Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement

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For we went . . . despairing
When there was only injustice and no resistance.

For we knew only too well:
Even the hatred of squalor
Makes the brow grow stern.
Even the anger against injustice
Makes the voice grow harsh. Alas, we
Who wished to lay the foundations of kindness
Could not ourselves be kind.

But you, when at last it comes to pass
That man can help his fellow man,
Do not judge us
Too harshly.

Bertolt Brecht[1]

There is, at long last, a "left" in legal academia, equipped with nascent theory.[2] I do not share the consternation with which some of my colleagues greet this development.[3] On the contrary, I welcome it. Indeed, I breathe a sigh of relief and pleasure, for it is possible that we may soon have a legal scholarship which makes rich contributions to, and learns and evolves from, reflection on social life and struggle in the United States.

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1. B. BRECHT, *To Posterity,* in SELECTED POEMS 173, 177 (H.R. Hays trans. 1947).

2. The emergence of this movement reflects and, to some extent, follows comparable developments in other areas of academia. *See generally* THE LEFT ACADEMY (B. Ollman & E. Vernoff eds. 1982).

3. *See, e.g.,* Schwartz, *With Gun and Camera Through Darkest CLS-Land,* 36 STAN. L. REV. 413 (1984).

That such a legal scholarship has not yet emerged, except on the most minor scale, reflects both the newness of the left in the legal academy and the absence thus far of certain battles in which the left must eventually engage. If such legal scholarship does evolve, we will owe much to the small, intrepid group of law professors who today comprise the heart and soul of the "Critical Legal Studies movement."

I do not intend in this essay to present an overview of Critical legal theory or to assess its many important, indeed seminal, contributions to our understanding.[4] Rather, I here comment upon three important, closely related issues raised by much Critical legal scholarship today. These are: (1) the critique of "liberal rights"; (2) the explicit rationalization of negative critique as *the* appropriate route for left scholarship today and the consequent failure to develop—or even self-consciously to work towards—a praxis for radical legal the-

4. The contributions of Critical legal scholars have been extraordinary. Particularly noteworthy are the writings of Alan Freeman, Gerald Frug, Peter Gabel, Robert Gordon, Duncan Kennedy, Karl Klare, William Simon, and Mark Tushnet. I mention these writers in part because aspects of their thinking and writing have been singled out for criticism in this essay but also because their work has enormously affected me as well as legal and social thinking generally. For example, Frug's *The City as a Legal Concept,* 93 HARV. L. REV. 1051 (1980), is *the* leading work in American legal literature on decentralized governmental authority. Duncan Kennedy's seminal contributions are so well-known that I will not bother to repeat the list here. Of very special importance to me, however, has been his refusal "to be quiet" on the subject of why "there is no such thing as the skill of legal analysis in the way most . . . faculty think there is." D. Kennedy, Utopian Proposal or Law School as a Counter-hegemonic Enclave (Apr. 1, 1980) (unpublished manuscript prepared as a dissent to the Report of the Committee on Educational Planning and Development [The Michelman Report], Harvard Law School, May 1982, on file with the *Stanford Law Review*). Until I read Kennedy, I fear I was one of those who "privately snicker(ed)" but did not "dare say so because it's not respectable." *Id.* at 34. Law teachers, law students, and others should find much to reflect on in Kennedy's popular essay, *Legal Education as Training for Hierarchy,* in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 40 (D. Kairys, ed. 1982) [hereinafter cited as THE POLITICS OF LAW].

Karl Klare, in my opinion, is one of the two outstanding labor law theorists in the nation today. (His contributions are exceeded only by those of Clyde Summers.) Insofar as an appreciation of the relation of labor law to the *work processes* in our lives is concerned, Klare's *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941,* 62 MINN. L. REV. 265 (1978), is unmatched.

