http://www.law.cornell.edu/wex/critical_legal_theory

CRITICAL LEGAL THEORY

CRITICAL LEGAL STUDIES: AN OVERVIEW

Critical legal studies (CLS) is ***a theory*** **that challenges and overturns accepted norms and standards in legal theory and practice. Proponents of this theory believe that logic and structure attributed to the law grow out of the power relationships of the society. The law exists to support the interests of the party or class that forms it and is merely a collection of beliefs and prejudices that legitimize the injustices of society.** The wealthy and the powerful use the law as an instrument for oppression in order to maintain their place in hierarchy. **The basic idea of CLS is that the law is politics and it is not neutral or value free. Many in the CLS movement want to overturn the hierarchical structures of domination in the modern society and many of them have focused on the law as a tool in achieving this goal.** CLS is also a membership organization that seeks to advance its own cause and that of its members.

CLS was officially started in 1977 at the conference at the University of Wisconsin-Madison, but its roots extend back to 1960 when many of its founding members participated in social activism surrounding the Civil Rights movement and the Vietnam War. Many CLS scholars entered law school in those years and began to apply the ideas, theories, and philosophies of post modernity (intellectual movements of the last half of the twentieth century) to the study of law. They borrowed from such diverse fields as social theory, political philosophy, economics, and literary theory. Since then **CLS has steadily grown in influence and permanently changed the landscape of legal theory.** Among noted CLS theorists are Roberto Mangabeira Unger, Robert W. Gordon, Morton J. Horwitz, Duncan Kennedy, and Katharine A. MacKinnon.

Although CLS has been largely a U.S. movement, it was *influenced to a great extent by* European philosophers, such as nineteenth-century German social theorists *Karl Marx*, *Friedrich Engels*, and Max Weber; Max Horkheimer and

Herbert Marcuse of the Frankfurt school of German social philosophy; the Italian *marxist* Antonio Gramsci; and *poststructuralist* French thinkers Michel Foucault and Jacques Derrida, representing respectively the fields of history and literary theory. CLS has borrowed heavily from Legal Realism, the school of legal thought that flourished in the 1920s and 1930s. Like CLS scholars, legal realists rebelled against accepted legal theories of the day and urged more attention to the social context of the law.

CLS includes several subgroups with fundamentally different, even contradictory, views: feminist legal theory, which examines the role of gender in the law; critical race theory (CRT), which is concerned with the role of race in the law; **postmodernism**, a critique of the law influenced by developments in literary theory; and a subcategory that emphasizes political economy and the economic context of legal decisions and issues.

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http://cyber.law.harvard.edu/bridge/CriticalTheory/critical2.htm

Critical Legal Studies Movement

A self-conscious group of legal scholars founded the Conference on Critical Legal Studies (CLS) in 1977. Most of them had been law students in the 1960s and early 1970s, and had been involved with the civil rights movement, Vietnam protests, and the political and cultural challenges to authority that characterized that period. **These events seemed to contradict the assumption that American law was fundamentally just and the product of historical progress**; instead, **law seemed a game heavily loaded to favor the wealthy and powerful.** But these events also suggested that grassroots activists and lawyers could produce social change.

Fundamentally convinced that law and politics could not be separated, the founders of CLS found a yawning absence at the level of theory. How could law be so tilted to favor the powerful, given the prevailing explanations of law as either democratically chosen or the result of impartial judicial reasoning from neutral principles? Yet **how could law be a tool for social change, in the face of *Marxist* explanations of law as mere epiphenomenal outgrowths of the interests of the powerful?**

Hosting annual conferences and workshops between 1977 and 1992, CLS scholars and those they have influenced try to explain both why legal principles and doctrines do not yield determinate answers to specific disputes and how legal decisions reflect cultural and political

values that shift over time. They focused from the start on the ways that law contributed to illegitimate social hierarchies, producing domination of women by men, nonwhites by whites, and the poor by the wealthy. **They claim that apparently neutral language and institutions, operated through law, mask relationships of power and control. The emphasis on individualism within the law similarly hides patterns of power relationships while making it more difficult to summon up a sense of community and human interconnection**. Joining in their assault on these dimensions of law, CLS scholars have differed considerably in their particular methods and views.

Many who identify with the critical legal studies movement resist or reject efforts to systematize their own work. They seek to express claims of textual ambiguity and historical contingency in their own methods. Influenced by post-modernist developments in cultural studies, these critical scholars prefer episodic interventions to systematized theories. Some critical scholars press hard on a particular line of argument, and then shift away from it in order to avoid treating the argument itself as a kind of fetish or talisman.

Some critical scholars adapt ideas drawn from Marxist and socialist theories to demonstrate how economic power relationships influence legal practices and consciousness. For others, the Frankfurt School of Critical Theory and its attention to the construction of cultural and psycho-social meanings are central to explaining how law uses mechanisms of denial and legitimation. **Still others find resonance with postmodernist sensibilities and deconstruction, notably illustrated in literary and architectural works. Some scholars emphasize the importance of narratives and stories in devising critical alternatives to prevailing legal practices**. Many critical legal scholars draw upon intellectual currents in literature, pop culture, social theory, history, and other fields to challenge the idea of the individual as a stable, coherent self, capable of universal reason and guided by general laws of nature. In contrast, argue critical scholars, individuals are constituted by complex and completing sources of ideology, social practice, and power relationships.

