

3

Undoing the Rule of Market Laws

Social Critique and the Making of Normative Futures

Rodrigo Cordero

In the months of August and September 2011, Chile grabbed international news headlines due to the sudden emergence of massive protests of students demanding “free public education.” The movement confronted the newly elected right-wing government of the billionaire president, Sebastián Piñera, with the largest protests since the end of Pinochet’s dictatorship in 1989. As students paralyzed university campuses and secondary schools for more than seven months, and hundreds of thousands of ordinary citizens and families gathered in demonstrations across the country’s main cities, they articulated a powerful critique of the highly privatized educational system imposed by the dictatorship and then consolidated by the neoliberal policies of social-democratic governments.

In this chapter, I explore one of the most salient but less discussed aspects that emerged out of this struggle: the students’ critical engagement with legal rationality and the complex sociolegal framework that recast education in an economic register as an asset rather than a right.¹ My argument is that their struggle for free public education is not simply a moral protest against neoliberalism and market forces but also entails a broader political challenge to the role of law in the economization of society, or rather the monopoly of what may be called the “economic rule of law.”² The inquiry thus explores how the critique of marketized education—deployed on the streets and in formal institutional settings (such as parliamentary commissions, the Constitutional Court, and the like)—makes apparent the deep crisis of the educational system, but also leads to a resignification of the political meanings of law to empower other possible futures.

To make my argument clear, a bit of background is necessary. The student uprising started as a minor complaint over the government’s delay in handling financial resources for student aid. Two months after the beginning of the 2011 academic year, thousands of low-income students had not received the monthly stipend to cover the daily costs of food and transport. The scale of the negligence manifestly contradicted the president’s efficiency-driven rhetoric of a new style of public management, and it showed the government’s unresponsiveness to long-term demands for

¹ Wendy Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution* (New York: Zone, 2015), 151–73.

² Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978–1979*, ed. Michel Senellart (Basingstoke: Palgrave, 2008), 171. See also Miguel Vatter, “Neoliberalism and Republicanism: Economic Rule of Law and Law as Concrete Order (*Nomos*),” in *The SAGE Handbook of Neoliberalism*, ed. Daniel Cahill et al., 370–83 (London: Sage, 2018).

Didier Fassin and Axel Honneth (2021). *Crisis Under Critique*. New York: Columbia University Press.

increasing the \$2.5 daily allowance, an amount with which a student could hardly afford a decent meal. This episode, as circumscribed as it was to an issue of monetary transferences, became a whirlpool of accumulated frustrations linked to the state's indifference toward students' social experiences of abandonment, material insecurity, and financial burden.

A second episode acted as a political catalyst for a yearlong process of protest and critique, as it brought into full light the contradictions and irrationalities of a system that sees education through the epistemic lenses, normative categories, and harsh rules of the market. The conflict involved the selling of 50 percent of the property of a small private university, Universidad Central, to an investment company owned by militants of the Christian Democracy Party. The institution, known for its public vocation and democratic structure of government led by a council of faculty members, was about to experience a radical transformation: the university would now be controlled by an investment fund and expanded through the creation of associated commercial firms in which faculty members could participate as shareholders.³ The organized action of the faculty and the fierce resistance of the students, who went on strike and denounced the illegality of the covert operation in every public forum, managed to stop a \$45 million deal and the transformation of the university into a financial holding. The Universidad Central case became a symbol of the extent to which higher education institutions had become extremely lucrative business opportunities,⁴ paradigmatic of the distortions provoked by the unruly rules of market laws in education. The student movement used this case to draw public attention to the building blocks of the political economy that for decades had aligned state policies, corporate interests, and legal mechanisms in the making of a multimillion-dollar industry, as well as to the experience of a growing number of low- and middle-class families whose adherence to the ideals of "social mobility" and "personal sacrifice" were being paid in the common currency of debt.⁵

While government officials and most members of the main political parties remained silent about the looming social crisis that these episodes revealed, students began to raise questions that, at first, looked silly, even infantile, in the eyes of the elites, who were convinced of the long-term benefits of a market economy. Why should education be sold and paid for like a pair of shoes? Why must the value of university degrees be tied to interest rates set by banks in contracts drafted by financial and legal experts? How to untie such a tight nexus between education, debt, and profit? Why cannot the meaning of education be considered and justified as something other than a consumer good, an object of measurement and investment, or a source of economic valorization and accumulation? Why should public money aimed at funding education end up in private hands? What prevents us from even conceiving free higher education for all as a defensible normative ideal?

Everywhere the students looked for answers to these vexing questions, they found a complicated entanglement of institutions, concepts, rules, experts, and policies knit together by the

³ María Olivia Monckeberg, *Con Fines de Lucro. La Escandalosa Historia de las Universidades Privadas en Chile* [For profit. The scandalous history of Chile's private universities] (Santiago: Debate, 2013), chap. 1.

⁴ Qué Pasa, "Universidades: Un Mercado Bullente" [Universities: A bustling market], *Santiago*, June 18, 2010, <http://www.quepasa.cl/articulo/negocios/2010/06/16-3586-9-universidades-un-mercado-bullente.shtml/>.

⁵ Francisco Figueroa, *Llegamos Para Quedarnos: Crónicas de la Revuelta Estudiantil* [We came to stay: Chronicles of the student revolt] (Santiago: LOM, 2012), 49–53; see also Giorgio Jackson, *El País Que Soñamos* [The country we dream] (Santiago: Debate, 2013); and Camila Vallejo, *Podemos Cambiar el Mundo* [We can change the world] (México, DF: Ocean Sur, 2012). All these books, authored by the main leaders of the 2011 student movement, offer informative first-person accounts of the struggle for free public education.