Alan Freeman's *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine,* 62 MINN. L. REV. 1049 (1978), is, I believe, the most penetrating analysis of Supreme Court doctrine in that area. Peter Gabel, Robert Gordon, William Simon, and Mark Tushnet also are among my favorite "legal" writers. Each has taught me much, even in the pieces with which I most disagree. When one adds to this CLS list the extraordinary work of Roberto Unger, Morton Horwitz, and Paul Brest, plus the work of such Critical scholars and practitioners as are singled out in note 5 *infra,* some idea may be gleaned of how rich a contribution has already been made by the nascent Critical Legal Studies movement.

ory and social movement; and (3) the role of the radical law teacher vis-a-vis her or his students who are to become practicing lawyers.

I will critique what I label the dominant tendency of the Critical Legal Studies (CLS) movement. But perspectives different from the views I criticize have been articulated within the movement, even if they have only thus far emerged in a limited, piecemeal way. These perspectives have been articulated by lawyers and professors heavily involved in social movement practice,[5] but some of those who are within the "dominant" strand are also deeply involved in movement practice.[6] We are heirs to two distinct radical traditions, reflected within CLS, even though the scope of the difference in views within the movement is not clear. My hunch, however, is that the majority of the hundreds who have participated in Critical legal conferences and who are associated with the movement in one way or another are ill at ease with the dominant position.

I write as someone sympathetic to the CLS movement. I do not know yet whether I am a part of it, even though I consider myself a person "of the left."[7] My purpose in this essay is to speak to the

5. Examples include Staughton Lynd (on labor rights), *see* note 31 *infra*; David Kairys (on the right to free speech), *see* note 58 *infra*; Rand Rosenblatt (on welfare rights and entitlements), *see* note 161 *infra*. Gary Bellow, an active participant in the Critical Legal Studies movement, has long been a major exponent of the use of law in social movement practice. That approach has been further exemplified by feminist law professors and lawyers such as Nadine Taub and Elizabeth Schneider. *See* note 161 *infra*. Victor Rabinowitz, a leading radical lawyer, has written eloquently about the two radical traditions in the use of the law in social movement. *See* Rabinowitz, *The Radical Tradition in the Law,* in THE POLITICS OF LAW, *supra* note 4, at 310; *see also* Abel, *A Socialist Approach to Risk*, 41 MD. L. REV. 695 (1982) (on workers' cooperatives).

6. For example, although I discuss William Simon's work on welfare law as being within the movement's "dominant" tendency, *see* text accompanying note 137 *infra,* Simon has devotedly combined an interest in teaching law with practice. *See also* Simon, *Visions of Practice in Legal Thought,* 36 STAN. L. REV. 469 (1984). Another example is Karl Klare. While I criticize Klare's views on "rights," there is no question that his work on labor law is a major theoretical contribution to those who would seek to build decentralized, cooperative work institutions; who would seek to bridge the artificial divisions in "permissive" and "mandatory" bargaining; who would attempt to develop new structures of nonalienated work relationships in the United States. Moreover, Klare has long been devoted to the problems of building movements and is an active participant in the Legal Services Institute, Jamaica Plains, Boston.

7. Mark Tushnet, a leading Critical theorist, in an essay on Lawrence Tribe wrote, "I suppose my comments will inevitably be taken as the view from the left. I prefer, however, to think of them as coming from, say, the north—from a direction unrelated to the conventional liberal-conservative continuum." Tushnet, Book Review, 78 MICH. L. REV. 694, 694 (1980). I prefer, in this essay, to struggle with the point of view of the American "left," whether conventionally or unconventionally defined.

movement and to those who have a friendly interest in it in order to persuade them (if I can) of the need for new directions.

Part One considers certain aspects of the Critical legal attack on "liberal rights theory." The "rights" notions and theories which are criticized by Critical legal scholars cover a broad spectrum, ranging from "fundamental," "universal," and/or "inalienable" rights through varying statutory rights and the "rights" created by welfare entitlement programs. Part One considers, in particular, the implications of the Critical attack on certain "universal" and "inalienable" rights.