Despite their variety, CLS scholars commonly:

1. seek to demonstrate the indeterminacy of legal doctrine and show how any given set of legal principles can be used to yield competing or contradictory results;
2. undertake historical, socioeconomic and psychological analyses to identify how particular groups and institutions benefit from legal decisions despite the indeterminacy of legal doctrines;
3. expose how legal analysis and legal culture mystify outsiders and work to make legal results seem legitimate; and

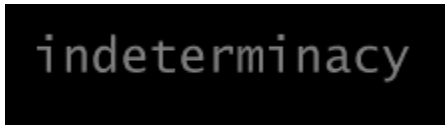
4. elucidate new or previously disfavored social visions and argue for their realization in legal and political practices in part by making them part of legal strategies.

Some critical legal scholars turned to a **critique of rights** as their primary subject.

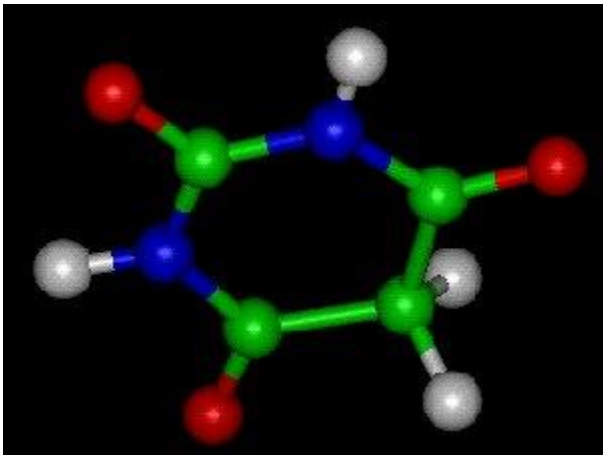
Indeterminacy

Legal principles and doctrines are said to be indeterminate in two ways. First, the rules in force contain substantial gaps, conflicts, and ambiguities. Critical theorists argue that existing gaps, conflicts and ambiguities are not anomalies or exceptions but are widely present even in simple cases. Two different rules may be available for resolution of a particular dispute without any obvious reason to favor one over the other. For example, an owner who withdraws substantial water from her land to sell to others, and as a result, undermines the support for the surface of the land, can claim an absolute right to withdraw the water from her land at the same time that her neighbors can claim a right to the support of their land and protection against the nuisance of unreasonable land use. Which of these rules should govern? How should "reasonable land use" be defined? These are typical, familiar problems in the open questions posed by legal analysis of disputes.

Legal indeterminacy also arises because of conflicts in the underlying norms. Such norms include stability and predictability but also fairness and utility. The first pair point toward the consistent application of prior decisions while the second set often counsel against the application of precedent or the creation of exceptions. It is almost always possible to find some doctrine that affords authority for the normative value promoted by each competing party in a given case. In the limited set of cases where no obviously relevant doctrine exists, one can always argue for a change in the law, and find available many conventional legal arguments in support of change, such as the call to modernize outmoded case law.



Critical theorists do not trace indeterminacy to an absence of structure. Instead, they **argue that the indeterminacy results from specific kinds of structures that run throughout law**. For example, critical scholars identify **a small, easily stated set of arguments and counterarguments are used repeatedly in briefs and judicial opinions**. Like a carpenter with a limited set of tools or a singer with a small repertoire of songs, the lawyer or judge uses and reuses arguments about rights and fairness, social utility and efficiency, ease or difficulty in administering a given rule or standard, and competence and incompetence of legislative and judicial bodies. A plaintiff may object that a defendant's conduct undermines a right to security and thereby summon judicial involvement to guard against harm. The defendant then would combine a defense based on her right to freedom of action with an



argument against judicial initiative in an area unaddressed by the legislature or beyond judicial capabilities. These stock arguments can be disentangled and reassembled in other combinations, in other cases. **The ability of courts to select from among predictable arguments and key arguments is a key feature of law's indeterminacy**.

To demonstrate the indeterminacy of legal doctrine, the critical scholar often adopts a method, such as structuralism in linguistics or deconstruction in literary theory, to unearth a deep structure of categories and tensions at work beneath the surface layer of legal talk. The aim is to develop a grammar or guide to those underlying tensions and to the techniques by which they are masked, expressed, and deployed. For example, **Duncan Kennedy maintains that various legal doctrines revolve around a structure of binary pairs of opposed concepts, each of which has a claim upon intuitive and formal forms of reasoning. Self and other, private and public, subjective and objective, freedom and control are examples of such pairs**. Some critical scholars demonstrate the influence of opposing concepts on the development of legal doctrines through history. Kennedy himself acknowledges that the psychological and social dimensions of the judicial role given even a critically inspired judge a sense of constraint, and experience vividly described by some sitting judges.

Recent work by critical legal theorists brings these methods and ideas to international and comparative law, to global markets and labor relations law, and to identity and cultural politics. 🕮 Another focus of critical theorists has long been legal education itself. Instead of replicating existing social power relations, critical legal classrooms -- Crits insist -- could instead be an arena for political analysis and struggle; instead of perpetuating the pretenses of reason and legitimacy in the legal system, law school classes should expose the indeterminacy of legal doctrine. **Law students can be trained simply to be tools of the existing social order or instead become social critics and activists**. Critical theorists, concerned that law students will simply internalize the predictable patterns of legal decisionmaking that benefit those who already have power and privilege, instead seek to teach law students to unbundle and reframe legal arguments on behalf of those with less power.