Didier Fassin and Axel Honneth (2021). *Crisis Under Critique*. New York: Columbia University Press.

normative authority of the law.⁶ Students did not initially foresee the law as relevant to their struggle. However, as they advanced the diagnosis of the educational crisis and as their critique of the perverse effects of the dominance of market laws gained traction in public opinion, they also became more aware of the significance of legal devices and legal reasoning in the political ordering of the educational system. One of the main leaders of the 2011 student revolt, Giorgio Jackson, put it eloquently: “this issue became evident, truly palpable to all of us because after each new demand we made [to the government], we hit our heads against the *walls* of the Constitution.”⁷ This image explicitly evokes the experience of confrontation with the most durable aspects of the social-political order inherited from Augusto Pinochet’s dictatorship: the legal buttressing of private interests and the political divorce of education from democratic life. Yet it also draws attention, quite unintentionally, to one of the original meanings of the concept of law rooted in the Greek notion of *nomos* (i.e., the walls of the city). As the notion of *nomos* implies, walls function as the material and epistemic reminder of an act of legal ordering, an original division and distribution of space in which a concrete form of life is made possible, while others are excluded or disqualified.⁸

Drawing from this image, I shall pay attention to three moments when the student movement engaged with the walls of the law. First, I discuss the critique of “debt” as the principle that defines student experience, inasmuch as the concept enacts, through the juridical interplay of private loan contracts, a regime of valuation that credits and discredits students based on their capacity to pay. Second, I highlight the critique of the vocabulary of economic “freedom” as the normative bedrock upon which the educational system is supposed to operate and the constitutional protection of such a conception as it sustains an economic-juridical framework that guarantees profit making rather than the realization of rights. Third, I examine the critique of the disempowerment of “democracy” produced by a political system that isolates itself from those unofficial, subaltern, and nonspecialized forms of knowledge in the process of the constitution of norms (lawmaking), which narrows down the space of normative reflection to a domain of definitions coded in the language of legislators and experts. Each of these moments of critique, as I wish to show, brings into focus the historicity of some key devices that have facilitated the juridical consolidation of market laws in Chilean society as well as in other places of the Global South.

From this vantage point, the Chilean student uprising should not be seen as a single event attached to the peculiarities of a local story. What the student critique of the economic rule of law actually reveals, I think, is a concrete mode of engagement with the pathological effects of neoliberal globalization and the power of its juridical avatars. By putting the crisis of marketized education under the lens of a social critique of law, the student uprising challenged the meanings and institutional forms of key concepts. This critique should be seen as one of many critical

⁶ The issue of law is almost absent in the bulk of literature that emerged since 2011, which has mostly framed the analysis within the contours of social movement studies (resources of mobilization), media studies (discourses and practices), and educational policy (institutional reforms). For a general overview, see Sofia Donoso and Nicolás Somma, “‘You Taught Us to Give an Opinion, Now Learn How to Listen’: The Manifold Political Consequences of Chile’s Student Movement,” in *Protest and Democracy*, ed. M. Arce and R. Rice, 145–72 (Calgary: University of Calgary Press, 2019).

⁷ Jackson, *El País Que Soñamos*, 137-38; emphasis added.

⁸ Martin Loughlin, “Nomos,” in *Law, Liberty and State: Oakeshott, Hayek and Schmitt on the Rule of Law*, ed. D. Dyzenhaus and T. Poole (Cambridge: Cambridge University Press, 2015), 72; Rodrigo Cordero, “It Happens In-Between: On the Spatial Birth of Politics in Arendt’s *On Revolution*,” *European Journal of Cultural and Political Sociology* 1, no. 3 (2014): 258.

Didier Fassin and Axel Honneth (2021). *Crisis Under Critique*. New York: Columbia University Press.

responses to crises that are happening throughout the world; it is connected to global movements that struggle to expand the imagination of society against the *fictio iuris* of neoliberal reason.

Bounded by Debt: Counting and Miscounting the Crisis

One of the most salient features of the public discourse about the system of higher education in a country such as Chile is the extent to which it has been phrased in the rhetoric of numbers and quantitative reasoning. This is not simply because of performance metrics that have turned universities, academics, and students into accountable objects; rather, it is due to the very use of numbers to produce public validation for state policies in this area. After the end of the dictatorship, social-democratic governments made fulfilling the promise of social mobility a top priority by transforming higher education from a privilege for the *few* to an opportunity for the *many*. The promise of democratization translated into legislation favorable to private institutions and aggressive policies to subsidy demand in an open and competitive educational market. In a period of two decades or so (1990–2015), the results offered robust evidence of a successful path: the number of students enrolled in higher education increased four times—it went from less than 250,000 to more than 1 million; the social composition of educational institutions changed dramatically as three out of four students were “first generation”; and the proportion of graduates who could contribute advanced human capital to a growing economy almost doubled.

This story of expansion and inclusion experienced a breakthrough in 2005 when the first socialist government after Salvador Allende paved the way to achieve the unthinkable: universal access to higher education. Inspired by a mixture of third-wave political pragmatism, orthodox economic rationality, and sophisticated juridical abstraction, the formula pledged to guarantee “the *equal right to credit*”⁹ to every student through a new system of state-guaranteed loans provided and managed by private banks. The numbers were undeniably promising, as the counting of politicians and policy experts showed that more than 500,000 poor and lower-middle-class students, who otherwise would not attend college, were now able to afford the high costs of tuition fees and climb the ladder of social mobility. When the student movement exploded in 2011, the fragility and contradictions of the official narrative became evident. A dissonance emerged between the expectations of “social mobility,” “self-realization,” “meritocracy,” and the expansion of “possibilities” that political elites and policymakers had nurtured for years, and the actual experience of increasing costs, burdening debts, poor-quality degrees, and class segregation associated with the expansion of a highly privatized educational system.

This sense of dissonance was not a spontaneous reaction but the result of a critical gesture made by some of the leaders and organizations of the student movement: they began to inquire about what those official numbers really meant and what they hid. Somewhat timidly at first, they mobilized, in a language comprehensible for everyone, empirical evidence gathered in World Bank and Organisation for Economic Co-operation and Development (OECD) reports on the Chilean educational system. The data visualized the “miscount” of the crisis through the elaboration and

⁹ José J. Brunner, “Crédito estudiantil: La Torre de Babel” [Student credit: Tower of Babel], *La Tercera*, Santiago, January 15, 2006, http://200.6.99.248/~bru487cl/files/Credito_def.pdf; emphasis added.

