

BEING COUNTERINTUITIVE

Karin van Marle
BLC LLB LLM LLD
Professor, University of Pretoria

Danie Brand
BLC LLB LLM LLD
Associate Professor, University of Pretoria*

1 Introduction

For anyone writing to celebrate his work, Frank Michelman's academic oeuvre offers a veritable feast of possible topics, ranging from the legitimation of welfare rights,¹ to property law and theory,² to constitutional law and theory,³ to constitutional property law and theory,⁴ to the question whether there are two such things as property law and constitutional property law,⁵ to republicanism as an interpretative principle and political philosophy,⁶ to

* Our thanks to the participants in the *Colloquium in Honour of Frank Michelman*, SAIFAC and the University of Pretoria, 18-07-2012 for comments and discussion, to Drucilla Cornell for conceptualising the event and, with much appreciation and admiration, to Frank Michelman for all those years of inspiring and engaging work

¹ See FI Michelman "The Supreme Court 1968 Term – Foreword: On Protecting the Poor through the Fourteenth Amendment" (1969) 83 *Harv L Rev* 7; FI Michelman "In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice" (1973) 121 *U Pa L Rev* 962; FI Michelman "Constitutional Welfare Rights and a Theory of Justice" in N Daniels (ed) *Reading Rawls: Critical Studies of "A Theory of Justice"* (1975) 319; FI Michelman "Formal and Associational Aims in Procedural Due Process" in J Pennock (ed) *Due Process (Nomos XVIII)* (1977) 126; FI Michelman "Welfare Rights in a Constitutional Democracy" (1979) 3 *Wash U LQ* 659; FI Michelman "The Constitution, Social Rights, and Reason" (1998) 14 *SAJHR* 499; FI Michelman "The Constitution, Social Rights, and Liberal Political Justification" (2003) 1 *I Con* 13; FI Michelman "Socioeconomic Rights in Constitutional Law: Explaining America Away" (2008) 6 *I Con* 663; and FI Michelman "Democracy-Based Resistance to a Constitutional Right of Social Citizenship: A Comment on Forbath" (2011) 69 *Fordham L Rev* 1893

² See for example FI Michelman & D Kennedy's "Are Property and Contract Efficient?" (1980) 8 *Hofstra L Rev* 711; FI Michelman "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 *Harv L Rev* 1165

³ See for example FI Michelman "The Rule of Law, Legality and the Supremacy of the Constitution" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2003) ch 11; FI Michelman "On the Uses of Interpretive Charity: Some Notes on Application, Avoidance, Equality, and Objective Unconstitutionality from the 2007 Term of the Constitutional Court of South Africa" (2008) 1 *CCR* 1

⁴ See for example FI Michelman "Property as a Constitutional Right" (1981) 38 *Wash & Lee L Rev* 1097; FI Michelman "Socio-Political Functions of Constitutional Protection for Private Property Holdings (in Liberal Political Thought)" in GE van Maanen & AJ van der Walt (eds) *Property on the Threshold of the 21st Century* (1996) 433; and, most recently, FI Michelman "Liberal Constitutionalism, Property Rights, and the Assault on Poverty" (2011) 22 *Stell LR* 706

⁵ See for example FI Michelman "The Bill of Rights, the Common Law, and the Freedom-Friendly State" (2003) 58 *Miami L Rev* 401; FI Michelman "Constitutions and the Public-Private Divide" in M Rosenfeld & A Sajo (eds) *The Oxford Handbook of Comparative Constitutional Law* (2012) ch 14

⁶ See for example FI Michelman "The Rhetoric and Substance of Self-Government" (1994) 4 *Cornell JL & Pub Pol'y* 510; FI Michelman "Law's Republic" (1988) 97 *Yale LJ* 1493; and FI Michelman "Foreword: Traces of Self-Government" (1986) 100 *Harv L Rev* 4

political liberalism as a political philosophy,⁷ to democratic theory⁸ and to a variety of fusions and combinations of all these things. But in this article in honour of him we do not focus on any one or more of these substantive aspects of his work. Rather, we consider a manner of thinking and doing that we find characteristic of Frank Michelman and that we think important – an “angle of approach”,⁹ to use Njabulo Ndebele’s words, to the very many substantive topics he engaged with in the 50 odd years of his academic career. We refer to his characteristic method not to react instinctively or in the manner that would be expected; his tendency instead to develop his ideas from an unexpected or non-obvious angle – in short, his tendency to think, reflect and work in a counterintuitive fashion.

We start, in part 2 by illustrating his counterintuitive bent with reference to his early work on welfare rights¹⁰ and a recent publication on the links between poverty and property.¹¹ We conclude this section with reference to a response by him to South African legal scholars Johan van der Walt and Henk Botha’s article in which they argue for the notion of “beyond justification”.¹² A question that remains with us right through the article, is the extent to which counter-intuition in Michelman borders on pragmatism and thus a strategic approach. We pose the question of the difference between being reflective/counterintuitive and being reflexive – has Michelman been reflecting on the liberal tradition from the standpoint of pragmatism following strategic concerns or are there signs of reflexivity, of problematising liberalism at its roots?

We then explain in part 3 why we find his counter-intuition interesting. We do so with reference to Hannah Arendt’s understanding of judgment and “common sense”.¹³ For Arendt common sense does not designate an instinctive, unreflective response – quite the opposite. In the tradition of Kantian aesthetic judgment common sense entails an enlarged mentality that could engage plurality and worldliness, which on one reading we see at work in Michelman’s counterintuitive approach.