Law's Contribution to Group Inequality (or "Tilt")

Despite the indeterminacy of legal doctrine, **critical theorists argue that actual judges and legislatures produce predictable results.** Using historical, socioeconomic, and psychological analyses, the scholars try to unearth these predictable patterns and relate them to larger patterns of power and privilege. Thus, Morton Horwitz argued that 19th century American courts changed legal rules to spur economic competition and assist the mercantile elite's search for power and wealth.. Joseph Singer recounts how 19th and 20th century courts remade property rules to permit owners to exclude people from access to commercial and other enterprises precisely as social struggles for racial inclusion grew.. Feminist legal theorists document how traditional privacy protections for families preserved patterns of male dominance, but legal reforms perpetuated the deeper structures that assign altruism to the home and selfish competitivism in the marketplace,

all disguised under pictures of natural differences between the public and private spheres. Alan Freeman advanced the view that law reforms aimed at racial discrimination consistently implemented the perspective of perpetrators rather than the perspective of victims.

Mystification and Legitimation

How can law appear fair and objective and nonetheless predictably tend to perpetuate the power of the powerful? Critical theorists suggest that psychological dynamics, such as denial provides one explanation. Mark Kelman used the psychological concept of denial to explain legal treatment of criminal law that ignore or disguise insoluble issues of intention, free will, and determinism. **A related source is the effect of law's use of abstractions that remove legal issues into a realm of concepts remote from the facts and patterns of actual power**. Thus, the "right" of an employer to remove a worker who speaks in a way that bothers the employer is treated as an instance of private property, and the abstract right is cast in a way to appeal to everyone who also wants power over property. Perhaps most importantly, critical legal scholars depart from the legal realists who inspired many of them by denying that progressive social change can be easily engineered through changes in legal rules. First, law itself helps to constitute people's consciousness, entrenching notions like the divides between public and private and market and government so deeply as to make it seem natural and beyond discussion or change. **Law itself supplies many of the methods and rationales that society uses to treat racial, class, and gender inequalities as legitimate or inevitable. As a result, law cannot be itself a simple tool of progressive change**.

New Visions

Some critical theorists nonetheless elaborate constructive efforts to use law in pursuit of progressive politics. Roberto Unger calls for **"deviationist doctrine,"** which can involve transferring arguments and practices that are familiar and accepted in one context to a different context where they could produce dramatic change. The idea of "workplace democracy" is a general example; the wide appeal of democratic norms and practices in politics are transferred to the workplace in hopes of redistributing power. Another form of deviationist doctrine amplifies counterprinciples or subordinated values already present in legal doctrines, such as the dimensions of solidarity and responsibility for others that are present in contract and property law doctrines, although usually subordinated to the values of self-reliance and competition.[6]

In one work, Unger proposed a three-point program of governmental reform taking the principles of social and economic liberalism to their logical conclusions; this "super-liberalism" would include the establishment of a rotating capital fund, making capital temporarily available to teams of workers under governmentally-set conditions, and the creation of a system of rights to safeguard "individual security without immunizing large areas of social practice against the struggles of democracy."

Other critical theorists are much more wary of large, structural proposals either for institutional arrangements or for forms of legal argument. They suggest reliance on individuals' ethical sensibilities and existential responsibilities in order to resist roles, rules and institutional practices that shield oppression and unfairness from challenge.

Opposition

Opponents argue that critical legal approaches in the classroom and in legal scholarship undermine respect for law and dedication to law's aspiration to be independent of politics or irrationality. Owen Fiss, for example, warns that both critical legal studies and economic approaches to law risk killing law as an arena for reasoned debate about social ideals. Daniel Farber and Suzanna Sherry treat critical legal studies as a simplistic and failed assault on liberal principles and Enlightenment notions of truth. Paul Carrington generated an intense debate among legal academics when he published an article suggesting that critical legal scholars have a "substantial ethical problem as teachers of professional law students;" because their cynicism could rob students of the "courage to act on such professional judgment as they have have acquired" or even result in "the skills of corruption: bribery and intimidation."

Some critics charge that CLS work hampers progressive political movements by challenging the idea of the subject and human agency. Others view CLS work as unimportant or failing because of inadequate development of specific policies, strategies, or constructive direction. **CLS is faulted for implying that simply changing how people think about law will change power relationships or constraints on social change, although a fair reading indicates that "crits" simply treat changes in thought as a necessary but insufficient step for social change**. Feminists and **Critical Race Theorists** object that conventional critical legal studies employs a critique of rights that neglects the concrete role of rights talk in the mobilization of oppressed and disadvantaged people. Robert Gordon has responded with a warning that even such mobilization efforts must be done with an experimental air and "full knowledge that there are no deeper logics of historical necessity that can guarantee that what we do now will be justified later."

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http://cyber.law.harvard.edu/bridge/CriticalTheory/rights.htm

legal theory: critical theory

Critical Perspectives on Rights

Scholars participating in the Conference on Critical Legal Studies developed a critique of rights characteristic of mainstream legal thought. Feminists and critical race theorists, although showing some sympathy for this critique, nonetheless responded with defenses of rights that diverge from both critical legal studies and mainstream legal thought.

The Critique of Rights

The critique rights developed by critical legal theorists has five basic elements:

1. The discourse of rights is less useful in securing progressive social change than liberal theorists and politicians assume.
2. Legal rights are in fact indeterminate and incoherent.
3. The use of rights discourse stunts human imagination and mystifies people about how law really works.
4. **At least as prevailing in American law, the discourse of rights reflects and produces a kind of isolated individualism that hinders social solidarity and genuine human connection**.
5. **Rights discourse can actually impede progressive movement for genuine democracy and justice**.

1. ***Rights should not be credited with progressive political advances***.