Didier Fassin and Axel Honneth (2021). *Crisis Under Critique*. New York: Columbia University Press.

public communication of a different “count”: the fast-growing mass of indebted students, the abusive interest rates of loans, the amount of public money transferred to private institutions, and the exorbitant profits of commercial banks.¹⁰ In the context of an educational market boosted by the state in an unprecedented manner, the public scrutiny of those numbers created a generalized sense of injustice that also helped shape the very understanding of what was at stake in the crisis: the existence of an institutional order that subjects education to the laws of competition and transforms students and their families into a source of economic value.

The *count of the miscount*, to use Rancière’s wording,¹¹ brought to the fore the commonality of the debt experience, as well as the rules that made such a bond possible in the first place. By building this connection, students were exposing the rules of a regime that credits and discredits them according to their capacity to pay, a regime that ties their biographies and expectations to the inventiveness and practical effects of a very powerful device: legally binding contracts.

In the overall scheme of things, every student—even before entering campus—had first to become the signer of a sixteen-page loan agreement with a commercial bank (see figure 3.1).¹² The written document’s logic and structure were no different from any other standard loan agreement, but it had two prominent features that made it especially interesting. On the one hand, the contract was built on a multifaceted set of economic norms, regulations, procedures, and categories accessible only to a handful of legal experts (e.g., Trade Code, Civil Code, Securities Market Act, Credit Operations Act, Organic Law of the Chilean Central Bank, General Banking Act, and Bills of Exchange Act). On the other, the contract outlined various areas of engagement (e.g., aid policy, academic performance, equity capitalization, loan management, money transferences, and document trail) that brought into relation many agents (the state, universities, banks, and students) according to strict rules of action. Despite the formal symmetry of all actors before the law, the contract placed the student as the weakest link of a complex credit value chain for up to twenty years.¹³

Figure 3.1 First page of the student loan agreement.

¹⁰ After implementation of the new loan system known as CAE (*Crédito con Aval del Estado*), the majority of private universities adjusted their fees and increased student enrollment dramatically. Their strategy was to capture as many loans as they could, for which poor and lower-middle-class students became a precious and low-risk business asset. To take an example, between 2006 and 2018, the American holding Laureate International, which owns three universities and one professional institute, increased student enrollment by 212.9 percent and, as a consequence, received more than \$1.3 billion in student loans. Over the same period, the Chilean state transferred more than \$4 billion to commercial banks, as the loan scheme involved management fees and the state’s obligation to purchase a portion of the debtor portfolio. Alexander Páez, Marco Kremermann, and Benjamín Sáez, *Endeudar para gobernar y mercantilizar: El caso del CAE* [Indebting to govern and marketize: The case of State loan guarantee program], Documento de Trabajo Fundación Sol [Fundación Sol Working paper], June 2019, 17, <http://www.fundacionsol.cl/wp-content/uploads/2019/06/CAE2019-3.pdf>.

¹¹ Jacques Rancière, *Disagreement: Politics and Philosophy*, trans. Julie Rose (Minneapolis: University of Minnesota Press, 1998), 27–30.

¹² Before reaching this point, there was a whole market-like dynamic. The state called once a year for applications to the loan program and selected students according to socioeconomic criteria. Then it opened a competitive bidding process for banks to make package offers to thousands of poor and lower-middle-class students to whom they would give loans. The best bids were selected based on the price banks would charge the state for selling back the riskier loans by following a logic very similar to collateralized debt obligations (CDOs).

¹³ Cámara de Diputados, *Informe Comisión Investigadora de los Actos de Gobierno Vinculados a la Implementación de la Ley N° 20.027* [Report of the Commission of Inquiry into Government Actions Related to the Implementation of Law No. 20.027], <https://www.camara.cl/pdf.aspx?prmID=43144&prmTIPO=INFORMECOMISION>.

Didier Fassin and Axel Honneth (2021). *Crisis Under Critique*. New York: Columbia University Press.

CONTRATO DE APERTURA DE LINEA DE CREDITO
PARA ESTUDIANTES DE EDUCACION SUPERIOR,
CON GARANTIA ESTATAL, SEGUN LEY N° 20.027

En [], a [], de [] del año [], entre el estudiante de educación superior que se individualiza al final de este instrumento, en adelante, indistintamente, "el Estudiante" y/o "el Deudor", por una parte; y por la otra, [], Rol único tributario [], representada por quienes suscriben al final el presente instrumento, en adelante indistintamente "el Acreedor" y/o "la Institución Financiera", en adelante tanto el Estudiante o su representante legal como el Acreedor denominados cada uno individualmente "la Parte" y ambos conjuntamente "las Partes", todos los comparecientes mayores de edad, y exponen:

