

Critical Legal Studies  
and the Veil of Rights



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Karl Marx warned us that legal rights are not always to be trusted. His reasoning was simple: that legal rights often perpetuate systems of exploitation and bolster the status quo. But somehow, several generations later, we continue to believe in them. Liberal, individual-centered rights blueprints – for example Dworkin’s insistence that we “take rights seriously”<sup>1</sup> – continue to guide rights scholarship. The belief that rights promote prosperity, protect against tyranny, and that zones of public and private life should govern our behavior is the norm rather than the exception.<sup>2</sup> This essay seeks to understand how this belief came to be.

One reason for ignoring Marx’s rights critique is that his contention that the law is merely superstructural, reinforcing the mode of production, is only half-baked.<sup>3</sup> Unlike his more penetrating material analysis of economic history, his discussion of the legal system is almost irresponsibly vague and the subject of only a few short works.<sup>4</sup> Most lawyers will concede that the legal system perpetuates some inequalities, but they will also observe that the law is not entirely sinister. Labor rights and minority rights do not necessarily make the lives of machinists or Latino immigrants worse, even when examined from the perspective of class. Scholars have also found that Marx would have wanted *some* political rights because of their ability to further the proletariat revolution and make space for communism.<sup>5</sup> But what if the revolution is not coming? Should we kowtow to the individual, egoistic liberal rights regime?

The Critical Legal Studies movement fills in Marx’s abstractions with needed substance and moves beyond them.<sup>6</sup> Emerging in American legal scholarship during the 1970s and 80s, the movement delved into the common law and dissected the implications of rights and law in society. The traditional regimes of constitutional law, tort law, criminal law, and contract law were analyzed along with more “elective” subjects such as labor and employment law. Individual cases were considered alongside developments in legislation and policy. The results of the multifaceted analysis were, and continue to be, startling. Liberal rights discourse has been substantively debunked, but, because of the Critical Legal

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<sup>1</sup> Ronald Dworkin, Taking Rights Seriously (Cambridge: Harvard University Press, 1977).

<sup>2</sup> David Andrew Price, “Taking Rights Cynically: A Review of Critical Legal Studies,” 48 Cambridge L.J. 271 (1989).

<sup>3</sup> Phillip E. Johnson, “Do You Sincerely Want to Be Radical?,” 36 Stan. L. Rev. 247 (1984).

<sup>4</sup> Marx’s primary contributions to rights theory were arguably his essays “On the Jewish Question” and the “Critique of the Gotha Program”. D. McLellan, Karl Marx: Early Texts 85-114 and Robert C. Tucker, ed., The Marx Engels Reader 382-391.

<sup>5</sup> Both Jeremy Waldron and Allen Buchanan acknowledge the possibility that Marx left room for citizenship rights such as speech and voting rights. See Jeremy Waldron, Nonsense Upon Stilts (London: New York Meuthen, 1985) 119-136 and A. Buchanan, Marx and Justice, 50-85.

<sup>6</sup> Mark Tushnet rails against vague reasoning, (writing it “does not advance understanding to speak of rights in the abstract.”) Mark Tushnet, “Symposium: A Critique on Rights: An Essay on Rights,” 62 Tex. L. Rev. 1363, 1364 (1984).

Studies' (CLS or "Critical") emphasis on transformation, the abstract Marx analysis has also been found to be insufficient. CLS scholars have discovered that the law diffuses power in intricate, complex ways that are not so transparently legitimating as Marx proposed.<sup>7</sup> More important, this pluralist movement has waged its critique with a continuing eye towards transformation of established institutions.

The attack on liberal, individual-centered institutions has not been received with open arms. Other scholars have waged a rebuttal to some of the CLS' central claims or found them to be irrelevant (a footnote). In a fascinating display of flexibility CLS has also shown itself to be adept at critiquing its own contentions. This paper will examine the CLS critique of rights discourse in four parts, and argues that the movement has been instrumental in dismantling conceptions of legal orthodoxy, providing a workable method of analysis, and shifting scholarship towards a central concern with *transformation*. Part I offers a broad summary of some of the common features of the diverse CLS movement. Part II presents the radical CLS critique of rights in its manifold forms. Part III exposes the liberal response to the critique (the "critique of the critique"), and demonstrates it to be generally insufficient and often petty. Part IV, acknowledging the successful CLS dismantling of rights discourse, will briefly address the challenges of lawyering in a post-Critical world.

## Part I. Some Themes of the Critical Legal Studies Movement

Perhaps the most unifying aspect of Critical Legal Studies, besides its taking "legal doctrine and judicial reasoning seriously",<sup>8</sup> is its diversity. Critical scholars draw upon the traditions of the social sciences, including forays into existentialism, sociology, literary deconstruction,<sup>9</sup> and critical theory of the Frankfurt School variety. Its project, while radical, also transcends political agendas, comprising contributors of "libertarianism, radical liberalism and humanist socialism."<sup>10</sup> It is not uncommon to find an article quoting Antonio Gramsci, Jürgen Habermas, or Horkheimer.<sup>11</sup> Unorthodox analytical methods are welcomed as providing insight into stagnant legal orthodoxy, making for varied scholarship. The movement's inclusivity is also not without its irony: one of its main hallmarks is that it does not have any. This provides a built-in flexibility that makes the movement capable of

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<sup>7</sup> David Andrews Price, "Taking Rights Cynically: A Review of Critical Legal Studies," 48 Cambridge L.J. 271 (1989).

<sup>8</sup> Peter Fitzpatrick and Alan Hunt, Critical Legal Studies (Oxford: Basil Blackwell, reprint 1990) 3.

<sup>9</sup> Costas Douzinas and Ronnie Warrington, "On the Deconstruction of Jurisprudence: Fin(n)is Philosophiae," in Peter Fitzpatrick and Allen Hunt, Critical Legal Studies, 33-46.

<sup>10</sup> *Ibid.*, 15.

<sup>11</sup> Roger Cotterrell, "Power, Property and the Law of Trusts," in Peter Fitzpatrick and Allen Hunt, Critical Legal Studies, 78.

assimilating most areas of the law into its numerous theories, as well as capable of avoiding grounded liberal attacks. In fact, one of the strangest parts about reading critiques of the CLS movement is that they are often waged as if the Critics are part of a monolithic structure, making some of the claims bizarre and misplaced. The beginning of most critical assessments of the movement (like this one) spend half of the time trying to define its scope.

CLS is also an American academic project that is concerned with transformation. Although no epicenter may be conclusively established, much of the scholarship has emerged from the elite law schools. Professors Duncan Kennedy, Mark Kelman, and Mark Tushnet have been influential in illuminating a consistent methodology. Attempts have been made to identify a collective experience of these professors – academics who dabbled in legal realism at law school, participated in failed social activist movements upon graduation, and then went within the system to try to take it down<sup>12</sup> – but this description is cynically underinclusive. The scholars *are* concerned with encouraging progressivism, fostering an egalitarian society, and political activism.<sup>13</sup> Its American roots should also not detract from the proliferation of its ideas in other regions. Britain developed a thriving Critical base of scholarship towards the mid to late 80s, probably in part because its common law system lends itself well to the analysis. Alan Hunt, for example, has been a prolific contributor to the scholarship, while other British scholars have noted that the American school was inadequate as only “the latest in an historical succession of movements of critique of law ‘from within.’”<sup>14</sup>

The diverse, flexible nature of Critical Legal Studies has not precluded the development of certain consistent themes. Many of them have been identified by Mark Kelman in his work A Guide to Critical Legal Studies, but other scholars have also made poignant observations. There is a concern with contradiction and indeterminacy, with the reification of vague principles, with the legitimating aspects of the law and its pervasiveness, with the failure of liberal rights discourse, and above all with transformation.

“Contradiction” with respect to CLS has two meanings. The first and most popular meaning was developed by Duncan Kennedy in his essay “The Structure of Blackstone’s Commentaries”, in which he identified a “fundamental contradiction” present in the law:

most participants in American legal culture believe that the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it. Others... are necessary if we are to

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<sup>12</sup> Ed Sparer, “Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement”, 36 Stan. L. Rev. 509, 557 (1984).

