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ARTICLE

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Poverty in Judgecraft: New Narratives through the Language of Equality

Sarah Ganty

Yale Law School, New Haven, Connecticut, United States of America
Email: sarah.ganty@yale.edu

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Abstract

Millions worldwide face poverty daily. While its effects vary by society, poverty consistently marginalizes individuals, limiting their opportunities and access to societal benefits. Myths about poverty undergird and perpetuate socioeconomic exclusion, being the vehicles for cultural processes, such as stigmatization, racialization, and rationalization. These myths abound in law. They include the conception of poverty as solely concerned with the deprivation of basic material goods; equal opportunities and collective amnesia about the past; stigmatization of people in poverty as irresponsible and lazy; the categorization of aspects and elements of their poverty condition as criminal. This Article argues that judges, as (meta)narrators, have the power to challenge myths and develop new narratives about poverty, through the language of non-discrimination and equality. This could open the way to judicially redress certain troubling situations of misrecognition, social exclusion and inequality. Ultimately, as long as myths about poverty prevail in law any attempt to tackle the issue of socioeconomic exclusion is destined to fail. This article contributes to the law and sociology literature on poverty in judgecraft by addressing the research gap on narratives of poverty within judicial reasoning and practice.

Keywords: Poverty; judgecraft; narratives; culture; equality; power; stigmatization; racialization; rationalization

"The oppressed makes the world, he has only an active, transitive (political) language; the oppressor conserves it, his language is plenary, intransitive, gestural, theatrical: it is Myth. The language of the former aims at transforming, of the latter at eternalizing".

— Roland Barthes[1]

A. Narratology, Myth, and Poverty

Poverty and socioeconomic exclusion are an everyday reality for millions of people around the globe. Though an individual's experience of poverty depends on the society in question, it is nonetheless the case that, whether it is experienced in the U.S., Gambia, India, or France, poverty marginalizes people, rendering them unable to fulfill the expectations and enjoy the benefits of their society. Myths about poverty undergird and perpetuate socioeconomic exclusion, including in law, which is anchored in narratives.

[1]Roland Barthes, Mythologies 150 (1991) (selected and translated from French by Annette Lavers).

"Law, one might say, needs a narratology."[2] This might not appear as obvious because law tends not to disclose its latent narratives in order to defend "its seemingly exclusive reliance on abstract norms and logical reasoning."[3] Law tells us that its narratives are not stories, but reality.[4] This is the first myth that law tells. In fact, narratives in law are nothing but "imaginative structures to which we constantly appeal in making sense of our experience."[5] These imaginative structures may or may not correspond to reality.

Such narratives have a role in cultural processes[6] which "contribute to the production (and reproduction) of inequality through the routine and taken-for-granted actions of both dominant and subordinate actors."[7] In these cases, narratives tend to express the "falsely obvious,"[8] such as biases and prejudices, and are developed to maintain existing hierarchies and subordination. They are myths, and the law is overrun with such myths about people who have been silenced throughout time and across space. People in poverty are among them. Surveying their experience, the law tends to narrate them and treat them as outcasts: Lazy, criminal, negligent parents, not politically able, unreasonable, etc.[9] The law tells us that this is reality and keeps the myths about poverty alive. After all, in the words of Roland Barthes:

> Myth does not deny things, on the contrary, its function is to talk about them; simply, it purifies them, it makes them innocent, it gives them a natural and eternal justification, it gives them a clarity which is not that of an explanation but that of a statement of fact.[10]

Judges play a major role in keeping these myths alive. Opinions and judgments that apply, interpret, and implement the law rest on narratives that are familiar to a society's history and way of life, and help support the general belief that the outcome of a case was appropriate,[11] including for people in poverty.

This Article discusses myths about poverty in judgecraft. It shows that such myths participate in the cultural processes producing and reproducing inequalities. It argues that the law needs new narratives about people in poverty to be explained by judges as their main (meta)narrators, an important step in the enterprise of tackling inequalities and poverty in particular. It is a "call to context."[12] Specifically, I show that non-discrimination and equality in the choice of language are powerful tools for expelling the myths about people in poverty and "reciting alternative stories to those related in hegemonic legal contexts."[13] In what follows, in Section B, I first set the background by reviewing the process by which myths and narratives are produced in courts in relation to people in poverty. In Section C, I tackle four prevalent myths about poverty in judgecraft and propose alternative narratives. I argue that these alternative narratives should form

[2]Peter Brooks, *Narrative in and of the Law*, *in* A Companion to Narrative Theory 415, 424 (James Phelan & Peter J. Rabinowitz eds., 2005).

[3]Greta Olson, *Narration and Narrative in Legal Discourse*, *in* The Handbook of Narratology 371, 372 (Peter Hühn, John Pier, Wolf Schmid and Jörg Schönert eds., 2014)

[4]Catharine A. MacKinnon, *Law's Stories as Reality and Politics*, *in* Law's Stories. Narrative and Rhetoric in the Law 232, 235 (Peter Brooks & Paul Gewirtz eds., 1995).

[5]Paul W. Kahn, Making the Case: The Art of the Judicial Opinion 21 (2016). On storytelling in law *see generally*, Kim Lane Scheppele, *Foreword: Telling Stories*, Mich. L. Rev. 2073 (1989).

[6]For a definition and discussion of cultural processes, see next section.

[7]Michèle Lamont, Stefan Beljean & Matthew Clair, *What is Missing? Cultural Processes and Causal Pathways to Inequality*, 12 Socio-Economic Review 573, 573 (2014).

[8]Barthes, *supra* note 1, at 10.

[9]E.g., Khiara M. Bridges, The Poverty of Privacy Rights (2017).

[10]Barthes, *supra* note 1, at 143.

[11]Kahn, *supra* note 5, at 18–45.

[12]Prof. Schauer quoted in Toni M. Massaro, *Empathy, Legal Story Telling, and the Rule of Law: New Words, Old Wounds?*, 87 Mich. L. Rev, 2099, 2000 (1989).

[13]Olson, *supra* note 3, at 376.

the foundation for a theory of poverty that acknowledges agency, history, structures and participation as essential premises for narrating individuals experiencing poverty.

B. Setting the Background: Myths, Actors, and Language

Judging involves craftmanship that needs to be continually honed, refined, and practiced, to ensure that opinions and judgments are well constructed. This includes the art of narration, weaving the facts and the law into coherent stories,[14] with developed characters speaking and acting according to comprehensible motivations, rooted in the realities which cases examine. The art of narration results from plot and language, style and substance, and is provided by lawyers to lead the minds of judges towards agreeable outcomes, and is used by judges to help justify their decision. This art must include the voiceless people of this world, especially people in poverty. In too many instances, however, judges and those who are involved in the judicial process more generally repeat baseless and harmful myths about the poor that need to be challenged and recrafted into narratives that correspond to lived reality. What are these myths and narratives about the poor and what is their role? Who tells these narratives? Through what language? These are the questions that I will answer in this section.

I will first discuss in subsection *I* the role of narratives and myths in the legal field—especially judgecraft—and their potential involvement in the reproduction of inequalities through the sociological concept of "cultural processes" identified by Michèle Lamont, Stefan Beljean, and Matthew Clair. Second, I unpack the role of judges and courts in maintaining myths about the poor and explain that they have the power to develop new narratives despite the formal limits of the law.[15] The concept of "demosprudence," which aims to reinforce the democratic potential of courts, implying a conversation between the judges and the public, is key in that regard—discussed in subsection *II*. I finally consider in subsection *III* the question of the appropriate language to "tell poverty and the poor" in judgecraft, arguing that the language of equality and non-discrimination is particularly suited to unveiling myths and developing new narratives about the precarious and indigent, with potentially important consequences for the fight against socioeconomic exclusion.

I. (Re)producing Inequalities through Myths

It might seem surprising to focus on narratives in a legal paper on poverty, instead of tackling the classical issue of redistribution, which traditionally concerns socioeconomic rights. But narratives participate in the production and reproduction of inequality—material and symbolic—and the perpetuation of poverty through the sociological concept of "cultural processes." Narratives are part of cultural processes that allow individuals to make sense of their environment through shared categories and classification, which in turn produce or reproduce inequality, as I will further explain below.[16] These narratives need to be unpacked in the legal field to understand "how law operates, under what premises, and with what contingencies,"[17] unveiling its role in the production and reproduction of perpetuated inequality and poverty. For this reason, narratives deserve all the attention of legal scholars preoccupied with issues of inequality and poverty. Of course, we will not end socioeconomic inequality and poverty through tackling narratives alone. However, and because narratives help us make sense of our world, especially when it comes to

[14]KAHN, *supra* note 5, at 18–45.

[15]I fully recognize that the construction and perpetuation of such myths in the judicial process are not solely the result of judicial decision-making practices; many other actors involved in judicial processes, including lawyers, public prosecutors, and litigants, also contribute to them. However, this article focuses exclusively on the role of judges.

[16]*See* Lamont et al., *supra* note 7.

[17]Olson, *supra* note 3, at 372.

judgecraft, they constitute an important element in the cultural processes that enable the maintenance of the *status quo* and therefore inequality and poverty.

Sociologists usually identify three dimensions of inequality that allow us to grasp the complex phenomena that undergird them: Material inequalities, related to control of material resources; symbolic inequalities, related to non-material resources, such as cultural and symbolic capital; and place-based inequalities, related to the network, neighborhood, community, or city levels.[18]

Going beyond these three dimensions, scholars have also shown that inequalities can be produced and reproduced in subtle and unconscious ways through connective processes, identified by connecting the social structural and the social psychological.[19] Building on these cognitive processes, Lamont, Beljean and Clair have unveiled what they call "cultural processes," which inform us on "how inter-subjectively shared meaning structures (e.g. scripts, narratives, repertoires and symbolic boundaries) come to enable and constrain behaviours" and therefore produce and reproduce inequality.[20] Through these cultural processes, individuals perceive and make sense of their environment, implying the construction of "shared categories or classification systems,"[21] which open and close opportunities. Such processes include and involve classifications and categorizations through representation of individuals, groups, and practices, and are carried out in organizations and institutions, producing various types of outcomes. Lamont, Beljean and Clair identify two main types of cultural process. First, "rationalization" at whose heart is the Weberian bureaucracy, which aims to maximize efficiency based on perceived "neutral" and "fair" rules and principles that are applied universally and impersonally.[22] Rationalization takes place in many different domains of social life, particularly in "the modern bureaucratic organization,"[23] and, among others, takes the form of the "standardization" or "evaluation" described below, nurturing inequality. Second, "identification" is "the process through which individuals and groups identify themselves, and are identified by others, as members of a larger collective," including through racialization and stigmatization, which are both detailed in the next section.[24]

Cultural processes are important because "they contribute to the production and reproduction of inequality in routine ways, often as a side effect of other ongoing activities,"[25] constituting the "causal (often hidden) pathways through which inequality is created and perpetuated."[26] They are not necessarily developed intentionally and can emerge spontaneously within organizations and institutions, the state being the most important actor, including courts.[27] Both in-group members and subordinate out-group members participate in the elaboration of cultural processes, which are taken as granted and are carried out routinely, and which enable and constrain the social action through which we make sense of the world. It is precisely because structural harms are created and perpetuated by cultural processes, among others, that they "may not be traced back to specific individuals or policies" in the words of Shreya Atrey.[28] In the legal field, these cultural processes are also close to what Sara Greene has identified as "legal immobility" in relation to poverty in the U.S.: The cumulative effects of law "as a mechanisms through which poverty is perpetuated and upward socioeconomic mobility is stunted."[29] And this concerns both public and private law.[30]

[18] *See* Lamont et al., *supra* note 7, at 575–579.
[19] *Id.*
[20] *Id.* at 580.
[21] *Id.* at 574.
[22] *Id.* at 574, 591.
[23] *Id.*
[24] *Id.* at 587.
[25] *Id.*
[26] *Id.* at 592.
[27] *Id.* at 583.
[28] Shreya Atrey, *Equality Law: A Structural Turn*, 26 GERMAN L.J. 153 (2025) (in this same Special Issue).
[29] Sara S. Greene, *A Theory of Poverty: Legal Immobility*, 96 WASH. U. L. REV. 753, 753 (2019).
[30] Hanoch Dagan & Avihay Dorfman, *Poverty and Private Law: Beyond Distributive Justice*, 68(3) AM. J. JUR. 229 (2023).

