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How the Welfare State Tries to Protect Itself Against the law: Luhmann and new Forms of Social Immune Mechanism

Niels Åkerstrøm Andersen[1] · **Paul Stenner**[2]

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Abstract
Sociologist Niklas Luhmann argued that the law functions as society's immune system by regulating conflicts that threaten the certainty of expectation structures. In this article, we argue that law itself has become a target of new social immune mechanisms. Since the 1980s, welfare states have increasingly seen their own structures as a threat. Today, the ideal is a public sector consisting of organizations that constantly emerge anew by selecting the structures that fit each specific moment, case, and citizen. To protect public sector organizations against their own structures, 'potentialization' now functions as a social autoimmune mechanism by initiating a constant search for new openings and possibilities. This critique of structures includes a critique of legal structures like rights. Looking at the Danish law of early retirement as our empirical case, this paper analyzes, how the tension between law and 'potentialization' is built into the law itself. While the law gives citizens certain rights to early retirement, it simultaneously 'protects' against the same rights by potentializing citizens. 'Potentialization' here functions as a mechanism that protects the operations of a system against its legal structures. It functions by 'un-relating' those operations from the structures. This means that when citizens claim their right to pensions, the social workers can reject them on the grounds of a right to a future that is not foreclosed and 'parked' on a pension. The paper's contribution is to show how potentialization works by dissolving even fundamental legal expectations. This profoundly transforms the relationship between the citizen and the public sector.

Keywords law · Niklas Luhmann · potentialization · social immune mechanisms · welfare organizations

Extended author information available on the last page of the article

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Introduction

Since the early 1980s, the structures of public sectors in nations like Denmark and the UK have been critiqued for being too bureaucratic. 'Privatization', 'out-sourcing', 'marketization', and other buzzwords arose as 'solutions' to this perceived problem of structural inflexibility. As New Public Management became the dominant discourse, the attack on the public sector was nuanced. To open the closed distinction between public and private, all institutions-in-hierarchy should become partly independent organizations with their own budget, responsive to the demands and opportunities of their own environment. New tools of self-management were introduced such as benchmarking which encourages the single organization to have a side-gaze to other comparable organizations and to become aware of the contingency of their own way of organizing. Since 2000, New Public Management itself has been critiqued. Under the umbrella of post-NPM, many new concepts have emerged like 'public value', 'interprofessional management' and 'co-creation'. Though critical of public sector marketization, post-NPM has continued and even radicalized the *anti-structural* tendency that is the focus of this article. Now, not only are organizational structures attacked, but also professional knowledge and professional structures (perceived as 'silos'), and even law as such. Anti-structure has come to include anti-law. Law is seen as an obstacle to agile solutions, to emotional and motivational engagement, to potentializing inter-professional co-creation, and above all to processes open for the unexpected future. This desired unexpected future can be called the future of the future (henceforth 'future future'), since it is precisely not the future of the current present, but that of a present to come (a future present).

This new skepticism about law as a force of unwelcome closure, with negative implications for the future future, can be observed more generally. Extreme examples include Putin's disdain for Ukrainian legal sovereignty and Trump's ambition to 'make America great again' which involved viewing not just various international legal agreements but also their own administrative apparatus as hostile obstacles to this great returning future (though naturally in both cases respect is reserved for laws found congenial). A comparable (selective) disdain for law, justified by appeal to a future future, was evident in the UK Brexit movement's aspiration of freedom from EU law and bureaucracy. The then Government Chief Special Advisor, Dominic Cummings (notorious for his 'outlaw' attitude and breaking of lockdown rules) was held in contempt of parliament after refusing to answer questions about electoral fraud during his direction of the 'vote leave' campaign. According to Cummings' own public judgement, the illegal funds were spent on targeting 1.5 billion ads at voters identified as 'persuadable' on social media in the crucial last few days before the referendum (Cadwalladr 2019). His blogs informed his public that 'powerful insiders' planned to use law to gain a second referendum. They will: 'do *absolutely anything* to keep their grip on power and money. They will do anything to stop YOU, normal voters, from taking back control OF THEM.' (Cummings 2019). Post-Brexit, within a matter of months the UK Government revised the legally binding Northern Ireland protocol prompting the European Commission to take legal action against the UK in June 2022.

A tendency to stress the constant change needed in readiness for an unknown future was already apparent before the phase inaugurated by Trump and Johnson but without the radical extension to law. In his farewell speech on 11th of January 2017, for example, Obama, addressed 'young Americans' proclaiming that America's future is safe in their hands because: '…you know that constant change has been America's hallmark, something not to fear but to embrace' (see Smith 2017). This matches Tony Blair's famous description of 'a world fast forwarding to the future at unprecedented speed' (Blair 2005). The 'change or die' reality of the global economy, he insisted, 'rewards those who are open to it' but is 'indifferent to tradition… no respecter of past reputations… has no custom and practice' (Blair 2005). The future of the past is death but the future future – scary though it may be – is replete with opportunities for those fast and flexible enough to exploit them. 'Unless we "own" the… reality now upon us and the next about to hit us, we will fail.'

In this article, we will suggest that more is at stake in this development than a strong pendulum swing to the right within the political system. In our reading, the above cases are symptomatic of evolutionary changes in the form of state which challenge the structural couplings between State (and state administration) and law and maybe even involve a change in the function of law.

In *Social Systems* (1995) and later in *Law as a Social System* (2004), Niklas Luhmann suggests that the legal system functions as the immune system of society. Conflict and contradiction serve as the immune mechanism for this immune system. This is because conflict and contradiction sound an alarm that alerts to threats to the system. In Luhmann's sociology communications are the basic operations that form social systems. On this premise he defines conflict as the communication of the contradiction of a communication (the communication of a 'no'). As society's immune system, law does not prevent conflicts, but creates conditions which contain its more harmful effects by reconstructing it as an immune *mechanism* (Luhmann 2004, p. 475). As an antibody seeks an antigen, so law invites conflict, and transforms it by means of legal decision making. The recruitment of conflict as an immune mechanism is therefore not a matter of protecting the system against external threats. Rather, it protects the system from structures created by itself over time that it now observes – thanks to the alarm mechanism of conflict - as compromising its own capacity to continue into the future. Law is a self-generating recursive network that creates conditions for the production, recruitment, regulation and dissemination of conflict *qua* immune mechanisms. What concerns us here, however, is that the immune system of law is itself increasingly becoming observed as an inappropriate structure. Law itself is being observed and placed under attack by a new mechanism of immunity.