<sup>13</sup> James Boyle, Critical Legal Studies (Aldershot: Dartmouth Publishing Co. Ltd., 1992) xiv.

<sup>14</sup> Roger Cotterrell, “Power, Property and the Law of Trusts”, in Peter Fitzpatrick and Allen Hunt, Critical Legal Studies, 78.

become persons at all – they provide us with the stuff of ourselves and protect us in crucial ways against destruction...But at the same time that it forms and protects us, the universe of others...threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad rather than good.... Numberless conformities, large and small abandonments of self to others, are the price of what freedom we experience in society. And the price is a high one.<sup>15</sup>

His analysis implies that there are competing and irreconcilable forces at work in legal culture. Individual freedom, so trumpeted by liberal theorists, is incompatible with the “coercive action” required by the community to provide that freedom. To become a free individual one must rely on those who can annihilate our freedom in the name of conformity to the collective. Any transformation of the law, Kennedy posits, would require acknowledging this contradiction. This contradiction bears resemblance to Marx’s own division between man-as-citizen and egoistic man and is probably the most frequently quoted passage of all CLS scholarship.<sup>16</sup> (We will discuss Marx’s distinction in more detail later.)

The second definition of contradiction is related to Kennedy’s “fundamental contradiction” but is more substantive. While the fundamental contradiction serves to alert CLS scholars to the presence of contradiction in liberal *theory*, there is also contradiction present in *laws themselves*. All bodies of law require negotiating between rules and standards. CLS writers tend to observe that complete “legal relief depends not simply on the application of a rule but on a vague standard as well.”<sup>17</sup> While it is attractive to imagine that the “Rule of Law” will consistently and predictably determine a result, this is not so. Discretion is human and therefore indeterminate, and it is never clear whether a standard or a rule will be followed or, more relevant, enforced. Mark Kelman provides the example of a 25 mile-per-hour speed limit:

Take what appears to be the most mechanically applicable of rules: no vehicle may go faster than 25 miles per hour on a particular road. The problem with assuming that there is a clear rule governing the traffic-control *regime*, even when there is at its core a linguistically clear rule without apparent conflicting counterrules, is that the rule will by no means be universally enforced.<sup>18</sup>

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<sup>15</sup> Duncan Kennedy, “The Structure of Blackstone’s Commentaries,” in Allan C. Hutchinson, *Critical Legal Studies* (Totowa, New Jersey: Rowman & Littlefield, 1989) 139-140.

<sup>16</sup> Louis B. Schwartz, “With Gun and Camera Through Darkest CLS-Land,” 36 *Stanford L. Rev.* 413, 429 (1984).

<sup>17</sup> Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge, MA: Harvard University Press, 1987) 49.

<sup>18</sup> *Ibid.*, 49-50.

Perhaps the simplest rule in the imaginary Rule of Law falls apart under analysis. Because of its reliance upon a regime to implement it, it is never possible to fully predict whether driving 26 or even 50 miles per hour will be enforced. All rules are in this way fundamentally indeterminate, and few benefit from the absence of conflicting counter-rules.<sup>19</sup> Yet the American legal regime is also obsessed with rules, as Kelman has observed, supplanting religion as “the opiate of the masses.”<sup>20</sup> It is therefore obsessed with perpetuating contradiction and indeterminacy. Difficult cases are not the exception but the bread and butter of the system.

The principles of reification and legitimation also deserve mention as consistent aspects of the CLS movement. To *reify* is to “convert (a person, abstraction, etc.) into a thing” or “materialize.”<sup>21</sup> One of the more unpredictable aspects of the law is the ability for it to obfuscate underlying realities through the crystallization of abstract notions into black letter language. Calling a “remedy” a “remedy” gives rise to the belief that this “thing” is real and structurally sound, when it is really only an abstraction riddled with contradictions. There comes a point when these reifications serve to cloud understanding about the law’s fluctuating nature.<sup>22</sup> We become convinced that the reifications are part of an underlying reality, when these “idea-things” are products of our consciousness.<sup>23</sup>

Legitimation is a related concept and is an important modification of the Marxist critique of the law. While reification may cause confusion about the injustices present in law, that does not mean that the *purpose* of the law is to confuse. The CLS take is that it is possible for the law to reinforce existing institutions, but that is not its aim. In part because of its pervasiveness, the law contains a degree of autonomy that Marx did not seem to acknowledge. This autonomy is not derived from the case jargon and is also not derived from the law as spin-off of the institutions of power.<sup>24</sup> When it legitimates, the law does so in diffuse ways that involve reification, contradiction, and other complex notions. Exactly how and which way it does this is one of the primary end-goals of the “unified theory” that CLS scholars actively seek.<sup>25</sup> Ideology *is* being propagated, but it is also *created* by the law and the challenge is to perceive how it functions.<sup>26</sup>

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<sup>19</sup> Even this 25 mile per hour rule is suspect. Some traffic laws permit a vehicle to exceed the speed limit to overtake a slow-driving car, for example.

<sup>20</sup> *Ibid.*, 63.

<sup>21</sup> Reader’s Digest Oxford Complete Wordfinder (London: Reader’s Digest Assoc., 1993), “reify”.

<sup>22</sup> Kelman, *A Guide to Critical Legal Studies*, 263.

<sup>23</sup> Peter Fitzpatrick and Alan Hunt, *Critical Legal Studies*, 8.

<sup>24</sup> Kelman, *A Guide to Critical Legal Studies*, 262-3.

<sup>25</sup> Mark Kelman does offer his own insights. His belief is the law legitimates through “(1) reification; (2) conflation of the potential legal solubility of a problem with the existence of a problem; (3) synthetic individualism (a belief that social relations can be understood only as the sum of readily comprehensible individual relations); (4) ‘take and give’ (giving the appearance that the system is less harshly oppressive or

Concluding, Critical scholars have waged a multipronged attack on legal orthodoxy. A guiding tenet is a concern with flux and change. They are ultimately concerned with *transforming* institutions and advancing emancipation.<sup>27</sup> Mark Kelman, for example, concludes each facet of his “Cognitive Theory of Legitimation” with an explanation of its relative ability to transform.<sup>28</sup> His and similar approaches reveal basic contradictions in the law while acknowledging its complexities. The law is not controlled by a sinister *status quo* but is a nuanced, headless institution deserving of rigorous scholarship. With this understanding we may now proceed to their nuanced critique of rights discourse.

## Part II. The Critical Legal Studies Critique of Rights

Even after noting the diverse and varied nature of Critical Legal Studies scholarship, it is safe to say that the scholars take a very skeptical view of orthodox rights analysis. Rights, whether civil or “inalienable”, are not what we were raised to think they were. The obfuscating, legitimating legal regime uses rights analysis to smooth over the fundamentally contradictory struggle between individual freedom and order.<sup>29</sup> Exactly how this happens is the subject of debate within the movement. In this section the approaches of three scholars to rights analysis will be examined, with themes highlighted where possible.

### A. Mark Tushnet and the Danger of Rights

One of the most considered analyses of rights discourse comes from Georgetown Professor Mark Tushnet. His work may be seen as foundational in the sense that several of the themes he stresses are present in the other scholarship we will examine. In his work “An Essay on Rights,” Tushnet attacks orthodox rights as being (1) inherently unstable; (2) indeterminate; (3) guilty of reification; (4) ultimately antagonistic to progressive activism; and (5) overly weighted towards individualism (and away from community).<sup>30</sup> We will consider each claim in turn.

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biased than it readily could be); (5) denial of political stress through the use of technical thought; and (6) privileging of the libertarian poles in the face of contradictory political pulls.” *Ibid.*, 269. Yet Alan Hunt, writing after Kelman’s work, seems to think that a unified theory has not arrived, (writing that the “question of whether it is either possible or desirable to construct a ‘general theory’ is a major source of tension amongst critical scholars”). Peter Fitzpatrick and Alan Hunt, *Critical Legal Studies*, 6.