It is important that these "cultural processes" should be made explicit and studied in law and politics because through understanding them we shed light on the fact that inequality is not restricted to its three traditional dimensions—material, symbolic and place-based— and that there are much less "obvious" assumed and routine processes that have real consequences for access to material and non-material resources and therefore operate in the reproduction of structural inequalities and perpetuation of poverty. They occur not only in our individual lives but also at an institutional level in the functioning of organizations, institutions, and the state.[31] Inequality that derives from cultural processes tends to be uncertain and open-ended. It is, therefore, impossible to quantify the specific inequalities or their extent that arise from a particular cultural process. Ultimately, as Lamont, Beljean and Clair explain, what matters is to empirically gain "a better understanding of when, how, and by how much inequality results from the unfolding of cultural processes," especially in the field of law and policy.[32]

These cultural processes are shaped by narratives, among other things. Narratives are at the heart of judgecraft and in general help us make sense of our environment and experience. They constitute powerful vehicles for cultural processes, especially when narratives are based on myths or "prenotions" in the Durkheimian understanding of this idea.[33] These myths or prenotions are representations of the prescientific world, which is not anchored in the empirical world and which can act as a barrier between our imagined or perceived reality and this empirical world: While related to human analysis of lived experience, myths or prenotions ultimately only describe a reality that people think exists or want to exist, but which does not necessarily have any empirical correspondents. Myths consistently diminish "the importance of real fact, real figures."[34] In the context of poverty, as explained in the next section, these myths concern what poverty *really* is, equal opportunities and collective amnesia about the past, stigmatization of people in poverty as irresponsible and lazy, and their categorization as criminals. These myths are shaped by cultural processes that negatively impact individuals experiencing poverty. It is therefore important to replace these myths or prenotions—that is, speculation based on our ideas about realities—with "a science which deals with realities through systematic observation and explanations subjected to testing by confrontation with evidence."[35] Replacing these myths is not an easy task precisely because "everything conspires to make us see in them the true social reality":[36] Exactly what judges are confronted with on an every-day basis.

II. The Actors: Judges as "Metanarrators" and "Demosprudence"

Narratives are essential to making sense of the world: "[W]ithout these narratives, we would not just be lost, we would have no world to be lost in."[37] As Robert Cover states in his seminal paper on "*Nomos* and Narrative", narratives are the "codes that relate our normative system to our social construction of reality and to our visions of what the world might be."[38]

This is particularly true in judgecraft, as explained by Paul Kahn: Narratives in opinions and judgments participate in persuading us "when we come to see the situation as making sense in light of these large, organizing ideas that have already structured our understanding of ourselves

[31] *See* Lamont et al., *supra* note 7, at 585.

[32] *Id.*

[33] Emile Durkheim, *Rules for the Observation of Social Facts*, in Emile Durkheim The Rules of Sociological Method and Selected Texts on Sociology and its Method 29, 31 (Steven Lukes ed., W. D. Halls trans., 2d ed. 2013).

[34] Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 Mich. L. Rev 2128, 2130 (1989).

[35] Steven Lukes, *Introduction to this Edition*, in Emile Durkheim The Rules of Sociological Method and Selected Texts on Sociology and its Method i, xiii (Steven Lukes ed., W. D. Halls trans., 2d ed. 2013).

[36] Durkheim, *supra* note 33, at 31.

[37] Kahn, *supra* note 5, at 22.

[38] Robert M. Cover, Nomos *and Narrative*, 97 Harv. L. Rev. 4, 10 (1982).

and our communities."[39] In Kahn's words: "This is the core issue behind our recurrent controversies over the role of judicial empathy: how the judge chooses among available narratives" as "the opinion holds our attention not because of its formal application of a rule but because of the narrative it offers."[40] Therefore, treating law as narrative is a dynamic process that extends far beyond the mere application of an abstract rule. As put by Robert Cover: "Once understood in the context of narratives that give meaning, law becomes not merely a system of rules to be observed; but a world in which we live."[41] Relying on one narrative or another implies choosing, giving a lot of power to judges as interpreters, with potential unpredictable implications on cultural processes and therefore the production and reproduction of inequality and poverty. In this context, a chosen narrative exerts a "normative force upon a state of affairs"[42] while simultaneously maintaining the authority of the law as the application of a normative system, which can have significant damaging implications when the narrative is a myth.

If narratives carry with them a social imaginary, they are likely to categorize reality in ways that can be full of biases and prejudices—myths or Durkheimian prenotions as explained above. Through the process of legal interpretation, judges play an important role in developing, building, and repeating the myths involved in cultural processes. In facts, these myths are quite powerful at solidifying cultural processes, which in turn harm out-group members, generate violence upon others in the "shadow of coercion,"[43], reproduce long-standing inequalities, and reinforce hierarchies.[44] The repetition of such myths about people in poverty in judgecraft is rooted in a system where the judge, as a figure of authority, consciously or unconsciously perpetuates power dynamics, often reflecting strong class interests. In short, understanding and unpacking the way narratives about poverty are developed in court decisions and opinions is indispensable to identifying how cultural processes which reproduce inequalities, hierachies, and perpetuate poverty consolidate through the interpretation and implementation of rules in courts.

Although narratives in judgecraft are usually explicit, they can also be conveyed indirectly or even implicitly, confirming mainstream narratives about some subordinate out-group members. A good example is the *Dano* case before the European Court of Justice, where the Court upheld the exclusion from social benefits of poor mobile EU citizens. In this case, although the Court did not develop an explicit narrative about poverty, it was implicitly present in the description of the facts, with the Court presenting the applicant as an uneducated and lazy person, incapable of integrating into German society.[45] Whether one agrees or disagrees with the outcome of the case—scholars have widely commented on it—*Dano* is paradigmatic of the reproduction of cultural processes about poverty through a specific myth that the Court *chose*: The lazy non-deserving applicant. The Court could have opted for a narrative that excluded such a myth—after all, social benefits were available in Sweden, Ms. Dano's country. Instead, the presentation of the underserving applicant reinforced the moral aspect of the case, consolidating in the judicial imaginary the myth of the underserving poor discussed below.[46]

Myths about poverty need to be deconstructed, implying proposing alternative narratives about, for, through, and by people in poverty, including in courtrooms. These narratives should be understood as political in the sense defined by Barthes, where "political" encompasses "the whole

[39] *Id.*

[40] *Id.* at 24.

[41] Cover, *supra* note 38, at 4-5.

[42] *Id.* at 10.

[43] *Id.* at 40.

[44] Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV., 137, 137 (2013).

[45] The Court neither mentioned that the applicant was part of the Roma community nor that she was a single mother. Case C-333/13, Elisabeta Dano, Florin Dano v. Jobcenter Leipzig, ECLI:EU:C:2014:2358, § 39.

[46] I am grateful to Gareth Davies for a great discussion about this which helped me identifying this most disturbing aspect of the Dano case.

of human relations in their real, social structure, in their power of making the world."[47] The political language is the only language that is not mythical:

> [I]t is the language of man as a producer: wherever man speaks in order to transform reality and no longer to preserve it as an image, wherever he links his language to the making of things, metalanguage is referred to a language-object, and *myth is impossible*.[48]

Only a political endeavor to explode the myths about poverty can achieve change to the legal *status quo*. This is no different from other legal fields currently in crisis, such as climate and democracy discussed in this Special Issue. For instance, it has been argued that law is disrupted by climate change, which is vague and not visible enough, but has a clear capacity to force the society to "rethink its normative and interpretative tools" through new narratives.[49] The same goes for representative democracy and the myth of popular sovereignty it carries. It is only through the deconstruction of this myth and the formation of alternative narratives that changes can emerge to reinvent the rule of democracy.[50]

Developing these new alternative narratives in the courtroom can help those at the bottom of the social ladder progress towards emancipation and can be achieved through a "demosprudential framework."[51] "Demosprudence" was initially defined by Lani Guinier as the ability of judges to engage in "democracy-enhancing jurisprudence."[52] The concept later took a more radical turn and was defined in opposition to jurisprudence.[53] This Article embraces the midway position adopted by Monica Bell, Stephanie Garlock, and Alexander Nabavi-Noori, implying "a conversation between the public and the courts"; "[j]udges are not the central actors or audience within a demosprudential framework—the people are."[54] In fact, judges are likely to play multiple roles in a demosprudential framework, echoing Guinier's initial approach of demosprudence as "focused on enhancing the democratic potential of the work of lawyers, judges, and other legal elites."[55]

One of the main ways that judges can "support and enhance the democratic capacity of the public" is precisely "by acknowledging the world as it is in a way that members of the public can see and understand,"[56] including through narratives. In other words, judges have an essential role in receiving alternatives stories about poverty—from applicants and lawyers mainly—and narrate them through their role of narrator or even "metanarrator" because they are telling a story behind or about stories. Telling new narratives that coincide with historical, human, social, historical and economic reality is therefore at the heart of demosprudence, which is not primary concerned with "the logical reasoning or legal principles that animate and justify a judicial opinion,"[57] but rather with feeding and informing the work of judges with wisdom, narratives, and reality.It transcends the traditional vision of recognition or implementation of legal rights in courts, which the Court either uphold or reject, and fundamentally challenges the presumed objectivity through which judges interpret the world by selecting particular narratives.

[47]Barthes, *supra* note 1, at 142.

[48]*Id.* at 146 (emphasis added).

[49]Chiara Armeni, *Narratives as Tools of Legal Re-Imagination in the Climate Crisis*, 33 J. of Env't L. 485, 485 (2021).

[50]Hélène Landemore, Open Democracy. Reinventing Popular Rule for the Twenty-First Century 3 (2020).

[51]Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 63 Duke L.J. 1473, 1507–20 (2020).

[52]Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 Harv. L. Rev. 4, 13 (2008).

[53]Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 Yale L.J. 2740 (2014).

[54]Bell et al., *supra* note 51, at 1509.

[55]Guinier, *supra* note 52, at 16.

[56]Bell et al., *supra* note 51, at 1511.

[57]Guinier, *supra* note 52, at 16.

In this respect and as I will show in the next section, deconstructing myths and developing new narratives must necessarily involve a conversation between the public—people in poverty, researchers, NGOs, etcetera—and judges, and therefore a demosprudential framework: "Judges who write opinions can give voice to the context of the poverty-related cases before them."[58] Judging is also about unveiling history and social reality as well as preventing systematic bias and prejudice,[59] and this is simply an impossible enterprise without the voice of the people.