We proceed to make a few tentative comments on the Constitutional Court’s decision in *Albutt v Centre for the Study of Violence and Reconciliation*¹⁴ in

⁷ See for example FI Michelman “Our Liberalism” (2011) 89 *Tex L Rev* 1409; FI Michelman “The Subject of Liberalism” (1994) 46 *Stan L Rev* 1807

⁸ See for example FI Michelman *Brennan and Democracy* (1999); FI Michelman “How Can the People Ever Make the Laws? A Critique of Deliberative Democracy” in J Bohman & W Rehg (eds) *Deliberative Democracy: Essays on Reason and Politics* (1997) 145; FI Michelman “Is Democracy a Constitutional Right: New Turns in an Old Debate” in P Bryden, S Davis & J Russel (eds) *Protecting Rights and Freedoms: Essays on the Charter’s Place in Canada’s Political, Legal, and Intellectual Life* (1994) 145; FI Michelman “‘Protecting the People From Themselves,’ or How Direct Can Democracy Be?” (1998) 45 *UCLA L Rev* 171; and FI Michelman “Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation” (1989) 56 *Tenn L Rev* 291

⁹ N Ndebele *The Cry of Winnie Mandela* (2003) 82

¹⁰ Michelman (1969) *Harv L Rev*; Michelman (1973) *U Pa L Rev*; Michelman “Formal and Associational Aims” in *Due Process*; and Michelman (1979) *Wash U LQ*

¹¹ Michelman (2011) *Stell LR*

¹² FI Michelman “Postmodernism, Proceduralism, and Constitutional Justice: A Comment on Van der Walt & Botha” (2002) 9 *Constellations* 246, responding to J Van der Walt & H Botha “Democracy and Rights in South Africa: Beyond a Culture of Justification” (2000) 7 *Constellations* 341

¹³ H Arendt *The Life of the Mind* (1971) 255-272; E Young Bruehl *Why Arendt Matters* (2006) 157-210

¹⁴ 2010 3 SA 293 (CC)

part 4 and attempt there to give a counterintuitive/reflective reading to the majority judgment's emphasis on rationality that we hope stands in, if not the substance then at least the form of Frank Michelman's counterintuitive tradition. Drawing on Michelman's notion of "jurisgenerative politics"¹⁵ we aim to disclose other responses to and consequences of the judgment than those that appear at first glance.

2 Frank Michelman being counterintuitive

Although we see it in many other places in his work, we illustrate Michelman's counterintuitive approach here only in three contexts: his early work on welfare rights; one of his most recent publications dealing with the relationship between property and poverty; and a response of his to an article by two South African legal scholars, Johan van der Walt and Henk Botha.

In a series of articles published in the late 1960s and during the 1970s¹⁶ Michelman makes a case for the existence in American law of constitutional rights "to make provision for certain basic ingredients of individual welfare, such as food, shelter, health care and education"¹⁷ – that is, welfare rights, or as we would call them in South Africa, socio-economic rights.

In broad terms his argument has two strands. First, in a descriptive sense, based on a series of equal protection decisions,¹⁸ as well as a number of due process decisions,¹⁹ Michelman argues that the constitutional welfare rights he proposes had at the time in fact implicitly been recognised by the American Supreme Court, or at least that the series of decisions he analyses can be read to imply such a recognition. So, for example with respect to the equal protection decisions, he points out that certain classifications on the basis of poverty were at the time regarded as suspect classifications so as to attract strict scrutiny to pass constitutional muster. These decisions, he argues, "could be more soundly and satisfyingly understood as vindication of a state's duty to protect against certain [poverty-related] hazards which are endemic in an unequal society, rather than vindication of a duty to avoid complicity in unequal treatment".²⁰

Second, in a normative sense, he suggests a particular theoretical basis or justification for the recognition of welfare rights as constitutional rights.

¹⁵ Michelman (1988) *Yale LJ* 1505

¹⁶ Michelman (1969) *Harv L Rev*; Michelman (1973) *U Pa L Rev*; Michelman "Formal and Associational Aims" in *Due Process*; and Michelman (1979) *Wash U LQ*

¹⁷ Michelman (1979) *Wash U LQ* 659

¹⁸ *Douglas v California* 372 US 353 (1963); *Harper v Virginia State Board of Elections* 383 US 663 (1966); *Shapiro v Thompson* 394 US 618 (1969); *Memorial Hospital v Maricopa County* 415 US 250 (1974); *United States Department of Agriculture v Moreno* 413 US 528 (1973); *United States Department of Agriculture v Murray* 413 US 508 (1973); and *New Jersey Welfare Rights Organization v Cahill* 411 US 619 (1973) See Michelman (1979) *Wash U LQ* 686-687 for his analysis of these cases

¹⁹ *Goldberg v Kelly* 397 US 254 (1970) and *Snidach v Family Finance Corp* 395 US 337 (1969) See Michelman (1979) *Wash U LQ* 687 for a discussion

²⁰ Michelman (1969) *Harv L Rev* 9; for elaboration of this point see further 9-13

Drawing on Rawls²¹ and Ely,²² Michelman emphasises basic need and its satisfaction as a prerequisite for political and social participation, and a guiding value capable of explaining, justifying and giving content to the recognition of constitutional welfare rights. In his own words:

“Without basic education – without the literacy, fluency, and elementary understanding of politics and markets that are hard to obtain without it – what hope is there of effective participation in the last-resort political system? On just this basis, it seems, the Supreme Court itself has expressly allowed that ‘some identifiable quantum of education’ may be a constitutional right. [*San Antonio Independent School Dist. v. Rodriguez*, 411 US 1, 36 (1973)] But if so, then what about life itself, health and vigor, presentable attire, or shelter not only from the elements but from physical and psychological onslaughts of social debilitation? Are not these interests the universal, rock-bottom prerequisites of effective participation in democratic representation – even paramount in importance to education ...?”²³

What is important for us is the manner in which he makes these arguments. The descriptive argument is not one on how, in a practical sense to introduce welfare rights into American constitutional law; rather, it is an argument that these rights were already there, it’s just that no one had noticed. Although tentative, Michelman is quite explicit about this. The decisions he analyses to him are “evidence of recognition of a constitutional right to the means of subsistence” and although the recognition of this right “cannot be established by any purely empirical method” the cases, despite arguments and evidence to the contrary “suggest such rights”.²⁴

The normative argument is similarly internal to the existing tradition – it is not one made from a particularly leftist or socialist ideological position; rather, it is made from a distinctly liberal vantage point, drawing as it does on the theory of social justice of premier political liberal John Rawls and the proceduralism of John Hart Ely.