Andersen and Stenner (2020) suggest that certain anti-structural technologies – those they call 'potentialization technologies' (see also Andersen and Pors 2016) – have emerged as a new form of social immune mechanism. Familiar and innocuous seeming examples include innovation games, future workshops, co-creation, trust-based partnerships, managerial laboratories, and cross professional speed-dating. They share the goal of potentialization in that they aim to create new possibilities for what welfare, education, care and treatment can be. The premise of potentialization technologies is not just to expect change but to facilitate it by changing fixed expectations. Andersen and Stenner (2020, p. 92) draw upon Barel's (1979) definition

of potentialization as 'the recovery of possibilities provisionally excluded by structure'. They point to its role in the emergence of novelty. Potentialization is about the exploration of new horizons, rather than realizing options within the given horizon (Andersen 2008). In short, potentialization is about creating conditions for the future future. An innovation game, for example, is designed to enable participants to 'think the unthinkable' or 'expect the unexpected'. It is anti-structural in that it dissolves the likelihood that the present will give rise to its expected future, freeing the possibility of a different future (a future future). During the game, participants can work towards enabling a future future by entertaining possibilities that exist beyond the horizon of the present future.

Building on Luhmann's theory in which law's mechanism of immunity is its response to conflict, Andersen and Stenner argue that 'potentialization' is now also functioning as an immune mechanism via these technologies. Here we take forward the observation that law - where it produces structures perceived to limit expectations of open change - is being targeted by immune mechanisms of potentialization. Conflicts may arise spontaneously, but potentialization technologies, by contrast, are *devised* occasions (Stenner 2017). They are carefully designed to defend welfare operations against *any* established structures in the welfare system. However, they put basic premises at stake since they indiscriminately attack structures in general, including those established through professionalization, through daily routines, and through legalization. In this sense, they dissolve security around any and every expectation structure, hindering the formation and institutionalization of professional routines and even undermining the legal certainty afforded by rights (Andersen and Stenner 2020).

This article makes a case that the immune mechanism of potentialization is now working in an auto-immune way by attacking the traditional immune system of the welfare state: law and legal right. This broad frame adds a new perspective to recent debates in critical legal theory that recognize the centrality of temporality (Zevnik 2017; Castillejo-Cuéllar 2014) As a preliminary step it is necessary to further clarify what a social immune system is and how it can be theorized.

Toward a Social Immunologic

Luhmann is not the first or only scholar to apply 'immunologic' to the social and psychological domains. Freud's 'defense mechanisms' protect the psyche from integrity threatening interruptions, and Bergson explained the evolution of traditional 'static' religion as 'a defensive reaction of nature against the dissolvent power of intelligence' (1932/1986, p. 131). For Bergson, the evolution of the human intellect endangered social solidarity because intelligent thought challenges customary authority. Religion protects society against these dissolvent side-effects and shores up the points of attachment between individuals and society through the mechanism of a 'myth-making' faculty (see Stenner 2021). More recently Girard offered a comparable thesis concerning the quasi-immunological function of religion. This centers on the capacity of the scapegoat mechanism to neutralize escalating violent conflict, giving rise to institutions respected as 'sacred'. From this perspective, law takes over

from sacrificial ritual as the principle immune system for managing conflict in more complex literate societies. Donna Haraway (1989), Jacques Derrida (2003; 2005), Peter Sloterdijk (2011) and Roberto Esposito (2011), have each developed the immunological theories in their own distinctive ways, and Hannah Richter (2016) and Cary Wolfe (2017) have offered valuable syntheses.

Jacques Derrida(2002) began working with the immune concept after 9/11 in 2001 (Timar 2014; Long 2013). He examined the war on terror as autoimmunological: 'An autoimmunity process is the strange behavior where a living being, in quasi-*suicidal* fashion, "itself" works to destroy its own protection, to immunize itself against its "own" immunity' (Derrida 2003, 94). Derrida points out that the distinction between immunity and autoimmunity is imperfect and impossible, since any immunity also involves autoimmunity: 'Without autoimmunity, with absolute immunity, nothing would ever happen or arrive; we would no longer wait, await, or expect, no longer expect one another, or expect any event' (Derrida 2005, p. 152). This Derridian sensitivity to paradox echoes Luhmann's premise that a system can be cognitively 'open' to its environment only by means of its operational closure and hence self-referentiality. Donna Haraway(1989) highlighted the ways in which a misconceived vision of the 'purity of the immune system' (as destroying the 'other' discriminated from 'self') institutes and justifies exclusionary social norms and expectations directed against non-conformists. Esposito's (2011; 2013) approach elaborates this insight, noting the etymological resonances between the words, 'community' and 'immunity' (in Latin 'immunis' meant 'not paying a share' and was used to indicate situations of exemption from taxes, sins or other liabilities). Building on ideas from Michel Foucault and Georgio Agamben, Esposito is critical of a way of understanding politics which starts from the idea that community is something proper whose purity is guaranteed by immunity. Yet, the politics and law of modern western society have typically been 'imagined' as a project of community that operates under the banner of immunity (e.g., by keeping out those considered not to properly belong). Just as an organism's immune system is supposed to protect it from external and internal pathogens, so an 'immunized' model of community imagines its citizens protected against improper internal and external threats. For Esposito, 'the task at hand is to overturn in some way – indeed in every way – the balance of power between "common" and "immune"' (2013, p. 87). One important aspect of this is to 'conceptualize the function of immune systems in a different way, making them into relational filters between inside and outside instead of exclusionary barriers' (2013, p. 87).

We note that Esposito begins his immunological theorizing with the old image of biological immunity (as an attack on intruders) and only then calls out for a new image that might put the picture right and help solve our political problems. This account thus faces an historical problem, because it is implausible that this theory of immunity influenced society's much older self-image as sovereign. More plausibly, it was the self-image of the sovereign state that fed into and 'infected' the articulation of the much later scientific concept of biological immunity with concerns derived from the socio-political domain. Luhmann (1985), by contrast, does not start with this flawed concept of immunity only to call out for a new one. Drawing inspiration from the autopoietic turn within biology, he starts with a more scientifically sophisti-

cated account of how immune systems actually work[1]. On that basis he diagnoses the law as having an immunological function not because it attacks invaders, but because it affords tolerance of conflicts by recruiting them into a system which creates expectable insecurities out of them.[2]

