rules and practices with emancipatory and egalitarian content; • to persuade students that legal discourses and practices comprise a medium, neither infinitely plastic nor inalterably rigid, in which they can pursue moral and political projects and articulate alternative visions of social organization and social justice; • to train them to argueprofessionally and respectably for the utopian and the impossible; • to alert them that legal cases potentially provide a forum for intense public consciousness-raising aboutissues of social justice; • to encourage them to view legal representation as an opportunity to challenge, push, and relocate the boundaries between intra-systemic and extra-systemic activity, that is, an opportunity to work within the system in a way that reconstitutes it; and • to show that the existing social order is not immutable but “is merely possible, and that people have the freedom and power to act upon it.”46 The most important point of the class is that social justice lawyers never give up**.** The appropriate response when you think you have a hopeless case is to go back and do more work in the legal medium.

#### The debate should be an experimental space for pushing the bounds of law. That’s best for radical organizing and proves our interp turns their offense.

Ashar 23 – Clinical Professor of Law at UC Irvine.

Sameer M. Ashar, “Pedagogy of Prefiguration”, Yale Law Journal, Vol. 132, 02/14/23, https://www.yalelawjournal.org/forum/pedagogy-of-prefiguration

We must radically alter our social arrangements if we are to abate economic inequality, re-democratize the state, and adapt to environmental change collec- tively. But radical posturing in the classroom, even with the use of creative ped- agogies, does not necessarily yield radical outcomes. We can use the language of prefiguration but still remain mired in a neoliberal order with antidemocratic elements gathering force.138 Even accounting for the inherently small scale of prefigurative experimentation, what if these approaches are corrupted139 before they bear any fruit? Three cautions prompt this question: first, whether deep- seated ideological hostility may compromise the radical politics underlying pre- figurative thinking; second, whether lawyers, as agents of the state, can partici- pate in efforts to disrupt authority and move toward just social arrangements and institutions; and third, whether academics might appropriate and dilute radical ideation from movement spaces. This Part examines and responds to each, and it argues for lawyers to take up prefigurative thinking with these cau- tions in mind.

First, the automatic and nearly unconscious effort to distance oneself from radical ideologies in the United States may detach prefiguration from its Marxist and anarchist foundations, domesticating and deradicalizing the experimenta- tion that we attempt in law clinics. In law, the mainstream of the discipline has viewed collectivity and solidarity with suspicion, instead elevating measures of individualized utility—or law and economics—as the core currency in lawmak- ing and legal interpretation.140 Neoliberal austerity has placed questions of social welfare outside of the realm of the contestable, outside of politics.141 So, can we fathom truly radical prefigurative projects in the midst of our current order?142 We may not have the imaginative capacity required to envision and realize a so- cial vision untethered from our current dystopian reality. Indeed, one thread of Marxist critique holds that prefiguration is impossible in a feudal or capitalist order and that a movement pursuing revolutionary change may need to deploy means out of accord with the radical pro-social arrangements that the movement seeks to establish.143 Anarchist principles are, if possible, made even more invis- ible in our current social context.144

Despite this skepticism about the potential of prefigurative practices to yield radical outcomes, there are signs of life, of radical futures. Abolitionist ideation and solidarity exist today in all corners. People are generating ideas and institu- tional arrangements that fundamentally counter neoliberal austerity, policing, surveillance, racialization, criminalization, militarization, and human and natu- ral exploitation. People are queering institutions, disrupting hierarchies, and in- vesting in mutual-aid projects.145 In tangible terms, the vitality of the land and the water persists in spite of every human effort to despoil and exploit. Prefigu- ration occurs today in the context of our current institutional arrangements. Al- most by definition, prefigurative struggle toward a more just, safe, and auton- omy-enhancing existence occurs in conditions likely to be hostile to radical ideologies and social arrangements. In a moment of conjuncture,146 it is incum- bent on lawyers to join the struggle with workers and organizers to originate radical arrangements that build with our solidarities and other utopian re- sources. And perhaps we might ultimately co-develop institutions and ideolog- ical precepts that transcend our current reality.