<sup>26</sup> Kelman, *A Guide to Critical Legal Studies*, 263.

<sup>27</sup> Peter Fitzpatrick and Alan Hunt, *Critical Legal Studies*, 15.

<sup>28</sup> Kelman, *A Guide to Critical Legal Studies*, 269-295.

<sup>29</sup> Allan C. Hutchinson, *Critical Legal Studies*, (Totowa, New Jersey: Rowman & Littlefield, 1989) 137.

<sup>30</sup> Mark Tushnet, “Symposium: A Critique on Rights: An Essay on Rights,” 62 *Tex. L. Rev.* 1363, 1364 (1984).

## 1. Instability

Tushnet argues that unearthing the presence of instability requires dealing with specific instances of rights. John Rawls' theory of justice has resulted in analysis that is disarmingly relative and frustratingly general, such that rights-talk has lost its substance.<sup>31</sup> If it had been more specific, rights would have been revealed as unstable.

He delves into reproductive rights to demonstrate this point. Abortion was upheld by the U.S. Supreme Court in *Roe v. Wade*, later confirmed by *Casey*, to be consistent with substantive due process privacy rights. The opinion turned upon a vague judicially created standard about the viability of a fetus at certain stages of development. Unviable fetuses could be aborted while viable fetuses capable of surviving outside the womb could not.

To highlight the instability of abortion rights, Tushnet imagines a “modest” change in technology that could make fetuses viable at a much earlier stage. The concern which originally gave shape to the right – that the mother could control her own body – would now give way to a concern over what to do with the now-living fetus. In other words, since the mother did not want the fetus in the first place, would she have a right to destroy it or could society intervene? The right would then have to be secured on property-based, psychological, or genetic arguments.<sup>32</sup> The property right would fail because, while we recognize the right to control genetic organs, it would be easy to make it possible for people to remove an organ but not destroy it.<sup>33</sup> A small alteration in legislative or judicial reasoning would be required. Psychological rights would be insufficient because they would have to be justified on the distress felt by the mother as to the future of her child. The genetic argument would unlikely succeed because the Supreme Court only offers weak protection to parents based on a genetic link.<sup>34</sup>

This reproductive argument is admittedly a strange one. Writing nearly twenty years ago, Tushnet seems to have had more faith in the advent of technology than was warranted. Medical advances have increased the ability to “save” a previously unviable child, but not to the extent he envisions. Most severely premature births, at any rate, result in lasting developmental problems that have prevented the debate from becoming inflamed. But he is right to suggest that it is a possibility: a small invention could destabilize a right that affects millions of women. This may not even be needed given the recent right-wing activism against abortion in the U.S. His substantive Critical analysis, in short, reveals that reproductive rights are indeed unstable.

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<sup>31</sup> Ibid., 1365.

<sup>32</sup> Ibid., 1366.

<sup>33</sup> Ibid., 1367.

<sup>34</sup> Ibid., 1368.

## 2. Indeterminacy

Tushnet's second and more powerful argument pertains to the indeterminacy of rights. The language of rights provides an almost unlimited variety of arguments and claims that can be presented, making rights "so open and indeterminate" that each side in a dispute can manipulate the language to its advantage.<sup>35</sup> Indeterminacy can be either "technical" or "fundamental." *Technical* indeterminacy is caused by the use of judicial balancing tests, the existence of competing rights, and the shifting background of legal context. 'Balancing tests' are utilized by judges to permit flexible decision making in complex cases. But balancing requires some "common measure of value" that the Supreme Court has failed to provide, resulting in an inadequate ability to predict the consequences of any balancing test. For example, he notes that the balancing tests utilized in *Brown v. Board of Education* gave rise to a powerful backlash by right-wing interests and the era of Reaganism. Balancing is also subject to the judicial ability to accord weight to "facts" and "interests" at random. The upshot is that

a balancer who wants to 'recognize' a right can choose the necessary measure of value, the necessary consequences, and the necessary level of protection generally. So can a balancer who wants to deny the claim that a right has been violated.<sup>36</sup>

This fickleness goes for competing rights as well. The Supreme Court often has to balance different rights regimes, such as private property and freedom of speech,<sup>37</sup> against each other. How they will come out is more or less arbitrary. Finally, rights do not exist in a vacuum and often relate to other rights, but a court can relate them or not at will. They rest on top of a right "background" fabric that may or may not be recognized, again at the courts discretion. The decision to contrast property rights with speech rights, as opposed to, say, procedural rights is unpredictable.

Whereas technical indeterminacy is concerned with the legal context, *fundamental* indeterminacy centers upon the *social* context of a right. The existence of a right does not mean that it will be exercised by all people or in the same manner. "Material" and "psychological" resources differ from person to person, and it may be necessary for "fundamental social changes" to make a right more effective in order to level the playing

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<sup>35</sup> Ibid., 1371.

<sup>36</sup> Ibid., 1373.

<sup>37</sup> Tushnet cites shopping center cases as an example, e.g. *Hudgens. v. NLRB* 424 U.S. 507 (1976).

field.<sup>38</sup> When a particular right is specified, then, it becomes “either an act of political rhetoric or a commitment to social transformation.”<sup>39</sup>

### 3. Reification

The third major point presented by Tushnet is that rights discourse suffers from reification. This is the same basic contention as has been discussed above in our general summary of the Critical project. Reification involves the concretization of abstract ideas into “things.” Tushnet’s original observation is that reification is often the reduction of an “experience”<sup>40</sup> into a right. Marching against racism, for example, can be considered exercising a First Amendment right or a political experience. If we reify the experience as a “right,” then it presents problems. One must then acknowledge the ability of neo-Nazis to exercise that right, which could be completely anathema to the cause. The two vastly different political movements have been equaled through the “filter of the language of rights”.<sup>41</sup> The social movement would be subverted by the rights regime.

### 4. Antagonism to Activism

His fourth major point is that rights can be antagonistic to progressive activism. This point is probably his weakest. Entertaining the contention that rights have utility, he contends that they will be abandoned when no longer useful. As an example he cites the intervention of the Communist Party on behalf of blacks accused of rape in Alabama. The intervention infuriated the NAACP, the leading organization of the civil rights movement, because the Communists stifled needed support from libertarians.<sup>42</sup> Rights thereby ran contrary to black interests. Another example, but one tied to the resource disparities highlighted in “technical indeterminacy” is the fact that, at least at the time of Tushnet’s writing, many of the major Supreme Court First Amendment decisions were about commercial advertising.<sup>43</sup> The “wealthy” could thereby use their shares in stocks to pepper the public with speech that it could not do in the private sphere. This last point is pretty implausible because it ascribes a diabolical disposition to those in power. Corporate law, as Anupan Chander has shown, actually benefits from democratic decision making processes

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<sup>38</sup> Ibid., 1380.

<sup>39</sup> Ibid., 1380.

<sup>40</sup> Ibid., 1382-83.

<sup>41</sup> Ibid., 1383.

<sup>42</sup> Ibid., 1385.

<sup>43</sup> Ibid., 1385.

not equaled in the private sphere.<sup>44</sup> But whether an individual can “shape public consciousness” or not does not detract from the fact that the corporation as a whole can do so, whether or not someone is pulling the strings.<sup>45</sup> A right trumpeted as a triumph of individualism and freedom is actually most exercised by the corporations that tend to quash that individualism and manufacture individual consent.