In "***The Critique of Rights***," **47 SMU Law Review**, Mark Tushnet **emphasizes the first theme in arguing that progressive lawyers overestimate the importance of their work because of an inflated and erroneous view of the role of the Supreme Court in advancing progressive goals in the 1960s.** That period of judicial leadership was aberrational in American history and also more reactive and pro-active, depending on mass social movements rather than lawyers' arguments. Legal victories also are often not enforced; judicial victories do not obviate the need for ongoing political mobilization. Legal victories may have ideological value even where they lack material effects; a court victory can mark the entry of previously excluded groups into the discourse of rights which holds ideological importance inside the nation. Nonetheless, legal and political cultures inside the United States can also produce large consequences from judicial losses for relatively powerless groups. Losing a case based on a claim of rights may in some cases lead the public to think that the claims have no merit and need not be given weight in policy debates.

Robert Gordon similarly argues that even noted legal victories for blacks, for labor, for the poor, and for women did not succeed in fundamentally altering the social power structure. "The labor movement secured the vitally important legal right to organize and strike, at the cost of fitting into a framework of legal regulation that certified the legitimacy of management's making most of the important decisions about the conditions of work." Robert Gordon, "Some Critical Theories of law and Their Critics," in The Politics of Law 647 (David Kairys ed., third edition, Basic Books: New York, 1998). Moreover, rights are double-edged, as demonstrated in the content of civil rights. "Floor entitlements can be turned into ceilings (you've got your rights, but that's all you'll get). Formal rights without practical enforceable content are easily substituted for real benefits. Anyway, **the powerful can always assert counterrights (to vested property, to differential treatment according to "merit," to association with one's own kind) to the rights of the disadvantaged.** "Rights" conflict—and the conflict cannot be resolved by appeal to rights." Id., at 657-68.

The content of contemporary American rights in particular must be understood as failing to advance progressive causes. *Current constitutional doctrine, for example, heavily favors so-called negative liberties (entitlements to be free of government interference) over positive liberties (entitlements to government protection or aid) and thus reinforces the pernicious "public/private" distinction*. That distinction implies that neither government nor society as a whole are responsible for providing persons with the resources they need to exercise their liberties, and indeed, any governmental action risks violating private liberties. Current freedom of speech doctrine accords protection to commercial speech and pornography, limits governmental regulation of private contributions to political campaigns, and forbids sanctions for hate speech. Such rules operate in the often-stirring language of individual freedom, but their effect is more likely to be regressive than progressive.

2). ***Rights are indeterminate and incoherent***.

As Mark Tushnet puts it, "nothing whatever follows from a court's adoption of some legal rule (except insofar as the very fact that a court has adopted the rule has some social impact — the ideological dimension with which the critique of rights is concerned.) ***Progressive legal victories occur, according to the indeterminacy thesis, because of the surrounding social circumstances."*** **At least as they figure in contemporary American legal discourse, rights cannot provide**

answer to real cases because they are cast at high levels of abstraction without clear application to particular problems and because different rights frequently conflict or present gaps. Often, judges try to resolve conflicts by attempting to "balance" individual rights against relevant "social interests" or by assessing the relative weight of two or more conflicting rights. These methods seem more revealing of individual judicial sensibilities and political pressures than specific reach of specific rights. Moreover, central rights are themselves internally incoherent. **The right to freedom of contract, for example, combines freedom with control: people should be free to bind themselves to agreements: the basic idea is private ordering. But the law's reliance on courts to enforce contracts reveals the doctrine's grant of power to the government to decide which agreements to enforce, and indeed what even counts as an agreement**. Even more basically, freedom of contract implies that the freedom of both sides to the contract can be enhanced and protected, and yet no one stands able to know what actually was in the minds of parties on both sides. Resort to notions of objective intent and formalities replace commitment to the freedom of the actual parties.

3. ***Legal rights stunt people's imagination and mystify people about how law really works***.

The very language of a right, like the right to freedom of contract, appeals to people's genuine desires for personal autonomy and social solidarity, and yet masks the extent to which the social order makes both values elusive, write Peter Gabel and Jay Fineman, in Contract Law as Ideology, in The Politics of Law 496,498 (David Kairys, ed., third edition, Basic Books: New York 1998). **Contract law in fact works to conceal the coercive system of relationships with widespread unfairness in contemporary market-based societies. The system of rights renders invisible the persistent functional roles such as landlord, tenant, employer, and individual consumer of products produced by multinational conglomerates, that themselves reflect widely disparate degrees of economic and political power**. Contract law is a significant feature in the massive denial of experiences of impotence and isolation and the apology for the system producing such experiences. Similar points can be made about other areas of law. **Property rights, for example, imply promotion of individual freedom and security, and yet owners' property rights are precisely the justification afforded to the control of others and arbitrary discretion to wreak havoc over the lives of tenants, workers, and neighbors.**

Contract law artificially constrains analysis by focusing on a discrete promise and a discrete act of reliance rather than complex and often diffuse communications and inevitable reliance by

people on others than. Courts and legislatures recognize to some extent the power of these real features of people's lives but the language of legal rules often leads decisionmakers to feel powerless to act on such recognition. Workers at a U.S. Steel plant in Youngstown, Ohio and their lawyers tried to buy the plant after the company announced plans to close it. Federal trial and appellate judges acknowledged that the plant was the lifeblood of the community but nonetheless concluded that contract and property law provided no basis for preventing the company either from shutting down the plant or refusing to negotiate to sell it to the workers. Local 1330, *United Steel Workers v. United States Steel Corp*. 631 F.2d 1264 (6th Cir. 1980). Gabel and Feinman conclude: "it was not the law that restrained the judges, but their own beliefs in the ideology of law. **By recognizing the possibilities of social responsibility and solidarity that are immanent in the doctrine of reliance, they could have both provided the workers a remedy and helped to move contract law in a direction that would better align the legal ideals of freedom, equality, and community with the realization of these ideals in everyday life."** Id.,at 509. But the ideology of law made the judges feel they could not do so.[more reading: Staughton Lynd, the fight Against Shutdowns: Youngstown's Steel Mill Closings (Single Jack Books: San Pedro, CA 1982); Joseph William Singer, ***The Reliance Interest in Property***, 40 Stanford Law Rev. 611 (1988)]

4. ***Conventional rights discourse reflects and produces isolated individualism and hinders social solidarity and genuine human connection***.