No matter what one’s perspective is on the substantive issue – welfare rights in US constitutional law yes or no – this approach to the subject matter is unexpected. For mainstream US constitutional theorists of the time, sceptical or critical of the idea of welfare rights in US constitutional law,²⁵ the obvious place from which to expect an argument in favour of such rights was not from within their own liberal tradition; nor was the obvious argument in a descriptive sense that these rights were already there. Rather, they would expect arguments for welfare rights to come from the “outside”, from

²¹ J Rawls “Distributive Justice: Some Addenda” (1968) 13 *Natural Law Forum* 51; J Rawls “Constitutional Liberty and the Concept of Justice” in CJ Friedrich & JW Chapman (eds) *Justice (Nomos VI)* (1963) 96; J Rawls “The Sense of Justice” (1963) 72 *Philosophical Review* 281; J Rawls “Justice as Fairness” (1958) 67 *Philosophical Review* 164

²² JH Ely “Constitutional Interpretivism: Its Allure and Impossibility” (1978) 53 *Ind LJ* 399; JH Ely “The Supreme Court, 1977 Term – Foreword: On Discovering Fundamental Values” (1978) 92 *Harv L Rev* 5; and JH Ely “Toward a Representation-Reinforcing Mode of Judicial Review” (1978) 37 *Md L Rev* 451

²³ Michelman (1979) *Wash U LQ* 677

²⁴ 661, 663 and 664

²⁵ Of these there were many. See in particular R Bork “The Impossibility of Finding Welfare Rights in the Constitution” (1979) *Wash U LQ* 695 and DP Currie “Positive and Negative Constitutional Rights” (1986) 53 *U Chi L Rev* 864 for expositions of the traditional view, contrary to Michelman’s; and R Posner *Economic Analysis of Law* 2 ed (1977) 503-504; GE Frug “The Judicial Power of the Purse” (1978) 126 *U Pa L Rev* 715; HP Monaghan “The Constitution Goes to Harvard” (1978) 13 *Harv CR-CL L Rev* 117; and RK Winter “Poverty, Economic Equality, and the Equal Protection Clause” (1972) *Sup Ct Rev* 41, all reacting directly to Michelman’s views

ideological/political positions foreign to the mainstream tradition. Indeed, the unexpectedness – the counterintuitive nature of Michelman’s internal argument for welfare rights is illustrated by the “skeptical, critical, and even derisive” reaction to his claims, that he notes himself.²⁶

Similarly, for champions of welfare rights at the time and subsequently, situated within other ideological or political frameworks than Michelman’s liberalism, the obvious place from which to argue for the rights they championed was neither liberal constitutional law nor liberal political theory – after all to a large degree the very liberal constitutional law and theory from which Michelman constructed his arguments were perceived as part of the problem they sought to address.²⁷ And, finally, in a much broader sense, for outsider observers such as us of course, whose intuitive understanding of American constitutional law is that it is the last place one would expect to find claims for the existence of constitutional rights to minimum welfare, his arguments are positively (and pleasantly) startling – in short, counterintuitive.

This counterintuitive rhetorical move or strategy – in sum to argue for positions that at first glance are foreign to the liberal tradition squarely from within that tradition and in the process simultaneously to persuade liberals to those positions and to soften non-liberals to liberalism one finds often in Michelman’s work. Most recently, we see it operating in his piece on “Liberal Constitutionalism, Property Rights, and the Assault on Poverty” that Thaddeus Metz analyses in his contribution to this volume.²⁸

Reacting to suggestions that the South African constitution as “liberal” instrument and in particular the constitutional property clause stand in the way of transformation and the fight against poverty,²⁹ Michelman argues that “the attractions of liberal constitutionalism do not come necessarily laden with a counter-reformative property-clause”.³⁰ Again, he argues for ends that at first glance seem incompatible with or at least at the margins of the liberal constitutional tradition (the “assault on poverty”; egalitarian socio-economic transformation) squarely from within that tradition, albeit a particular strand of that tradition (what he calls “social liberalism”). He seeks to construct an interpretation of the property clause not as an enhanced defence mechanism against interference with the haves, but as one mechanism among many others through which to achieve the true “ultimate aim or value” of liberalism,

²⁶ Michelman (1979) *Wash U LQ* 659, referring to Posner *Economic Analysis* 503-504; Frug (1970) *U Pa L Rev*; Monaghan (1978) *Harv CR-CL L Rev*; and Winter (1972) *Sup Ct Rev*

²⁷ See, for example, W Simon “Rights and Redistribution in the Welfare System” (1986) 38 *Stan L Rev* 1431; and L Williams “Welfare and Legal Entitlements: The Social Roots of Poverty” in D Kairys (ed) *The Politics of Law. A Progressive Critique* 3 ed (1998) 569 both decrying what they see as the failure of the welfare rights movement of the 1960s and early 1970s in the US to break with or move outside existing liberal legalist legal theoretical thinking and, more broadly the liberal philosophical tradition and attributing the eventual failure of the movement to that failure

²⁸ Michelman (2011) *Stell LR* See T Metz “The Desirability of a Property Clause: Michelman’s Defence of Constitutional Liberalism” (2013) 24 *Stell LR* 312

²⁹ S Sibanda “Not Purpose-made! Transformative Constitutionalism, Post-independence Constitutionalism and the Struggle to Eradicate Poverty” (2011) 22 *Stell LR* 482 See his contribution to this volume (S Sibanda “Not quite a Rejoinder: Some Thoughts and Reflections on Michelman’s ‘Liberal Constitutionalism, Property Rights and the Assault on Poverty’” (2013) 24 *Stell LR* 329) where he continues his engagement with Michelman on this topic

³⁰ Michelman (2011) *Stell LR* 706

namely a Rawlsian conception of dignity.³¹ Again, in the process, he seems to be alerting liberals to the possibilities imminent in their tradition and to persuade them to his (perhaps intuitively non-liberal) anti-poverty stance; while showing non-liberals the “true” and more palatable face of liberalism – social liberalism.