PRIMERO: Antecedentes y Contrato de Apertura de Línea de Crédito. (a) Entre el Acreedor y el Estudiante, se conviene la celebración de un Contrato de Apertura de Línea de Crédito, en adelante "el Contrato", con el objeto de poner a disposición del Estudiante a partir del presente año créditos o mutuos destinados exclusivamente al financiamiento total o parcial del Arancel de Referencia de Educación Superior del Estudiante, en adelante "el Arancel", en su calidad de alumno regular de pregrado, del [] año, de la carrera de [] en adelante "la Carrera", que imparte la [], en adelante "la Institución de Educación Superior" o "la IES", o en su calidad de alumno regular de pregrado de la carrera a la que tiene derecho a cambio por una única vez de acuerdo con la ley 20.027 y su reglamento. El presente Contrato y cada uno de los créditos que se desembolsen por el Acreedor en conformidad a este Contrato, contarán con la garantía del Estado, por intermedio del Fisco de Chile, en adelante "la Garantía Estatal" y con la garantía por riesgo de deserción académica de la Institución de Educación Superior, en adelante "la Garantía por Deserción Académica". El Contrato, cada uno de los Créditos, la Garantía Estatal y la Garantía por Deserción Académica se regirán por las disposiciones de la ley 20.027, sobre financiamiento de la educación superior publicada en el Diario Oficial, con fecha 11 de Junio del año 2005, en adelante "la Ley"; su Reglamento, contenido en el Decreto Supremo N° 182 de fecha 07 de septiembre del año 2005, publicado en el Diario Oficial con fecha 28 de enero de 2006, en adelante "el Reglamento"; en las especificaciones de las Bases de Licitación Pública contenidas en la Resolución (T.R.) N° [] de fecha [], dictada por la Comisión Administradora del Sistema de Créditos para Estudios Superiores, en adelante "las Bases" o "las Bases de Licitación"; y en lo no previsto en ellos, por las contenidas en el Código de Comercio, en el Código Civil, la ley N° 18.010 sobre Operaciones de Crédito de Dinero y sus modificaciones, la ley N° 18.045 sobre Mercado de Valores y sus modificaciones, y por las estipulaciones, términos, condiciones y demás requisitos que se contienen en las cláusulas siguientes. (b) Por escritura pública de fecha [] de [] de [], otorgada ante el notario [], suscrita por el Acreedor y la Comisión Administradora del Sistema de Créditos para Estudios Superiores, en adelante "la Comisión", se dejó constancia de haberse adjudicado al Acreedor en proceso de licitación pública, Nóminas de Estudiantes, según este término se define en ese instrumento, de diferentes Instituciones de Educación Superior, a quienes deberá otorgárseles créditos, con Garantía Estatal y Garantía por Deserción Académica, destinados al financiamiento total o parcial de los estudios de educación superior, siempre que éstos sean concedidos en conformidad con las normas señaladas en la ley, su reglamento y en las

Source: Comisión Administradora del Sistema de Créditos para Estudios Superiores, accessed October 18, 2019, <https://portal.ingresa.cl/contrato-del-cae/>.

The loan contract was, therefore, a key to organizing higher education as a domain of market relations and students' experiences as an entanglement of economic value and bonds of debt. The loan contract worked as a proxy for what Katherine Pistor calls "the legal code of capital,"¹⁴ namely, the juridical operation that makes it possible for an object like education to be traded in exchange for money. In this way, the loan contract defined the market, set the rules of "who will be subjected to market discipline" and on what grounds, and thus instituted moral obligations and social bonds that followed the market logic.¹⁵

All of this may have been invisible to the casual observer at the time. However, the 2011 movement showed that all students' lives were, in one way or another, tied by the bond of debt. With the help of official numbers and the narration of personal experiences, as one of the student leaders said, "The message spread quickly. We did not have anything new to say to the families of students, we did not have to show them what was happening in their homes. . . . They knew perfectly well the suffering caused by debt. The point for us was for them to stop accepting it as something normal."¹⁶

¹⁴ Katherine Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton, NJ: Princeton University Press, 2019), 22.

¹⁵ David Singh Grewal and Jedediah Purdy, "Introduction: Law and Neoliberalism," *Law and Contemporary Problems* 77, no. 4 (2015): 1–23, 7–8.

¹⁶ Jackson, *El País Que Soñamos*, 80.

Didier Fassin and Axel Honneth (2021). *Crisis Under Critique*. New York: Columbia University Press.

The questioning of the loan mechanism clarified the human costs and social problems generated by an educational system built on student debt. By putting the debt crisis under critical scrutiny, the student movement exposed the contradictions of Chilean higher education. On the one hand, instead of providing good education, universities were doing something else: producing exorbitant profits for their controllers, with an overpopulation of graduates in some areas; increasing dropout levels; underinvesting in academics; and, paradoxically enough, pushing public spending up to finance commercial banks. On the other hand, the system not only had transformed education into a consumer good accessible to anyone who could pay but also had unleashed a perverse logic that ended up destroying its social value: quite simply, it forced people to “choose between having debt, or having no education.”¹⁷

Students did not need expert knowledge of contract law to perceive the abusive clauses in their loan agreements and recognize that educational entrepreneurs were getting rich at the expense of their debts. In 2011, as the number of students going into default grew rapidly, especially among those who did not finish their degrees or who graduated from professions with low salary returns, the main question was whether education could ever be imagined without the principle of debt. The leaders of the student movement made the case before several parliamentary committees for the abolition of the state-guaranteed loan system, the exclusion of commercial banks from any form of student aid, and the transition to a new system of free public education that guaranteed education as a social right. They dared to contest the authority of the neoliberal *nomos* by exposing the contract of debt in front of those who were seen as politically responsible for promoting and sustaining a fraudulent system.¹⁸ The students’ critique confronted the system with the limits of its official truth.

One of the most eloquent criticisms was made by a visual artist and hundreds of indebted students whose university (Universidad del Mar, a large private profit-seeking institution) was shut down after its accreditation was stripped away and the owners declared bankruptcy in 2012. As students were still forced to pay their debts, the artist Francisco Tapia decided to steal a large stack of promissory notes (worth \$500 million) from the university.¹⁹ He then burned the financial documents, and the ashes were later exhibited in a VW Kombi van. The destruction of the files brought to the fore the issue of the rule of law in a different light: first, because the act was immediately treated by the police as a serious criminal offense against the constitutional protection of private property; second, because the incineration of documents contested the very legality of the debt obligations on the grounds of restorative justice; and third, because the destruction of the documents—although it did not technically rescind the debt—made calling in the debt almost impossible.

If the experience of student debt is coded in law, as I have suggested, we may say that the disidentification from the force of this code was (and still is) central to the student’s critique of marketization. Thus the conflict over the boundaries of legality left exposed the fact that the crisis of the educational system was not an issue of mere policy change; rather, it was a struggle over how to separate education from the rule of market laws. To put it in the words of one of the student

¹⁷ Patrick Kingsley, “Chilean Rebel Camila Vallejo: The Problem Is Bigger—It’s Structural” [interview], *The Guardian*, November 20, 2012, <https://www.theguardian.com/world/2012/nov/20/chile-student-rebel-camila-vallejo>.