## 5. Overemphasis on Negative Rights

The fifth major point focuses upon the ability of rights to run contrary to the interests of community. In this section, Tushnet draws upon philosopher Isaiah Berlin’s distinction between positive and negative rights. In Berlin’s scheme, negative rights guarantee freedom from interference by the state and positive rights require the state to furnish citizens with certain provisions, usually but not always related to basic sustenance and well-being.<sup>46</sup> A harmonious society would ideally incorporate both positive and negative rights. But American culture has fostered an imbalance, where negative rights “overshadow” positive rights and block their proliferation<sup>47</sup>:

In our culture, the fear of being crushed by others so dominates the desire for sociality that our body of rights consists largely of negative ones. The language of negative rights supports a sharp distinction between the threatening public sphere and the comforting private one. The very idea of negative rights compels us to draw that distinction. But it is possible to see the public sphere as comforting and the private one as threatening. Indeed, the idea of positive rights compels us to blur the distinction. That means, however, that it will be difficult to develop a rhetoric of rights that both creates and denies the distinction between public and private, that justifies both negative and positive rights. By abstracting from real experiences and reifying the idea of rights, it creates a sphere of social life stripped of any content. Only by pretending that the abstract sphere of social life has content can we talk about positive rights.<sup>48</sup>

What Tushnet appears to be saying here is that the negative-positive right distinction has resulted in placing all intrinsic rights-value into the private sphere. This is because we fear the imposition of the collective will upon our individual freedom. But there are circumstances, most notably in the nuclear family and in gender relations,<sup>49</sup> in which the private sphere is potentially oppressive as well and social life can provide a respite. The

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<sup>44</sup> See Anupam Chander’s “Minorities, Shareholder and Otherwise,” 113 Yale. L. J. (2003).

<sup>45</sup> Ibid., 1388.

<sup>46</sup> Ibid., 1392.

<sup>47</sup> Ibid., 1392.

<sup>48</sup> Ibid., 1392-93.

<sup>49</sup> We will discuss these possibilities in Mark Kelman’s discussion of reification.

ability to foster comforting social rights is blocked by the widespread presence of negative, individual, egoistic rights theories. Like Kennedy's analysis of the "Fundamental Contradiction" in which man both needs and abhors others, it is challenging to get away from the abstract distinctions between negative and positive rights.

## B. Mark Kelman and the Attack on Hohfeldian Rights

Mark Kelman's primary contributions to Critical scholarship are in substantive criminal law and in his seminal Guide to Critical Legal Studies. It is in the latter work that his analysis of rights discourse may be found. Three forces are at work in the liberal discourse on rights, according to Kelman: (1) an overemphasis on the existence of a legal remedy when a right is implicated; (2) a misguided belief in the presence of a correlative Hohfeldian claim; (3) and the denial of the importance of community. Several of Kelman's points, particularly those of reification and the problem of social-community rights, contain similarities and we will contrast them where possible, while examining each of his ideas in turn.

### 1. Rights and Remedies

According to Kelman, a fundamental problem with rights is that they can blur the existence of an underlying social problem. Because of a belief in the "completeness" of the legal remedy regime, it becomes difficult to imagine that a problem exists if there is no right to accompany it.<sup>50</sup> Tautologically, the absence of a legal remedy indicates that there is no right. But more important is the fact that the absence indicates that there is no "significant interest" to vindicate the right, to exercise the right or demand its creation.<sup>51</sup> "The world appears perfect," Kelman writes, "or at least as tolerable as we can make it... because our tools for further perfecting it are so dull."<sup>52</sup> The circular reasoning of finding a remedy for every right and a right for every remedy convinces us that anything outside the circle cannot merit a new remedy.

To bolster the point that legal problems are soluble only in the presence of a remedy, Kelman delves into his expertise on criminal law. Criminal law becomes notoriously vague and patriarchal when it enters the domain of married life. Forced, nonconsensual sex was historically unenforceable under the "marital rape exception." Attempts to provide a standard or rule with which to judge a formal line of excessive force were for the most part

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<sup>50</sup> Kelman, A Guide to Critical Legal Studies, 275-76.

<sup>51</sup> *Ibid.*, 275-76.

<sup>52</sup> *Ibid.*, 275-76.

unsuccessful. Fears about jailing husbands and difficulties in drawing a bright line rule have resulted in the absence of a right and remedy. The social problem of marital rape, however, remains bristling underneath. But because there is no right and no remedy, we do not speak of it and do not see it.<sup>53</sup>

## 2. Group distortion

Another major point of Kelman's is that the individual treatment of rights can prevent desirable social welfare goals. This point is very similar to Tushnet's analysis of positive and negative right imbalance, but the analysis is more detailed and technical, meriting its own discussion.

Wesley Hohfeld's turn of the century classification scheme is seen as giving shape to what we mean by a 'right'.<sup>54</sup> Hohfeld demonstrated that the term "rights" is accompanied by relationships called "jural relations". Jural relations include claims, duties, liberties or privileges, and no-claims; and power, liability, immunity, and disability. Certain jural relations, such as "claim" and "duty", must accompany one another, while others, such as "immunity" and "liability", are opposites and cannot co-exist. This elaborate classification scheme has been elucidated at length elsewhere<sup>55</sup> and will not be repeated here.

But the significant point for understanding Kelman is that Hohfeld's technical scheme centers upon individuals. Claims exercised against groups are broken into "claims against particular others" because liberalism considers groups "artificial", and merely the aggregation of the individuals that comprise them.<sup>56</sup> "Groups move," Kelman explains, "because particular persons move; group 'character' is just the norm of individual characters."<sup>57</sup> We are duped into thinking in twos about "concrete individual diads, particular paired persons, one burdened party owing duty to the other rights holder, a hypothetical plaintiff and defendant in a lawsuit."<sup>58</sup> These diads deny the existence of groups and limit both our ability to recognize problems that accompany groups.<sup>59</sup>

The upshot of individualized, Hohfeldian rights analysis is that it prevents the recognition of social duties. Law and economics bastion Richard Posner, for example, cites the case of a bulimic tomato consumer and his right to eat (or not to eat). Adhering to the

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<sup>53</sup> Ibid., 276-277.

<sup>54</sup> This paragraph is taken from a shorter work by the author (Deji) called "Reconciling Hobbes and Hohfeld".

<sup>55</sup> See Judith Jarvis Thomson, *THE REALM OF RIGHTS* (1990) and R.W.M. Dias, "Hohfeld's analysis of 'rights'" in *Jurisprudence*.

<sup>56</sup> Kelman, *A Guide to Critical Legal Studies*, 279.

<sup>57</sup> Ibid., 279.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

typically narrow economic view of individual choice, Posner cautions that “the impersonality of market transactions protects privacy and freedom”<sup>60</sup> and suggests that the bulimic should choose whether or not to gobble the apple. Kelman finds Posner’s analysis to be deficient because of its overreliance upon the Hohfeldian tradition. Searching for correlative rights-duties and privileges-immunities, one will be unable to recognize that bulimia is troubling and worthy of a remedy. A victim for bulimia may have lost the capacity to make an autonomous choice. The failure to recognize bulimics as a group results in a failure to address the problem of bulimia; their collective inability to exercise a claim causes their powerlessness. Removing oneself from the individual tradition, on the other hand, can result in subsidies, taxes for bulimic counseling, or other non-legal measures.<sup>61</sup> Generalized social duties can be as equally important – if not more so – as duties owed to individuals.<sup>62</sup> We must move away from thinking of these duties merely as “charity” because of the individual-centered rights regime, and should consider bulimics “needs-based ‘rights holders’” instead.<sup>63</sup>

As we mentioned, this point bears similarity to Tushnet’s point about negative and positive rights. But where Tushnet speaks about rights in the abstract manner of Isaiah Berlin’s political theory, Kelman writes in terms that resonate on a practical level within the legal regime. The shift from particular rights to group rights will require a concomitant shift in the language we traditionally utilize to understand group relations. Revising the Hohfeldian scheme to include group rights may be a step in the proper direction. The approaches of both scholars may be harmonized by understanding that they suggest a reorientation of rights-discourse analysis towards groups and, in an ideal form, tolerant communities.

### **3. More Reification**

Similar to his analysis of the importance of group rights, Kelman presents a nuanced view of reification that meshes well with that of Tushnet. Understanding what categories the legal system uses to classify the world is “both obvious and powerful”, making it especially important to identify which concepts are substantive and which are the mere conversion of abstraction into idea-things.<sup>64</sup> One reification is the “market” and the “family.” Although reformers realize that their conception of the family and the market was inaccurate, their

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<sup>60</sup> Ibid., 283.

<sup>61</sup> Ibid., 284.