Our final example for now is a comment of Michelman’s on an article by Van der Walt and Botha in which he responds even more explicitly in what we’ve been trying to describe as a counterintuitive manner above.³² He describes what he calls “reasonable interpretive pluralism” as something that entails diversity of comprehensive ethical and metaphysical views as well as different views on constitutional interpretation and application.³³ He connects his own understanding of reasonable interpretive pluralism with the view of Van der Walt and Botha.³⁴ The crux of their argument was to expose the “lack of ethical harmony” under South Africans and to argue that constitutional review will always fail to resolve problems arising from a conflict related to the common will of the people as such conflict exposes also the absence of consensus about the norms embedded in the constitution.³⁵ Justification therefore will always amount to the giving of “unjust” reasons, or will be unjustified.³⁶ Michelman’s careful and respectful engagement with their argument is beyond our specific focus. Of interest is that in his response he goes to lengths to show the agreement between him and them. He describes them as “far-out liberal political justifiers” and asks where in their argument and if indeed they depart from liberalism.³⁷ In what sense do we understand this as counterintuitive? Michelman, instead of rejecting their claim as invalid, faddish or drawing on a philosophical tradition other than his own, responds in a counterintuitive way, going along with them in homeopathic fashion. This approach of Michelman could be a manifestation of an ability to place himself imaginatively in the position of others and so attempt to understand and to give the best possible meaning of their perspective. Such an approach is indicative of thinking, of reflection and not merely following a rule or first impulse.

What is it that we find interesting in this stance? In one view, as noted above, this can be regarded as strategy, an attempt to “sell” his ideas to those within his tradition and his tradition to those outside it. In this vein one could ask: What if the approach of being counterintuitive is a strategic or pragmatic one that evades the real difficult questions on impossibility, radical otherness and Van der Walt and Botha’s concern with unjust reasons or sacrifice? What if this approach cannot allow an escape from its own containment? Let’s turn to Christodoulidis:

³¹ 719, referring to J Rawls *Political Liberalism* (1993) 333, 335

³² Michelman (2002) *Constellations*, responding to Van der Walt & Botha (2000) *Constellations*

³³ Michelman (2002) *Constellations* 247

³⁴ Van der Walt & Botha (2000) *Constellations* 351

³⁵ As described by Michelman ((2002) *Constellations* 247) referring to Van der Walt & Botha (2000) *Constellations* 351

³⁶ Van der Walt & Botha (2000) *Constellations* 352; Michelman (2002) *Constellations* 249-250

³⁷ Michelman (2002) *Constellations* 259-261

“Law and democracy are reconciled only via the suppression of a paradox. Need we repeat, against all those who proclaim the return of the political in law, that constitutional politics is a compromised politics (to the same measure that legal discourse is a compromised instance of practical discourse)?”³⁸

Invoking Lyotard’s notion of the “*differend*” he argues that political change in constitutional law is always limited:

“A ‘*differend*’ is an objection that cannot be raised because the terms of discourse always-already preclude it.”³⁹

Constitutional politics and the claim of law to contain politics and community are claims that should be challenged in his view. He refers to Arendt for whom politics should be true only to its inherent features of forgiving and promising displayed in action and speech – a view that does not allow a notion of constitutional law as the vessel for politics and the will to live together.

In the introduction we posed the question whether Michelman can be seen to be reflective or reflexive concerning the tradition of liberalism. For Christodoulidis reflexive politics rests on contingency and self-reference. He explains it as follows:

“Because contingency is about the freedom to contest what politics is about and self-reference is the freedom to contest the terms in which that question is contested.”⁴⁰

Does an approach or method of counter-intuition allow the possibility of reflexive politics? To paraphrase Christodoulidis, does it invite a resistance to the closure of law on politics that prevents us to recognise the contingency on which it is based? Maybe it depends on the subject enacting the counter-intuition. Following Michelman’s own embrace of Davidson’s notion of “interpretive charity” – giving, that is, to the ideas of someone from whom you might differ the best possible interpretation – we would like this not to be so.⁴¹ Below we explore if in Michelman’s counterintuitive approach we could find traces of Hannah Arendt’s conception of common sense and the possibilities for plurality and worldliness that it entails, that instead of strategy it indicates imagination and sensitivity to plurality.

3 Hannah Arendt’s understanding of common sense

In a reflection on the work of Hannah Arendt and the ongoing significance of her work after her death, a former student of hers, Elizabeth Young Bruehl, highlights the shift from the emphasis in two earlier works, *The Human Condition*⁴² and *On Revolution*⁴³ on the need “to think what we are doing” when we act, to a concern later in her life with the question of the connection between philosophy and politics emanating from the question “what we are doing when we think, will and judge”.⁴⁴ In the final project before her death

³⁸ E Christodoulidis “The Aporia of Sovereignty” (2001) 12 *King’s College LJ* 111 132-133

³⁹ 133

⁴⁰ E Christodoulidis *Reflexive Politics* (1998) 287

⁴¹ Michelman (2008) *CCR* 1, relying on D Davidson *Inquiries into Truth and Interpretation* (1984)

⁴² H Arendt *The Human Condition* (1958)

⁴³ H Arendt *On Revolution* (1963)

⁴⁴ Young Bruehl *Why Arendt Matters* 160

she was working on the third section of a work on “thinking, willing and judging”. The former two sections were completed. The last one remains incomplete because of her unexpected death. Young Bruehl notes that Arendt continued the relationship with her mentor Karl Jaspers and engaged specifically with his reading of philosophers who “thought freely, standing outside their inherited mythic traditions and imagining the possibilities of human action, new beginnings, and new relationships among peoples of a shared world, a *cosmopolis*”.⁴⁵

She describes how Arendt also shared the views of her life partner, Heinrich Blucher, for whom judgment was not about the following of rules, but rather about examples presented in the imagination.⁴⁶ Arendt regarded judgment as always exercised in relationship with others: “visiting others – physically or in your mind – consulting them, seeing things from their point of view, exchanging opinions with them, persuading them, wooing their consent”.⁴⁷ Following Kant, judgment for her meant the reflection of the plurality of possible opinions. She subscribed to a notion of common sense, which meant that experience where an enlarged mentality allows a person to get beyond (transcend) her own subjectivity and reach what could be regarded as a common understanding, common sense.⁴⁸ This notion of common sense in contrast to how it is often understood is not something unreflective or instinctive, but the outcome of a transcendental thought process. Significant about this process is that and how it discloses the possibility for a plurality of perspectives to come to the fore.