Biologists informed by systems theory started an important debate around the immune concept in the 1980s. A turning point was the work conducted from the mid-1970s by the Danish immunologist Niels Jerne. Jerne demonstrated how the body's production of antibodies was organized into networks. Francisco Varela, in collaboration with Humberto Maturana, reconstrued Jerne's network as an 'autopoietic system'. From this perspective, it is not the antibodies and other agents that, taken together, constitute an immune system. Rather, the immune system occurs only when these agents are recruited as immune mechanisms and linked together into the self-generating, self-referential and self-learning network of an immune *system* (Varela et al. 1988, pp. 364–65). This autopoietic turn involved a changed view of the relationship between the immune system, the environment and the organism. Varela (1979, p. 216) describes this as a movement from a classical antigen-centered immunology ('Classic immunology understands immunology in military terms as a defense system against invaders') to an organism-centered immunology. The function of the immune system from this new perspective is to increase the body's flexibility and tolerance to antigens. This theory has the advantage of explaining why the organism is rarely attacked by its immune system, and it explains how the immune system continues to function without irritations from antigens. The core principle of the immune system is its ability to connect to the 'foreign' material, whether that be the body's own elements or the antigens: it is positive, creative and active before being defensive and reactive (Stewart and Coutinho 2004, p. 275). The immune system is 'flexibility in living' (Varela and Anspach 1994, p. 284), and its unlimited flexibility creates connectivity to multiple antigens via a large diversity of antibodies (Vaz 2011).

Luhmann's (1995) sociological imagination is captured by this notion of immunity as operating through the inwardly directed positive creation of flexibility within a self-referential system. The lifeblood of social systems is *communication*, but that life-blood flows thanks to structures of *expectation* that build up and are preserved and modified over time: 'social structures are expectational structures' (Luhmann 1995, p. 292). This identification of social structure with expectation is crucial to Luhmann's immunologic. Health communication, for example, has built up expecta-

[1] Luhmann's theory of social systems is part of a broader tradition of systems theory that includes mathematicians, physicists, biologists, psychologists and sociologists (Pias 2003). In this tradition, it is customary to distinguish between a 'universal' or 'general' systems theory and theories of specific system types (von Bertalanffy 1950). Luhmann implicitly claims that the term 'immune mechanism' should be discussed as a general concept with homologous manifestations in multiple system types. Biological systems thus need not be given ontological priority as if they were the objective 'source' domain of concepts which are thereafter applied only metaphorically to other system types.

[2] Luhmann has since proposed that inflation and deflation serve as immune mechanisms in the economic function system (Luhmann 1993, p. 177) and he has made a more comprehensive analysis of protest movements and social movements as important immune mechanisms at the societal level (Luhmann 1989, p. 126; 2000, p. 448; 2013, pp. 157–62). He also considered emotions as immune mechanisms in systems of consciousness: where the continuation of the stream of consciousness is threatened, emotions bridge the interruption so that autopoiesis can continue (see Stenner 2004).

tion structures in the form of a division of roles between doctor and patients, medical diagnoses, treatments that respond to diagnoses and so on. But the value of structures is double-edged. Clear expectations allow for heightened predictability, but structures can also become rigid and problematic. More fundamental to a social system than its structures is the continuation of its communicative operations: that new connections create new connectivity for new connections.

Luhmann uses the term 'immune mechanism' to identify resources communication can draw upon when the continuity of its communication is threatened. Immune mechanisms defend the continued operations of a social system against those of its structures that have become problematic. As with Varela, immune mechanisms are 'autoimmune' operations directed inwardly towards the system itself: they immunize the system against its own immunity (Derrida 2003). From this perspective social systems are autopoietic systems that create all their elements and structures (expectations) through communication. As with Varela's theory, the difference between system and environment is not a 'given' but an internal construction of the system: an observation the system makes of and for itself. When a social system adapts itself to its environment, it thus adapts to an internal construction of the system. This makes it problematic to say that the social system 'defends' itself against, or even reacts to, the environment. Furthermore, it may be the way in which the social system has been constructed to be sensitive to its environment that ends up threatening its possibilities to continue. The system has closed itself in relation to a specific internal construction of its environment, which may no longer be adequate, and the more the system adapts to this 'environment', the more it reduces its capacity to continue.

In Luhmann's account immune mechanisms are a matter of recruiting conflicts in the system of law. There might be many conflicts in society some very small and some larger. Communication everywhere produces latent contradictions and these become social immune mechanisms when recruited by law (Luhmann 2000, p. 421). How should we understand this? Communication is composed of recursive streams of selections/connections and each connection selects into a horizon of connectivity. The connection could be different. Not all connections are possible, and no connection is a necessity. Luhmann points out that the constant selection process produces latent contradictions between the actualized connection and the discarded possibilities. These are latent in the sense that they are not articulated. Until they are explicitly communicated in the form of a 'no' they exist as indeterminate and internal 'noise' in the communication, reproducing contingency. A hand was waved, for instance. As no one waved back there could be latent contradictions between 'hello friend-waving' and 'non-wave'.

The latent contradictions are not in themselves immune mechanisms. They become so only when non-acceptance of the communication is communicated, that is, when communication is answered with a 'no' (A hand was waved. No one waved back. This was answered with an abusive V sign). Contrary to intuitive understanding, we must therefore not understand 'no' as a threat to communication, but as an immune mechanism within it. Luhmann writes:

> The system does not immunize itself *against the no*, but *with help of the no*: it does not protect itself *against changes*, but *with the help of changes* against

> rigidifying into repeated, but not environmentally adequate, patterns of behaviour. The immune system does not protect structure, but autopoiesis, the system's closed self-reproduction. (Luhmann 1995, pp. 371–72)

After the abusive finger communication, we might communicate further, but the gesture will have dissolved some structure: i.e., security in the expectation of friendship.

Of particular interest are those conditions of instability during which the continuation of a social system is so threatened that a fundamental re-ordering of its principle of organization is occasioned. Conflicts – both latent and actual - multiply during transitional periods such as the European shift from the Middle Ages to the modern era. For Luhmann, this shift saw a societal form of functional differentiation replace the older feudal form of hierarchical differentiation. This change represented a fundamental change in structures of expectation and this was mirrored by deep changes in law as society's immune system. From this perspective, the modern notion of basic rights – which formed the foundational principle of the constitutions of the French and American revolutions during a subsequent phase of massive societal transition – can be observed in its immunological function. The semantics of basic rights as inalienable attributes of human beings (irrespective of social order) functions immunologically both by dissolving structural expectations that supported the feudal order (where rights were specific and unique to particular groupings in the hierarchy) whilst bolstering the structures supporting the new functional differentiation (see Stenner 2004, pp. 176–180). Rights in general might always have functioned immunologically - in the sense that in the face of a conflict involving disappointed expectations they allow law to intervene and support the right bearer's insistence that their expectations be honoured – but the new *Grundrechte* were a modification of this tool to support the new form of society (Verschraegen 2002). With basic rights the State begins to distinguish between the interest of society and the interest of the individual, and to expect disputes and conflict between them. This constitutes a significant shift in how the State observes these conflicts: they are no longer avoided but invited. Public and administrative law develops to recruit and handle conflicts between state and individual, rather than simply suppressing them. The challenges to law we are highlighting in this article may be part of a comparable episode of profound societal instability connected to the collapse of this modality of juridical power.