Narratives are also important for judges who are limited by legal doctrine or process: Depending on the narratives chosen implicitly and indirectly in shaping their thinking, judges are likely to participate in cultural processes perpetuating poverty. Avoiding such myths and their consequences implies that judges should promote "participatory public dialogue"[60] by interrogating relevant aspects of the cases, including the facts, establishing "principles and ethical standards that aim to reduce systematic socioeconomic bias"[61] and educating themselves and their staff about the daily experiences of people living in poverty.[62] Of course, the structural solutions and changes needed to address poverty will not necessary happen in courts. However, judges can work on developing and naming new narratives that correspond to historical, social, and economic reality and fight against the myths about poverty—a necessary enterprise—to build the basis for structural social changes. In short, through the development of new narratives, "judges are powerful system actors that can – while adhering to current doctrine – work in important ways to recognize and lay a foundation for disentangling substantive and structural poverty [. . .]."[63] As explained in the next section, the language of equality and non-discrimination is useful in naming harmful narratives or myths and developing new ones full of opportunities both for in-group and out-group members.

III. The Language: Developing New Narratives through the Language of Equality and Non-discrimination

Narratives about poverty in judgecraft are conveyed through legal languages and concepts that touch upon rights, sanctions, responsibilities, duties, proportionality, vulnerability, process, dignity, etcetera in many areas of law, be it private, procedural, criminal, consumer, or non-discrimination law.

Not all legal languages have the same power in tackling myths about poverty. For instance, although it has been effective in granting people in poverty relief in some instances, the language of process is greatly limited in challenging myths and developing new narratives related to structural and substantive inequalities and poverty. This echoes what Bell, Garlock and Nabavi-Noori explain about the language of process, which "leaves courts without a vocabulary that would demand eradication of the substantive link between poverty and legal social control."[64]

The language of equality and non-discrimination appears the most appropriate to fight against myths about poverty and develop new narratives faithful to social, political, historical, and economic reality. In fact, new collective and individual narratives have already made their way into judgecraft through the language of discrimination and equality in various parts of the world, concerning the patriarchy and sexism, racism, homophobia, transphobia, Islamophobia, etcetera. This process has been slow and limited, and has encountered recent and important backlashes,[65] but has been ongoing.

[58]Bell et al., *supra* note 51, at 1511.
[59]*See* Benedetto Neitz, *supra* note 44.
[60]Bell et al., *supra* note 51, at 1511.
[61]*Id.*
[62]*Id.*
[63]*Id.* at 1507.
[64]*Id.* at 1506.
[65]*E.g., Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

Although the language of non-discrimination and equality can be found and applied in many fields of law—especially human rights law—and can transcend them, the most obvious field to consider is of course non-discrimination and equality law itself. It has already been convincingly argued that non-discrimination and equality law is capable of addressing some material and non-material aspects of inequality, through recognition and redistribution dimensions.[66] In this vein, non-discrimination and equality law can specifically address the poverty myths—especially when such myths close opportunities for subordinate out-group members—and develop new narratives, a prerequisite for any social changes, including in courtrooms. Moreover, anti-discrimination and equality law seems quite appropriate for such enterprise as it precisely implies challenging certain practices, omissions, and processes that can disadvantage out-group members because of ascribed and defined characteristics. Myths about the poverty ecosystem lie at the heart of it.

There is some disagreement about the role of non-discrimination and equality law. Shreya Atrey points at a strong tension between a liberal vision of equality "as an individual, episodic and isolated issue" and a structural view of inequality which places individuals "within the broader dimensions of the social, legal, political, economic and cultural context in which they exist."[67] The latter is very much in line with the importance of developing narratives true to reality, as it not only considers what is wrongful "and hence something to be corrected through law," but also takes into account the "root causes of the mischief itself" and "how it comes about in the first place."[68] Defending a structural version of equality implies getting rid of the myths that deny or justify subordination in the society.

Ultimately, what version of equality law is adopted by courts and how they motivate and persuade others through their decisions will depend on the narratives they employ to justify their choices: After all, the role of narratives is to persuade and make sense of the world, including when it comes to judging. Even the most outrageous case of segregation in the U.S. was justified by a formal vision of equality based on myths: The narrative "separate but equal" prevailed for years based on "the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority" was a "fallacy" and if it existed, it was solely "because the colored race chooses to put that construction upon it."[69] Decades passed before *Brown v. Board of Education* ultimately ruled out this racializing cultural process justified by the myth that such subordination does not exist: Segregation does "generate a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[70] As for poverty in particular, the ambiguous role of equality is famously captured by Anatole France in the *Red Lily* who speaks of "the majestic quality of the law which prohibits the wealthy as well as the poor from sleeping under the bridges, from begging in the streets, and from stealing bread."[71] The language of equality law is therefore likely to be simultaneously part of the problem of inequality[72] as it can inflict harm and reproducing cultural processes through damaging narrative still at work today—such as that of meritocracy, as discussed below— and part of the solution, with the potential to develop new narratives about poverty and structural harms grounded in a broader context.

Narratives are central as they constitute the vehicle for *a* version of equality through the language of equality, especially in judgecraft, and therefore play a role in the way judges perceive poverty, how they make sense of it, and how they convey it to the society. In the next section, I will explain that that dispelling myths about poverty leaves no choice to judges to adopt a narrative

[66]Olivier De Schutter, Combating Discrimination on Grounds of Socio-Economic Disadvantage: A Tool in the Fight against Poverty, 3 Eur. J. Hum. Rts/Journal Européen des Droits de l'Homme 223, 240 (2022). See also Sarah Ganty, Poverty as Misrecognition: What Role for Anti-discrimination Law in Europe?, 21 Hum. Rts. L. Rev. 962 (2021).

[67]Atrey, *supra* note 28.

[68]*Id.*

[69]*Plessy v. Ferguson*, 163 U.S. 537 (1896).

[70]*Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

[71]Anatole France, *The Red Lily (Chapter VII. Madame has her way)* (1894, transl., Project Gutenberg 2004).

[72]*See, e.g.,* Williams, *supra* note 34.

aligned with a *structural vision of equality*, regardless of whether they are legally limited in drawing conclusions from such a vision.

The language of non-discrimination and equality has been barely used to challenge myths about poverty in law so far and therefore cultural processes reproducing inequalities, although most subordinated and oppressed groups share being socioeconomically marginalized and excluded because of their poverty. Most provisions of international, European and national discrimination law include a prohibition of socioeconomic discrimination on grounds of social origin, social status, property, wealth, economic vulnerability, financial status, housing assistance, education, social standing, etcetera. Discrimination law thus has the power to speak directly about people in poverty. It has been convincingly argued that the ground of socioeconomic status, or any related ground, is important to reversing situations of discriminations from a recognition and redistribution point of view.[73] Moreover, the experience of poverty is fluid and heterogenous, potentially avoiding the pitfalls of identity politics and the limitations of an overreliance on anti-classification approaches that overlook socioeconomic subordination, making poverty a particularly interesting candidate for narration through non-discrimination and equality law. That said, whether it contains a specific socioeconomically related ground, equality and discrimination law in general can narrate poverty: Not only under the general principle of equality, as Cara Röhner explains in light of the case law of the German Federal Constitutional Court concerning the guarantee of the existential minimum,[74] but also on other grounds in discrimination law which most of the time overlap with poverty when it comes to structural injustice and through the language of equality in fundamental rights protection more generally.[75]

Narratives are central to judging poverty and this is the core argument of this Article. Indeed, telling narratives and combating myths is much more than just making arguments and winning or losing a case, because, in the words of Paul Gewirtz, those narratives have "a distinctive power to challenge and unsettle the legal status quo, because stories give uniquely vivid representation to particular voices, perspectives, and experiences of victimization traditionally left out of legal scholarship and ignored when shaping legal rules."[76] As will be shown in the next section, in many instances there is a correlation between the chosen narrative and the outcome of a case. This is logical if we understand narratives in their persuasive function. On the one hand, alternative narratives that evacuate myths usually imply a more protective outcome for people in poverty, tackling and addressing structural harm; on the other hand, myths about poverty imply a more negative outcome, ignoring structural harms. Sometimes, judges have no choice but to reach a specific outcome because they are bound by constitutional principles and the legislative framework, especially in criminal cases: The legal structures are so defined by myths on poverty that there is no way out in terms of outcome even within a context of "justice." However, and this is crucial, judging is not limited to the outcome of a case and narratives that combat myths about poverty can have a crucial symbolic importance for the applicant and society in terms of "recognition," even though the outcome is not necessarily entirely it its favor. This is also true for dissenting opinions. In short, the impact of narratives can sometimes lie somewhere other than in the mere outcome of a case. Of course, developing alternatives narratives and combating myths

[73]Frank I. Michelman, Foreword: On Protecting the Poor through the Fourteenth Amendment, 83 HARV. L. REV. 7 (1969); De Schutter, Combating Discrimination on Grounds of Socio-Economic Disadvantage, supra note 66; Olivier De Schutter (UN Special Rapporteur on Extreme Poverty and Human Rights), The Persistence of Poverty: How Real Equality can Break the Vicious Cycles, U.N. Doc. A/76/177 (July 19, 2021), § 1; Cara Röhner, Addressing Poverty and Socio-economic Status under German Constitutional Social Law, 26 GERMAN L.J. 213 (2025) (in this same Special Issue). See also Ganty, Poverty as Misrecognition, supra note 66, and the literature cited therein.

[74]Röhner, *supra* note 73.

[75]*E.g.* Cary Franklin, *The New Class Blindness*, 128(1) YALE L.J 5, 5 (2018).

[76]Paul Gewirtz, *Narrative and Rhetoric in Law*, in LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 2, 3 (Peter Brooks & Paul Gewirtz eds., 1995).

about poverty do not suffice if we want to address structural harm and enact structural change;[77] it is however a key step for such changes, including in judgecraft, as narratives constitute an important tool of persuasion in the legal field, which makes them "a potential transformative device for the disempowered."[78]

To sum up, established and routine cultural processes which shape our lives and institutions—including in courtrooms—participate in feeding the ecosystem of poverty and inequality. Myths are the vehicles for such cultural processes, including in court opinions and judgments. They need to be deconstructed to create space for alternative narratives, which are true to social, economic, and historical reality while being less harmful to the equality and the non-subordination of out-group members. The language of non-discrimination and equality, and more specifically non-discrimination and equality law, are likely to be useful for identifying damaging narratives or myths and developing new ones full of opportunities for both in-group and out-group members, tackling structural harms. Of course, neither these narratives in the courtroom nor equality law will create the necessary deeper changes to eradicate poverty and inequality on their own. However, as long as we need to work with the legal system as it currently exists, addressing myths about poverty in the courtroom through the language of equality and non-discrimination law is likely to constitute an important tool in addressing poverty and inequality, not only when it comes to the distribution and redistribution of material and non-material resources, but also and mostly when it comes to the recognition of people in poverty and their participation as full members of society, with agency, dignity, and freedom.

C. Myths and New Narratives

In the sections that follow, I will tackle four narratives channeling different types of cultural processes likely to produce and reproduce inequality and perpetuate poverty. For each of these myths, I will propose new narratives likely to challenge harmful cultural processes: The multidimensional poverty narrative to replace the myth of poverty as deprivation of basic material goods, discussed in subsection *I*; the retrospective narrative to replace the amnesic narrative of the past, discussed in subsection *II*; the structural disadvantage narrative to replace the irresponsibility narrative, discussed in subsection *III*; and the participation narrative to replace the criminalization narrative, discussed in subsection *IV*. These alternatives narratives are all related to each other as they are geared towards changing the *status quo*. They also overlap and cumulate. They should be viewed as analytical devices because they help inform and build new normative positions based on equality and fairness at the heart of judgecraft.