The individualism pervading American law calls for "the making of a sharp distinction between one's interests and those of others, combined with the belief that a preference in conduct for one's own interests is legitimate, but that one should be willing to respect the rules that make it possible to coexist with others similarly self-interested. The form of conduct associated with individualism is self-reliance. This means an insistence on defining and achieving objectives without help from others (i.e., without being dependent on them or asking sacrifices of them." Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685(1976). **As implemented in law, individualism means that there are some areas within which actors (whether actual individuals or groups) have total arbitrary discretion to pursue their own ends without regard to the impact of their actions on others. A legal right evokes the idea of a domain**

protected by law within which the individual is free to do as he or she pleases, and the arrangements ensuring that freedom are fair, neutral, and equitable. Judges must facilitate private ordering and avoid regulating or imposing their own values on the aggregate of individual choices. The state thereby polices all boundary crossings by private individuals and contributes to the pretense that individual, private, self-interested values are all that matter.

Yet people need others as much as they need their own freedom. Altruism has roots as deep as individualism, and altruism urges sacrifice, sharing, cooperation, and attention to others. Rights help people deny the equal tug of individual freedom and social solidarity on people's hearts and assert that legal rules resolve the tension by assuring that people relate to one another through the recognition and respect for each others' separate, bounded spheres of self-interest. **Yet this very mode of thinking renders it more difficult for individuals — and for the legal system — to act upon altruism, social cooperation, and relationships of generosity, reciprocity, and sacrifice**. The legal structure of rules, and the abstracted roles (owner, employee etc.) upon which it depends makes it more likely that people feel helpless to counteract existing hierarchies of wealth and privilege or any perceived unfairness.

Robert Gordon explains: "This process of allowing the structures we ourselves have built to mediate relations among us so as to make us see ourselves as performing abstract roles in a play that is produced by no human agency is what is usually called (following Marx and such modern writers as Sartre and Lukacs) reification. It is a way people have of manufacturing necessity: they build structures, then act as if (and genuinely come to believe that) the structures they have built are determined by history, human nature, and economic law." Robert Gordon, Some Critical Theories of law and Their Critics, in the Politics of Law 650 (David Kairys, ed., third edition, Basic Books: New York 1998).

5. ***Rights discourse actually can impede genuine democracy and justice***.

Rights discourse contributes to passivity, alienation, and a sense of inevitability about the way things are. Even when relatively powerless groups win a legal victory, the rights involved can impede progressive social change. The victory may make those who won it complacent while galvanizing their opponents to do all they can to minimize the effects of the ruling. Conflicting rights or alternative interpretations of the same rights are

always available. **Conservatives can deploy the indeterminacy of rights for their benefit. Using the language of rights reinforces the individualistic ideology and claims of absolute power within individuals' spheres of action that must be undermined if progressive social change is to become more possible**. The language of rights perpetuates the misconception that legal argument is independent of political argument and social movements. Through rights language, those in power often grant strategic concessions of limits sets of rights to co-opt genuinely radical social movements. Progressives who use the language of rights thus lend support to the ideology they must oppose.

With the notable exception of Roberto Unger, who has proposed an alternative regime with immunity rights, destabilization rights, market rights, and solidarity rights, **most critical legal scholars argue that rights do not advance and may impede political and social change. Rights are indeterminate and yet conceal the actual operations of power and human yearnings for connection and mutual aid. Contemporary legal and constitutional practice are less likely to provide avenues for challenging unfair social and economic hierarchies than political movements**, and a focus on law reform can divert and disengage those political movements.

Responses by Critical Race Theorists and Feminist Legal Theorists

Although critical race theorists and many feminist legal theorists acknowledge their indebtedness to critical legal studies, they reject in part or in whole the critique of rights. The existing system of legal rights, they concede, is unstable and often manipulated to advance the interests of the wealthy and powerful. But, as illustrated by Kimberle Crenshaw's discussion, **rights can be defended and reconstructed; the critique of rights neglects the historical potential of rights in the real lives of people of color and women.**

The argument offered by critical race theorists and feminists to defend and reconstruct rights has several elements. First, **although the establishment of legal rights, even if much more enforced than at present, would not eliminate racism and sexism, arguments for and public recognition of rights for persons of color and women do help to combat group-based oppression**. As Richard Delgado rights, "Rights do, at times, give pause to those who would otherwise oppress us; without the law's sanction, these individuals would be more likely to express racist sentiments on the job. It is condescending and misguided to assume that the

enervating effect of rights talk is experienced by the victims and not the perpetrators of racial mistreatment."