Conflicts and Law in 'The Classic Welfare State'

Conflicts constitute an immune mechanism because they protect communication by transforming it in a manner that dissolves certainty in existing expectations. Communication thus *continues* but in the altered form of 'conflict communication' which tends 'to draw the host system into conflict to the extent that the attention and all resources are claimed for the conflict' (Luhmann 1995, p. 390). Conflict communication has a tendency to escalate because it inverts the form of double contingency at the basis of all communication (see Luhmann 2000, p. 451). The improbability of communication ever occurring is usually reduced by a structure of positive expectations (all else being equal, I expect that you expect that I expect). But in cases of

contradiction the positive expectation informing one communication is met with a 'no' from another. Double contingency then takes a negative form: I do not do what you want when you do not do what I want. Conflict continues when 'no' is answered with a 'no' and the autopoiesis of communication continues on the basis that 'everything that harms you, benefits me'. Conflicts can thus serve as immune reactions 'to perturbations (…) within the circuit of communication itself – and given the danger of not being able to continue communicating, they tend to abandon structures and to rescue communication's self-reproduction' (Luhmann 1995, p. 403).

Conflicts form continuously across the welfare state. They can begin with something very small. A client gets angry with the caseworker. A teacher criticizes the school. Most conflicts lose their energy relatively quickly and die out. Other conflicts recruit new topics and connect to the wider societal communication. A health-care assistant, who faces tight deadlines, asks an elderly person to urinate in a diaper, because he had no time to help. He shares this unbearable experience with colleagues. Together they communicate non-acceptance of their present working conditions. The manager of the elder care institution invites the employees to a dialogue about the case, aiming to limit the conflict to the organization level. The health care assistant writes in his public blog that a lack of resources at the institution forces him and his colleagues into undignified situations for elderly people. It becomes a story in the national media. The labour union connects to the conflict and makes it into a general conflict about the under resourced elderly care sector. More and more communication resources are enrolled into conflict. Such conflicts can sometimes result in changes in the regulations of the welfare institutions. In other cases, the conflicts simply drain the organization of attention. What the conflicts share is that they say 'no' to specific existing structures (expectations) and create uncertainty around these.

But how does law serve as an immune *system* by recruiting this immune *mechanism*? The legal system serves 'as a society's immune system' (Luhmann 1995, pp. 372–73) by regulating the formation of conflicts. Conflicts are elevated and cultivated through the differentiation and evolution of the legal system (Malsch and Weiss 2000, p. 126). The Court neither removes nor extinguishes conflicts, since law: 'does not serve to avoid conflicts (…) It merely seeks to avoid the violent resolution of conflicts and make suitable forms of communication available for every conflict' (Luhmann 1995, p. 375). The legal system constructs its own image of society observing other systems as steered by norms understood as expectations of expectations. When norms are disappointed or contradicted in other systems the legal system can normalize norms saying that this or that norm is either legally right or wrong according to legal programs. In this way law offers the possibility of transforming conflict by moving it into law. The court handles conflicts self-referentially by making them internally comparable elements:

> [An] immune system gets along without knowledge of its environment. It only registers internal conflicts and develops case by case solutions for them, which can be generalized, that is providing surplus capacity for future conflicts.

> Instead of researching its environment, the immune system generalizes experiences with itself. (Luhmann 2004, p. 476)

But the law also contributes to the production of conflicts (Esposito 2011, p. 49). When legislation provides rules and assigns rights to individuals and collectives, it simultaneously invites the conflict to re-situate around these rules and rights. For example, in 1938 new legal regulation of psychiatric hospitals in Denmark gave doctors new powers to use force with psychiatric patients, leading to new conflicts about the limits of the doctors' authority. By inviting new conflicts about where doctors' authority begins and ends, law facilitated a controlled re-situation of the original conflict. In the latest amendment to the Mental Health Act from 2006, psychiatric hospitals are obliged to prevent coercion, opening new relationships between the various professions at work in the hospitals. This illustrates how the law does not simply constrain conflicts, but works formatively in relation to them, immunizing the welfare state by allowing, supporting and regulating the controlled production of conflicts. In this specific sense 'conflict *is* order, and community *is* immunity' as argued by Roberto Esposito (2011, p. 50). Following this line of argument, society needs conflicts, and law is the means by which the 'noise' they generate can be tolerated and converted into a form that can be put to use. The basic challenge of law as immune system 'becomes how to produce enough contradictions to create a valid immune apparatus' (Esposito 2011, p. 49).

What if we look at the welfare state from the point of view of the immune system? The development of the welfare state has accelerated processes of legalization, individualization and universalization. More and more areas of society have over time been legally regulated. Individuals have been separated from the State becoming legal subjects first with personal rights and later with social rights. And these rights have become universalized ending up covering all legal subjects. In this sense the welfare state has been working as an accelerator intensifying the function of law as the immune system of society, whilst also applying law more extensively. Each time new individual and collective rights have been created, the legal system's capacity to regulate the production of antigens in the form of conflicts has increased. Many welfare states have developed sophisticated law on social work, health, education, pension regulation, etc. And in connection to this they have constituted a number of legal rights supported by special courts, complaints rights and participatory rights. And then there are also collective rights, for example rights to organized special groups of citizens, rights to be heard in policy processes, and rights to be represented in commissions and council. In this way, law as immune system has come to include the neo-corporativism and later network governance supplementing conflict on individual rights with collective conflicts (Kjaer 2015).

Luhmann emphasizes that the modern development of functional differentiation demands a more intensified immune system (Luhmann 1995, 382). Esposito likewise suggests that 'immunization has progressively extended itself from the legal sphere to politics, economics, and culture until assuming the role of system of system, the general paradigm of modernity' (Esposito 2011, p. 50). We now resume our argument that new immune mechanisms have emerged which attack the legal immune system, and which work not through conflicts but through potentialization.