Each myth and alternative narrative is based on a series of examples of opinions and judgments from supreme or constitutional courts—U.S., India, Germany, and Canada—and regional courts—the European Court of Human Rights (ECtHR), the European Court of Justice (ECJ), the European Committee for Social Rights (ECSR), the Inter-American Court of Human rights (IACtHR) and the African Court on Human and Peoples' Rights (ACHPR)—some of which are examples of problematic practice, others of good practice. All of the good practice examples share the adoption of the language of equality and non-discrimination. I opted for geographical diversity to show that the myths about poverty are global and appear in very similar ways, despite differences in legal cultures. Cases have been selected because they illustrate significant developments likely to have important impacts on future cases in the field, preserving or transforming cultural processes at the roots of structural inequalities, and shaping poverty narratives in the legal field. The choice of apex national, regional, and international courts is explained by the fact that they are last instance courts, likely to create a precedent in the field by

[77] Atrey, *supra* note 28.

[78] Steven L. Winter, *The Cognitive Dimension of Agon Between Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2228 (1989).

cementing or reversing myths about poverty, some of them for decades.[79] Two domestic rulings by non-apex courts are the exceptions to this selection: The *Bannister* opinion by a U.S. district court and the *Social Justice Coalition and Others v. Minister of Police and Others* judgment by the Equality Court of South Africa, Western Division, which constitute remarkable examples of alternative narratives for poverty in judgecraft, showcasing both the power and the limits of such alternative narratives.

I. The Multidimensional Poverty Narrative

The myth that poverty relates to material deprivation alone *and* should be defined by a high threshold of deprivation still prevails today, including in law and politics: Poverty is widely understood as the incapacity to satisfy essential material needs. For instance, the monetary approach to poverty by the World Bank sets the floor for poverty at USD 2.15 per day—using purchasing power parity—which barely allows people to survive and live in dignity.[80] The World Bank's approach to poverty has rightly been described as "neither meaningful, nor reliable."[81]

The narrative that poverty is only about materiality and a lack of basic goods is a myth that does not capture the complex, heterogenous, and multidimensional experience of poverty. It not only ignores the relationship between poverty and inequality, but also defines the needs of people in poverty on their behalf.[82] Such a myth participates in the cultural process of standardization, which can be defined as "the process by which individuals, groups and institutions construct 'uniformities across time and space' through 'the generation of agreed-upon rules.'"[83] Standardization has intended and unintended consequences, but standards are likely to play an important role in the distribution of resources. This standardization of poverty is likely to exacerbate inequality and the very reality of poverty, as it does not encapsulate the experience of poverty and therefore cannot tackle it properly, be it through social benefits, fines, non-payment, begging, homelessness, urban arrangements, criminalization, etcetera. Importantly, the myth about what poverty is also feeds the related image of the "genuine" poor. The ECtHR recently embraced this myth in the *Dian* case where the applicant, a 61-year-old beggar of Romanian origin, illiterate, uneducated, and living as a homeless person in Denmark, was convicted and sentenced by the Danish authorities of imprisonment for a term of twenty days for begging. In this case, the Court adopted a restrictive material vision of poverty, finding in substance that an applicant who spent twenty days in prison after infringing the prohibition to beg in Denmark was not poor enough not to be bound by this prohibition. The Court considered that the applicant did not prove that he "lacked sufficient means of subsistence, or that begging was his only option to ensure his own survival or that by the act of begging, he adopted a particular way of life with the aim of rising above an inhumane and precarious situation, and thus of protecting his human dignity." [84] The Court went as far as concluding that there was no interference with his right to private life and therefore found the complaint inadmissible, even not bothering ruling the case on the merits.

The Court develops an image of the "genuine poor," that is, only extremely vulnerable people in a desperate situation, in order to decide that only this intentionally narrowed and imaginary group

[79]Such as *San Antonio Independent School District v. Rodriguez* as decided by the U.S. Supreme Court. *See San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

[80]Olivier De Schutter, Changer de boussole: La croissance ne vaincra pas la pauvreté (2023).

[81]Sanjay G. Reddy and Thomas W. Pogge, *Unknown: Extent, Distribution and Trend of Global Income Poverty*, 41(22) Ec. Pol. Weekly 2241 (2006).

[82]Sandra Fredman, *The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty*, 22 Stellenbosch L. Rev. 567, 570 (2011).

[83]Lamont et al., *supra* note 7, at 591.

[84]*Strugurel Ion Dian v. Denmark*, App. No. 44002/22, § 53 (May 21, 2024), http://hudoc.echr.coe.int/.

should not be prohibited from begging. In a paternalistic tirade the Court told Mr. Dian that he absolutely did not need to beg, especially because he was selling the *Hus Forbi* newspaper and collecting discarded bottles to reclaim the deposit paid for them. To the Court, the best proof that the applicant was not in a sufficiently desperate situation was that: "He had been able to send money to his family in Romania regularly, and he had a house there. He had been a cocaine and cannabis user for eight years ... and was found to be in possession of cash amounting to approximately EUR 135."[85] The Court simply ignored the complex reality of poverty and its relationship to dignity. Begging in itself is a survival strategy. In this case, the applicant lived in Denmark as a homeless person and could not find a job and did not qualify for any public assistance except for assistance to be returned to Romania.[86] The Court developed a narrow conception of what a precarious situation entails when it comes to "being poor." Mr. Dian did not fit this standardized and idealized image of the poor. According to these myths and beliefs, the poor should be authentically deprived and therefore sufficiently miserable, but at the same time should make appropriate efforts and display their merit in facing their precarious situation.[87] Beggars often have to contend with the definition of the "ideal poor," that is, they must either be "genuine" enough—through the evidence of their dirty, emaciated and diseased body—or "good" enough—by demonstrating their competences, skills and efforts to conceal the consequences of their state of poverty.[88] It is precisely because Mr. Dian was not considered as "genuinely" poor that the Court was able to depart from its previous more protective case law on the criminalization of begging—the *Lăcătuş* case—where the applicant was considered as a "genuinely" poor, fitting the myth of poverty as a certain material reality.[89]

This standardization process to determine who is really poor, developed through the narrative of poverty as a high level of material deprivation, also echoes the paternalistic vision that people in poverty have to use and to earn their money in the "right way." Mr. Dian was not only not miserable enough, but also did not make the efforts expected of someone in genuine poverty: Refraining from begging, when it comes to earning; not consuming drugs and not travelling to see his family, when it comes to spending. There are strong expectations about how people in poverty should earn and spend their money. Matthew Desmond explains that if people in poverty are perceived as spending their money unwisely, it is not because money is left, but precisely because they are left with so little, even when in receipt of social benefits. People in poverty throw money away precisely because they are poor:

> [T]hose at the bottom ... have little hope of climbing out even if they pinched every penny. So they choose not to. Instead, they tried to survive in color, to season the suffering with pleasure. They would get a little high or have a drink or do a bit of gambling or acquire a television. They might buy lobster on food stamps.[90]

Even when courts take the material aspect of poverty seriously and develop narratives accordingly—as opposed to the *Dian* case—ignoring other aspects of the experience of poverty can lead to half-baked outcomes. For instance, in one of the cases related to the guarantee of the existential minimum discussed by Cara Röhner in this Special Issue,[91] the German Federal Constitutional Court judged that sanctions in the form of welfare benefits cut of more than 30 % for job-seekers and working poor imposed as a negative incentive were

[85] *Id.* § 47.
[86] *Id.* § 40.
[87] Denis Colombi, Où va l'argent des pauvres 48 (2023).
[88] *Id.* at 34.
[89] Sarah Ganty, *The Double-Edged ECtHR Lăcătuş Judgment on Criminalisation of Begging: Da Mihi Elimo Sinam Propter Amorem Dei*, 3 ECHR L. Rev. 393, 393 (2022).
[90] Matthew Desmond, Evicted: Poverty and Profit in the American City 223–4 (2016).
[91] Röhner, *supra* note 73.

unconstitutional.[92] However the Court did not address the stigmatizing effect of the sanctions themselves, which constitute a form of institutional violence against people in poverty and participate in the poverty cycle. Had the Court acknowledged that the experience of poverty is not only about materiality, but also about the relational dynamic and institutional maltreatment, it might have found that the sanctions themself, whatever percentage, were disproportionate.

Similarly, in *Wallova and Walla v. Czech Republic*,[93] the ECtHR's reasoning failed to fully capture the reality of poverty because the Court limited its narration of poverty to its material aspect. In this case, the applicants, parents of five children, were deprived of parental responsibility because they were unable to provide their children with adequate and stable housing because of their situation of poverty. The Court ruled in favor of the applicants under Article 8 ECHR—the right to family life—emphasizing the material aspect of poverty—unsatisfactory living conditions or material deprivation—cannot constitute the sole ground to justify the placement of children in care.[94] In this case the language of equality and non-discrimination would have allowed the Court to develop an alternative narrative to address the issue of stigma and stereotypes that poor parents are not able to look after their children, portraying them as lazy, irresponsible, or neglectful of their children,[95] but the Court refused to decide the case under the prohibition of discrimination (Article 14 ECHR).[96] Although the outcome was ultimately in favor of the applicant, the misrecognition aspect of the case related to the stereotypes and stigma against poor parents remained unconsidered because of the inability or unwillingness of the Court to address the institutional violence through the cultural process of the stigmatization of people in poverty.

Moreover, focusing exclusively on the physical necessities aspect in poverty talks ignores what is vital for people living in poverty. Lucie White powerfully explains that "for subordinated communities, physical necessities do not meet the minimum requirements for a human life."[97] Rather, they "must create cultural practices through which they can elaborate an autonomous, oppositional consciousness" and established shared rituals "for sustaining their survival and motivating their resistance."[98] In the American context, the Black Church "has been one such self-affirming cultural practice for the communities of African American slaves, and remains central to the expression of Black identity."[99] This was true for Ms. G and her daughter for whom a second pair of shoes— the Sunday shoes—, that might seem superfluous in other contexts, was a vital necessity.

In this context, the experience of people in poverty is crucial to understanding and narrating poverty. Poverty is a state of self-denial that can be very difficult to imagine for the non-poor.[100] In a study conducted by ATD Fourth World and the University of Oxford, practitioners, academics, and people in poverty shed light on the complexity of what poverty entails, and showed that it encompasses several interacting dimensions: Dimensions related to deprivation, such as lack of decent work, insufficient and insecure income, and material and social deprivation; the relational dimension, or "relational dynamics", which includes social maltreatment, institutional maltreatment, and unrecognized contribution; as well as the core experience of poverty, which places

[92] BVerfG, *Welfare sanction*, 1 BvL 7/16, Nov. 5, 2019. *See also* Röhner, *supra* note 73 (analyzing this Judgment of the German First Senate).

[93] *Wallovà and Walla v. Czech Republic*, App. No. 23848/04, § 47 (Oct. 26, 2006), https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-1820815-1910281%22]}.

[94] *Id.*, at §§ 72, 74 and 78. Valeska David, *ECtHR Condemns the Punishment of Women Living in Poverty and the "Rescuing" of Their Children*, Strasbourg Observers (Mar. 17, 2016).

[95] *Id.*

[96] *Wallovà and Walla v. Czech Republic*, App. No 23848/04, § 88.

[97] Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 Buff. L.R. 1, 42 (1990).

[98] *Id.*

[99] *Id. at 43.*

[100] Colombi, *supra* note 87, at 86.