As noted by Young Bruehl, judgment for Arendt was the way through which a person became a “world citizen”. The exposure to and experience of plurality assist us in seeing the world also from another’s perspective and the more positions that can be made present or taken into account the more representative judgment will be.⁴⁹ This way of judgment that is possible only through imagination is neither objective nor subjective but rather inter-subjective and representative and is seeking for a relation between particularity and generality. The notion of aesthetic judgment is therefore never about following or applying general rules, but rather an experiment in the imagination.⁵⁰ This understanding of reflective judgment is a prerequisite to living in a shared or common world and for the ability to live well. Benhabib also emphasises the importance of worldliness for Arendt’s notion of judgment, which she describes as “an interest in the world and in the human beings who constitute the world, and a firm grasp of where one’s own boundaries lie and where those of others begin”.⁵¹

⁴⁵ 163-164 (original emphasis)

⁴⁶ 165

⁴⁷ 165

⁴⁸ 166

⁴⁹ 166

⁵⁰ 166

⁵¹ S Benhabib *The Reluctant Modernism of Hannah Arendt* (1996) 191

Young Bruehl poses the following question: What do people who are able to judge reflectively contribute to the political domain?⁵² For Arendt artists are fabricators who can make original things, but they need spectators who by judging make their works of art communicable and tell stories about them. The public realm for Arendt depends on spectators and critics without whom the works of the artists will remain unseen, unknown and uncommunicable.⁵³ Frank Michelman and his long and rich engagement with constitutional law and politics stand in the guise of someone who through his ongoing reflective/counter-intuitive engagements discloses possibilities for multiple perspectives and stories to come to the fore, for the possibility of natality/ new beginnings. His rich body of work reflects the importance of thinking and reflection, and also dialogue and communication. The strong reliance on Rawls, in particular *Political Liberalism*, as contemporary social contract theorist and Neo-Kantian underscores also Michelman's intrigue with the imagination.

In what could be regarded as a similar method or angle of approach to Michelman's, Patricia Williams in an earlier work has followed an intriguing and perhaps counterintuitive reading of privacy and property, asking for privacy to be "turned from exclusion based on self-regard, into regard for another's fragile mysterious autonomy" and for property to "regain its ancient connotation of being a reflection of that part of the self which by virtue of its very externalization is universal".⁵⁴ By doing that, private property rights could become "civil rights, into the right to expect civility from others".⁵⁵

Jennifer Nedelsky's project of as she puts it "reconceiving" traditional liberal concepts rather than discarding them can also be linked to this method of reflection/counter-intuition.⁵⁶ Nedelsky for example carefully considered autonomy from a feminist perspective and argued for a reconceptualisation rather than rejection. For Nedelsky the source of autonomy, what makes autonomy possible, is exactly our relations with and to others and not our autonomy or being in isolation from others. Nedelsky of course has been a close reader and colleague of Michelman and is a former student of Hannah Arendt.

We now turn to Michelman's support of what he has called "republican constitutionalism".⁵⁷

Michelman's exposition of civic republicanism expands on many issues that are still almost 25 years later significant for deliberations on constitutionalism, politics and community. Time and space do not allow us to engage with these on the level it requires. For now we want to recall only three important aspects raised by Michelman that we find of significance for an appraisal of his counterintuitive approach and, more generally for the transformation of and further development of post-apartheid constitutionalism.

⁵² 176

⁵³ 176

⁵⁴ P Williams "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" (1987) 22 *Harv CR-CL L Rev* 401 432

⁵⁵ 432

⁵⁶ J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2011), in general

⁵⁷ Michelman (1988) *Yale LJ* 1493

Firstly his call for “a kind of normative tinkering” that “involves the ongoing revision of the normative histories that make political communities sources of contestable value and self-direction for their members” comes to mind.⁵⁸ The need for exactly such a “tinkering” in a society in the aftermath of a violent, authoritarian and exclusionary past is that it “entails not only the recognition but also the kind of re-cognition – reconception – of those histories that will always be needed to extend political community to persons in our minds who have as yet no stakes in ‘our’ past because they had no access to it”.⁵⁹ Secondly, his critique of the American Supreme Court’s “excessively detached and passive judicial stance toward constitutional law” in *Bowers v Hardwick* is relevant.⁶⁰ He ascribes the “devastating effect ... of a judicial posture of deference to external authority” to “backward looking” and “authoritarian jurisprudence”.⁶¹ The third point flows from the second, that is his critique on the belief that the “Court is the servant not the author, of a prescriptive text” and that the Court thus “is an organ of law, and therefore not of politics”.⁶² To our minds South African legal scholars can gain much by thinking about his suggestion of a “normative tinkering” and his critical response to judicial detachment, deference and authoritarianism.

Michelman’s rejection of the pluralist view that stands in opposition to the republican view that he supports in which “political [participation] and engagement is considered a positive human good because the self is understood as partially constituted by, or as coming to itself through such engagement”, is also relevant here.⁶³ He described the pluralist view as one “in which the primary interests of individuals appear as pre-political, and politics accordingly, as a secondary instrumental medium for protecting or advancing those ‘exogenous’ interests”.⁶⁴ American constitutionalism for him rests on two conflicting premises regarding political freedom, namely the notion of collective self-governance together with governance by laws and law alone that are in “endless contestation”.⁶⁵ One way to address this conflict is to conceive of a political process that could ensure the becoming of self-interested individuals as citizens with a concern with public issues. Following Robert Cover, he calls this process “jurisgenerative”.⁶⁶ At the heart of this becoming is the contemplation of a self “whose identity and freedom consists in part in its capacity for reflexively critical reconsideration of the ends and commitments that it already has and that make it who it is [what he calls elsewhere ‘self-modulation’]. Such a self necessarily obtains its self-critical resources from, and tests its current understandings against understandings from beyond its own pre-critical life and experience, which

⁵⁸ 1495

⁵⁹ 1495

⁶⁰ 1496, referring to *Bowers v Hardwick* 478 US 186 (1986)