Potentialization and law

Potentialization technologies deliberately stage an interruption designed to shift the present present to a past present and create room for a new present to emerge capable of imagining a future future. To our knowledge it was G.H. Mead (1932/1980) who first put terms like the 'past past' and the 'present future' systematically to work in social theory (Stenner 2017). Of particular relevance to our thesis is his article 'How can a sense of citizenship be secured?' (Mead 2011). Here Mead raises the problem that legalistic (and other institutional) solutions to social problems can only work by stating their problems in terms of institutional norms which are fixed in advance ('structures'). By definition, the 'norms of the institution are not flexible provisional means of bringing out the social problem as it appears in the individual's experience' (Mead 2011). In law, for example, an actual human situation complete with evaluative feelings, must always be forced into a highly formalized evaluation, whose rules and standards are already institutionally established. Any conflicts between the institutionalized system and the perspective of the judged individuals are not tolerated. The individual is effectively negated and forced to obey. Mead is aware that this approach can be counter-productive. It can hardly be expected to engender a positive sense of citizenship on the part of legal subjects and can backfire by fostering conflicts, instilling rebellious feelings, entrenching criminality, etc. Mead observes signs of the development of alternatives to legal (and institutional) structures in the form of the Juvenile Courts and experimental schools. In the former a more sympathetic approach to interrogation allows the ends of law to be stated in terms of the emotional interests of the juveniles. Legal decisions, for example, can be accounted for by spelling out their implications for the future future wellbeing of the juvenile. Instead of simply applying pre-given legal procedure, the aim is to 'be on all fours with the estimates and standards of the child' (Mead 2011). Encouraged to grasp the application of the law in relation to their own concrete and affective situation, the juvenile thus has the chance of actually identifying with the social system they are subject to (and thus developing a 'sense of citizenship').

Mead observes this development as diagnostic: 'we have not realized the full implications of the change' (Mead 2011). From our perspective, he is observing an initial phase in the development of modern technologies of 'potentialization'. Juvenile Courts emerged as a means to 'flexibilize', 'personalize' and 'emotionalize' a legal system that would otherwise manage conflicts in a hyper-structuralized manner (the system's expectations being fixed in advance). The fact that law can respond to the viewpoint and feelings of those involved only by forcing obedience - and silencing other thematisations and perspectives on the situation - means that law in turn generates unexpected conflicts. The problematic nature of those conflicts is particularly evident in the case of young people, whose lives can easily be observed to be still full of 'potential'. Here we see an incipient critique of law which focuses on how to immunize against its unintended consequences. How can courtroom communication be modified so that a potential 'future good citizen' may be provided with a way out from the crushing motivational effects of the application of law? The law of the welfare state is 'articulated from within as its own threat' (Andersen and Stenner

2020, pp. 99–100) and a solution is offered (the Juvenile Court) which takes the form of communication which opens up towards a future future.

Consider now a recent example from the Denmark. the Government initiative of 2018 called 'One Denmark with no parallel societies'(Regeringen 2018) addresses the perceived problem of minority groups with values different from the Danish mainstream. This document articulates two levels of threats against the Danish society. At the first level the 'parallel society' is problematized:

> Parallel society is a major burden on the cohesion of society and for the individual. It is a threat to our modern society when freedom, democracy and equality are not accepted as fundamental values. And when rights and obligations are not adhered to. (Regeringen 2018, p. 5)

At this first level, where a self-organized ethnic or religious minority that might not respect Danish law is contemplated, fundamental rights are championed as inviolable. At the second level, however, universal legal rights and universal welfare laws are observed as the true threat because these make it impossible for the welfare state to do what is presented as practically necessary; to solve the problem of parallel society. Universal rights and welfare laws in areas such as public housing, access to local schools, social rights and duties as well as legal penalty rights are observed as obstacles blocking the ability to address particular groups and individuals with the necessary dispositions. The government want to have possibilities available to make particularized decisions which are only valid for particular groups, individuals and areas. Already in 2010 building upon the whitepaper 'Bring the Ghetto back to the society' (Regeringen 2010), the ghetto became a legal category that opens up for the delegation of certain new rights to the local police to define special zones where criminals from the ghettos are no longer allowed to enter. In 2018, this way of defining particular exceptions from general rules was taken to a new level.

There are three clear examples of such exceptions. First, all Danish parents have a universal welfare right to a 'child cheque' for each child. No conditions are connected to this right. But now the Government have implemented a ruling that parents living in the ghettos can be denied this right if they do not live up to a requirement of 'parent responsibility' (Regeringen 2018), a requirement which applies only to them. If children of parents in ghettos miss 15% of their public schooling, fail to attend a specially designed language test, or do not take steps to learn Danish, then they lose the cheque (Regeringen 2018). The second example illustrates that it is not just universal individual rights that are seen as problematic. The Danish welfare state is based upon an extended autonomy of local municipalities that basically have responsibility for the welfare institutions. The welfare institutions such as schools are in turn delegated a certain autonomy and are run by school managers in collaboration with a democratically elected board of parents. The government initiative sees these institutional rights as a potential threat against doing what is needed. The state gives itself the right to take over any school that shows poor results (too many weak students) for three years in a row. In worse case scenarios the state reserves the right to close a school, thereby annulling its autonomy and that of its municipality. But this option to cancel local autonomy is only to be used in exposed city areas (Regeringen 2018, p. 27). The

third example covers criminal law. The government gives the police rights to define a so-called 'sharpened penalty zone' (Regeringen 2018). In these zones penalties will be doubled, or where the normal penalty is a fine, the penalty can be increased to a prison sentence. Criminals will not be allowed to live in certain exposed city areas, and municipalities will be given more efficient powers to evict them from their apartments (Regeringen 2018, pp. 22–23; Folketinget 2018).

In this case, as in Mead's example, a certain tension is set up between the structural inflexibility of law (which imposes fixity and closure) and the requirement to flexibly potentialize openness to a different future to the one that law, with its backwards gaze onto the facts, would insist on *expecting into existence*. In both cases the potentialization thus immunizes against the iatrogenic effects of law and a new mechanism of immunity is layered upon the old. It is in this sense that the 'welfare state is articulated from within as its own threat' (Andersen and Stenner 2020, pp. 99–100). To law's closure, potentialization technologies respond with the positive creation of new possibilities for the future. They say 'no' to structures but with a flexible agenda of innovation. They function immunologically, not through legal regulation of spontaneous conflict, but through positive and self-conscious generation of radical alternatives. But in doing so they remain systematically blind to their destructive side: they dissolve security around any and every expectation structure, including legal rights. In the following section we offer a further case of the 2012 reform of early Danish pension law to illustrate how these new immune mechanisms attack the 'classical' legal immune system by observing legal structures as a threat for continuous communication.