That attack, as we shall see, is not directed simply at the theories used to justify rights. Rather, it is primarily an attack on the notion of legal rights as basic instruments of human freedom and welfare. On this point, I believe that Critical legal theorists have built an argument of great force and yet one which encompasses dangerous distortion. This attack is both ahistorical (despite the Critical legal insistence on historically conditioned analysis) and reactionary. It is sometimes blind to the significance of legal protections for certain fundamental human rights. This attack leads not to "transformative" social activity but to a nihilistic perspective which can encourage repression and tyranny.

Part Two of this essay critiques the dominant strain in Critical legal theory on the concept of "praxis": the relationship of articulated legal and social theory to social change. The shortcomings in Critical legal theory on this subject stem directly from the sweep of its attack on liberalism, rights, and rights theory. The emphasis on negative critique (which some CLS theorists argue should be the *exclusive* concern of CLS theory) is the converse of the comprehensive rejection of contemporary rights and institutions. The affirmative potential of these rights, the potential on which we can build, is buried, hidden, and denied. For example, the attack by some Critical theorists on entitlement theory, which in many ways parallels the attack on fundamental rights, precludes an appreciation of how entitlement programs can be used to enhance social movement, rather than to legitimize the status quo and promote hegemony. Even some of the Critical theorists who emphasize the need for praxis are, as a result of this attack on rights, at a loss as to where to turn for serious social reconstruction.

As an introductory matter, some clarification of my view of "inalienable" human rights may be helpful. I believe that certain fundamental human rights are inalienable. They exist regardless of

whether or not they have been legally recognized. These rights—the "individual" right to free speech and dissent and to develop and express an independent conscience, including the right to free religious expression; the "solidarity" to associate with one's fellow humans for common endeavor, including the right of working people to organize in unions of their own choice—are part of ourselves as human beings, each one and all of us.

What is the source of these rights? Is it the Declaration of Independence? The text of the Constitution? The Declaration of the Rights of Man? Statements of positive law? Judicial recognition of moral consensus? Utilitarian theory? Socialist theory? A "natural law" proclaimed by God? In my view, such sources are merely guides to an understanding of whether there has been legal or intellectual recognition of these inalienable rights and what the range of argument has been. But certain fundamental human rights are inalienable, regardless of the arguments for legal recognition and regardless of whether there exists a "higher" natural law which human beings are obliged by God to obey. These rights are part of our potential, what we might be as living persons, even if they do not express what we are or do at any given moment in our lives. The recognition that they are part of each one of us underlies the concept of the "equality" of human beings, whether national, racial, or sexual.

We cannot give these rights away—we cannot "alienate" them—any more than we can give away a part of ourselves. We certainly can deny them to ourselves and to others. But when we do, we deny a part of ourselves and a part of others. We can act as if these rights do not exist; we can stop dissenting and thinking critically; we can stop developing our own free consciences; and we can stop associating with our fellow humans in common struggle. But if we stop expressing these parts of our humanity, we become "alienated" human beings. We would be suppressing a piece of ourselves or acceding to the efforts of others to suppress us.

What is the relation of law to inalienable human rights? On the one hand, because they are a part of us, no law, regime without law, or social structure can fully suppress our inalienable rights, as long as we choose to act on them. The young Staughton Lynd, then practicing his vocation of historian, eloquently observes that even in the concentration camps, people demonstrated their human capacity to be free moral agents—to express individual conscience, dissent, and

human solidarity.[8] As Victor Frankl put it, "Freedom is not something we 'have' and therefore can lose; freedom is what we 'are.' "[9]

On the other hand, law coupled with particular social institutions and structures, has often been used to suppress our inalienable rights, to brutally suppress people as people, and to deny all but the most ultimate of opportunities to be free. But the converse is also true. The need for recognition of inalienable human rights can be seen in the historical experiences of diverse modern societies of all types, both capitalist and socialist.

If we learn nothing else from twentieth century life, we should learn that the human values of autonomy and solidarity require legal expression and protection. To be sure, the very law which is necessary to protect inalienable human rights can serve to lull and confuse people and to legitimize oppression. This contradictory relationship of legal rights to human freedom and community serves only to demonstrate that legal rights, by themselves, are insufficient for their announced purposes. It is the relationship of social movement and struggle to the use of legal rights which is determinative. In short, legal recognition of the inalienable human rights is a necessary, even though manifestly insufficient, protection against oppression.