¹⁸ During 2011, representatives of the main student federations attended more than ten hearings in the Chilean Chamber of Representatives and the Chilean Senate. They voiced ideas that would openly contradict the established consensus on educational policies and move the discussion beyond neoliberal common sense. Figueroa, *Llegamos Para Quedarnos*, 128–31, 144–45.

¹⁹ Jonathan Franklin, “Chile Students’ Debts Go Up in Smoke,” *The Guardian*, May 23, 2014, <https://www.theguardian.com/world/2014/may/23/chile-student-loan-debts-fried-potatoes>.

Didier Fassin and Axel Honneth (2021). *Crisis Under Critique*. New York: Columbia University Press.

leaders, it was about breaking free from “the contract that was imposed on us to regulate social relations.”²⁰

Freedom of Education: The Constitution Is the Crisis

In many ways, the Chilean student movement was able to articulate the urgency for comprehensive reforms aimed at rolling back years of educational policies that had dismantled public education, denigrated its social value, and turned thousands of students into debtors. However, their critique brought to the surface of everyday life a new kind of “constitutional consciousness”:²¹ namely, awareness that the crisis of the educational system was deeply connected to the abstract concepts of the Chilean constitutional order. Accordingly, the students’ struggle for free public education should also be seen in relation to a second object of critique: the 1980 constitution.²²

In the midst of the festive demonstrations and creative street performances of the many marches that took place during 2011 and 2012, lighting fire to oversized replicas of the constitutional text became a popular ritual in many cities in Chile. The symbolic act of profanation, accompanied by the chant “It will fall, it will fall! The education of Pinochet, now it will fall!” should not be disregarded as something merely negative or destructive. It actually crystallized the idea that if the constitution itself was the root of the crisis, a critical engagement with established constitutional meanings was socially and politically necessary. As a matter of fact, the student movement sparked a generative process of constitutional interpretation that was taking place not in a judicial chamber but on the streets and social media. It was fostered by the claims of those seemingly unqualified to rule (students and common people), not by lawyers and experts. And it drew from the existing archive of constitutional history not only to show the extent to which market laws were ingrained in and protected by the constitution, but also to compose a different “public hermeneutics” that would contest the very meaning of *what is* and *who counts* as “constitutional” in the existing order of society.²³

If it is true what a former minister of Pinochet’s regime once unapologetically claimed, namely, that “the key of the Chilean liberal revolution was not the use of force but the force of a

²⁰ Vallejo, *Podemos Cambiar el Mundo*, 117.

²¹ Rohit De, *A People’s Constitution: The Everyday Life of Law in the Indian Republic* (Princeton, NJ: Princeton University Press, 2018), 10.

²² This constitution has a special status in recent Latin American political history, not only because it was created and legitimized in a dictatorship under conditions of violence and repression but also because it successfully set the model for a radically new market-centered society and was the breeding ground for the unfolding and consolidation of the neoliberal experiment. Drafted by a commission of legal scholars appointed by the military junta led by General Augusto Pinochet, this constitution was discussed over a period of five years (1973–1978), approved in a sham plebiscite in 1980, and then ratified, with some amendments, months before the dictatorship ended in 1989. Since the return to democracy, it has been an object of both worship and disdain, somehow constituting the lens through which democratic life is thought about, debated, practiced, and projected to this very day in Chile. See Rodrigo Cordero, “Giving Society a Form: Constituent Moments and the Force of Concepts,” *Constellations* 26, no. 2 (2019): 194–207.

²³ Domingo Lovera, “The Right to Social Protest: Negotiating Constitutional Meanings” (PhD thesis, York University, Toronto, 2016), 3–12. See also Jason Frank, *Constituent Moments: Enacting the People in Postrevolutionary America* (Durham, NC: Duke University Press, 2010), 243.

Didier Fassin and Axel Honneth (2021). *Crisis Under Critique*. New York: Columbia University Press.

concept—individual freedom,”²⁴ one could argue that the student movement was precisely calling attention to the political formation, social costs, and cultural inscription of a whole conception of society grounded in the primacy of economic freedom. The denaturalizing effect of this critique—albeit resisted by right-wing groups as an expression of old-fashioned “Marxist ideology” and downplayed by political elites as a “policy issue”—was effective not only in denouncing the injustices produced by neoliberal education but also in unraveling the frame of reference upon which a marketized conception of society was grounded, justified, and reproduced. The struggle over free public education brought to the fore and actually reinscribed the question of how society was conceived, not as an abstract problem but as a concrete and open-ended question. The students also challenged the hierarchies of authority that establish *who* may pose the question and *how* it can be answered.

Having said this, it is not an accident that Chilean students found in the constitution (i.e., in the actual legal text) a perfect metaphor and a concrete terrain for their struggle. This is not because they had a legalistic understanding, although they were very active in debating the legal framework of the educational system, as I have already shown, but rather because they saw in the themes of the constitutional order a key to the political work of contesting and breaking free from the concepts that have shaped Chilean society as a market-centered society. Among those concepts, individual freedom and private property came to be seen as nodal points of contestation in the attempt to undo the complicity of the law in the making of marketized education.

Article 19 of the 1980 Chilean constitution consecrates the principles of private property and economic freedom as the foundation of an educational system that is based on the idea of “freedom of education.” It does so by codifying three entwined subjective rights: “the right to open, organize and maintain educational institutions” (section 11), “the right to develop any economic activity” (section 21), and “the right to property over any kind of tangible and intangible asset” (section 24). Read as a unity, these legal precepts are the bedrock upon which education can be constitutionally protected and promoted as an economic activity like any other within the bounds of what Chilean constitutional doctrine denominates as a “public economic order.”²⁵ Within this framework, universities and schools work under the premise that what they do is indistinguishable from any other economic activity, as well as under the provision that the educational goods they produce—as susceptible to being economized as they are—should be protected on the grounds of the individual freedom to develop any economic activity.