Potentialization as Immune Mechanisms Observed Through Rehabilitation Teams and Resource Trajectory (RTRT)

In order to clarify the 2012-reform, a brief analysis of the 'original' law on early pension is required. The first Danish law on public financial support for the elderly was passed in 1891. The law allowed the disadvantaged over 60-year-old with a birth right and residence in Denmark to apply for a modest benefit called 'old age support'. This law was replaced in 1956 when a Danish national public pension was introduced as a universal welfare benefit for all citizens over a certain age. In 1965, this law was supplemented by a law on early retirement making it possible for people below the pensionable age to receive benefits under certain conditions. The 1965-law had a very clear structure regarding the legal rights of the citizen and the decision criteria for applying them (including the structural coupling between law and non-law). It makes clear that a citizen is entitled to receive pension if his or her work ability is reduced to a certain level: 'Early retirement pension is a service intended to provide compensation for the consequences of a reduction or cessation in the ability to work' (Socialministeriet 1965, p. 20). The law here is clearly structured by a *conditional* program, in other words, one based on *if/then* sentences (Teubner 1983, 1988; Willke 1988). *If* one's ability to work is limited, *then* one has a right to early retirement. In this way citizens can know with relative certainty when they are entitled to a pension. The challenge is of course to decide in a given case, whether work ability is in fact

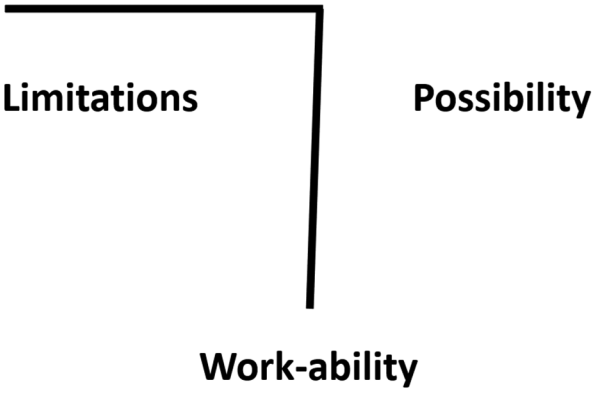

Fig. 1 Legal work ability as decision on the limitations of possibility

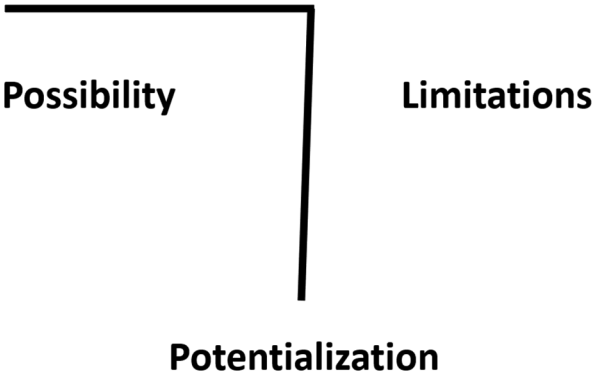

Fig. 2 Potentialized work ability as possibilities despite limitations

sufficiently limited. To make this decision the conceptual line illustrated in Fig. 1 must be put to work. The other side of the concept of limitations here implied is possibility. Work ability is a line drawn within the unity of the difference limitations/possibility (Fig. 2):

'Early retirement pension' is essentially a right or a positive entitlement based on the observation of limitations. A positive decision compensates for the consequences of an incapacity or reduced capacity to work: what a person *cannot* do (Socialministeriet 1965, p. 20). Possibility here refers to an assumption of the general work ability of a normal healthy citizen. But how can the public administration, through the medium of law, observe work ability and draw the line needed to reach a conclusion? When the citizen is observed in the medium of law, the citizen emerges as a legal subject, rather than a living body. Law thereby becomes dependent upon observations made by other social systems that are able to apply their own 'gestalts' and treat the citizen as body (the medical system, for example). This dependency could potentially lead to radical uncertainty, but the law on early retirement structures this dependency upon non-law very carefully. The law states that '[t]he grounds for employability must be a morbid condition: medical disability' (Socialministeriet 1965, p. 29). And it continues: 'The medical component of the disability assessment consists of ascertaining whether there is an illness that has an effect on the person's ability to perform a job' (Socialministeriet 1965, p. 29–30). The law thus creates procedures regarding

how the code of law and the code of medicine should be coupled and how the law communication should observe the medical observations of the citizen: 'On the basis of the medical discretion, an assessment is then made on whether the conditions of the law are fulfilled' (Socialministeriet 1965, p. 57). Law installs procedures for how to interrupt law by inviting contributions formed in the medium of the health system. By invoking the medium of medicine, the public administration becomes able to observe the citizen not just as a legal subject, but also as a patient whose health has been examined. Symmetrically, within the medium of medicine, observations of the patient's health are possible, but the patient's rights and duties are removed as topics of observation. The legal communication has procedures for interrupting its own self-interruption, thus returning to the medium of law. Though medical facts and legal facts are not the same, the public administration can now observe, in the medium of law, the earlier medical observations and medical facts and make legal decisions regarding the legal facts within the medical facts. In other words, the public administration observes medical facts by productively misreading them as legal facts that can function as legal premises in *if/then* decisions. This well-defined structural coupling from law to medicine creates high expectation security regarding how to make a decision as well as high calculability for citizens to understand their rights.

From the year 2000, a discussion arose around the perceived economic and social problem of there being too much permanent early retirement amongst people too young. Calling for reform, an official report states:

> It's about people who do not get the opportunity to realize their potential in an active working life. It is about future-proofing our welfare. And it is about our community and Danish business growth and job creation and new jobs, that do not benefit from the resources and skills of the many retired young people. (Beskæftigelsesministeriet 2012a, p. 4)

A contradiction is here articulated between the citizen's clearly defined right to early retirement and their more diffusely understood right to realize their potential. In the semantic of the citizen's right to early retirement, we have seen that communication operates with the distinction 'limitations of possibilities' (what a person *cannot* do). In the semantic of the citizen's right to realize his or her potential, 'limitations' and 'possibilities' are interchanged. The semantic imperative is that we must stress potential despite limitations. Here, communication operates with the distinction potentialization of possibilities from limitations. Work ability as the unity of the difference limitations/possibility is substituted by potentialization as the unity of the difference possibility/limitations:

As a former Social Affairs Minister Henrik Dam Kristensen put it back in 2000:

> The main aim of the reform is to focus on people's work abilities instead of how sick they are (...) After the reform the principal of social work will be the resources and value of the single individual. What counts is not the disabilities of an applicant, but what he or she can do. (Kristensen 2000)

After the reform was fully implemented in 2014, Minister of Employment, Mette Frederiksen articulated this as a right as follows:

> The opportunity to work or educate yourself for a life that provides the best conditions for fulfilling and living the potential and the resources, dreams and desires that each individual has. It is a right that everyone has, whether they are ill, have limited working capacity, get off to an early start in adulthood or have outdated skills. (Politiken.dk1).