I would like to be clear on what I am not attempting to do with regard to inalienable human rights. I am *not* attempting to define:

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8. For a compelling portrait of free moral struggle and human solidarity in the concentration camps, see T. DES PRES, THE SURVIVORS: AN ANATOMY OF LIFE IN THE DEATH CAMPS (1976). Viktor Frankl, the noted existential therapist who was himself a victim of a Nazi camp, has written of the camp:

> Does it not prove that man cannot escape the destiny of his social surroundings? Our answer is: it does not. But if not, where does man's inner freedom remain? Consider his behavior—is he still spiritually responsible for what is happening to him psychically, for what the concentration camp has "made" of him? Our answer is: he is. For even in this socially limited environment, in spite of this societal restriction upon his personal freedom, the ultimate freedom still remains his: the freedom even in the camp to give some shape to his existence. There are plenty of examples— often heroic ones—to prove that even in these camps men could still "do differently"; that they did not have to submit to the apparently almighty concentration-camp laws of psychic deformation. In fact the weight of evidence tends to show that the men who typified the character traits of the camp inmates, who had succumbed to the character-forming forces of the social environment, were those who had beforehand given up the struggle spiritually. The freedom to take what attitude they would toward the concrete situation had not been wrested from them; they had themselves withdrawn their claim to use that freedom. For whatever may have been taken from them in their first hour in camp—until his last breath no one can wrest from a man his freedom to take one or another attitude toward his destiny. And alternative attitudes really did exist.

V. FRANKL, THE DOCTOR AND THE SOUL 96–97 (1967) (footnote omitted).

9. V. FRANKL, *supra* note 8, at 97.

(1) what the full range of such rights is; (2) where one draws the line between the legal protection afforded such rights and other, more transitory and/or waivable legal protections; or (3) what the legal expressions of such rights should fully cover (e.g., whether such protections are appropriate for corporations, for aesthetic values, or for government incentives which affect their use). I do not discuss the "hard" cases and problems, of which there are many (though they become easier when you are willing to "err" in favor of dissent, conscience, and association, rather than against them). I do not discuss how easy it is for the abstract *right* to dissent to become an empty, formalistic facade. (It is very easy. The task of social transformation is as important to the right to dissent as the right to dissent—and actual dissent itself—is to social transformation.) In sum, this essay does not purport to be an exercise in first amendment law, though it might easily be confused with such an exercise. It is, however, in part, a defense of the need for first amendment law in the struggle for social change and against oppression, and, additionally, the amendment's importance in relation to a concept of what we are and can be as human beings.

In addition, I am *not* suggesting that Critical legal theorists do not believe in the values of human self-determination, speech and dissent, and association. They do. My criticisms instead focus on the tendency on the part of some Critical theorists to disparage the notions of "legal," "inalienable," and "universal" rights as a means of addressing those values, together with the references by some Critical legal theorists to the "egoistic" nature of such rights. Liberal rights *theory* may be incoherent, but certain liberal rights themselves need be defended, not disparaged—a need which sometimes seems to be overlooked in the sweeping attacks made by some Critical theorists on liberal rights and liberal rights theory. I enjoy a sense of optimism concerning the future of Critical Legal Studies. Future debate, I believe, will enhance an appreciation of how indispensable legal rights are as well as how such legal expressions can be used to justify an oppressive status quo. In addition, there is good reason to believe that the CLS movement will, more and more, search for theory which aids social advancement. In fact, the beginnings of such efforts may already be in place.[10]

It may be that the "times they are a-changing" for the work of Critical legal scholars, and that a central thrust of their work will

10. *See* examples cited in note 5 *supra* and note 161 *infra*.

turn to the problems of social movement and change. Much of the negative critique of the CLS scholars has been of great value. I look forward to the grand social contributions that may be made by these intrepid men and women when they turn their imagination, radicalism, and intellectual guts to the affirmative task of making a new social life.