<sup>62</sup> Ibid., 281.

<sup>63</sup> Ibid., 282.

<sup>64</sup> Ibid., 270.

reforms still demonstrate a paternalistic bent towards protecting the weaker female. Men are implored to “share” their power with women, in a manner which presupposes the power *starts* with the man.<sup>65</sup> The fundamental differences between males and females are instead collapsed into an androgynous, cookie-cutter individual rights bearer.<sup>66</sup> The reified family, and its “right” to privacy, clouds perceptions about gender disparities and suffering.

Another example of reification occurs in property law. A homeowner has a “right” to eject a picketer from the front lawn. An employer also has a “right” to kick a worker out of the factory for speaking in a manner that is not approved. Both rights, Kelman explains, relate to the right of privacy on private property. But each right would require completely different substantive justification, drawing upon separate reasoning. But because both instances would be characterized as disputes over “rights” we would be hard-pressed to argue against one rather than the other.<sup>67</sup> The employer can say “I have a right to kick you out” and so would the homeowner, even when the employer may be kicking the employee out simply to close down the factory. They could both hide behind the reified category of rights, because the “particularistic dialogue” has been trumped even if the general purpose of each “right” is completely different.<sup>68</sup>

Kelman’s concept of reification may be combined with Tushnet fairly easily. Whereas Tushnet focuses on the ability of rights to reduce a *political experience* to a category, Kelman’s observation is that the reductive nature of rights prevents making *substantive* arguments. Rights can be exercised in different ways and for different purposes, but calling them all the same thing makes it challenging to present arguments that distinguish between them. In both notions of reification, it is necessary to question whether using rights language will advance the cause or hinder it.

#### **4. the Fundamental Contradiction Again**

We again must return to Kennedy’s notion of the Fundamental Contradiction. Kelman contends that rights consciousness permits us to believe that we have “solved the problem” of mediating between the fact that individuals are shaped and destroyed by society. Rights are in this way a complex method of denial that permits us to think that we will be fine as long as our rights are protected. A neighbor need only respect our rights and our freedom to do what we like will be ensured. But the inherent difficulties in defining what

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<sup>65</sup> Ibid., 273.

<sup>66</sup> Ibid., 273.

<sup>67</sup> Kelman relies upon Gordon’s Essay “New Developments in Legal Theory” in making this argument. Ibid., 270.

<sup>68</sup> Ibid., 274.

rights are and binding them to a consistent, clearly delineated praxis gives rise to a “fantasy” that the “world of others is no threat.”<sup>69</sup> Everything will *not* be ok if our rights are respected because they are often illusory, no matter how thick the shutters or strong the front door.<sup>70</sup>

### C. Peter Gabel and False Consciousness

Peter Gabel is perhaps the most ardent Critical promoter of the ideas contained in the fundamental contradiction. As head of the progressive New College Law School in San Francisco, he was also more committed to practical social activism than most Critical scholars, placing a strong emphasis on the necessity of fitting rights discourse within the aims of social movements. Strangely, however, many of his ideas are less substantive than the above scholars and focus upon abstract power relations and notions of public consciousness.

#### 1. False Consciousness

Gabel posits that society suffers from a debilitating illusion about the nature and function of rights. Rights discourse tends to channel meaningful “feelings” into an ideological structure that assimilates their original political aims.<sup>71</sup> A person fighting against the monopolistic practices of Wal-Mart, for example, will find himself speaking the language that gives Wal-Mart all kinds of rights that permit it to continue acting in a monopolistic way. By going to the courts, an activist must adopt the “consciousness” of the system that it means to transform. His words are instructive here:

Without even knowing it they start talking as if ‘we’ were rights-bearing citizens who are ‘allowed’ to do this or that by something called ‘the state,’ which is a passivizing illusion – actually a hallucination which establishes the presumptive political legitimacy of the status quo.<sup>72</sup>

Thinking through rights gives rise to a perception that the state permits an activist to do something. This “hallucination” causes us to think of the state as an actual, existing entity, making it difficult to change it. The diffusion of yearly Supreme Court opinions discussing this hallucination helps reify the ideological framework in the legal regime, perpetuating the

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<sup>69</sup> Ibid., 289-290.

<sup>70</sup> Ibid., 289-290.

<sup>71</sup> Peter Gabel and Duncan Kennedy, “Roll Over Beethoven”, 36 Stanford L. Rev. 1, 26 (1984).

<sup>72</sup> Ibid., 26.

fantasy of a “true” social reality.<sup>73</sup> Their decisions do not provide precedent for the lower courts to follow so much as to educate people about how to navigate institutional hierarchies, and as a result concretize those hierarchies.<sup>74</sup>

Gabel’s thought on false consciousness seems to have been heavily informed by Marx’s thoughts on the law and rights. A central problem with modern society is that there is a “broken reciprocity”, so that “people experience themselves simultaneously as living their actual, real lives as people with all kinds of feelings, and then as citizens of a political group.” To accommodate this dichotomy, they “project out a false form of unity” and credit the projection with “all kinds of powers.” The projection in turn becomes an entity in and of itself.<sup>75</sup>

The parallel to Marx’s “On the Jewish Question” is undeniable.<sup>76</sup> Bourgeois society was characterized by a concern for egoistic, atomized rights that stood in sharp contrast to that of the citizen, of political life. “The formation of the political state and the dissolution of civil society into independent individuals...who are related by law,” Marx wrote, “is completed in one and the same act” of political revolution.<sup>77</sup> This chasm caused the social, political citizen to become an abstraction contrasted against the reality of atomized individuals.<sup>78</sup> The individual was the hard center and the social citizen an exercise in thought. True “emancipation” would require man to absorb these separate spheres back into himself so he could become a “species-being.”<sup>79</sup>

While Gabel concedes his debt to Marx, he argues that his concept of false consciousness is more refined. Specifically, he felt that Marx’s thought was soured by the goal of reaching a communist end-state devoid of rights, while his own analysis does not require one.<sup>80</sup> His focus turns more upon the daily concerns of lawyers and activists engaged in social struggles and increasing their effectiveness.

## 2. Rights as Temporary Gains in Power

One method of avoiding the pitfalls of false consciousness is to treat rights as temporary gains in power. Instead of floundering in the technical rights language of

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<sup>73</sup> Ibid., 27.

<sup>74</sup> Peter Gabel and Paul Harris, “Building Power and Breaking Images: Critical Legal Theory and the Practice of Law, in Allan C. Hutchinson, *Critical Legal Studies* 305.

<sup>75</sup> Gabel and Kennedy, “Roll Over Beethoven,” 29.

<sup>76</sup> Ibid., at 29.

<sup>77</sup> Karl Marx, “On the Jewish Question,” 107.

<sup>78</sup> Ibid., 107.

<sup>79</sup> Ibid., 108.

<sup>80</sup> Gabel and Kennedy, “Roll Over Beethoven,” 37.

Supreme Court judgments, it is better to search for “ideological” levels and loci of power.<sup>81</sup> Rights should be thought of as momentary tools rather than end-goals, capable of bending in another direction without warning. Winning a right presents a temporary victory that has the “potential for using it for leverage to gain more power,” but the right is “*not* an absolute abstract gain in social progress.”<sup>82</sup> The gains are marginal, but can develop needed protected spaces and force officials to “obey their own rules” for a short while. Thinking of the right otherwise offers potential for pacification, “returning” the right-power to the state, and for the vitiating of the underlying social movement.<sup>83</sup> The key is to “keep your eye on power and not on rights”; the newly found social space created can be swallowed at any second by the ideological framework.<sup>84</sup>

Gabel’s stance is useful because, despite its negative undertones, it does not eliminate the use for rights altogether. He acknowledges, unlike Tushnet, that it may have been wise to wage civil rights cases such as *Brown v. Board of Education*, for example.<sup>85</sup> Rights may create false consciousness but that does not mean they should be abandoned. They can play a role in the overall strategy of transformation, whatever that may be. This serves as an optimistic contrast to the more negative descriptions offered by Tushnet (he ends his work by saying that “things are on the whole terrible”)<sup>86</sup> and the complex, deeply suspicious cognitive warnings about rights-consciousness presented by Kelman. Gabel frankly admits that rights can be pernicious, but places them within the reach of activists with transformative intentions.