Observing potential amidst and despite limitations becomes the starting point for developing citizen's resources, and we end up with two almost antagonistic gazes at the citizen: limitations/possibilities and possibilities/limitations.

It is remarkable how both differences are built into the new law despite the fact that they are exactly antagonistic. So, the citizen is both given a right to early pension on the basis of limitations to his/her possibilities and at the same time given a right to develop and realize his/her potentiality based on the limitations, however serious they are. The reform of early retirement incorporates this antagonism into the law so that the citizen's right to early retirement can be exercised only when her right to realize her potential has been exhaustively explored: 'It is a condition for a case to be processed under the rules on early retirement that the case has been submitted to the municipality's rehabilitation team' (Retsinformation 2014b, Chap. 3). We will explore further below how these rehabilitation teams function as potentialization technologies. Here we simply note the sequencing whereby, first, when all possibilities of potentializing the citizen have been exhaustively explored by observing by means of the difference possibility/limitation, only then is the citizen permitted to be observed with the difference limitations/possibility. As written in the law text:

> The local council decides that the case will be dealt with according to the rules on early retirement, when it is documented or it is quite obvious that due to special circumstances, the person cannot be improved by participating in resource trajectory or activation, rehabilitation, treatment or other measures' (Retsinformation 2014b, Chap. 3).

The law gives a right to early pension and rejects it too! The contradiction that this builds into law (between a closed formal *if/then* program and an open program of potentialization) serves to protect the welfare state against the law. We see two immune functions in this regard: The first is to protect the process of finding possibilities and solutions against citizens that claim their rights. The second is to protect an explorative process investigating how different function systems might contribute to the potentialization of the citizen against legal *if/then* procedures and the search of legal closure of the case. Unrelating law from the process of potentialization here seems crucial.

Regarding the first point it is very clear that citizens who claim their rights to early pension are observed, not as active collaborative citizens, but as a kind of counter-citizen (actually a commonly used word in Denmark in social work). Minister of Social Affairs and Integration, Karen Hækkerup states this very clearly in 2012: 'We

cannot look passively on, while we park young people on benefits for the rest of their lives' (Beskæftigelsesministeriet 2012b). And the Danish Agency for Labour Market and Recruitment formulates the new expectation concerning the active citizen in 2014 in this way:

> Co-ownership means that the citizen is committed to the effort and takes responsibility for his own situation. This means that the caseworker plays a more coaching, motivating and recognizable role in relation to the citizen. A trusting relationship must be established between the caseworker and the citizen, where the citizen gets help to get an overview of his opportunities and help to use the opportunities. (Styrelse for Arbejdsmarked og Rekruttering 2014, p. 2)

The citizen should take ownership of the process of potentialization and not fall back on their rights to a final decision on a case. In one case, where a citizen insisted on her rights in formulating a legal complaint, the National Board of Appeal concluded: 'It is not excluded that your ability to work can be developed so that you could manage more than just a few hours of work per week' Retsinformation 2014a, 2). There are almost always possibilities of potentialization left to explore no matter how much the citizen's health has been weakened.

The following example is from a field study conducted by Anne Roland Hoolbaum and Karen Maria Jensen in 2015, observing how the rehabilitation teams work. We are here seeing a piece of the communication between the client 'Martine' and her regional doctor:

Doctor I can see what it is that affects your functioning. It is especially ADHD and I can see now, and it is also described that you have psoriasis to a considerable extent. So, it is clear that there are some things that affect your ability to work and that is what you have to take into account in terms of how to find opportunities for you in the labour market, perhaps reduced time, etc. This is what is the exercise. When I look at you that you are 27 years old, there are opportunities. But where they are located, I can't take care of that. From a medical point of view, we can take into account your special needs. I think you are only 27 years old. We should do our best to explore your possibilities.

Martine The more I get pressured the more my illness will be. And it has become.

Doctor It's early at 27 years old to have to park on an early retirement, don't you think?

Martine I need the calm. I need to be allowed to have my life!

Doctor I fully understand that. I just think that there must be a balance between giving you some peace while also trying to have a future. It is also important to have a future. (Hoolbaum and Jensen 2015, pp. 90–91)

Martine tries to argue that she really needs early pension because she needs a closure to her case. She needs calculability and fixed structures that allow her to relax and to live with her limitations. But the Doctor points out that this attitude is an obstacle for her potentialization. She is only 27 and has a long life to lead, full of possibilities despite her limitations. So, the 'exercise' is to explore what opportunities for work Martine might have, and how these can be adjusted to fit with her health limitations. The rule, requiring the construction of a 'resource trajectory' to enable this adjustment, protects the welfare state from its obligation to meet Martine's claim to early pension and does so in the name of potentializing Martine's future. The potentialization says 'no' to the right to early retirement to the extent that this right threatens the citizen's potential to remain active.

But in saying 'no' to the legal right of the citizen, this type of potentialization also provides a technical alternative to the well-defined structural coupling between law and non-law. The rehabilitation teams function as a technology for exploring the citizen's possibilities by including them in a multi-disciplinary conversation with a variety of stake holders (an open-ended invitation to engage with diverse function systems). Rehabilitation Teams and Resource Trajectory (RTRT) is constituted in the law in order to potentialize the citizens. RTRT basically says no to legal conditional regulation of the coupling between legal concerns and non-legal concerns like health, care, love, and education. The Rehabilitation Team is in the law constituted as

> a dialogue and coordination forum, which shall give an assessment in all cases, before decisions regarding resource trajectory (...) and early retirement are taken. (...) Based on the individual citizen's overall situation, the aim of the rehabilitation team is to ensure interdisciplinary coordination and a holistic effort across administrations and authorities focusing on employment and education, so that the citizen as far as possible gets a connection to the labour market. (Retsinformation 2012)