I. THE CLS CRITIQUE OF LIBERALISM, RIGHTS, AND RIGHTS THEORY

A. *The Setting for the CLS Critique*

1. *General approaches to "liberalism" and "rights."*

The Critical legal perspective on rights and rights theory flows in part from a general critique of liberalism by Critical legal scholars. But what is "liberalism"? The definitions of liberalism used by Critical scholars are, on the one hand, extremely broad, and on the other hand, they are framed and focused so as to lead the ensuing debate along lines which shape both its content and outcome.

In its broadest expression, liberalism is defined as "the dominant ideology in the modern Western world, an ideology that pervades our views of human nature and of social life."[11] It is not confined to the "liberal-conservative" debate in American politics, though it includes both strands of that debate. Liberalism is so fundamental to our thinking "that it can be contrasted only with radically different ways of understanding the world, such as that based on medieval thought or that derived from modern critiques of liberalism itself."[12]

More specifically, for purposes of much CLS critique, liberalism—the dominant Western ideology—is seen as viewing the world in terms of a series of contradictory dualities and values such as reason and desire; freedom and necessity; individualism and altruism; autonomy and community;[13] and subjectivity and objectivity.[14] These contradictory values are reflected in virtually all of our common law and statutory concepts and rights.[15]

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11. Frug, *supra* note 4, at 1074.

12. *Id.* (footnotes omitted).

13. *Id.* at 1075. For an extensive analysis of the dichotomy of individualism and altruism, as expressed in American private law, see Kennedy, *Form and Substance in Private Law Adjudication,* 89 HARV. L. REV. 1685 (1976).

14. *See* Tushnet, *Legal Scholarship: Its Causes and Cure,* 90 YALE L.J. 1205 (1981).

15. For example, the National Labor Relations Act is said to simultaneously serve the goal of "industrial peace" and the goal of protecting working people's right to organize and strike. *See* Klare, note 18 *infra.*

Liberal apologists, according to CLS, seek to hide the conflicts inherent in such dualities and values, and do so in part through law.[16] Thus, for example, because liberal legal rights are premised on contradictions, they allow courts and other decisionmakers to move from one result to another without any consistent normative theory. Results are rationalized retrospectively.[17] Given the inability of liberal theory to resolve the contradictions inherent in the dualities which it embodies, the assertion of the legal rights created under liberal theory cannot, and does not, transform the oppressive character of our social relations.[18]

The thrust of CLS critique is devoted, in turn, to the exposure of the contradictions in liberal philosophy and law. This strand of the Critical legal critique is quite powerful and makes a much-needed contribution. In my view, however, it suffers from two general problems. First, the critique lends itself to exaggeration. This observation may be appreciated by considering what happens when Critical legal theorists themselves make tentative gestures at the social direction in which we should move. Such gestures, even from the most vigorous critics of liberalism, do not escape from liberalism and, indeed, liberal rights theory. Nevertheless, those gestures have great merit, particularly *because* of their use of liberal rights. For example, Frug, while expounding his vision of the city as a site of localized power and participatory democracy, attacks liberal theory and its dualities as an obstacle to his vision.[19] At the same time, without

16. Consider, for example, the first of several definitions of "liberalism" given by Kennedy in his commentary on Blackstone's Commentaries:

> For the moment, I hope it is enough to define it [liberalism] very roughly in terms of a splitting of the universe of others into two radically opposed imaginary entities. One of these is "civil society," a realm of free interaction between private individuals who are unthreatening to one another because the other entity, "the state," forces them to respect one another's rights. In civil society, others are available for good fusion as private, individual respecters of rights; through the state, they are available for good fusion as participants in the collective experience of enforcing rights. A person who lives the liberal mode can effectively deny the fundamental contradiction.

Kennedy, *The Structure of Blackstone's Commentaries,* 28 BUFFALO L. REV. 209, 217 (1979).