### 3. Towards Legal Strategies

Related to an insistence upon rights as temporary gains in power is Gabel’s incorporation of rights into legal strategies. In his essay with Paul Harris, “Building Power and Breaking Images,” he analyzes several cases that specifically deal with community empowerment. His discussion of the *Basta Ya* case is particularly instructive. Two defendants were imprisoned for selling their community newspaper in front of a local San Francisco store front, and charged with trespass, obstructing the sidewalk, and resisting arrest.<sup>87</sup> The state expected the defendants to either plea bargain, vindicating the arrest and preventing their ability to sell more newspapers, or to offer a weak First Amendment

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<sup>81</sup> Peter Gabel and Paul Harris, “Building Power and Breaking Images,” 304-305.

<sup>82</sup> Gabel and Kennedy, “Roll Over Beethoven,” 33.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*, 36.

<sup>85</sup> *Ibid.*, 29.

<sup>86</sup> Tushnet, “An Essay on Rights,” 1402.

<sup>87</sup> Peter Gabel and Paul Harris, “Building Power and Breaking Images,” 310.

offense. It assumed that as minority Latino immigrants, they would enter guilty pleas and leave the courtroom as soon as possible. However, the legal strategy was not based on First Amendment rights but on championing the concerns of an abused immigrant community. The First Amendment was indeed entered, but only to shift the burden of evidence on the state.<sup>88</sup> Counsel, with the consent of the defendants, decided to defend the act of selling the newspaper and its context within a political reality,<sup>89</sup> and the jury acquitted the defendants as a result.

The victory of *Basta Ya* serves as a valid demonstration that the implication of a right does not mean it should be utilized. The rights-based strategy would have potentially been effective for the defendants, but the community was not just trying to assert its ability to speak freely. The gain would have been momentary or, Gabel suggests, the judge would not have let the rights argument through. By focusing on the needs of the community instead, the First Amendment claim presented merely one step in an overall strategy.

### Conclusion of Part II

The three scholars discussed above were selected because of the breadth and novelty of their arguments. No doubt other scholars, particularly Roberto Unger or Paul Frug, could have been selected instead and been equally instructive. The thrust of these arguments is that it is dangerous to pay rights too much respect. They can be unstable, used by any side, and they can get in the way of a clear understanding of situations. At the same time, their pervasive nature forces us to reconcile their presence and subsume them into a transformative framework that works for *us*. Not only is this possible for the Critical scholars, it is also desirable.

### Part III. Critical Assessments of the CLS Movement

It is not surprising that the radical Critical critique of rights consciousness created a backlash from scholars across the political spectrum. Many legal careers are inspired and dedicated to fundamental rights; calling oneself a First Amendment or Civil Rights lawyer is a badge of honor that one wears proudly. Also, so much of legal discourse centers upon rights that unveiling them or, worse, removing them would send shockwaves through the foundations of society. The “critique of the critique” is complex and has been leveled from

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<sup>88</sup> Ibid., 312.

<sup>89</sup> Ibid., 313.

both outside and inside the movement. We can only examine a small sample here. On the whole, however, many of the Critical arguments are too powerful to be cast aside, forcing us to reconcile their contributions with the legal orthodoxy. Each critique will be followed by a hypothetical rebuttal that is based upon CLS take on rights we outlined above.

#### A. Superficial Arguments

There are variety of superficial, less considered arguments against the CLS critique that are not substantive in nature. The most prevalent attack is on the Marxist influence upon Critical thought. The theme is that Marxism has been discarded by liberalism and failed in practice in Soviet Russia, so we no longer need to take it seriously. The scholars must carry “ideological baggage” that “take[s] a dim view of everything” because “the capitalist system is responsible for every form of misery in the world.”<sup>90</sup> This critique is untenable for several reasons. First, not all of the scholars rely upon Marxism and those that do treat Marx’s thoughts on rights in novel ways. Second, that Marxism was expunged from American society during the McCarthy era is only evidence of the coercive effect of an intolerant system; similarly, Soviet Russia was obviously an experiment in communism, albeit a terrible one. Third, for many reasons Marx’s critique is valuable and sheds insight upon American society as a method of analysis, whether or not the economic and legal particularities are themselves true.

Another theme is that the movement suffers from elitism. This view is that the Critical scholars, while clamoring for transformation and the masses, benefit from the status quo through their enthroned tenures in academia.<sup>91</sup> They talk the talk but do not walk the walk. Related to this claim is that they utilize an abstruse techno-babble that is totally inaccessible to the laymen, “a private jargon whose drumbeats numb the mind.”<sup>92</sup> These arguments are unconvincing because the relative position of scholars in society does not mean they cannot attack it from “inside the system.” Scholars like Paul Gabel have shown a clear commitment to social transformation and community activism. Duncan Kennedy and Mark Kelman both have advocated restructuring the law school curriculum so as to make the students more capable of effecting social change.<sup>93</sup> The claim about jargon does seem valid, but it is no more technical than orthodox legal speak. Perhaps the jargon is complex

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<sup>90</sup> Phillip E. Johnson, “Do You Sincerely Want to Be Radical,” 36 *Stanford L. Rev.* 247, 262 (1984)

<sup>91</sup> *Ibid.*, 262.

<sup>92</sup> Louis B. Schwartz, “With Gun and Camera Through Darkest CLS-Land,” 36 *Stanford L. Rev.* 413, 439 (1984).

<sup>93</sup> *Ibid.*, 413.

because the ideas are new, and regardless not every Critical scholar writes in that manner. One need not read the ones that do.

A final superficial critique is that Critical analysis is a negative exercise of the academic razor. The project chops down rights without providing anything to replace them. A right-less system would resemble that of Stalinism or Nazi Germany, and law-abiding citizens would be shipped off to concentration camps. Tushnet calls this the “Stalinism” argument and addresses it in the essay we examined above. The simplest response to the claim is that the removal of rights in these states did not cause the deaths so much as the maniacal leaders. Rights deny the influence of the personality of leadership. We are too quick to attribute the most awful behaviors to people who for the most part want to get along. Tushnet deals with this argument more extensively in his essay and it will not be repeated here.<sup>94</sup>

## B. Deep Criticisms

There are some deeper criticisms that do penetrate closer to the heart of the Critical assessment of rights. These include the importance of rights to minorities, the presence of reifications within CLS scholarship itself, the dangers of a rights shift towards groups and communities, the flexibility of liberal rights, and the absence of solutions.

The danger for minorities of attacking the liberal rights regime is similar to that expressed about communism by blacks in the U.S. and black Africans in South Africa during apartheid. Reducing the experience of different minorities to a class-based system of oppression robbed them of ability to address the concerns of their particular group.<sup>95</sup> Rights may be useful to minority groups even though they do not benefit the entire system. Patricia Williams underscores this point:

For blacks... the battle is not deconstructing rights, in a world of no rights; nor of constructing statements of need, in a world of abundantly apparent need. Rather the goal is to find a political mechanism that can confront the *denial* of need. The argument that rights are disutile, even harmful, trivializes this aspect of black experience specifically, as well as that of any person or group whose vulnerability has been truly protected by rights.<sup>96</sup>

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<sup>94</sup> Tushnet, “An Essay on Rights,” 1364.

<sup>95</sup> See for example, Nelson Mandela’s discussion (writing that “the party saw South Africa’s problems through the lens of class struggle. To them, it was a matter of the Haves oppressing the Have-nots. This was intriguing to me, but did not seem particularly relevant to South Africa”). Nelson Mandela, *A Long Walk to Freedom* (Randburg, South Africa: Macdonald Purnell) 69.

<sup>96</sup> Patricia Williams, *The Alchemy of Race and Rights* (Cambridge: Harvard University Press) 152.