.The Rehabilitation Team becomes a technology of potentialization examining the potential development of the citizen oscillating between many perspectives belonging to different administrations and functions systems. The Rehabilitation Team is an interdisciplinary team consisting of doctors, psychologists, lawyers, social workers, and others who represent different administrative and social systems' perspectives on the client (a care perspective, a health perspective, a labor market perspective, a law perspective). Before examining retirement rights, the team must first explore possibilities to develop the client. They can either devise a resource trajectory which practically articulates those possibilities (e.g., in relation to the labor market), or recommend a retirement decision. In the first case, the citizen is observed within the frame of 'possibilities from limitations.' The individual resource trajectory they are offered aims – through provision of mentoring, psychological counselling, job training, voluntary social work, treatment of abuse, exercise and so on – to develop their resources to enable new or subsidized employment. In the second case of a retirement decision, the citizen is observed within the 'old' frame of limitations upon possibilities. We noted that in the early retirement law from 1965 the law has clear procedures for how to manage the structural coupling of law and medicine. Defining the main

purpose as potentialization of the citizen, the new law from 2013 makes itself dependent on numerous non-law social systems. The regulation of the couplings between these many systems is delegated to the Rehabilitation Team who outlines a Resource Trajectory. One might say that RTRT functions as an immune mechanism that protects the work of potentialization by intercepting structural decisions and creating a zone of uncertain expectations about how to observe the citizen in order to potentialize. It is the rehabilitation team's duty to exhaust the possibilities for developing the citizen's resources before arguing for early retirement. A rehabilitation team can recommend a resource trajectory lasting up to five years and it can legally recommend yet another resource trajectory. This effectively grants a buffer-zone of immunity from the legal structure of rights, meaning that citizens who have applied for early retirement have no opportunities for clear and unambiguous expectations regarding their legal possibilities for early retirement.

Using this immune mechanism, the many codes and perspectives offered by society can now be perceived as being an open reservoir through which the social work organization can experiment with itself (Andersen 2008; la Cour and Højlund 2017; Andersen and Pors 2016; Andersen and Knudsen 2014). Here the question is not how to use available facts to reach legal closure in a case. The questions are rather: What are the possibilities of potentialization of this case, this citizen and this communication, when we choose to form this or that code and perspective? What does this or that perspective open towards? What does it make us discuss and see as interesting possibilities? How does the citizen react if we invite him/her into a dialogue coded by care in comparison with a dialogue coded by education or health? Does the motivation of the citizen increase mostly in the discourse of psychology, pedagogy, health promotion, or money? What discourses provoke citizen resistance and should therefore be avoided?

Basically, this experimental program dealing with a multiplicity of perspectives is only possible if the relations between the different perspectives are in principle open and loosely coupled. Which perspectives in a given case are relevant (and how) cannot be taken for granted. All taken for granted relations between case and perspective have to be constantly un-related to make the potentialization work. The readiness to loosen up, to disconnect or to un-relate specific form/medium relations becomes essential (Stäheli 2018). This is what Pedersen calls 'creative cutting' (Pedersen 2014). But 'creative cutting' can only work on condition that the RTRT is able to render irrelevant the perspective of legal rights.

Conclusion: When the Welfare State Protects its Operations Against its own Structures

This article took off from the observation of a certain skepticism about law that is acquiring prominence. Law is perceived as a force of unwelcome closure with negative implications for the future of the future. We have not offered a normatively based critique, but rather a *diagnosis* of this aspect of the present. We have done so by developing an immunological analytical strategy that involves observing with the guiding difference: immune mechanism/expectation structure. For as long as we have

had a welfare state, we have had immune mechanisms (and probably long before). Employing Luhmann's account of law as society's immune system allowed us to identify some special types of welfare technology, whose function is potentialization: the creation of radically new possibilities for what welfare is and can be. Potentialization is not about realizing existing possibilities or meeting existing challenges with closure. Potentialization is about the hunt for a new horizon of possibilities on the other side of the existing one. Without this diagnostic approach the quest for potentialization might simply be championed as an unquestioned basis for normative critique. The economic 'instrumentalizations' often associated with 'neoliberalism', for example, might be challenged and countered by a call for the creation of 'alternative spaces' with 'atmospheres' suited to the entertainment of radical new possibilities (Van Marle 2018).

Our analytical strategy allowed us to address how potentialization technologies have emerged as an integral part of today's 'neoliberalized' welfare states to address – in part at least - unintended side-effects of law. We have also observed that they are now coming to attack law. Potentialization can thus be observed as a distinctive type of social immune mechanism which is functionally equivalent to conflict but works in a different way. In *Law as a social system*, Luhmann refers to Ross Ashby's point about the function of variety in complex systems and argues that law as immune system 'compensates for the lack of "requisite variety"' (Luhmann 2004, p. 476). Conflicts as elements of the immune system are in this regard important because they have a 'high degree of randomness' and an 'extreme frequency'. Potentialization technologies differ in a number of ways. First, they are devised rather than spontaneous. They represent a more direct and managerially controlled solution to Ashby's problem of 'requisite variety'. They are basically designed to create new requisite variety. Second, potentialization technologies function virtually by use of imagination to conjure a steerable future. That is to say, by pointing out a not yet visible horizon of potentiality beyond the existing horizon, and by using this new horizon to mobilize and communicate contradictions against the present future (a future that can be portrayed as a frozen dead-end). In short, potentialization technologies operate with a future future. Third, in this way, potentialization technologies differ from conflict in that they can perform a paradoxical operation of saying 'no' to the present future whilst at the same time 'saying no' to the 'no' of conflict. Conflict and contradiction is, as it were, unfolded and put to use within a carefully designed safe-space of playful imagination which can present itself as positive, as opposed to destructive critique. Fourth, conflicts and potentialization represent different kinds of 'no' that indicate structure differently. Conflicts communicate 'no' to the specific structure that they highlight. A school conflict might communicate 'no' to a teacher's unilateral authority, for instance. Potentialization says 'no' to structures as such. Given the widely perceived need for coordination on a global scale in the face of multiple systemic crises (De Lucia 2020), this anti-structural feature of addressing all kinds of structures as problematic is likely to become the source of problems in whatever future replaces the future future.

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Authors and Affiliations

Niels Åkerstrøm Andersen[1] · Paul Stenner[2]

✉ Paul Stenner
paul.stenner@open.ac.uk

Niels Åkerstrøm Andersen
na.mpp@cbs.dk

[1] Department of Management, Politics and Philosophy, CBS, Frederiksberg, Denmark

[2] School of Psychology and Counselling, Faculty of Arts and Social Science, The Open University, Milton Keynes MK7 6AA, UK