In order to contest this premise, the students did not rely on the traditional tools of constitutionalism and legal scholarship—although they were very influenced by the writings of Fernando Atria, a law professor at Universidad de Chile²⁶—but on their own lived experience with neoliberal education: the experience of living with unpayable debts, the experience of studying in institutions that function like retail companies and investment banks, and the experience of their collective demands for justice being ignored by the very rules that should protect them as holders of rights. In this regard, the constitutional interpretation they put forward is simple in its formulation but radical in that it disrupted the coded constitutional meanings: you cannot guarantee

²⁴ José Piñera, “Chile: El poder de una idea” [Chile: The power of an idea], in *El Desafío Neoliberal: El Fin del Tercermundismo en América Latina* [The neoliberal challenge: The end of third worldism in Latin America], ed. B. Levine (Santa Fe de Bogotá: Norma, 1992), 80.

²⁵ Cordero, “Giving Society a Form,” 10–11.

²⁶ Atria’s op-eds and books were often read by students “en toma” and by the leaders of the movement, who found in his writings a global view of the crisis of the educational system and its deep connections with the institutional logic of Chilean democracy. See Fernando Atria, *La mala educación: Ideas que inspiran al movimiento estudiantil en Chile* [Bad education: Ideas that inspire the student movement of Chile] (Santiago: Catalonia, 2012).

Didier Fassin and Axel Honneth (2021). *Crisis Under Critique*. New York: Columbia University Press.

the right to education via the legal buttressing of freedom of enterprise and the will to choose only what the natural order of free markets allows to flourish.

The fact that the existing institutional framework could not contain the students' demands for free public education was a testament to the binding force of a constitutional order that uses economic rationales to order society, but also to the ideological attachment to neoliberal common sense among proprietary classes and governing elites. As a matter of fact, the president himself—who made his personal fortune by introducing credit cards in the late 1970s in Chile—disqualified the students' demands by ironically saying, “We all want education, health and many more things to be free for everyone, but after all nothing is free in this life.”²⁷ This response is symptomatic of the privatopia that the student revolt was challenging: a social world where price mechanisms and free enterprise serve as regulative ideas of the state and the rule of law.

Like other progressive demands for reform that emerged from social movements in the last decade in Chile, students' proposals to regulate the power of economic interests and promote the universal right to free public education often met with the same response: they were welcomed as morally desirable goals but then politically framed as unrealistic and disregarded as “unconstitutional.” In fact, the organized resistance of political and economic elites to the students' egalitarian demands and critique of neoliberal education showed that the force and resilience of the constitutional order inherited from Pinochet lie in the very ways in which the distinction between the “constitutional” and the “unconstitutional” is defined, interpreted, and enacted through policies and regulations that govern the life of the population.

This is nowhere clearer than in a ruling of the Constitutional Court on a law that prevented higher education institutions from being owned and controlled by for-profit organizations. Approved by parliament in 2017 after years of discussion prompted by the 2011 student revolt, the law was a great achievement for student organizations as it represented a step forward in the process of demarketization of the educational system. However, after mounting pressure from right-wing advocacy groups and private university officials, the court's ruling declared the law “unconstitutional” because it violated the key principles of “economic freedom” and “freedom of education” sanctioned in the 1980 constitution. In defense of the ruling against objections to its evident disregard for the democratic process, the president of the court argued that even if the law had been democratically conceived, “it is not enough for a law to be democratic in order to be constitutional.”²⁸

Inadvertently, the ruling summarizes in a nutshell and states in plain sight the neoliberal vision of a “democracy [that must be] protected from too much democracy,” of a democracy committed to the idea that “the majority of the political body must not have the [constitutional] power to ‘shape’ society.”²⁹ In doing so, the ruling also reveals the heart of the constitutional crisis brought about by the student uprising: the questioning of the uses of law as a tool to block popular egalitarian demands, prevent interference with the existing property system, and safeguard the integrity of a marketized society.

The identification of the perverse effects of this constitutional logic prompted the students

²⁷ “Presidente Piñera dice que ‘nada es gratis en esta vida’” [President Piñera says that “nothing is free in this life”], *La Tercera*, August 11, 2011, <https://www.latercera.com/noticia/presidente-pinera-dice-que-nada-es-gratis-en-esta-vida-y-que-la-educacion-no-puede-ser-gratis-para-todos/>.

²⁸ Tribunal Constitucional de Chile, *Sentencia Rol 4317–18*, 107, April 26, 2018, http://www.tribunalconstitucional.cl/descargar_sentencia2.php?id=3701.

²⁹ Friedrich A. Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (London: Routledge, 2012), 139; see also Nancy MacLenn, *Democracy in Chains: The Deep History of the Radical Right's Stealth Plan for America* (New York: Viking, 2017), 159.

Didier Fassin and Axel Honneth (2021). *Crisis Under Critique*. New York: Columbia University Press.

to raise the stakes of their critique of the educational system: from a diagnosis that exposes the dramatic outcomes of policies designed to foster competition, individual choice, and private initiative as if education were a market, to a radical contestation of a form of *doing* democracy.

Undoing the Economic Rule of Law: Imagining Another Democracy

The student critique of the constitutional order inherited from Pinochet's dictatorship should not be measured by its degree of juridical sophistication; its significance rather lies in the way in which it openly confronts the most durable contradiction of this political-legal order: namely, the establishment of a democracy built upon fear of democracy. As has been well documented,³⁰ after Chile's return to democracy in 1990, this fear persisted through institutional routines that disempowered the value of political dissent in favor of political stability, as well as in a system of norms that deflected collective action and reflection in favor of economic discipline. The refusal of this fear is what the 2011 student revolt staged with creative eloquence in the streets as well as in mass media and many formal institutional settings.