Second, **the impact of rights discourses on social psychology is likely, on balance, to be beneficial to minorities and to women**. The organization of human relationships in terms of rights may perpetuate alienation and reinforce artificial distance between people but it at least accords everyone a modicum of respect. And, as a rhetorical rallying cry, rights discourse can both mobilize those who have been oppressed and lend them a greater sense of self-respect and empowerment. Few members of historically disadvantaged groups are deluded by the language of rights into believing that the current distribution of wealth and power is legitimate. The vast majority are able to sustain a "dual consciousness" ◆ recognizing and capitalizing on the revolutionary potential of legal rights while remaining skeptical of the overall social and political order in which rights are currently embedded.

Third, the content and language of rights are malleable, not fixed, and afford an medium through which even the disempowered can claim equal rights to participate in defining their content. Even if it is only the hypocrisy of the powerful to which they appeal, the disempowered can use the language of rights to demand recognition, and by so doing, contribute to reshaping rights themselves. Using rights talk can get some people in the game who have not even been recognized before as players.

Further, for both people of color and women, social solidarity and close connections with others may be less elusive than protection of personal space and boundaries. **Asserting rights as a group can itself enhance solidarity while also assisting individuals in their own personal journey to recognize what they can and should demand for themselves**.

Patricia Williams affords in ***Alchemical Notes: Reconstructed Ideals From Deconstructed Rights***, **22 Harv. Civil Rights-Civil Liberties L. Rev. 401 (1987)** the most eloquent statement combining these kinds of responses following her "Mini-story (In which Peter Gabel and I Set Out to Teach Contracts in the Same Boat While Rowing in Phenomenological Opposition)"(footnotes omitted):

> *Some time ago, Peter Gabel and I taught a contracts class together. Both recent transplants from California to New York, each of us hunted for apartments in between preparing for class and ultimately found places within one week of each other. Inevitably, I suppose, we got into a discussion of trust and distrust as factors in bargain relations. It turned out that Peter had handed over a $900 deposit, in cash, with no lease, no exchange of keys and no receipt, to strangers with whom he had no ties other than a few moments of pleasant conversation. Peter said that he didn◆t need to sign a lease because it imposed too much formality. The handshake and the good vibes were for him indicators of trust more binding than a distancing form contract. At the time, I told peter I thought he was stark raving mad, but his faith paid off. His sublessors showed up at the appointed time, keys in hand, to welcome him in. Needless to say, there was absolutely nothing in my experience to prepare me for such a happy ending.*

I, meanwhile, had friends who found me an apartment in a building they owned. In my rush to show good faith and trustworthiness, I signed a detailed, lengthily-negotiated, finely-printed lease firmly establishing me as the ideal arm's length transactor.

As Peter and I discussed our experiences, I was struck by the similarity of what each of us was seeking, yet in such different terms, and with such polar approaches. We both wanted to establish enduring relationships with the people in whose houses we would be living; we both wanted to enhance trust of ourselves and to allow whatever closeness, whatever friendship, was possible. This similarity of desire, however, could not reconcile our very different relations to the word of law. Peter, for example, appeared to be extremely self-conscious of his power potential (either real or imagistic) as a white or male or lawyer authority figure. He therefore seemed to go to some lengths to overcome the wall which that image might impose. The logical ways of establishing some measure of trust between strangers were for him an avoidance of conventional expressions of power and a preference for informal processes generally.

I, on the other hand, was raised to be acutely conscious of the likelihood that, no matter what degree of professional or professor I became, people would greet and dismiss my black femaleness as unreliable, untrustworthy, hostile, angry, powerless, irrational and probably destitute. Futility and despair are very real parts of my response. Therefore it is helpful for me, even essential for me, to clarify boundary; to show that I can speak the language of lease is my way of enhancing trust of me in my business affairs. As a black, I have been given by this society a strong sense of myself as already too familiar, too personal, too subordinate to white people. I have only recently evolved form being treated as three-fifths of a human, subpart of the white estate. I grew up in a neighborhood where landlords would not sign leases with their poor, black tenants, and demanded that the rent be paid in cash; although superficially resembling Peter's transaction, such "informality" in most white-on-black situations signals distrust, not trust. Unlike Peter, I am still engaged in a struggle to set up transactions at arms' length, as legitimately commercial, and to portray myself as a bargainer of separate worth, distinct power, sufficient rights to manipulate commerce, rather than to be manipulated as the object of commerce.

Peter, I speculate, would say that a lease or any other formal mechanism would introduce distrust into his relationships and that he would suffer alienation, leading to the commodification of his being and the degradation of his person to property. In contrast, the lack of a formal relation to the other would leave me estranged. It would risk a figurative isolation from that creative commerce by which I may be recognized as whole, with which I may feed and clothe and shelter myself, by which I may be seen as equal even if I

am stranger. For me, stranger-stranger relations are better than stranger-chattel.

The unifying theme of Peter's and my experiences (assuming that my hypothesizing about Peter's end of things has any validity at all) is that one's sense of empowerment defines one's relation to the law, in terms of trust-distrust, formality-informality, or rights-no rights (or "needs"). In saying this I am acknowledging and affirming points central to CLS literature: that rights may be unstable and indeterminate. Despite this recognition, however, and despite a mutual struggle to reconcile freedom with alienation, and solidarity with oppression, peter and I found the expression of our social disillusionment lodged on opposite sides of the rights/needs dichotomy.

On a semantic level, Peter's language of circumstantially-defined need of informality, of solidarity, of overcoming distance sounded dangerously like the language of oppression to someone like me who was looking for freedom through the establishment of identity, the form-ation of an autonomous social self. To Peter, I am sure, my insistence on the protective distance which rights provide seemed abstract and alienated.