Her words require some explanation. One solution to the rights arguments of the CLS critique is shifting the demand for rights to a demand for “needs.” Instead of saying I have a “right to food,” I should make political noise about “needing” food. Rights discourse will get in the way of that basic reality of *need*. Williams contends that this solution is inadequate and that asking for needs has proven unsuccessful in the black community; the only time the majority listens to its demands is when needs are packaged in poetry and the musical arts and thereby confined to the voice of a sonorous wailing culture.<sup>97</sup> Their needs have been ignored. The conferring of rights, on the other hand, admits their presence as human beings in the social fabric and functions as a rhetorical symbol of an historically “illegitimate” people.<sup>98</sup> A previously invisible minority, now with members capable of imposing correlative duties upon others, suddenly becomes visible and empowered with a voice.<sup>99</sup>

Williams’ argument may be challenged in two ways. First, the invisibility of minority groups that stemmed from the absence of rights would be fixed only temporarily by their acquisition. Unless part of a broader social movement, the rights are really an effort to become “normal” like the majority and attain the status quo. The status quo of rights is an illusion fraught with instability and unpredictability, and will shatter the demands of the minority group into individual atoms. Second, Gabel – who Williams cites in her work – does acknowledge that rights are capable of providing temporary power. The securing of a right is not necessarily considered by Critics to be devoid of meaning, symbolic or otherwise. It just may not be around for long.

A more systematic rebuttal to the CLS rights theses has been offered by David Andrew Price. In his work, “Taking Rights Cynically,” Price argues that several of the central ideas of the movement are unconvincing. He first clarifies that, while Critical scholars do owe a debt to Marxism, their more recent influence has been the legal realist school of the 1920s and 30s. The notion of reification, of the “thingification” of abstract ideas, can be directly traced to scholars such as Felix Cohen and Karl Llewyn.<sup>100</sup> Other concepts such as the subjective and contradictory nature of the law were also developed by the realists. What separates the movement from the realists is their denial of the value of social sciences in resolving problems of decision-making and a pessimistic view about the status quo.<sup>101</sup>

Grounding the CLS theory in accepted legal thought does not prevent Price from attacking the emphasis on contradiction and false consciousness. He observes that few

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<sup>97</sup> Ibid., 151.

<sup>98</sup> Ibid., 154.

<sup>99</sup> Ibid., 160.

<sup>100</sup> Price, “Taking Rights Cynically,” 279.

<sup>101</sup> Ibid., 280.

liberal rights promoters believe that the law is flawless or perfect, and that contradiction does not make it impossible for legal rules to “accord with an individual rights.”<sup>102</sup> Legal regimes are “imperfect human institutions...and must continually be elaborated further and revised in response to new situations.”<sup>103</sup> Attempts are made to back up this claim with a superficial analysis of contract law, but the result is unconvincing for a few reasons. The Critics do not claim that imperfection results in the pernicious effects of capitalism. Indeed, on their emphasis on change and transformation, imperfection is a guiding aspect of their scholarship. The imperfection of the law is not the problem; it is rather the notion that certain aspects of the law, such as rules and standards, of imbalance and indeterminacy, are not *capable* of being perfected within the liberal rights regime. The contradictions inherent in the system will inevitably and perpetually keep rights functioning as they are, as passivizing instruments of the status quo, rather than assisting in social transformation. Price’s contention that “life is not perfect” does not seem a scholarly argument.

His critique of false consciousness, the mistaken belief that the system is beneficial, proceeds in a different vein.<sup>104</sup> Price notes that it is possible for legal norms, such as racism, to aid the formation of social norms. He cites the legal desegregation in the American South as an example that not all aspects of the law are legitimating and unjust. His more “persuasive” counter-thesis, as he calls it, is the fact that “when people are victims, they usually know it” and legal doctrine is “not the reason why” they would *not* know it.<sup>105</sup> False consciousness, in his view, is not capable of blurring the reality of victimhood. Neither of these basic points would be denied by the Critical scholars we examined above, but they would be qualified. Gabel noted the ability of rights to provide momentary gains in power in a broader social movement. Desegregation rights may *not* be legitimating and may have helped blacks approach the status quo, but these rights could not by themselves transcend the status quo. It is also true that victims generally know they are victims and that they are capable of protesting victimizing laws. But even though history is “replete” with such acts of disobedience, it is also possible that the law makes it confusing for them to recognize the extent of their plight.<sup>106</sup> False consciousness’ vulnerability in CLS criticism is rather that it is

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<sup>102</sup> Ibid., 286.

<sup>103</sup> Ibid., 288.

<sup>104</sup> Price defines false consciousness as “the erroneous belief that one is benefiting from the current system.” Ibid.

<sup>105</sup> Ibid., 291.

<sup>106</sup> The more persuasive argument about false consciousness actually comes from Duncan Kennedy, writing within the movement. See Duncan Kennedy and Peter Gabel, “Roll Over Beethoven,” 42 (explaining that “[o]ne of the things that identifies us as part of the ‘bad’ aspect of the radical tradition is that we treat false consciousness as a reified structure. What we really mean by false consciousness is, we can see a pattern; it is a patterned thing”).

itself a reified concept, an abstraction that has been thingified within the Critical movement.<sup>107</sup>

Price's most penetrating insight is that there is danger in an overemphasis on communitarianism. Tushnet, Kelman, and Gabel all noted the ability of rights to subvert transformative causes. For Tushnet, the overemphasis on negative, individual rights is that group *needs* are ignored. Kelman observed that the Hohfeldian tradition of seeing groups as comprised of particular individuals accomplishes the same effect. The thrust of their ideas is that there needs to be a shift towards communities and groups. Price observes that liberal rights provide voluntary opportunities for community by leaving individuals free to exercise their own choices, which is preferable to the coercive implications of group rights. "Those who value communal experience can seek it in a liberal society," Price explains, while "those who value distance can seek that."<sup>108</sup> The CLS concern with the ability of the law to *impose* communities ignores the importance of voluntary choices. Individual rights provide security and, feeling secure, individuals can develop relationship with others.<sup>109</sup>

The argument is a poignant one and it is not easy to counter from the Critical perspective. Most people would support voluntary choices and free will over being coerced into accepting something. But this is the essence of Kennedy's fundamental contradiction between individual freedom and the affirming quality of groups. Price's critique also suffers from the fact that Critical scholarship delves deep into substantive areas of the law and choices, but also must be examined from without. A central concern is with transformation of institutions and society. The voluntary choices – and CLS scholars would probably contest the assertion that there are *purely* voluntary choices – permitted by the liberal rights regime prevents effecting change. Even Price admits this,<sup>110</sup> but, unconvinced that change helps most people, he would rather keep the system as it is.<sup>111</sup> His contention that individuals need personal security is also strange; as social animals, humans can derive security from entering into groups rather than casting themselves into the wilderness alone. It is too strong to suggest that individual autonomy is a prerequisite for mutuality.<sup>112</sup>

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<sup>107</sup> Ibid.

<sup>108</sup> Price, "Taking Rights Cynically," 299.

<sup>109</sup> Ibid., 300.

<sup>110</sup> Price writes "it is true that a system of individual rights inevitably limits the possibility for change and community under liberalism." Ibid., 300.

<sup>111</sup> He explains that "the infirm and the needy" may most fear change because they are the most "vulnerable." Ibid., 298.

<sup>112</sup> This point was made by Ed Sparer in his "friendly critique" of the CLS movement. Ed Sparer, "A Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement," 36 Stan. L. Rev. 509, 550 ("Concern for autonomy, the underlying value of the classical democratic liberties, is inherent to the search for mutuality") (1984).