As part of a generation that grew up in democracy, students took the opportunity of the educational crisis to insert themselves into a conversation monopolized by the vocabulary of economists and policy experts and the cynicism of an elite too comfortable with the certainties of neoliberal common sense. Their revolt was not simply a reaction to unsatisfied material grievances; it was based on moral convictions and social knowledge that would guide them in assessing what was wrong with neoliberal education. They also relied on these convictions to address the question of what should be done to resist its dominance and undo its injustices. Accordingly, students saw themselves as pursuing a double critical task: on the one hand, holding political groups accountable for not respecting the commitments and obligations implied in the existing framework of laws and, on the other, reminding the adult world at large that prefiguring another form of education and society apart from the rule of markets was not only politically possible but ethically necessary. Seen in this light, the struggle for free public education certainly articulated a hard-hitting moral protest against the corrosive effects of neoliberal policies and market forces. However, it also entailed a less noticed but equally crucial challenge to the political role of law in the economization of society.

Insomuch as students were seen as the embodiment of those seemingly unqualified to rule (i.e., immature children),³¹ their very appearance in the political stage to discuss the legal framework of the educational system disturbed the background assumptions of democratic lawmaking. Such a disturbance, as the president of the Universidad de Chile Student Federation pointed out at the time, was not a capricious gesture but an act of responsibility because "the administration of power by the forever powerful forces us to interfere in their affairs, because their affairs are also our affairs and because we cannot let the privileged few be the ones who eternally

³⁰ Renato Cristi and Pablo Ruiz-Tagle, *El constitucionalismo del miedo: Propiedad, bien común y poder constituyente* [Constitutionalism of fear: Property, common good, and constituent power] (Santiago: LOM, 2014).

³¹ A prominent right-wing senator derogatorily called the students, and those who supported their demands, "a bunch of useless subversives." "No nos va a doblar la mano una manga de inútiles subversivos," [A bunch of useless subversives are not going to bend our hands] *La Tercera*, August 6, 2011, <https://www.latercera.com/noticia/carlos-larrain-no-nos-va-a-doblar-la-mano-una-manga-de-inutiles-subversivos/>.

Didier Fassin and Axel Honneth (2021). *Crisis Under Critique*. New York: Columbia University Press.

define the rules and contours of our nation.”³²

Of all the instances in which this political vision is invoked, I would like to focus briefly on a single episode that took place on August 16, 2011. On the occasion of a public hearing held by the Senate Education Committee to discuss a bipartisan motion to prevent higher education institutions from making profits out of public funds, the main leaders of the student movement were invited to present their views on the matter (see figure 3.2). By then, months of street protest and occupation of buildings had not produced any substantive response from government authorities other than brutal police repression, while public opinion had shifted toward a growing support of the demands and news outlets had transformed some student leaders (notably, Camila Vallejo and Giorgio Jackson) into global political celebrities of the left.

It was no wonder that there were high expectations. The scene was set for the hearing to be broadcasted live. Despite the senators’ welcoming initial words and the rhetorical insistence on their willingness to listen in good faith, their bodies communicated discomfort, condescendence, and lukewarm emotion. To be sure, the popularity of the student movement was not easy to digest for members of a discredited political class. However, the main issue perhaps was the students’ impertinence in disrupting the established order of the ordinary legislative process: their performance turned the space of the hearing into a lecture room. As one of them later recalled it,

Although on TV everything seemed very well crafted, the truth is that our interventions were rather improvised. Not because we did not care, but simply because during those days we did not have much time for anything. We prepared our talking points on our way to Valparaíso [the coastal city where Congress is located]. . . . I carried in my backpack a bunch of academic articles and op-eds in favor and against our positions. We read them aloud. . . . As we arrived late, we only could distribute topics and emphases for each speaker. Even so, the force and logic of our arguments were far superior than the rudimentary defense of for-profit education led by Senator Ena von Baer and the noncommittal reform proposals made by Senator Ignacio Walker. We were not really aware of the impact of what we were doing.³³

³² Vallejo, *Podemos Cambiar el Mundo*, 57.

³³ Figueroa, *Llegamos Para Quedarnos*, 145.

Didier Fassin and Axel Honneth (2021). *Crisis Under Critique*. New York: Columbia University Press.

Figure 3.2. Senate Education Committee Hearing, August 16, 2011 (video stills).



Source: Biblioteca Congreso Nacional de Chile

<https://www.youtube.com/watch?v=eGPz7QBS1cw>

The nine students who spoke that evening presented lawmakers with a series of arguments and evidence intended to unpack the troubling logic and lasting consequences of an educational system whose regulatory principles—to which some of the lawmakers in the room had helped shape with their votes—have systematically worked for the benefit of private interests and against the very idea of education as a means for social equality. Official data, research and policy reports, personal experiences, international treaties, and existing national legislation were all part of the discursive artillery that students employed. However, worth noticing is that, during the hearing, they also occasionally drew on the notion of the “rule of law” (*estado de derecho*) to make their case against for-profit and marketized education:

“no one here respects the law”;
“this is a system that undermines people’s rights”;
“we are not asking for anything that is not written in the law”;
“it has cost us a great deal to place the idea that the alleged rule of law be enforced.”³⁴

These references in no way imply that students wanted to make a principled defense of the liberal ideal of the supremacy of positive laws; rather, the students wanted to disclose the shaky

³⁴ Biblioteca Congreso Nacional de Chile, “Senate Education Committee Hearing on Bill 7856–04: It Prohibits That For-Profit Educational Institutions Receive State Funds,” August 16, 2011, <https://www.youtube.com/watch?v=eGPz7QBS1cw>.

Didier Fassin and Axel Honneth (2021). *Crisis Under Critique*. New York: Columbia University Press.

grounds of a democracy in which the rule of law ends up subsumed under the economic rule of wealth. To question the constitutional structure that holds and reinforces this order would mean recognizing and disarticulating its main sources and effects. I do not claim here that students actually did so during the three-hour-long senate hearing, but one can appreciate more than a few hints.