17. *See generally* Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship,* 90 YALE L.J. 1063 (1981).

18. *See generally* Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law,* 4 INDUS. REL. L.J. 450, 468–80 (1981).

19. *See* Frug, *supra* note 4, at 1074–80. Frug asks, "Why are cities today governed as bureaucracies, rather than as experiments in participatory democracy? . . . [T]he answer must be sought in the development of our liberal ideology." *Id.* at 1073. Later, however, Frug concedes a role for "economic, social, or political factors or even other ideas in the development of cities" and states that he is simply raising an additional aspect. *Id.* at 1078.

acknowledging the significance of what he is doing, Frug relies on the liberal image of law and rights to defend the potential of his vision. He writes:

> It should be emphasized that participatory democracy on the local level need not mean the tyranny of the majority over the minority. Cities are units within states, not the state itself; cities, like all individuals and entities within the state, could be subject to state-created legal restraints that protect individual rights. Nor does participatory democracy necessitate the frustration of national political objectives by local protectionism; participatory institutions, like others in society, could still remain subject to general regulation to achieve national goals. The liberal image of law as mediating between the need to protect the individual from communal coercion and the need to achieve communal goals could thus be retained even in the model of participatory democracy.[20]

My point is that both liberal *and* radical theory (including Critical legal theory) must balance competing values. Of course, the same problem affects any statement of "rights" as well. There is no way of generalizing a resolution of all *potentially* contradictory values in all situations. This impossibility, however, does not necessarily implicate the virtues of and need for rights themselves. Nor does it mean that we should not struggle to alter the political and social context in which rights operate or to win preference for certain rights over others.

The significance of the CLS overemphasis on and exaggeration of contradictions is that it increases the tendency on the part of some Critical legal theorists to emphasize negative critique because they are overwhelmed by the very deficiencies they criticize in liberal legal theory.[21] At the same time, some Critical legal theorists lose an ap-

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20. *Id.* at 1072 (footnotes omitted).

21. There is an interesting converse of the first problem and it presents another difficulty with the manner in which "liberalism" is portrayed as incoherent and contradictory. This problem has to do with what some Critical scholars see as the "fundamental" contradiction of liberalism: the contradiction between the goals of individual freedom and the need for community.

Community enhances individual freedom, and, at the same time, poses an inherent and apparently unresolvable threat to it. *See* Kennedy, *supra* note 16, at 113 (quoted in text accompanying note 101 *infra*). Tushnet describes this fundamental contradiction as one existing between "subjectivity" and "objectivity." Tushnet, *supra* note 14, at 1206. Brest echoes Kennedy's language, adding that our world is one with an "essential and irreconcilable tension between self and other, between self and *self*. This world is not entirely of our own making." Brest correctly states that he and Kennedy are talking about "the human predicament." Brest, *supra* note 17, at 1108. So, too, is Tushnet. Tushnet, *supra* note 14, at 1222–23.

For detailed comments on this fundamental tension—and it is a fundamental tension—see my discussion in notes 101–07 *infra* and accompanying text. Here, I want only to indicate that this fundamental contradiction is not peculiar to "liberalism" as that term is used by

preciation of the potential contribution of rights, a potential contribution which coexists with their negative potential. Exaggeration thereby promotes an "undialectical" approach despite Critical theory's emphasis on dialectics.

The second problem with the Critical legal attack is that its definition of "liberalism" unduly affects the nature of the debate over the alleged incoherencies. To illustrate, suppose that, instead of using the definition(s) quoted earlier, we used this definition by Baker:

> Liberalism is an elusive label. . . . As used in this Article, liberalism has normative, institutional, and theoretical content. The key normative content, which is the most persistent and fundamental aspect of liberalism, exalts the values of human equality, self-determination, and self-realization—that is, of liberty and autonomy. Historically, the institutional content of liberalism has included capitalist or market economic forms, bureaucratic organizational forms, and, at its best, democratic political forms. The theoretical content attempts to explain and justify liberal institutions in terms of liberal norms, and sometimes to explain and justify liberal norms themselves. In this theoretical component, liberalism faces the impossible task of explaining how its key values of liberty and autonomy are consistent with a social structure that in reality controls and limits human choice.[22]