"the anguish and agency of people at the centre of the conceptualisation of poverty" and relates to suffering in body, mind, and heart, disempowerment, and struggle and resistance.[101] These dimensions of poverty are essential because they help to acknowledge that discrimination and exclusion are fully part of the phenomenon of poverty and nurture it, with important consequences on deprivation and the way people living in poverty perceive themselves. They also allow the complexity of the mechanism behind socioeconomic discrimination to be fully captured as it relates to the interaction of several dimensions of poverty. In fact, had the Court taken into account the multidimensional nature of poverty and recognized the situation of Mr. Dian in light of it, it would have been difficult to justify the proportionality of such a measure against him: Criminalizing begging targets people in poverty, hurts them in many ways, and excludes them even more, contributing to the poverty cycle.

Building on the multidimensional description of poverty, Olivier De Schutter proposes a new definition of poverty that is adapted to the contemporaries realities as the impossibility to adapt to the society in which a person lives.[102] This definition encompasses more people than those who cannot meet basic material needs, but more importantly leaves room for people's experience of poverty, recognizing them as individuals with agency. Moreover, seeing poverty through the lens of adaptation to a given society allows socioeconomic inequalities to be narrated differently, as the deeper they are the more difficult it is for ever wider groups of people to adapt to society, regardless the fact that welfare in absolute terms has improved around the globe.[103]

Strikingly, the main component of this multidimensional definition of poverty – deprivation, the relational dimension and the core experience of poverty—echo the aspects of the multidimensional approach of substantive equality outlined by Sandra Fredman: Distribution and redistribution,[104] recognition,[105] transformation,[106] and participation.[107] In other words, the language of equality and discrimination is particularly suitable for capturing the multidimensional phenomenon of poverty in comparison to other languages, such as the language of sufficiency developed through welfare law, which exclusively focus on the material dimension of poverty. In other words, the language of non-discrimination and equality can give the world as reconstituted by new narratives "some standing in the yet-to-be reconstructed legal system."[108]

II. The Retrospective Narrative

Catharine MacKinnon writes that "storytelling in law is regressive when it promotes the notion that there is no such thing as 'what happened' in a society that is still determinately unequal and a legal universe that will find that inequality or not."[109] In this vein, narratives about poverty in law tend to ignore precisely the "what happened" or retrospective aspect of poverty—that is, the historical and present stories of oppression and exploitation resulting from a context of slavery, apartheid, colonization, segregation, dispossession, patriarchy, etcetera. Therefore, how the law currently narrates poverty is regressive, based on an amnesic approach to the past as it concerns exploitation, oppression, and hierarchy. This participates in constructing the myth of a fair society

[101]Rachel Bray, Robert Walker, Marianne De Laat, Xavier Godinot and Alberto Ugarte, The Hidden Dimensions of Poverty (International Movement ATD Fourth World 2019).

[102]De Schutter, *supra* note 80, at 36.

[103]Fredman, *supr*a note 82, at 570.

[104]Redistribution aims "to redress disadvantage by removing obstacles to genuine choice." *Id.* at 578.

[105]Recognition relates to the promotion of "respect for equal dignity and worth of all" and combats stereotypes, stigma and humiliation. *Id.*

[106]Transformation "entails changing underlying structures, rather than expecting individuals to conform." *Id.* at 579.

[107]Participation is about social inclusion and political voice, especially but not only political participation. *Id.*

[108]*Id.*

[109]MacKinnon, *supra* note 4, at 236.

based on equal opportunities[110] and helps maintain the legal *status quo*. Such a myth, like any other, is semiological, not factual:[111] It serves to empty reality and evacuate history.[112]

Most of the times, the retrospective narratives about poverty are ignored in law which, consciously or unconsciously, reproduces inequality and perpetuates poverty. This happens through the cultural processes of rationalization based on rules and principles presented as "neutral" and "fair," which are in fact "institutionalized from accumulated historical inequalities or resources,"[113] without this being acknowledged as such, reproducing inequalities.

Though court opinions and judgments are an appropriate arena to consider and develop these retrospective narratives through the language of non-discrimination and equality, some have been very reluctant to do so. One striking example is the infamous 1973 U.S. Supreme Court ruling in *San Antonio Independent School District v. Rodriguez*, which is still good law although widely criticized. Katharine Young describes it as a "counter canon" of constitutional democracy and human rights: It marks not only "the interpretive closure, by the Supreme Court, of available arguments for constitutional social and economic rights," [114] but also the constitutional protection of the poor under the equal protection clause. In this case, the Texas school financing system was challenged because it was based on local property taxation, resulting in serious disparities in the quality of education provided to the inhabitants in each area because financing was allocated according to wealth. Race and poverty overlapped almost completely as the challenged system had a specific differential impact on Mexican and African American communities because 90% of the residents of the poor neighbourhoods of San Antonio were of Mexican-American descent and 6% were of African-American descent.[115] Ignoring the retrospective narrative about poverty and its link to place—*de facto* and *de iure* segregation among others—the Court validated this school financing system, explaining that "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages" and therefore does not require strict scrutiny.[116] In this case, the stories behind the facts that were presented as data were not given credence by the Court, which ignored the reality deriving from history, despite having the opportunity and capacity to make it real, by approaching its narration of the case through the language of equality.[117] Instead, the Court embraced the myth of equal available opportunities which enables and is necessary to maintain the *status quo*. It based its reasoning on the so-called Strayer-Haig thesis developed in the nineteen-twenties, ignoring historical inequalities including *de facto* and *de iure* segregation, and finding that Texas struck a balance between the two traditional competing forces: "[T]he desire by members of society to have educational opportunity for all children, and the desire of each family to provide the best education it can afford for its own children."[118] This case has prevented the constitutional protection of the poor through the equal protection doctrine in the U.S. to the present day, to the point that due process language is the main "central viable alternative" for the protection of people in poverty in today's American law, with all the limitations that the language of due process carries with it, as previously explained.[119] The failure of the Supreme Court to develop the retrospective narrative and a structural-equality

[110]Thomas M. Scanlon, Why Does Inequality Matter? 71–3 (2018). *See also* Joseph E. Stiglitz, The Price of Inequality: How Today's Divided Society Endangers Our Future 17–20 (2012).

[111]Barthes, *supra* note 1, at 142 and 130.

[112]*Id.* at 152.

[113]*Id.*

[114]Katharine G. Young, *The Canons of Social and Economic Rights*, in *Global Canons in an Age of Contestation: Debating Foundational Texts of Constitutional Democracy and Human Rights 405, 405* (Sujit Choudhry, Michaela Hailbronner & Mattias Kumm eds., 2024).

[115]*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 12 (1973). By contrast, Mexican-American and African-American represented only 18 % and 1 % of the population of rich neighborhoods.

[116]*Id.* at 24.

[117]MacKinnon, *supra* note 4, at 237.

[118]*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 49 (1973).

[119]Bell et al., *supra* note 51, at 1499.

based approach, and its embrace of an individualized liberty-based approach, has locked out the substantive protection of the poor through equality law.[120]

Even when the law sets formal limitations for the protection of the racialized poor, nothing prevents courts and judges from developing retrospective narratives despite being bound by unfair laws. This is exactly what the U.S. District Judge Weinstein did in the *Bannister* opinion: Although he considered that under the law in force at that time he had no choice but to convict the defendants for various drug offences, he wrote a lengthy opinion of 64 pages about the connection between poverty, race and imprisonment, developing at length faithful narratives about poverty and its ecosystem and showing a remarkable clarity about the impact of history on poverty for people of color in the U.S. Among others, he wrote a long section about the retrospective narrative, addressing slavery and segregation while exploring the structural roots of mass incarceration of Black people in poverty and considering that "while the defendants are before this court because of choices they themselves have made, the limited options available to them are partly the fixed artifacts of history."[121] Though falling short of a viable defense for those specific defendants, telling the narrative that corresponds to the reality of poverty engrained in deep historical exploitation, subordination, and hierarchization is an important first step towards fighting cultural processes embedded in the law and the perpetuation of poverty. The *Bannister* opinion constitutes a textbook case of the power of alternative narratives about poverty despite the limits of the law within which a judge operates. Moreover, narratives told by people in poverty themselves can have a transformative impact on telling truthful narratives about poverty, independently of a favorable ruling on the merits. This was the case in *Boise* which concerns the ordinance of the City of Boise in the State of Idaho in the U.S. completely banning sleeping and camping in public, while the city experienced a shortage of shelter beds for homeless people.[122] In addition to the Ninth Circuit Court of Appeals prohibiting the City of Boise from enforcing its anti-camping ordinance against individuals who are involuntarily homeless, and despite the central role of the "voluntary" element distinguishing between "deserving" and "non-deserving" homeless individuals in the ruling, this case had an unexpected positive impact on poverty narratives. Indeed, "by challenging the City in a forum where they [the applicants] had some control over their stories, the plaintiffs spurred media coverage that questioned the City's policies, highlighted the lack of shelter beds, and, generally, reframed their struggles as city-wide concerns."[123] While this case serves as a remarkable example of how alternative narratives can emerge when people in poverty are given a forum, the majority of the Supreme Court later overturned the outcome reached by the Ninth Circuit in the problematic *Grants Pass* judgment, as discussed below.

Non-discrimination and equality law has been used in other jurisdictions around the world to relay the retrospective narrative about poverty, embracing its historical aspect and combining this with other factors of oppression.[124] The Equality Court of South Africa, Western Division,[125] has provided a powerful example of how such a narrative can play out through the language of non-discrimination and equality. In *Social Justice Coalition and Others v. Minister of Police and Others*,

[120] *Id.* at 1500.

[121] *U.S. v. Bannister*, 786 F.Supp.2d 617 (2011) at 624. Many thanks to Monica Bell for drawing my attention to that case. In this case, "discriminatory impact that would be prohibited when inflicted intentionally by lawmakers is permissible when accomplished through negligence or reckless disregard."

[122] *Martin v. City of Boise*, 920 F.3d 584, 617 (9th Cir. 2019).

[123] *Eighth Amendment-Criminalization of Homelessness - Ninth Circuit Refuses to Reconsider Invalidation of Ordinances Completely Banning Sleeping and Camping in Public.-Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019)*, 133 HARV. L. REV. 699 (2019).

[124] Atrey, *supra* note 28.

[125] South African Equality Courts are specialized courts. They deal with unfair discrimination, hate speech, and harassment cases. They are supposed to be very accessible to all. They are located at Magistrate Courts and appeals against their decisions can be lodged to the same appellate courts that hear appeals from Magistrate Courts. *See* Dana Kaersvang, *Equality Courts in South Africa: Legal Access for the Poor*, 15(2) J. INT'L INSTITUTE 2008.

it found that the system employed by the South African Police Service to determine the distribution of police human resources resulted in the allocation of a disproportionate part of these resources to wealthy, middle-class and mainly white neighborhoods, compared to poor and black areas.[126] It found that this allocation scheme unfairly discriminated against black and poor people.[127] The retrospective narrative was at the heart of the Court's reasoning, which highlighted the situation of black people who "still live under conditions which existed during the apartheid system of government," denouncing the "stark reality of abject poverty" and the inferior services these people receive because of their impoverishment.[128] As opposed to the U.S. Supreme Court in *San Antonio Independent School District v. Rodriguez*, the Equality Court of South Africa embraced the narratives behind the data provided to it by the applicants, making them real and drawing conclusions from this.