First, the students identified a “conceptual error”: the idea that education is, first and foremost, an economic good and a source of value that can be exchanged to the benefit of individual private agents. As the students argued during the hearing, the problem with the dominance of such a conception is that it produces a double distortion. On the one hand, it “distorts the goals of educational institutions” because they become more and more concerned with “increasing revenues” rather than creating public goods. On the other, it normalizes a way of addressing educational problems as if they were “market failures” that could be corrected through legal remedies and procedures. What follows from this view, according to the students’ account, is the failure to comprehend that, rather than more or fewer regulations, “the problems of our system are rooted in the very logic that governs them.”³⁵

By rendering visible the ways in which the existing framework of rules and norms had effectively benefited the wealthy instead of the majority, students also drew critical attention to the moral insensitivity that political elites had demonstrated toward an educational system that, within a general respect for the rule of law, gambles with the expectations of social mobility of middle and lower classes. Therefore, they took the opportunity of the senate hearing to remind everyone in the room that lawmakers and policymakers had passively allowed educational entrepreneurs to enrich themselves at the expense of people’s rights for far too long. For students, it was important to break the silence, for “it is a brutality to be complicitous with a system that converts a right into business.”

Perhaps what the students said that evening did not add new evidence to what senators already knew after years in the job of lawmaking. Still, the impassioned defense of free public education offered not only a refined reflection on the manifold causes of the educational crisis but also an ethical challenge to the neoliberal common sense and market forces that had dominated too many corners of Chilean society. Ultimately, what students poignantly disclosed during the senate hearing is that the marketization of education, instead of being a process of deregulation, entailed a particular appeal to the law and lawmaking as a means to safeguard market freedoms rather than claims of social justice.

To the senators in the room, this criticism was a caricature of the institutional complexities and constraints of lawmaking in a hyper-presidential system in which parliament has limited ability to amend or enact new legislation. Be that as it may, if the practices that form the law operate, in part, as a series of boundaries and distinctions that codify and enforce the difference between what is legal and what is illegal in society, then the more fundamental point the student critique actually raised was the historical contingency and lack of justification of a legal order whose boundaries continued to be drawn in accordance with the principles of a market economy.

By complicating the assumed understanding of the rule of law in this way, students were bringing to the fore more than the violence of neoliberal legalism as a social practice of rule. To the extent that the law is never just an instrument of the powerful, the student revolt against neoliberal education also helped reinvigorate the political idea that, especially in times of crisis, law and lawmaking—instead of being used to protect the status quo—should empower a different, more egalitarian future.

³⁵ Biblioteca Congreso Nacional de Chile, “Senate Education Committee Hearing on Bill 7856–04.”

Closing Remarks

When Chilean students hit the streets in the early months of 2011 to denounce the pathological levels of student debt and to rise up against the corrosive power of for-profit education, the role of legal forms began to appear in every issue they addressed: in the abusive contract loans they signed with private banks, in the lack of regulation of the educational market, and in the intricate web of constitutional norms and interpretations that protect a conception of education that reproduces class, gender, and cultural inequalities.

By reading their struggle through the lenses of law, students used legal forms and principles to *make sense* of their experiences with neoliberal education, to *demand an explanation from* power structures deemed responsible for a system that promotes freedom but ultimately undermines people's rights, and to envision *modes of transformative action* aimed at undoing the rule of market laws. In doing so, they transformed established legal meanings into concrete objects of social critique and at the same time mobilized the symbolic frame of law to encourage the *imagination* of a post-neoliberal social order.

One may debate whether this form of criticism actually brought about real social change and argue over the criteria for making such an assessment. However, such a discussion is likely to lead to the trivial conclusion that the students actually failed because the goals of the movement have not been fully accomplished: there is no free public education for all, the overall structure of a market society is still very much in place, and radical transformations have been until recently politically and legally blocked. To be sure, whenever critical social movements engage with and draw upon the law, there is the risk that their demands will be engulfed and tamed by legal experts, state institutions, and power elites with privileged access to the juridical field.³⁶ The fact that some of the main leaders of the student movement were later elected to Congress and became lawmakers themselves may prove the point.

However, a significant effect of the critique of law that arose out of the Chilean student revolt—as I have reconstructed it in this paper—is that it stimulated reflection among ordinary citizens and a collective reevaluation of the meaning of law in the political organization of society. Even if this critical practice may have fallen short of breaking through “the walls of the constitution,” it did actually make more visible the *fictio iuris* of the neoliberal order (i.e., the magical conversion of economic principles into quasi-permanent legal principles) and make less acceptable its everyday enforcements and justifications.

The critical memory of the human costs and social consequences of such a neoliberal fiction, but also the recollection of previous struggles against it, resurfaced in Chile in a more vehement and radical fashion on October 2019 when a popular revolt unexpectedly erupted across the country. The collective force of millions of citizens of all walks of life opened unprecedented pathways for political and constitutional transformation. The revolt sparked a generative process of popular engagement with the authority of the constitutional text inherited from the dictatorship. The 1980 Constitution experienced a conversion from being a document of higher law and expert knowledge to a very profane object that began to circulate through a multiplicity of everyday settings and aesthetic forms. There is no better indication for this than the simple yet rebellious

³⁶ Scott L. Cummings, “The Social Movement Turn in Law,” *Law and Social Inquiry* 43, no. 2 (2018): 360–416.

Didier Fassin and Axel Honneth (2021). *Crisis Under Critique*. New York: Columbia University Press.

exercise that many citizens began to carry out on their own: to read the Constitution. In the subway, the bus stop, the square, the classroom, self-organized assemblies, and social networks. People reading cheap copies of the Constitution, carrying the text marked with post-it, annotated with questions, underlined with important concepts, marked as a draft in progress.

If there is some truth in the phrase “neoliberalism was born and will die in Chile,” which became a signature of the dense landscape of graffiti, murals, stencils, and screen prints that clothed Chilean cities with a new skin (figure 3.3), it is because concepts and ideas do not simply perish due to the erasure of old terms or the forging of new meanings. Change requires the demanding political work of rearranging the institutions and relations in which concepts are able to thrive and move. In times of crisis, mythologies may reappear and order can be reestablished with new force, but the challenge of social critique lies in reading the scars left by those concepts and ideas on the lives and deaths of too many people and taking those scars as guideposts for exploring alternative, less unequal social futures.