⁶¹ Michelman (1988) *Yale LJ* 1496

⁶² 1497

⁶³ 1503

⁶⁴ 1503

⁶⁵ 1500

⁶⁶ 1502

is to say communicatively, by reaching for the perspectives of other and different persons”.⁶⁷

This understanding of Michelman’s jurisgenerative politics could be linked to an Arendtian understanding of plurality and natality/capacity for new beginnings. Referring back to what he calls the pluralist view, but what could be phrased as the classical liberal view of the atomistic self, we find here in Michelman a different view of the self as open to self-modulation and, drawing on Rawls’ *Political Liberalism*, a self that depends on the “practical cultural appeal of that view of the person, not on its ultimate truth”.⁶⁸

For Michelman, “the legal form of plurality is indeterminacy”.⁶⁹ Because there is legal indeterminacy, transformation of legal practice is possible. In Michelman’s words:

“[G]enerative indeterminacies are not just *there* as secrets awaiting random discovery. Rather they are products of action, the creations of motivated acts of perception and cultivation.”⁷⁰

He refers also to “endless contestation” as central to the American constitutional debate.⁷¹

What is significant here is that the people who will engage in action or will enter into or disrupt the conversation are those coming from the margin. In the words of bell hooks, as quoted by Michelman:

“To be in the margin is to be part of the whole but outside the main body ... Living as we did – on the edge – we developed a particular way of seeing reality. We looked both from the outside in and from the inside out ... This sense of wholeness ... provided us an oppositional world view.”⁷²

This concern connects with the requirement of “normative tinkering” referred to earlier in the sense that political community can be extended by a revision and reconception of accepted norms and values.

We mentioned above that we wanted to focus on two aspects of Michelman’s “Law’s Republic”. The one is his response to what he framed as “the pluralist viewpoint” and his support of a “Republican constitutionalism” discussed above. The second one was the approach or method followed by him that we’ve decided to name “counterintuitive”. We’ve referred above to how this approach of his came to the fore in his early social welfare work; a more recent article on constitutional property and a response to Van der Walt and Botha. A similar approach can be detected here. “Law’s Republic” has been regarded as exemplary of his civic republican turn.⁷³ However, Michelman doesn’t denounce liberalism in the article but rather a certain pluralist viewpoint in which individuals are self-interested and in which politics perform a mere instrumental function. The counterintuitive move is not difficult to spot – many will argue that the pluralist viewpoint described by Michelman is part

⁶⁷ 1528 (emphasis added)

⁶⁸ Michelman (1994) *Stan L Rev* 1807

⁶⁹ Michelman (1988) *Yale LJ* 1528

⁷⁰ 1529

⁷¹ 1500

⁷² b hooks *Feminist Theory: From Margin to Center* (1984) 113, as quoted by Michelman (1988) *Yale LJ* 1529 n 148

⁷³ See also Michelman (1986) *Harv L Rev* 4

and parcel of liberalism. His main argument for constitutional republicanism is based on the claim that historically republicanism has been the underlying foundation of American constitutionalism. To accept the notion raised by him in the argument is therefore not controversial but rather recognition of “what constitutionalism is all about”.⁷⁴

“I have presented the argument as motivated by a republican commitment to social plurality but the larger contention of this essay has been that the same commitment is implicit in American constitutionalism’s most basic professions of attachment to both self-government and a government of laws.”⁷⁵

Michelman is well aware of the presence of contingency but also tension and paradox in constitutional law and politics. And in some cases it seems as if he is prepared to accept that these would remain. In his review of Rawls’ *Political Liberalism*, for example, he leaves us with the question whether the main approach is relativist or universal and general.⁷⁶ Towards the end of his 1979 article on rationality review he ends with Arendt’s thoughts on the equivalence of the American Declaration of Independence concerning the distinction between public and private happiness. He quotes her writing:

“The outcome of the American Revolution has always been ambiguous and the question of whether the end of government was to be prosperity or freedom has never been settled.”⁷⁷

Linked to this is of course also Arendt’s distinction between freedom and liberation and her insight that they:

“[A]re not the same ... liberation may be the condition of freedom but by no means leads automatically to it; ... the notion of liberty implied in liberation can only be negative, and hence, ... even the intention of liberating is not identical with the desire for freedom. Yet if these truisms are frequently forgotten, it is because liberation has always loomed large and the foundation of freedom has always been uncertain.”⁷⁸

4 *Albutt* and “jurisgenerative politics”

Now to our own modest attempt at Michelmanian counter-intuition, in a reading of the Constitutional Court’s decision in *Albutt v Centre for the Study of Violence and Reconciliation*⁷⁹ (“*Albutt*”).

This case dealt with a special pardon process set in motion by then President Thabo Mbeki to allow convicted political offenders who for whatever reason had not participated in the Truth and Reconciliation Commission (“TRC”) the opportunity to apply to the President for pardon. The stated purpose of the process was to “close the book on the past”, finish the “unfinished business of the TRC” and achieve national reconciliation and nation building.⁸⁰

⁷⁴ Michelman (1988) *Yale LJ* 1499

⁷⁵ 1536

⁷⁶ Michelman (1994) *Stan L Rev* 1807, 1832-1833

⁷⁷ FI Michelman “Politics and Values or What’s Really Wrong with Rationality Review?” (1979) 13 *Creighton L Rev* 487 510-511, quoting Arendt *On Revolution* 133

⁷⁸ Arendt *On Revolution* 22 See also U Kistner “Unchaining the Human of the Humanities” (2012) 38 *Social Dynamics: A Journal of African Studies* 17

⁷⁹ 2010 3 SA 293 (CC)

⁸⁰ T Mbeki “Address to the Joint Sitting of Parliament to Report on the Processing of Some Presidential Pardons” (2007) *ANC* <www.anc.org.za/show.php?id=4240> (accessed 03-05-2012)

The complaint about the process was that the President, as well as the Parliamentary Reference Group he had set up to sift through applications for pardon, had refused to allow victims of the crimes in question or their representatives to make representations before the applications for pardon were to be decided. The Constitutional Court in a unanimous judgment penned by Ncgobo CJ, held that the President was duty bound to give victims a hearing before deciding on these applications for pardon and confirmed the interim interdict issued by the High Court in the case prohibiting the President from proceeding with considering and deciding pardon applications until victims had been given a hearing.⁸¹