This case shows that when the retrospective narrative is developed in judgecraft through non-discrimination and equality law language, it is likely to have an impact on the outcome of the case and foster solutions which engender redistribution among their other consequences, with symbolic and material impact, not only in cases of exclusion of social, economic and public goods, but also where the unfair distribution of resources implies revising an existing allocation scheme.[129] Accordingly, the distributive and redistributive potential of non-discrimination and equality law remains unexplored, including under the retrospective narrative, which constitutes strong grounds for judges to advance the redistributive function even further.[130]

When the IACtHR considered practices of forced labor and debt bondage in Hacienda Brasil Verde in the state of Pará in Brazil, it provided us with another illustration of telling the retrospective narrative about poverty through the language of equality and non-discrimination.[131] In this case, the Brazilian State failed to take into account the vulnerability of 85 workers rescued from a situation of modern slavery. Besides developing at length a narrative linked to structural discrimination, in finding and describing a pattern of discriminatory treatment based *inter alia* on the economic status of the victims—"poverty is the main factor behind modern-day slavery"[132]—the Court also wrote about the retrospective narrative, acknowledging from the outset that "the facts of the case took place in a context in which, each year, tens of thousands of workers were subjected to slave labor,"[133] and observing further that:

> [T]his situation of imminent risk for a specific group of people with identical characteristics [they were poor; they came from the poorest regions of the country, with the lowest human development and possibilities of work and employment, and they were illiterate with little or no schooling], from the same regions of the country, had historical roots and had been known since, at least, 1995 when the Brazilian Government expressly acknowledged the existence of 'slave labor' in the country.[134]

[126] *Social Justice Coalition and Others v Minister of Police and Others* (EC03/2016) [2018] ZAWCHC 181 (Dec. 14, 2018).

[127] *Id.* The measure was superficially neutral—it was based on a statistical formula—but it involved in practice a specific disadvantage for this latter category, without justification, constituting therefore indirect discrimination.

[128] *Id.* at § 90.

[129] Julie Ringelheim & Sarah Ganty, *Antidiscrimination and Economic Inequalities, in* HANDBOOK ON EU ANTIDISCRIMINATION LAW (Iyola Solanke, Colm O'Cinneide & Julie Ringelheim eds., forthcoming in 2024). See also: Catherine Albertyn, Section 9 *in a Time of COVID: Substantive Equality, Economic Inclusion and Positive Duties*, 37 S. AFR. J. ON HUM. RTS. 205, 211 (2021).

[130] De Schutter, *Combating Discrimination on Grounds of Socio-Economic Disadvantage*, *supra* note 73 at 240.

[131] *Hacienda Verde Workers v. Brazil*, IACtHR Ser C No. 318 (Oct. 20, 2016) [343]. Many thanks to Mariana Ferolla Vallandro do Valle for drawing my attention to this decision.

[132] *Id.* at § 340.

[133] *Id.* at § 1.

[134] *Id.* at § 339.

This case powerfully shows the persuasive support for the retrospective narrative to protect people in poverty.

Finally, the retrospective narrative has been slowly developed by the European Court of Human Rights (ECtHR) for the Roma community, especially in cases about the segregation of Roma children in education. The Court makes the retrospective narratives quite straightforward: In the most emblematic case,[135] highlighting the rejection and persecution they have suffered for centuries—including attempted extermination by the Nazis—and as a result, causing them to live in "very difficult conditions," "on the fringe of society in the countries where they have settled," and to experience "participation in public life [which] is extremely limited."[136] Strikingly, the Court has not explicitly developed the retrospective narrative in light of *the situation of poverty* in which most Roma people found themselves, while their socioeconomic situation is a decisive factor in their situation of exclusion. Missing this aspect of the narrative is likely to be counterproductive when attempting to reimagine the law to promote the inclusion of Roma people in society, especially when adopting the desegregation measures the Court has recently called for.[137]

Of course, the retrospective narrative will not solve on its own deep inequalities and poverty. Even when this narrative is used to achieve favorable judicial outcomes in term of distribution and redistribution, the implementation might be sometimes difficult, as explained by Kate O'Regan when commenting in *Social Justice Coalition and Others v. Minister of Police and Others*.[138] Moreover, the retrospective narrative may spark "history wars," particularly in contexts where populist right-wing factions (and others) permit themselves to adopt the most distorted interpretations of history.[139] This is particularly evident in the U.S., especially in the debates surrounding originalism and its implications for human rights.[140] Nonetheless, the retrospective narrative serves as a crucial starting point for illuminating and challenging cultural processes in law and politics, which act as significant drivers of inequality and poverty. It is an essential step in the fight against structural inequalities.

III. Structural Disadvantage Narrative

Another myth about poverty pervades in the legal field: That if people in poverty are poor, it is because they are responsible for their state due to their laziness, negligence, deficiency, irresponsibility, etcetera. This myth is part of the cultural process of stigmatization "that consists in designating symbolically, and qualifying negatively, identities and differences."[141] It is also intrinsically linked to the one of merit, which is popular in societies where socioeconomic inequalities tend to be greater.[142] Indeed, if meritocracy has sometimes been useful as a pragmatic rhetorical device in the discourse against discrimination as it focuses on individual talents and

[135] *D.H. and Others v. the Czech Republic* (GC), App. no. 57325/00 (Nov. 13, 2007), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-2439%22]} and https://hudoc.echr.coe.int/eng#{%22appno%22:[%2257325/00%22]}.

[136] *Id.* at § 13.

[137] *X and others v. Albania*, App. Nos. 73548/17 and 45521/19 (May 31, 2022), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-217624%22]}; *Elmazova and others v. North Macedonia*, App. Nos. 11811/20 and 13550/20 (Dec. 13, 2022), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-221503%22]}. *See* Merel Vrancken, *Beating Brown v. Board of Education? Overrepresentation and Desegregation Measures in Elmazova and Others v. North Macedonia*, STRASBOURG OBSERVERS (Feb. 7, 2023).

[138] Catherine O'Regan, *The Long Legacy of Apartheid Geography and the Reach of the South African Constitution's Equality Clause,* 26 GERMAN L.J. 198 (2025) (in this same Special Issue).

[139] Many thanks to Katharine Young for drawing my attention to this point. *See* Charlotte E. Rosen, *The End of Resistance History*, PROTEAN MAGAZINE (Jan. 20, 2025).

[140] Katharine Young, *Human Rights Originalism*, 110 GEO. L.J. 1097 (2022).

[141] Lamont et al., *supra* note 7, at 589.

[142] Nicholas Heiserman & Brent Simpson, *Higher Inequality Increases the Gap in the Perceived Merit of the Rich and Poor*, 80 SOC. PSYCH. Q. 243, 243 (2017).

efforts and rejects differences based on any other characteristics, it has not played this role for persons living in poverty; quite the opposite—it is ingrained in a vision of individual responsibility, based on the middle-class norm, unattainable for indigents, and overlooking the structural reasons behind poverty.[143] Discussing the work of Athena D. Mutua,[144] Cara Röhner echoes this individualistic injunction explaining that:

> [T]he norm of middle-classness constitutes the normality of gainful employment and the expectation that individuals can provide for themselves through their own economic activity. Deviations from that norm are negatively marked. The economic "others" must adapt to the middle-class norm or else experience exclusion and cultural devaluation. Formal equality and the middle-class norm individualize persisting inequalities. They seem to be the result of individual behavior, performance and talents.[145]

The individualistic myth of poverty participates in the "the moral construction of poverty" coined by Khiara Bridges, which refers to the discourse according to which people are poor because there is something wrong with them and they are themselves responsible for their situation of poverty.[146] This moralization marginalizes people in poverty even more and generates feelings of unworthiness and powerlessness, with important negative consequences on their situation of precarity and exclusion, creating a vicious circle.

Studies showing that people are poor for structural reasons outside of their control are countless.[147] "Poverty ... is not the result of laziness, a lack of self-control or deficient planning: it has its sources in structural factors such as high unemployment, stagnating wages and discrimination."[148] In fact, poverty is passed on from one generation to another: "In countries in the OECD, it would take around four to five generations for children from the bottom income decile to attain the level of mean earnings."[149] Of course, stigmatization through myths also ignores the "broken cultural institutions" that occupy a space between people in poverty and structural conditions and which encode disadvantage in people's language, habits, belief systems, and practices, as explained by Matthew Desmond.[150] They also ignore the potential abuse or even exploitation of people in poverty by the market itself[151] and in private law more generally, including accumulation by dispossession,[152] and there are very few protections in that regard.[153] In short, poverty is not an individual phenomenon based on an alleged dysfunctional individual; it is a collective, social and structural one. Considering each individual poor person separately would never explain why poverty exists, why it is propagated, and why it persists.

The myth of people in poverty responsible for their situation is still so vivid in judgecraft that case law challenging stereotypes or stigma applied to people in poverty is scarce.[154] In fact, judges tend to repeat the same myth about irresponsibility, laziness and incompetence. For instance, in

[143]Sarah Ganty, *The Constitutional Politics of Merit, in* Research Handbook on the Politics of Constitutional Law 483-530 (Mark Tushnet & Dimitry Kochenov eds., 2023).

[144]Athena D. Mutua, *Introducing ClassCrits: From Class Blindness to a Critical Legal Analysis of Economic Inequality*, 56 Buff. L. Rev. 859 (2008).

[145]Röhner, *supra* note 74.

[146]Bridges, supra note 9, at 38–64.

[147]*E.g.,* OECD, A Broken Social Elevator? How to Promote Social Mobility 14 (2018).

[148]*See* De Schutter, *The persistence of poverty: how real equality can break the vicious cycles*, *supra* note 73, at § 39.

[149]*Id.* at § 1.

[150]Desmond, *supra* note 90, at 383.

[151]It has been shown that poor tend to pay more: David Caplovitz, Poor Pay More: Consumer Practices of Low Income Families (1968); Joseph Spooner, *Contract Law When the Poor Pay More*, 44 Oxford J. Legal Stud. 257 (2024).

[152]David Harvey, The New Imperialism 144 (2003).

[153]Which concerns not only the distributive dimension, but also the limited self-determination aspect in the transaction: Hanoch Dagan & Avihay Dorfman, *Poverty and Private Law: Beyond Distributive Justice*, 68 Am. J. Juris. 229 (2023).

[154]Ganty, *supra* note 66.

his opinion in *San Antonio Independent School District v. Rodriguez*, Justice Marshall, listing the reasons why wealth does not attract a high degree of scrutiny under the Equal Protection Clause, wrote that "personal poverty is not a permanent disability; its shackles may be escaped."[155] In *O'Rourke*—which concerned a person evicted from his home who was left homeless for fourteen months to the detriment of his health—the ECtHR ruled that the applicant was largely responsible for his own deterioration following his expulsion, because he had refused to go to overnight shelters and temporary accommodation.[156] Going one step further, the Supreme Court of India upheld requirements imposed on persons seeking election to *panchayats*—local self-governing bodies—for a minimum education qualification and possession of a functional toilet at the place of residence. It justified the absence of discrimination on strong myths about poverty related to incompetence and negligence: "It is only education which gives a human being the power to discriminate between right and wrong, good and bad"[157] and "if people still do not have a toilet it is not because of their poverty but because of their lacking the requisite will .... Those who aspire to get elected to those civic bodies and administer them must set an example for others."[158]

Recently, such myths have been implicitly embedded in the growing trend of defunding and privatizing public services, reflecting the neoliberal "bootstrap" myth that individuals are solely responsible for themselves and should bear the cost of essential services like healthcare.[159] This approach has been particularly pronounced during periods of austerity, leading to detrimental effects—for instance, impacting access to and availability of healtcare. Meanwhile, human rights courts and committees have often retreated to a neutral stance regarding economic strategies, implicitly reinforcing these myths.[160] In contrast, adopting a language of equality that acknowledges structural disadvantages would promote a public health approach focused on the health and well-being of the entire population. Such a framework would empower courts to apply equality principles in guiding the realization of rights, particularly in contexts shaped by austerity measures.[161]

On the other side of the spectrum, a few courts have developed narratives showing a deep understanding of the structural, social and collective factors behind poverty. For instance, in the *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v. Brazil,* which relates to an explosion at a fireworks factory on December 11, 1998, in which sixty-four persons died and six survived, and where those affected included twenty-two children, the IACtHR found that because of the structural discrimination the applicants were subjected to based on their situation of poverty, they had no choice but to accept employment in dire conditions of vulnerability as they were unable to access any other source of income. The Court found that the work the applicants were offered "was not only the main, but also the only, employment option because they had very low levels of schooling and literacy; they were also perceived as being rather untrustworthy and were therefore unable to obtain other employment."[162] The Court also acknowledged the various structural disadvantages coalescing around the victims.[163] It found that the intersection of factors of discrimination increased the victims' comparative disadvantages, that

[155]*See San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), § 121 (Marshall J. dissenting) (Douglas J. concurring with the dissent).