A second caution: as agents of state discipline, lawyers may seem suspect for this prefigurative role. However, it is precisely because law is used to impose so- cial control and disrupt progressive social movements that we must act against its bounds. In the clinic, we see the limits of our liberal political order in every unpaid-wage case that we litigate before agencies and courts. We document con- ditions of racialized labor extraction in each of these cases. Generations of public- interest lawyers have been taught to build Sisyphean careers in courts that man- age unyielding neoliberal immiseration rather than dispense justice.147

By contrast, prefigurative practice permits lawyers and law students to use our powers of observation and documentation to work toward social arrange- ments that reconfigure the terrain on which we operate in everyday legalism. We teach our students to operate within the bounds of the law as it is, but also to conceive of law as it might be.148 Prefigurative practice opens vistas to lawyers and law students that are otherwise kept hidden from us. And it provides a means by which to join organizers and other movement activists in imagining alternative legal social orders.149 Because we are all—lawyers, organizers, work- ers—subject to capitalist discipline, it is incumbent on all to engage in prefigu- rative thinking and to prompt each other to persist. Ruth Wilson Gilmore says that “subjectivity is historical becoming.”150 This Essay is a call for lawyers’ his- torical becoming through prefigurative practice.

Finally, as Harney and Moten argue, the university is a mechanism of com- munity exploitation that reinforces our current unjust order.151 Might we as ac- ademics be extracting generative ideation from the workers, organizers, and movements with which we work? Clinical professors risk putting movement ideation in the service of our roles providing career skills training and our tenure and promotion cases. But as Harney and Moten also note, academics at the mar- gins of the university may choose to deploy their efforts and the institutional remnants that come into their possession toward radical experimentation.152 We create spaces in the undercommons in which we may study together, along with workers and organizers, to challenge social arrangements and originate new ones. Perhaps prefigurative practice also suggests a reconceptualization of law student as legal worker, which surfaces their potential exploitation and chal- lenges traditional academic hierarchy.153 The law clinic must recreate itself to serve as an undercommons, as a small-scale experiment in what the university and legal practice may become. Prefigurative pedagogies in the undercommons incorporate vigilance against the reproduction of hierarchy. And on a societal level, through prefigurative practice, law clinics might advocate for, document, and support movements as they fight deradicalization, cooption, and retrench- ment.

These responses are partial. But in the conjunctural moment in which we exist, lawyers and law students—and the law schools and legal practice organi- zations in which they work—have little choice but to attempt to generate new approaches and new arrangements. The structure and limits of the law clinic offer a defined space in which to experiment with movement collaborators. It is essential that we use the experimental spaces that we have.

### AT: 3 Tier---2AC

#### That’s not opposed to experience

Susen, Department of Sociology, School of Arts and Social Sciences, ‘19

(Simon, “No escape from the technosystem?” *Philosophy & Social Criticism*, October)

Feenberg’s analysis of the relationship between technology and society is based on a somewhat narrow conception of experience. He associates experience with the lifeworld, rather than with science. This is reductive, however, given that experience constitutes an integral part of the scientific endeavour, notably of its empirical variants. Thus, ‘technical knowledge and experience’219 are not only ‘complementary’220 but also co- constitutive. The former is not simply ‘incomplete’221 but, more fundamentally, inconceivable ‘without input from’222 the latter. We may add that, within the philosophy of science, experience serves as a foundational category in two diametrically opposed conceptions of social research: for positivists and realists, experience is a crucial source of objective knowledge; for constructivists and interpretivists, experience is a vital source of normative and/or subjective knowledge. For all of them, however, experience is a – if not, the – key source of knowledge, not only (as emphasized by Feenberg) in the lifeworld but also (as largely ignored by Feenberg) in science.

Hence, the opposition between science (as ‘an absolute spectator on existence’223) and everyday experience (involving ‘active persons in the contingent movement of events and ideas’224) is problematic, unless we recognize that the former and the latter are co-constitutive. Just as science relies on experience as a major point of reference in the search for epistemic validity, experience is permeated by science in both the material and the symbolic construction of social reality. Consider, however, Feenberg’s following passage:

The nature discovered by science seems indifferent to humanity, while the nature we experience is saturated with anthropomorphic qualities. We moderns believe in science.225

This statement (similar to several other sets of assertions in Feenberg’s book) is flawed for a number of reasons. (1) Given that ‘nature’ has been profoundly influenced and shaped (and, on many levels, both dominated and exploited) by ‘humanity’, the former and the latter are deeply intertwined, not least since the emergence of the Anthropocene. (2) Not all ‘moderns believe in science’ – or there is at least a large spectrum of opinions on the role and power of science, ranging from highly optimistic to highly pessimistic accounts of what it can achieve. (3) Most modern epistemologists would agree that ‘our ordinary understandings of nature’ are not only subjective but also objective and normative – that is, our everyday ways of making sense of the world are shaped by varying degrees of objectivity, normativity, and subjectivity, since human survival is inconceivable without the socio-epistemic confluence of realism, tribalism, and perspectivism.

### AT: McCarthy