Similarly, while the goals of CLS and of the direct victims of racism may be very much the same, what is too often missing from CLS work is the acknowledgment that our experiences of the same circumstances may be very, very different; the same symbol may mean different things to each of us. At this level, for example, the insistence of Mark Tushnet, Alan Freeman, and others that the "needs" of the oppressed should be emphasized rather than their "rights" amounts to no more than a word game. It merely says that the choice has been made to put "needs" in the mouth of a rights discourse thus transforming "need" into a new form of right. "Need" then joins "right" in the pantheon of reified representations of what it is that you, I and we want from ourselves and from society.

While rights may not be ends in themselves, it remains that rights rhetoric has been and continues to be an effective form of discourse for blacks. The vocabulary of rights speaks to an establishment that values the guise of stability, and from whom social change for the better must come (whether it is given, taken or smuggled). Change argued for in the sheep's clothing of stability (i.e., "rights") can be effective, even as it

destabilizes certain other establishment values (i.e., segregation). The subtlety of rights' real instability thus does not render unusable their persona of stability.

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The CLS disutility argument is premised on the assumption that rights' rigid systematizing may keep one at a permanent distance from situations which could profit from closeness and informality: ***"It is not just that rights-talk does not do much good. In the contemporary United States it is positively harmful."*** *Furthermore, any marginal utility to be derived from rights discourses is perceived as being gained at the expense of larger issues; rights are pitted against, rather than asserted on behalf of, the agencies of social reform.* ***This reasoning underlies much of the rationale for CLS's abandonment of rights discourse, and for its preference for informality'for restyling, for example, arguments about rights to shelter for the homeless into arguments about the "needs" of the homeless."***

However, such statements about the relative utility of "needs" over "rights" discourse overlook that blacks have been describing their needs for generations. They overlook a long history of legislation against the self-described needs of black people, the legacy of which remains powerful today. While it is no longer against the law to teach black people to read, for example, there is still within the national psyche a deeply, self-replicating strain of denial of the urgent need for a literate black population. ("They're not intellectual," "they can't'"). In housing, in employment, in public and in private life it is the same story: the undesired needs of black people transform them into undesirables or those-without desire ("They're lazy;" "they don't want to'").

For blacks, describing needs has been a dismal failure as political activity. It has succeeded only as a literary achievement. The history of our need is certainly moving enough to have been called poetry, oratory and epic entertainment'but it has never been treated by white institutions as a statement of political priority. *Some of our greatest politicians have been forced to become ministers or blues singers'[F]rom blacks, stark statistical statements of need are heard as "strident," "discordant" and "unharmonious"; heard not as political but only against the backdrop of their estwhile musicality, they are again abstracted to mood and heard as angry sounds.*

For blacks, therefore, 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 genuine vulnerability has been protected by that measure of actual entitlement which rights provide.*

"The black experience of anonymity, the estrangement of being without a name, has been one of living in the oblivion of society's inverse, beyond the dimension of any consideration at all. Thus, the experience of rights-assertion has been one of both solidarity and freedom, of empowerment of an internal and very personal sort; it has been a process of finding the self.

In the following excerpt from ***Making All the Difference: Inclusion, Exclusion, and American Law*** 306-311 (Cornell U. Press: Ithaca 1990), **Martha Minow defends rights while accepting features of the critical legal studies critique**:

Why advance this conception of right, including children's rights, as a vocabulary used by community members to interpret and reinterpret their relationships with one another? It is a clumsy vocabulary; it can never fully express individual experience. Its very claim to communal meanings, its dependence directly and indirectly on official sanctions, and its created past preclude that possibility. Michael Ignatieff advocates a language of needs instead, finding rights language too limited: ***"Rights language offers a rich vernacular for claims an individual may make on or against the collectivity, but it is relatively impoverished as a means of expressing individuals' needs for the collectivity****. It is because money cannot buy the human gestures which confer respect, nor rights guarantee them as entitlement, that any decent society requires a public discourse about the needs of the human person."*

I, too, have criticized rights rhetoric for its impoverished view of human relationships and its repeated assignment of labels that hide the power of those doing the assigning. And I find something terribly lacking in rights for children that speak only of autonomy rather than need, especially the central need for relationships with adults who are themselves entitled to create settings where children can thrive. Rights rhetoric can and should be expressed for its tendency to hide the exercise of state authority, even authority exercised in the name of private freedoms. Rights discourse, like any language, may mislead, seduce, falsely console, or wrongly inflame.

I have the luxury, as a scholar, the step back and criticize a basic tool of legal practice for preserving assumptions about human autonomy that I believe are contrary to social experience and likely to limit social change. Yet when I write a brief, supervise students in their clinical work, or talk to professionals in the trenches, I wonder sometimes whom I am helping and whom I am hurting by criticizing rights. It turns out to be helpful, useful, and maybe even essential to be able to couch a request as a claim of rights - and not just for winning a given case or persuading a particular official to do a good thing but for working to constitute the kind of world where struggles for change can in fact bring about change, and where struggles for meaning and communality can nurture both.