This definition also stresses a contradiction: the contradiction between the values of equality, self-determination, and self-realization as expressed in historic liberal rights and the various institutional structures of the market and bureaucracy which undermine and/or reshape those values. Following this definition, the thrust of social critique would be to analyze this contradiction for the purpose of altering institutional structures and thereby both preserving and enhancing—giving new life and meaning— to historic liberal rights and values. Put differently, social critique would be directed toward developing: (1) the theory whereby liberal values and rights fuse with decentralized cooperative or socialist institutions; and (2) the practice which leads to the realization of such theory, even while it helps shape the theory.

Critical scholars. Whether or not this contradiction was absent in previous historical periods, it is indeed fundamental enough to constitute a pervasive (and *perhaps* unsolvable) problem for even the most radical nonliberal perspective (under anyone's definition) today. Yet, insofar as it is used within the debate over "liberalism" and "rights"—as distinguished from our consideration of the human condition—it confuses the political and philosophical debate over "liberalism" and "rights." The "fundamental contradiction" is not simply a reflection of "liberalism," however defined.

22. Baker, *The Process of Change and the Liberty Theory of the First Amendment,* 55 S. CAL. L. REV. 293, 304 (1981).

The practical difference between the critique thereby provoked and much of the current Critical legal approach is dramatic. The negative-critique-only school within Critical legal theory is obviously inconsistent with the social critique which flows from the above definition. Also, even the most reform-minded analyses of the dominant approach would be significantly affected. With regard to Frug's participatory city, for example, one could write about the need for localized participatory democracy without making liberalism or rights theory the central theoretical problem. Within a perspective so developed, it would not be rights theory which stands as the obstacle to new, decentralized, participatory power but those real people whose class, institutional, and social interests are opposed to such a reordering and who use rights theory to protect their existing privileges. Rights, however, could be used to attack privilege as well. And, as Frug implies, rights of various sorts could function to protect the competing concerns within a democratic participatory structure.

I think that many who are within, or associated with, the Critical Legal Studies movement endorse and follow something closer to the definition and analysis of liberalism that Baker suggests than they do the view advanced by the dominant school. What then holds the "dominant" school to its course? Principally, I believe, it is the view that some Critical legal theorists have of liberal rights themselves. In this view, the fundamental liberal rights of liberty and equality do not serve the values of human self-realization and true equality; rather, they serve the purposes of the market and bureaucratic institutions which provide the institutional setting of liberalism. They do not provide the contradiction to the institutional setting that Baker's definition asserts. Indeed, such liberal rights, including the "fundamental" ones, are seen as having downright improper or bad connotations.

For example, while speaking about Dworkin and "other modern writers in the liberal tradition," Peter Gabel asserts that they "defend a liberty that is only an anxious privatism and a legal equality that conceals practical domination."[23] For Gabel, the focus of liberal writers on individual liberties and rights diverts attention from the real issues. Rather than concentrate on universalistic morality about rights, Gabel suggests that

> The alternative to this way of thinking about the relationship between justice and human needs is to understand the meaning of justice in concrete practical terms instead of in abstract legal terms.

23. Gabel, Book Review, 91 HARV. L. REV. 302, 315 (1977).

> If we are to think about justice from the point of view of people's concrete social experience, we must begin by penetrating the false and massified "institutional morality" that Dworkin has elevated to the status of a natural law, and focus on the details of a production process that directly or indirectly infects every aspect of our lives—from the quality of work, to the material products we produce, to the kind of social relationships available to us, to the organization of our families, and even to our sense of ourselves as social beings. In our world this production process operates very destructively, separating us from ourselves and from each other so efficiently that we forget what our true needs are by driving our memory of them into an oblivion which psychoanalysis calls "the unconscious." It is only by transforming these processes themselves rather than by tinkering with a legal system that legitimates them that we can create the possible conditions for a concrete justice. . . . They can emerge only from an open and decentralized socialism that has yet to appear in developed form anywhere in the world.[24]