Despite its favourable outcome for the victims of the political crimes in question, the decision has been almost universally criticised.⁸² This criticism has focused on what can be called the judgment's "collapse into rationality". In short, in order to hold that the President was bound to give to victims a hearing, Ncgobo CJ took none of the obvious routes presented to the court. He elected not to decide the question whether decisions related to the pardons were administrative action and as such subject to the procedural fairness guarantees of the Promotion of Administrative Justice Act 3 of 2000.⁸³ Having held that the pardon decisions of the President were subject to the constitutional requirement of legality, he also then eschewed the opportunity to build on his own minority opinion in *Masetlha v President of the Republic of South Africa*⁸⁴ to expand legality to include procedural fairness requirements under certain circumstances.⁸⁵ Instead, he simply evaluated the decision against a means end rationality standard and held that there was no rational link between the process excluding victim participation and its stated aims of national reconciliation and nation building.⁸⁶ Participation was imposed, therefore, through the medium of rationality.

This "collapse into rationality" has been criticised from a variety of perspectives. Doctrinally, administrative lawyers have pointed out that the Court had missed an opportunity to draw the conceptual lines between administrative and executive action and the legal standards applying to them more clearly, in the process contradicting its own prior jurisprudence on this point.⁸⁷ The decision not to develop legality to include a notion of procedural fairness in general terms has also been lamented as confirming the majority

⁸¹ *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) para 87. The High Court decision in the matter is *Centre for the Study of Violence and Reconciliation v President of the Republic of South Africa* GNP 29-04-2009 case no 15320/09.

⁸² For an excellent overview of the response to *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) and a trenchant critique of the judgment, see M Murcott "Procedural Fairness as a Component of Legality: Is Reconciliation Between *Albutt* and *Masetlha* Possible?" (2013) 130 *SALJ* 260.

⁸³ *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) para 83.

⁸⁴ *Masetlha v President of the Republic of South Africa* 2008 1 SA 566 (CC).

⁸⁵ Paras 75, 76, 84.

⁸⁶ Para 74.

⁸⁷ Murcott (2013) *SALJ* 260.

opinion in *Masetlha* and so setting “the law on procedural fairness back twenty years”.⁸⁸

More to the point for our purposes, Stewart Motha, in what from a critical perspective can perhaps be described as an intuitive reaction, criticises the reliance on rationality for its denial of plurality in favour of an individualist ontology. He argues that the decision in *Albutt* negates the “ontological plurality (of law and political existence)” that is foundational to the South African context and criticises the court for being “too caught up with a Kantian notion of rationality”.⁸⁹ Motha raises the notion of *ubuntu* as a way through which the court could have reflected “ontological plurality”.⁹⁰ In addition and linked to this, what concerns him about the Court’s reliance on rationality is that it stands in the neo-liberal tradition of subjecting political matters to instrumental, bureaucratic modes of reasoning. Motha refers to David Harvey’s description of the “juridicalisation of politics as a key feature of neoliberalism”:

[H]e suggests that neoliberal governance takes place through experts and elites who are often suspicious of and discourage more democratic and parliamentary modes of decision-making. With the horizons of social agonism and the possibility of consensus limited or discredited, political conflict is shifted to the courts. The rule of law’s protection of individual rights becomes the key mediator and remedy to wider political and social disagreements ... Neoliberal institutions take the individual as primary and elevate the rule of law as the key protector and guardian of individual interests. Experts such as judges are increasingly deployed to check political decisions and to assess whether they conform to increasingly globalised standards of governance. This rule-governed regime is consistently inattentive to the grounds of political community.⁹¹

We share Motha’s concern with plurality and heed his intuitive warning that the Court’s collapse into rationality stands in inevitable tension with the demands of plurality. However, we would ask whether, also from a critical perspective, it is not perhaps possible to react to the collapse into rationality in *Albutt* in a counterintuitive fashion, reading in it potential for plurality.

For this, we return to Michelman. What *Albutt* is about is exclusion of people on the margin, the families of the victims, from a state-driven process. Michelman, in a 1979 article, put forward two reasons why rationality review might be problematic, in alternative to those objecting to rationality review from an economic perspective.⁹² In answering the question “What is wrong with rationality review?” Michelman distinguishes two alternative understandings of political activity to that of the economic vision of political activity as a means of reconciling private values or as a means of self-defence. The one vision is what he calls Jeffersonian, which is a view of political activity as a “valued experience in itself”.⁹³ Arendt noted that in this vision

⁸⁸ C Hoexter “Clearing the Intersection? Administrative Law and Labour Law in the Constitutional Court” (2008) 1 *CCR* 209 231, describing the majority decision in *Masetlha v President of the Republic of South Africa* 2008 1 SA 566 (CC) Murcott (2013) *SALJ* 260 applies this criticism to *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) by virtue of its confirmation of the majority in *Masetlha v President of the Republic of South Africa* 2008 1 SA 566 (CC)

⁸⁹ S Motha “Rationality, the Rule of Law and the Sovereign Return” (2011) 4 *CCR* 113 127

⁹⁰ 127

⁹¹ 123

⁹² Michelman (1979) *Creighton L Rev* 487

⁹³ 506-507

political activity is regarded as “the source of public happiness” which meant “having a share in public business”.⁹⁴ Public happiness or freedom, Arendt radically distinguishes from private happiness or freedom. In response to this, Michelman says that as most of us think of politics simply as an institutional means, the Jeffersonian view might not hold. In the other vision, which he calls the Rousseauian view, “values are an intended outcome of politics: they are public as well as private in origin, originating in political engagement and dialogue as well as in private experience that supposedly pre-exists political activity and enters into it as a given”.⁹⁵ The result of this view is that politics is crucial in the self-defining choices that make our moral freedom:

“As social beings in a social world, we have such choices to make regarding the terms on which we co-exist with one another, not just the terms of social cooperation strictly speaking, but more broadly the moral ambience of the social world we can only inhabit together. Such choices by their nature have to be made jointly, that is to say politically. Public values then, are a necessary accompaniment of the moral freedom of the individual.”⁹⁶

Michelman comes to the conclusion that according to the Rousseauian version of politics the economic version cannot sufficiently explain majoritarian politics:

“Politics must also be a joint and mutual search for good or right answers to the question of directions of our evolving selves.”⁹⁷

For him the Rousseauian explanation provides a much better reason for rationality review than the economic one based on individualism and self-interest.