There is something too valuable in the aspiration of rights, and something too neglectful of the power embedded in assertions of another's needs, to abandon the rhetoric of rights. ***That is why I join in the effort to reclaim and reinvent rights.*** *Whether and how to use words to constrain power and questions that should be answered by those with less of it. For this task, rights rhetoric is remarkably well suited. It enables a devastating, if rhetorical, exposure of and challenge to hierarchies of power. In Patricia Williams words, people using the language of rights "impose a respect which places one in the referential range of self and others, which elevates one's status from human body to social being." Law professor Elizabeth Schneider has explained how lawyers and their clients, drawing upon their own experiences, can bring new meaning to legal rules, how they can appeal to legal officials to give force to those meanings, and how they can reflect on the results and develop new visions. Legal vocabulary, including that of rights, can be invested with meanings that challenge power and recover submerged or suppressed experiences. Once constructed and officially embraced, normative language can become loosened from its past uses and turned around to limit its authors, if only through their own shame or courageous self-restraint. For the individual speaker,* ***as Fred Dallmayer puts it, an inherited language is less a collection of preordained meanings than "a means of transgressing factual constellations in the direction of an uncharted future."*** *As a bridge between the world-that-is and alternative worlds-that-might-be, rights claims cannot belong exclusively to any state or set of officials. Those without official roles are equally important to the task of bridging present and future.*

This conception responds both to those who criticized newly articulated rights for lacking objective foundations and to those who criticize rights for their analytic indeterminacy. ***By analogizing rights to language and treating rights rhetoric as a particular vocabulary implying roles and relationships within communities and institutions, this***

approach suggests how rights can be real - without being fixed; and can change - without losing their legitimacy.

The language of rights helps people to articulate standards for judging conduct without pretending to have found the ultimate and unalterable truth. Rights as a language for expressing meaning persists even beyond their use within legal institutions. ***Jean-Paul Sartre's conception of language not as a set of rulebound meanings but as a mode of human action and creative self-expression is helpful here. Similarly, Ludwig Wittgenstein, in his later work, emphasized that the meanings of words are determined by their uses and that their use depends on context, situated in forms of life. Language in these senses is necessarily intersubjective and communal. People use rights and claims to particular freedoms or entitlements to refer to what they perceive as their due, even when the formal legal apparatus has not acknowledged or approved of those perceptions. People often speak spontaneously of rights, far from legal institutions.*** *For example, they may make assertions of entitlement, need, and interest when they collide that the bus stop or on the playground. Children no less than adults can participate in the legal conversation that uses rights to gain the community's attention.*

Rights are hardly neutral. With them, we pick from among a variety of possible legal consequences for human relationships and thereby influence the pattern of existing and future relationships. Claims of rights that call for negotiation, consultation, and discussion in handling disputes demand recognition of each disputant by the other. When the juvenile court sends to the Children's Hearings Project in Cambridge, Massachusetts, parental complaints about "unruly" children, the project staff create settings in which parents and children can negotiate contractual agreements to resolve their disputes and establish procedures for addressing future disputes. This demands that the parents take their children's complaints as seriously as their own.

Interpreting rights as features of relationships, contingent upon renegotiations within a community committed to this mode of solving problems, pins law not on some force beyond human control but on human responsibility for the patterns of relationships promoted or hindered by this process. *In this way the notion of rights as tolls in continuing, communal discourse helps to locate responsibility in human beings for legal action and inaction. Seeing rights as features of relationships may help us reinvent legal activity with a believable aspiration to create communal meanings in a world scarred by justifiable skepticism.*

It would be wrong, however, to ignore the fact that what judges do with law involves power and violence. ***Robert Cover has reminded us that law embeds interpretations of political texts in institutions that exercise the state's monopoly over legitimate violence. People lose money, their children, and even their lives on the basis of judicial judgements****. The hope of law is the discipline these decisions within collective processes, but the government too must remain subject to challenge and check when it claims to act - or refrains from acting - in the name of the community.*

The very act of summoning "community" through a language of rights may expose the divisions within the community - and even beyond it. ***Rights then can be understood as a kind of language that reconfirms the different commitment to live together even as it enables the expression of conflicts and struggles****. The struggle to make meaning of human existence may well demand our separation into groups away from, even antagonistic to, the larger community. If this is the case, then the discourse of rights may be all the more important as a medium for speaking, across conflicting affiliations, about the separations and connections between individuals, groups, and their norms conflict with those countenanced or enforced by the official system.*

At such moments, legal interpretation happens not just in official acts by official actors but also through resistance, compliance, and investment of old forms with new meanings*. Legal interpretations happen when nonofficials seek to hold officials to account, either in terms the officials themselves have offered as rationales or in new terms embodying normative commitments that have not before made their way into the official canon of meaning. Legal language, is never transparent to experience; in constrains and limits what individuals mean even as it conveys a communal meaning. And the communal meaning may well occlude the conflict it resists. Legal meanings pronounced by officials cannot be severed from the violence and power they seek to rationalize; nor can they be reduced to these acts of violence and power. Because private violence can be as bad as official violence, both public and private efforts to craft legal meanings and normative commitments are critical to freedom and to struggles against oppression.*

What happens after the law, after official legal pronouncements good or bad, to rights? Rights pronounced by courts become possessions of the dispossessed. We can listen to rights as a language that contains meaning but does not engender it, as sounds that demonstrate our sociability even while exposing the uniqueness of the speaker. Legal language, like a song, can be

hummed by someone who did not write it and changed by those for whom it was not intended.

Language is nuanced enough to express, "No, that's not what I mean," or even, "There are no words to say what I mean." The language of rights is, or could be, nuanced enough to express, "I am connected to you in my very willingness to observe your boundaries,' or, "I do not belong to your community, but I lay claim to some shared terms in demanding that you respect my separateness." Perhaps people can work through legal interpretation to communicate disjunction, misunderstanding, even the right to avoid conversation. Such work requires context as well as theory, actual settings and ongoing relationships in which discourse is part of a way of life. Beyond our talk of rights we have each other, and the steady burden of learning to live together and apart.