## Part IV. Conclusion

One of the most troubling aspects of the Critical Legal Studies movement is that its dismantling of rights discourse can leave a do-gooder floundering in space. If rights are unstable, legitimate the status quo, subvert political movements, reify abstract ideas into blinding things, and atomize us into egoistic individuals, should we scrap them? Is civil rights lawyering dead? Former labor activist Ed Sparer, for example, has warned that teaching critical legal theory could be:

simply one more law school factor in the decisions of students once concerned with social change to pursue corporate careers. What, after all, can the student do as a lawyer in the face of monumental, overpowering, and all-pervasive injustice other than pursue the same buck that everybody else does?<sup>113</sup>

But this statement is somewhat paternalistic and denies the ability of students to accept bad news. Learning that the law is full of contradictions is not a surprise and it is frankly helpful to find a theory that explains them.<sup>114</sup> Sparer's trepidation is akin to saying that we should not tell engineering students about the coming water crisis in Los Angeles County because all that engineers have done in the past was pump water from a different state and made things worse. Learning to be deeply skeptical about rights does not prevent students from coming up with solutions on their own. In identifying the problem they can help solve it.<sup>115</sup> Skepticism about rights also does not mean that the movement has invalidated law on the whole; Critical scholarship suggests that society needs law.

Sparer is right to point to the need for praxis in the movement. Gabel and Duncan Kennedy admit to the use of rights as possibly advancing social transformation.<sup>116</sup> They can be incorporated into a movement as legal "pegs" to be used in hoisting up a cause.<sup>117</sup> Numerous other scholars have presented complex theories about how to incorporate democratic decision-making and transformation into society. Roberto Mangabeira Unger,

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<sup>113</sup> *Ibid.*, 573.

<sup>114</sup> For example, the parol evidence rule, which defines what evidence may be admitted in determining the validity of a contract is controverted by a number of exceptions that do admit the evidence. Unfortunately, the exceptions tend to favor the stronger party.

<sup>115</sup> Kelman justifies the Critical approach as capable of shaking up the system. See Mark Kelman, "Trashing," 36 *Stan. L. Rev.* 293, 321 (1984) (writing that "trashing is above all a technique of seeing (and undermining) illegitimate power in the most comprehensible and immediate institutions I see – the law schools where I've studied and worked").

<sup>116</sup> See Peter Gabel and Duncan Kennedy, "Roll Over Beethoven," 30.

<sup>117</sup> See Peter Gabel and Duncan Kennedy, "Roll Over Beethoven," 30.

for example, developed a rights scheme to incorporate the ideals of Critical scholarship.<sup>118</sup> But these various “blueprints” for an ideal society suffer from the same vagueness and gaps in reasoning that plague other liberal projections of an idealized future, and require certain basic agreements about human values that are infinitely disputable.<sup>119</sup> The visions fall victim to the same razor of academic inspection that the Critics themselves apply to Dworkin<sup>120</sup> and Rawls.<sup>121</sup>

An assessment of the various solutions proposed by Critical scholars and their sympathizers could be the subject of an entirely different work. The point is that it would be inaccurate to describe Critics as cynics or naysayers. The sheer diversity of the movement precludes such a description and the scholars do present solutions. Their insights into the legitimating aspects of rights also does not encourage one to discard them entirely. Rather, I think the scope of their critique is to pay very, very close attention to the ability of rights to induce numerous effects of power and inhibit transformation.

At its worst, insistence upon external change can be caused by dissatisfaction in one’s own life. The Stalins and Hitlers that liberals properly fear were probably pressed from this mould. But in certain circumstances the demand for change is caused by an injustice in the social fabric. Homeless, poverty, racism, and group suffering seem to fit into this category, and these realities are a primary concern of the Critics. It is not a coincidence, I feel, that all conflict is about change.<sup>122</sup> The Critical scholars’ concern with change and transformation represents a candid confession that conflict is integral to our society. Instead of cowering behind a wall of individualism, they rightfully argue that we should run willingly into the fray and embrace it.

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<sup>118</sup> These included immunity rights (for resisting domination), destabilization rights (for disrupting institutions), market rights (for claims to divisible social capital, but not property rights), and solidarity rights (for encouraging the good stuff of communities). Allan C. Hutchinson and Patrick J. Monahan, “Law Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought,” 36 *Stan. L. Rev.* 199, 232 (1984).

<sup>119</sup> Tushnet writes that “blueprints invariably lead to a number of rhetorical traps.” Tushnet, “An Essay on Rights,” 1398.

<sup>120</sup> Alan Hunt finds Dworkin unable to escape from the “internal” view of law and “seeing the law through the eyes of judges and lawyers.” This results in normative assumptions that distort the analysis.

Alan Hunt, “The Critique of Law: What is ‘Critical’ about Critical Legal Theory?” in Peter Fitzpatrick and Alan Hunt, *Critical Legal Studies*, 10-11.

<sup>121</sup> Tushnet observes that Rawls’ “Theory of Justice”, when applied to liberal rights, still cannot prevent their pernicious effects. Tushnet, “An Essay on Rights,” 1364.

<sup>122</sup> Mark Anstey, *Managing Change Negotiating Conflict* (Cape Town, South Africa: Juta & Co., Ltd., 2d Ed. 1999) 3. Anstey adds that “momentous change is now an ongoing feature of human life.”

## Bibliography

1. Altman, Andrew. Critical Legal Studies: A Liberal Critique. Princeton, NJ: Princeton University Press, 1990.
2. Anstey, Mark. Managing Change Negotiating Conflict. Cape Town, South Africa: Juta & Co., Ltd., 2d Ed., 1999.
3. Boyle, James. Critical Legal Studies. Aldershot: Dartmouth Publishing Co. Ltd., 1992.
4. A. Buchanan, Marx and Justice, 50-85, from course reader.
5. Cotterrell, Roger. "Power, Property and the Law of Trusts." In Peter Fitzpatrick and Allen Hunt, Critical Legal Studies. Oxford: Basil Blackwell, reprint 1990.
6. Dworkin, Ronald. Taking Rights Seriously. Cambridge: Harvard University Press, 1977.
7. Gabel, Peter and Duncan Kennedy. "Roll Over Beethoven." 36 Stanford L. Rev. 1 (1984).
8. Gabel, Peter and Paul Harris. "Building Power and Breaking Images: Critical Legal Theory and the Practice of Law." In Allan C. Hutchinson, Critical Legal Studies.
9. Hutchinson, Allan C. Critical Legal Studies, Totowa, New Jersey: Rowman & Littlefield, 1989.
10. Hutchinson, Allan C. and Patrick J. Monahan. "Law Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought." 36 Stan. L. Rev. 199, 232 (1984).
11. Alan Hunt, "The Critique of Law: What is 'Critical' about Critical Legal Theory?" in Peter Fitzpatrick and Alan Hunt, Critical Legal Studies.
12. Johnson, Phillip E. "Do You Sincerely Want to Be Radical?" 36 Stan. L. Rev. 247 (1984).
13. Kelman, Mark. A Guide to Critical Legal Studies. Cambridge, MA: Harvard University Press, 1987.
14. Kelman, Mark. "Trashing." 36 Stan. L. Rev. 293, 321 (1984).
15. Kennedy, Duncan. "The Structure of Blackstone's Commentaries." In Allan C. Hutchinson, Critical Legal Studies 139-140.
16. Mandela, Nelson. A Long Walk to Freedom. Randburg, South Africa: Macdonald Purnell, 1994.
17. McLellan, D. Karl Marx: Early Texts 85-114 and Robert C. Tucker, ed., The Marx Engels Reader 382-391. (In Course Reader)
18. Price, David Andrews. "Taking Rights Cynically: A Review of Critical Legal Studies." 48 Cambridge L.J. 271 (1989).
19. Reader's Digest Oxford Complete Wordfinder. London: Reader's Digest Assoc., 1993.
20. Schwartz, Louis B. "With Gun and Camera Through Darkest CLS-Land." 36 Stanford L. Rev. 413, 429 (1984).
21. Sparer, Ed. "Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement." 36 Stan. L. Rev. 509, 557 (1984).
22. Thomson, Judith Jarvis. The Realm of Rights (1990).
23. Tushnet, Mark. "Symposium: A Critique on Rights: An Essay on Rights." 62 Tex. L. Rev. 1363, 1364 (1984).
24. Waldron, Jeremy. Nonsense Upon Stilts. London: New York Meuthen, 1985.
25. Williams, Patricia. The Alchemy of Race and Rights. Cambridge: Harvard University Press, 1997.