Our aim is to understand the decision of the court in *Albutt* with the argument underlying Motha’s critique as well as Michelman’s support of jurisgenerative politics and sociality. In the guise of counter-intuition we want to take the court’s reliance on rationality seriously. Our thought process is as follows: the court’s decision plainly stated, resulted in finding the act of releasing offenders without prior consultation with the family members invalid. In light of the Court’s reliance purely on rationality we want to consider an understanding of rationality derived from the case and the decision that entails plurality/community/sociability embedded in rationality itself. In other words one might conclude from the Court’s reliance on rationality that it would be irrational not to consult, irrational not to recognise a certain situatedness, plurality and sociability – or as Motha would have it that we are ontologically plural prior to being individuals. In other words, instead of reading the Court’s reliance on rationality as inevitably drawing it into a neo-liberal, individualist, instrumentalist and managerial idiom, we would ask whether it does not invite us or open the possibility for us to conceive of the liberally imbued concept of rationality in ways imbued with situatedness, plurality and sociability.

⁹⁴ Arendt *On Revolution* 115, discussed by Michelman (1979) *Creighton L Rev* 507

⁹⁵ Michelman (1979) *Creighton L Rev* 509

⁹⁶ 509

⁹⁷ 509

5 Concluding remarks

In this short piece we wanted to pay tribute to the work of Frank Michelman and in particular the contribution he has made to constitutional discourse and beyond that the development of a post-apartheid jurisprudence in South Africa. Instead of focusing on one theme of his work we have attempted to describe an approach or method that runs throughout his work that we have described as counterintuitive. We traced it through his early articles on social welfare rights; a more recent one on constitutional property and poverty; a response to Van der Walt and Botha on justification and an article of 25 years ago on republican constitutionalism. Prevalent in all of these is his firm support for liberalism. However it is never a mere affirmation of the *status quo*, but rather a continuous reflection on liberalism, going back to its roots, attempting to expand, to modify. By doing this he has come forward with a liberalism that allows and discloses possibilities for the protection for social welfare, for questioning constitutional property, for going along with the deeply contested norms within a constitutional order, and for expanding a vision of the self and politics based on a narrow view of self-interest to include dialogue, communication and interaction with others.

It is for this reason that we made tentative links between his approach and aspects of the thought of Hannah Arendt, particularly her approach to judging as one that requires an imagined community to allow a plurality of voices to be heard. Her Kantian understanding of common sense as not one's instinctive unreflective response to a matter but rather an approach of reaching the sense of the community, after consulting in one's imagination a plurality of perspectives, could be recognised in the approach or method of Michelman, in our view.⁹⁸ By responding counter-intuitively he shows reflection, a thought process of careful consideration and taking account of multiple perspectives. His notion of a normative tinkering and jurisgenerative politics linked to Drucilla Cornell's use of recollection (recollective imagination) displays not only thinking about issues but also opens possibilities for, to use Arendt's term, natality/new beginnings to come to the fore. In the same vein his acceptance of indeterminacy and the impossibility of blind rule application discloses opportunities for creative interpretation and judicial action. Maurizio Passerin D'entrèves notes that Arendt sought to connect thinking with judging in two ways.⁹⁹ For her thinking firstly challenges and displaces those aspects that have become fixed in our minds without replacing it with new ones: "it loosens the grip of the universal over the particular, thereby releasing judgment from ossified categories of thought and conventional standards".¹⁰⁰ Secondly, thinking, by underscoring the inner conversation that takes place inside oneself, gives rise to conscience – to a deep reflection

⁹⁸ Michelman's reliance on the work of Rawls of course already links him with a Kantian tradition, in particular the role of the imagination. See also his reference to the importance of the imagination in Michelman (1979) *Creighton L Rev* 509-510

⁹⁹ M Passerin D'Entrèves "Arendt's Theory of Judgement" in D Villa (ed) *The Cambridge Companion to Hannah Arendt* (2000) 245-248

¹⁰⁰ 248

on what is right and what is wrong.¹⁰¹ Over and above Michelman's rich contribution to constitutional theory in general and particularly to the early development of post-apartheid constitutional engagement is his example of a legal scholar who thinks, and thinks deeply, always with a conscience.

SUMMARY

In this article the authors consider a central characteristic of Frank Michelman's body of scholarship: his tendency to develop his ideas from an unexpected or non-obvious angle – in short, his tendency to think, reflect and work in a counterintuitive fashion. They show how, for example, he habitually advances positions intuitively foreign to the liberal tradition (for example recognition of constitutional welfare rights; a conception of property as a mechanism to fight poverty) from within that tradition. They ask whether there is a difference between being reflective/counterintuitive and being reflexive – does Michelman through his counterintuitive approach reflect on the liberal tradition with pragmatist, strategic concerns or does his counter-intuition show signs of reflexivity, of problematising liberalism at its roots?

They then link Michelman's counter-intuition to Hannah Arendt's understanding of judgment and "common sense". For Arendt common sense entails not an instinctive, unreflective response – instead, in the tradition of Kantian aesthetic judgment common sense entails an enlarged mentality that could engage plurality and worldliness. The authors, on one reading see this enlarged mentality at work in Michelman's counterintuitive approach.

The authors conclude by making tentative comments on the Constitutional Court's decision in *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC), attempting to give a counterintuitive/reflective reading to the majority judgment's emphasis on rationality that they hope stands in, if not the substance then at least the form of Frank Michelman's counterintuitive tradition. Drawing on Michelman's notion of "jurisgenerative politics" they aim to disclose other responses to and consequences of the judgment than those that appear at first glance.

¹⁰¹ 249