[156]*O'Rourke v. The United Kingdom*, App. No. 39022/97 (June 26, 2001) http://hudoc.echr.coe.int/. See also *Nitecki v. Poland*, App. No. 65653/01 (Mar. 21, 2002) http://hudoc.echr.coe.int/.

[157]*Rajbala and Ors. v. State of Haryana and Ors* (2016) 1 SCC 463, § 85.

[158]*Id.* at § 95.

[159]Michael G. Marcondes Smith, *Equality Restricted: The Problematic Compatibility between Austerity Measures and Human Rights Law*, 25 HEALTH & HUM. RTS. L.J. 177 (2023).

[160]*Id.* at 180–182.

[161]*Id.* at 182–184.

[162]*Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and Their Families v Brazil* (July 15, 2020) IACtHR Ser. C, No. 407 [187, 190, 197], § 189.

[163]*Id.* § 190.

is, living in poverty, being women of Afro descent, and, in some cases, pregnancy or youth and sometimes both.[164] This is precisely the confluence of factors that enabled the factory to set up in that neighborhood and to exploit its victims without any intervention from the State to protect and ensure their rights. The IACtHR ruling is remarkable in that it embraces the structural narrative about poverty—including the intersectional aspect of it—insisting that this is a collective and structural phenomenon and that the state has a responsibility to protect those who live in such situations instead of blaming them. Moreover, it demonstrates that employing a narrative centered on "structuralness" not only helps establish a framework that accurately reflects structural disadvantages, but also has a tangible impact on legal assessment, serving as a tool to intensify legal scrutiny.[165]

Strikingly, the irresponsibility myth towards people in poverty entrenched in stereotypes and stigmas tend to be reinforced for some groups, such as people of color in the U.S., Roma communities in Europe, and indigenous people in Canada. This is identified in sociology as "racialization," a cultural process "by which social markers or biological and phenotypic differences between human bodies are imbued with significance by social actors."[166] As explained by Khiara Bridges, in the United States, "throughout history, the categories of the deserving and undeserving poor have been racialized and, frequently, racist."[167] The figure of the "welfare queen" vilified by Ronald Reagan, stigmatizing and demonizing poor Black women on welfare perceived to be misusing or even abusing the welfare system, is the epitome of the kind of myth which reinforces the racialization process,[168] causing significant social and political harm.[169] The Supreme Court of Canada showed an awareness of this racialization process when developing a structural harms narrative concerning Indigenous people in Canada in *R. v. Gladue*. In that case, the Court interpreted the principles governing the application of section 718.2(e) of the Canadian Criminal Code, according to which all available sanctions other than custody that are reasonable in the circumstances should be considered for all offenders, "with particular attention to the circumstances of aboriginal offenders."[170] The Court acknowledged that "there is widespread bias against aboriginal people within Canada" and "there is evidence that this widespread racism has translated into systemic discrimination into the criminal justice system."[171] It insisted on the "background factors which figure prominently in the causation of crime by aboriginal offenders," including lack of opportunities and options, quoting Tim Quigley: "The unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail."[172] The Court insisted that the point of the provision is "to ameliorate the serious problem of overrepresentation of indigenous people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing."[173]

Such alternative narratives insisting on the structural harms of the overrepresentation of indigenous people in the criminal system, including its socioeconomic aspect, are remarkable. But

[164] *Id.* § 191.

[165] Many thanks to Michael Maconde Smith for bringing this point to my attention.

[166] Lamont et al., *supra* note 7, at 587. *See generally* Karim Murj & John Solomos, *Introduction: Racialization in Theory and Practice*, in RACIALIZATION STUDIES IN THEORY AND PRACTICE 1–29 (Karim Murj & John Solomos eds., 2005).

[167] Khiara Bridges, *The Deserving Poor, the Undeserving Poor, and Class-Based Affirmative Action*, 66 EMORY L.J. 1049, 1052 (2017).

[168] *"Welfare Queen" Becomes Issue in Reagan Campaign*, N.Y. TIMES, Feb. 15, 1976, at 51.

[169] Camille G. Rich, *Reclaiming the Welfare Queen : Feminist and Critical Race Theory Alternative to Existig Anti-poverty Discourse*, 25 S. CAL. INTERDISC. L.J. 257 (2016).

[170] Canadian Criminal Code, R.S.C. 1985 c. C-46, § 718.2(e).

[171] *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 SCR 688, § 61. Many thanks to the Honourable *Pierre LABRIE* for pointing this case out to me.

[172] *Id.* at § 67 (quoting Tim Quigley).

[173] *Id.* at § 94.

there is a caveat: An informed observer could rightly note that 25 years after the ruling, the incarceration rate of indigenous people in Canada has not decreased—quite the opposite—calling into question the positive impact of the *Gladue* ruling, and its narratives.[174] It does not mean, however, that the *Gladue* judgment and the narratives thereof are moot or useless. One of the reasons suggested to explain why the incarceration rate is still so high is that this judgment has precisely not been implemented adequality and was not given the attention it deserved by lawyers and judges. In short, the narratives about structural harms and inequalities might not have been integrated enough into the thought and practice of lawyers and judges. Another explanation might be the limits of the legal framework and other conditions imposed on judges—or even self-imposed—[175] when sentencing, which makes it legally difficult to depart from a custodial sentence, such as in the *Bannister* opinion. Further research on these two aspects would be necessary. In any case, as previously explained, new narratives about poverty are obviously not enough to reverse this phenomenon and to poverty more generally, but certainly contribute to counter them. One supreme court opinion on its own cannot change the systemic racism in a society and the poverty that results from it.

The myth of the irresponsible, lazy, incompetent, and non-meritorious poor is not irreversible, and the language of non-discrimination and equality is likely to relay new narratives by pointing to the structural disadvantages that people in poverty experience, following the example of the IACtHR in the *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus* and the Canadian Supreme Court in *Gladue*. In that vein, narratives about people in poverty could also convey the idea that people in poverty have essential and specific skills and competences linked to their survival and coping strategies, and that this has been the case throughout history.[176] The language of discrimination can counter destructive myths about the irresponsible, lazy and incompetent poor and judges have an important role as "(meta)narrators" to tell the stories behind the stories they hear and listen to.

IV. Participation Narrative

The idea that people in poverty are inherently criminal because of their circumstances constitutes another pervasive myth about poverty in many countries worldwide. The law embraces this narrative by penalizing and criminalizing poverty in many different ways, whether this concerns begging, homelessness, rough sleeping, vagrancy, misdemeanors related to life-sustaining activities, etcetera. Of course, people in poverty, like those who do not experience it, can commit crimes. However, the myth in question portrays individuals in poverty as inherently criminal solely because of activities tied to their poverty and survival strategies, which do not pose a threat to society and its members. This myth also manifests itself through the enforcement of criminal prohibition in poor neighborhoods: The "criminalization of urban space,"[177] while it has been showed that incarceration, but also less severe criminal charges for low-level offences, increase poverty and prevent mobility.[178] Recently, the Supreme Court has confirmed this myth in *Grants*

[174]Andrew A. Reid, *The Differential Utilization of Conditional Sentences among Aboriginal Offenders in Canada*, 22(2) Can. Crim. L. Rev. 133 (2017).

[175]For example, the more recent case R *v. Sharma* (2022 SCC 39) illustrates how, in practice, the *Gladue* framework can be difficult and controversial for judges to apply, even when drawing on retrospective and structural disadvantage narratives regarding Indigenous individuals, in §§ 69–83. In this case, Justices Karakatsanis, Martin, Kasirer, and Jamal, in dissent, convincingly criticized the majority's approach as a tendency to "raise the bars at each step of the test", § 205, thereby making it more difficult for the applicant to benefit from the *Gladue* framework. Many thanks to Akis Psygkias for drawing my attention to this case.

[176]Laurence Fontaine, Vivre Pauvre : Quelques Enseignements Tirés de l'Europe des Lumières (2023).

[177]Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 J. Am. Hist. 703, 706 (2010).

[178]Greene, *supra* note 29, at 763; Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 Stan. L. Rev. 611 (2014).

Pass, Oregon:[179] Considering homeless people as criminals because they camp on public property, entailing a fine for a first violation and imprisonment in case of multiple violations, does not constitute "cruel and unusual punishment" prohibited by the Eighth Amendment. After all, for the Court, the sanctions "remain among "the usual mode[s]" for punishing criminal offenses throughout the country,"[180] confirming the idea that people in poverty are regarded as criminal because of their poverty: Homeless people have by definition nowhere to go and even more so in *Grants Pass* where there is not enough "'practically available' shelter beds."[181]

That people in poverty are lawbreakers or wrongdoers is no different in the welfare state system, which increasingly surveils, scrutinizes, and punishes welfare recipients through workfare, conduct conditionality, and alleged unemployment benefit fraud. The child welfare system does not escape the myth of the poor as transgressor or delinquent. For instance, in the U.S. poverty conditions experienced by children are penalized by considering that lacking food, shelter, or clothing constitute an "environmental neglect."[182] In the same vein, the metaphor of the "queue jumper," often employed by the media, officials, politicians, and courts in countries such as South Africa and Australia, also serves as a narrative tool to portray those at the very bottom of the needs-based hierarchy as wrongdoers.[183] In the case of state-subsidized housing in South Africa, which is theoretically allocated based on the principle of queue priority—"first come, first served"—"queue jumpers" refers to homeless individuals or squatters who occupy vacant lots or empty houses and often invoke anti-eviction laws in court to justify their occupations.[184] These individuals exercise their agency by adopting survival strategies, which the government stigmatizes through a "blame frame," portraying these "queue jumpers" as selfish individuals who disregard others patiently waiting for housing allocation.[185] As Katharine Young explains, this "queue talk" frame, which is based on a myth, distorts the understanding and implementation of socioeconomic rights.[186] Moreover, it is likely to significantly impact the participation of socioeconomically precarious individuals in society, denying their agency and perpetuating myths that undermine their rights and dignity.

In general, the myth of the poor as transgressor and criminal is anchored in cultural processes of stigmatization and racialization and in turn works to consolidate hierarchies based on race and socioeconomic status, among others. Such processes also occur indirectly, as in the case of the criminalization of irregular migration or abortion.[187] In this context, even when courts show some sensitivity to an unequal situation experienced by the poor, the narrative of criminalization or wrondoing—linked to the one of responsibility and deservingness—still prevails.[188]

[179] *City of Grants Pass, Oregon v. Johnson et al.*, No. 23–175. 600 U.S. __ (2024).

[180] *Id.* at 17.

[181] *Id.* at 1.

[182] Bell et al., *supra* note 51, at 1482; Greene, *supra* note 29, at 778–79.

[183] Katharine Young, *Rights and Queues: On Distributive Contests in the Modern State*, 55 COLUMBIA J. TRANSNAT'L L. 65 (2016).

[184] *Id.* at 93.

[185] *Id.* at 135

[186] Katharine Young, *When Rights-Talk Meets Queue-Talk*, *in* NARRATIVE AND METAPHOR IN THE LAW 297, 303 (Michael & Robert Weisberg eds., 2018).

[187] For example, the UN Human Rights Committee in *Mellet* concluded that the criminalization of abortion in Ireland at that time had resulted in discrimination on grounds of gender and socioeconomic status in violation of Article 26 of the International Covenant on Civil and Political Rights. *See* Amanda Jane Mellet v. Ireland, 2324/2013 § 7.11 (Mar. 31, 2016), available at https://juris.ohchr.org/casedetails/2152/en-US.

[188] *E.g.*, *Plyler v. Doe*, 457 U.S. 202 (1982). *See also* City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd and Another (CC) [2011] ZACC 33, §§ 93-94. In that decision, the Constitutional Court of South Africa used the framing of "queue jumpers," reinforcing the idea of a division between wrongdoers and others. *Id.* However, it refused to portray the applicants as "queue jumpers," noting that "they were a homeless community that had been evicted once." *Id.*

The criminalization and penalization of the poor further excludes them from society: Harassment and violence, a perpetual cycle of sanctions and poverty, humiliation, further criminal behavior, discriminatory societal attitudes, oppression, exploitation, etcetera.[189] In this vein, inequality and poverty also greatly affect the distribution of political power and therefore the power to make law and policy and the narratives thereof which could potentially drive structural changes.[190]

Strikingly, activities associated with poverty are penalized not because individuals in poverty pose a danger, but because they are perceived as different: "[C]riminalization punishes the poor for their poverty."[191] The myth of the poor as criminals or wrongdoers is a way to manage social insecurity,[192] to impose discipline and coercive behavioralism based on neoliberal paternalism, and to conceal the poor.[193] Individuals are punished for failing to comply with the imperative to participate fully in the profoundly precarious and insecure low-wage labor market while encumbered by restrictions that make conformity impossible.[194] By pressuring people in poverty towards an impossible normalization and subjecting them to a state of permanent inferiority, the myth of the poor as criminals prevents them from participating in society through the full enjoyment of their rights and precludes the achievement of the democratic project which precisely requires that all people should be able to relate to each other as equals.[195] It also echoes the paternalistic conditional welfare and antipoverty programs that do not recognize people in poverty as individual agents able to make choices for themselves.[196]

In this context, the language of non-discrimination and equality can help develop alternative narratives for people in poverty about their agency and participation in society. The African Court of Human and People's Rights shows that such an approach is possible when it examined the compatibility of vagrancy laws across Africa. In this case, the Pan African Lawyers Union was challenging vagrancy laws that criminalized individuals who were considered as being "vagrants," often defined as "any person who does not have a fixed abode nor means of subsistence, and who does not practice a trade or profession," a "suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of him or herself," or "someone who loiters or is idle and who does not have a visible means of subsistence and cannot give a good account of him or herself."[197] The Court found these laws discriminatory because they prevent people in poverty from fully participating in society, showing the power of such alternative narratives:

> [V]agrancy laws, effectively, punish the poor and underprivileged, including but not limited to the homeless, the disabled, the gender-nonconforming, sex workers, hawkers, street vendors, and individuals who otherwise use public spaces to earn a living. Notably, however, individuals under such difficult circumstances are already challenged in enjoying their other

[189] *E.g.,* Jean Galbraith, Latifa AlMarri, Lisha Bhati, Rheem Brooks, Zachary Green, Margo Hu and Noor Irshaidat, *Poverty Penalties as Human Rights Problems* 117 Am. J. Intl. L. 397, 397 (2023).

[190] Wade M. Cole, *Poor and Powerless: Economic and Political Inequality in Cross-national Perspective, 1981–2011*, 33 Int'l Socio. 357, 357 (2018).

[191] Bell et al., *supra* note 51, at 1478.

[192] Loïc Wacquant, Punishing the Poor: The Neoliberal Government of Social Insecurity (2009).

[193] Ganty, *supra* note 89.

[194] Bell et al., *supra* note 51, at 1496.

[195] Pierre Rosanvallon, The Society of Equals (Arthur Goldhammer trans., 2013); Nancy Fraser, *Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation*, *in* Redistribution or Recognition? A Political-Philosophical Exchange 36 (Nancy Fraser & Axel Honneth eds., 2003).

[196] Fredman, *supr*a note 82, at 580.

[197] Advisory Opinion on the Request for Advisory Opinion by the Pan African Lawyers (PALU) on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and other Human Rights Instruments Applicable in Africa, No. 001/2018, § 69 (Dec. 4, 2020). For a discussion of this case, see Virginia Mantouvalou, *Structural Injustice and Human Rights: The Case of Begging*, *in* Structural Injustice and the Law (Jonathan Wolff & Virginia Mantouvalou eds., 2024).

> rights including more specifically their socio-economic rights. Vagrancy laws, therefore, serve to exacerbate their situation by further depriving them of their right to be treated equally before the law.[198]

As long as the myth of people as criminals pervades, efforts to promote distribution and redistribution will fail because actions decided within a context determined by the wrong myths about poverty make applying a rights-based approach inefficient. Indeed, socioeconomic exclusion based on myths about the poor reinforces the suffering, disempowerment, and sense of being of less valued that is experienced by people in poverty. This often leads to non-take-up and non-access to rights.[199] Generally, such myths prevent people in poverty from participating in society and from being able to express their narratives. As powerfully put by Judge Keller in her concurring opinion in the ECtHR *Lăcătuş* case about the criminalization of beggars:

> [T]he act of holding out a hand or a goblet constitutes a real cry of distress and a call for the generosity of others. Begging is the ultimate way to communicate poverty in words or in gestures . . . . This is all the more evident as this distress message is addressed to others and constitutes a clear invitation to interact. The recipients of this call are free to ignore or answer it.[200]

Generally, unemployed people who fail to abide by the middle-class norm of having a "proper" job are also prevented from participating in society in many ways. Not only are they subjected to surveillance, scrutiny and punishment, but they are often unable to access or obtain sufficient benefits from society to be able to participate fully in it: By offering them so little, society limits their power and maintains them in their situation of poverty.[201] They are also unable to benefit from basic public services because unable to pay for it, such as public transportation.[202] Sometimes they are implicitly punished for being unemployed by having their children excluded from early childhood education and care services. On this latter point, the European Committee of Social Rights, using the language of equality, insisted on the participation and inclusion of indigents into society, finding that a measure excluding children from early childhood education and care services just because their parents were unemployed constituted a socioeconomic discrimination. Considering that the "unemployment of a parent is already a factor that has a harmful impact on children," and that such restriction "makes their position even more difficult,"[203] the Committee insisted on the fact:

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[198] *Id.* at § 70.

[199] *E.g.,* Michael Fuchs, Katrin Gasior, Tamara Premrov, Katarina Hollan and Anette Scoppetta, *Falling through the Social Safety Net? Analysing Non-take-up of Minimum Income Benefit and Monetary Social Assistance in Austria*, 54 Soc. Pol'y & Admin. 827, 827 (2020); Hilke A. Kayser & Joachim Frick, *Take it or Leave it: (Non-)take-up Behavior of Social Assistance in Germany*, 121 J. Applied Soc. Sci. 27, 27 (2000); Jennifer Stube & Karl Kronebusch, *Stigma and other Determinants of Participation in TANF and Medicaid*, 23 J. Pol. Anal Management 509, 509 (2004).

[200] Judge Keller's concurring opinion in *Lăcătuş v. Switzerland*, App. No. 14065/15, ¶¶ 9–10 (Jan. 19, 2021), http://hudoc.echr.coe.int/.

[201] Colombi, *supra* note 87, at 227.

[202] *E.g.,* Bundesministerium der Justiz und für Verbraucherschutz, *Prüfung alternativer Sanktionsmöglichkeiten-Vermeidung von Ersatzfreiheitsstrafen gemäß § 43 StGB* (available at, https://fragdenstaat.de/dokumente/142049-jumiko-blag-ersatzfreiheitsstrafen/). This report illustrates the extent of the criminalization of poverty for petty offenses such as non-payment of metro tickets—and the prison sentences imposed for non-payment of fines—however, it does not draw any connection between criminalization and poverty, which is problematic.

[203] *International Federation for Human Rights (FIDH) and Inclusion Europe v. Belgium*, Complaint No. 141/2017, § 71 (Sept. 9, 2020), https://hudoc.esc.coe.int/.

> [T]hat one of the best ways of effectively addressing child poverty and social exclusion is through child protection systems that carefully integrate preventive measures, family support policies, and early childhood education and care … early childhood education services promote the development of children's personalities and stimulate their sensory, motor, cognitive and social skills.[204]

Such a narrative, which recognizes that people in precarious situations, including children, need inclusion and participation, is an important step towards challenging the myths about the criminal and transgressive poor, and in this way towards eradicating poverty.

Participation narratives could also pave the way for recognizing that poverty calls for relational justice, recognizing that the state of poverty can prevent a person from "interact[ing] with others in terms that reflect respect for one another's self-determination and substantive equality" and as a consequence call for accommodations including within private law, as argued by Dagan and Dorfman.[205] This narrative helps combat the rationalization process of evaluation which concerns "the negotiation, definition and stabilization of value in social life"—that is, "who is worthy and who is competent"—and plays out in "hiring, recruiting and promotion in labour markets," but also in admission and success at school. This process results "in winners and losers," reproducing inequalities. Developing a participative narrative through a relational idea of justice is likely to transform the evaluation process through a substantive idea of equality for people in poverty, including accommodation.

D. Conclusions

New narratives through the language of non-discrimination and equality law are an important tool to break the cycles perpetuating poverty and, in the words of Olivier De Schutter in his capacity as UN Special Rapporteur on extreme poverty and human rights, allows the discrimination faced by disadvantaged individuals and households to be seen "for what it is: a form of systemic discrimination that affects a range of areas including health, education, housing and employment."[206] The law needs to narrate the poor differently, not only to participate in changing the *status quo* but also to make the participation and the rights of people in poverty effective. In this Article, I have argued that the law needs alternative narratives about people in poverty, truthful to their historical, social, political and economic reality, which judges could use as the main (meta)narrators through the language of non-discrimination and equality. These myths are interconnected and exist across various juridictions embedded within different legal cultures, highlighting the importance of addressing them holistically and on a global scale.

Telling these stories in court is an important step in redressing some troubling situations of social exclusion, poverty and inequality. Indeed, new narratives free of harmful myths are a necessary but non-sufficient step to effect structural social changes. Ultimately, as long as myths about poverty prevail, any attempt to tackle the issue of socioeconomic exclusion through law is hopeless.

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[204] *Id.* at § 72.

[205] Dagan & Dorfman, *supra* note 153.

[206] *See* De Schutter, *The Persistence of Poverty: How Real Equality Can Break the Vicious Cycles*, *supra* note 73.

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Author affiliations. JSD candidate at Yale Law School, New Haven, United States; F.N.R.S. Postdoctoral Researcher at UCLouvain, Louvain-la-Neuve, Belgium; Affiliated Researcher of CEU Democracy Institute, Budapest, Hungary.

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