While stressing a concept of justice which is concerned with concrete human needs, Gabel's critique goes on to analyze the function of liberal rights in legitimating and romanticizing the "requirements of free market capitalism."[25] Rights theory conceals the "practical domination" in concrete relations that should be the concern of justice, says Gabel. The "atomistic" point of view, "a normative theory which insists on the radical liberty of the individual,"[26] serves a distinct purpose. "For it was long ago discovered that if people could be persuaded to avert their eyes from reality and look unto the hills, they might accede to their domination with gratitude."[27]

Even where a right may serve a legitimate function, many Critical legal theorists argue that no right can be "universal" or "inalienable," as asserted by liberal theory. Rights are not universal, say the Critical legal theorists. They make sense or not in different societies at different times. Their very meaning is historically conditioned.[28] It thus follows that one cannot say that every person has an "inalienable right" to "free speech" or to "equal concern and respect" or to "organize with one's fellow workers." Such statements are seen as merely universalistic pietisms.

My purpose is not to pigeon-hole individual scholars but to single out these criticisms of rights as motifs for purposes of discussion and debate. Indeed, there are differences with regard to the CLS critique

24. *Id.* at 314–15 (footnotes omitted).
25. *Id.* at 309.
26. *Id.*
27. *Id.* at 302.
28. *See, e.g.*, Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1025 (1981).

of rights theory even within the dominant branch of Critical legal scholarship. But I do wish to note the way in which one leading Critical legal theorist, Mark Tushnet, during the course of his critique of Lawrence Tribe, recasts the issue raised by discussion of particular rights:

> Someone who learned political philosophy from Professor Tribe, or from reading law reviews, would be surprised to learn that the central issue in political philosophy today, as it has been for at least a century, is not whether or to what extent freedom of expression is required, not whether abortion is morally permissible, not whether remedial action that takes race explicitly into account is justified. In many ways, indeed, those issues are shadows cast by the real one that has animated philosophical discussion: put bluntly, the real issue is which social-economic system, capitalism or socialism, justice demands.[29]

I did not learn my political philosophy from Professor Tribe or the law reviews. I am not—in my view—a liberal, politically or philosophically, but a socialist who shares the belief of Gabel and other Critical legal theorists in "an open and decentralized socialism that has yet to appear." The real issue to me, and certainly one which animates much philosophical discussion today (as it has for over a century), is whether we *can* separate the conception of socialism as well as the struggle to achieve it from such questions as "whether or to what extent freedom of expression is required."[30] Put another way, what kind of justice will be achieved and what kind of life promoted in a socialist socioeconomic system which does not recognize and defend certain inalienable rights of each human being, including the rights of free speech and political dissent and the rights of working people to join in mutual associations (i.e., unions) of their own choice and control?

2. *The Klare-Lynd-Kennedy exchange on the rights of working people.*

To better illustrate the issues that are involved in the dominant strand of Critical legal scholarship's rights critique, I examine an unusual example of sharp and direct disagreement on rights theory by three Critical scholars: Karl Klare, Staughton Lynd, and Duncan

29. Tushnet, *supra* note 7, at 696 (footnote omitted).

30. It should be noted that other Critical legal scholars have sensitively examined the relation of racial justice and women's autonomy to class and the socioeconomic system and challenged the notion that the former are but "shadows" cast by the latter. *See, e.g.,* Freeman, Book Review, 90 YALE L.J. 1880, 1889–95 (1981); Polan, *Toward a Theory of Law and Patriarchy,* in THE POLITICS OF LAW, *supra* note 4, at 294–95.

Kennedy.[31] The exchange concerns the role of "liberal rights theory"—and, as I read the exchange, "rights" themselves—in labor law, and what the appropriate position of Critical legal scholars should be with regard to the rights of working people.

Duncan Kennedy's four-page essay, *Critical Labor Law Theory: A Comment,* both summarizes the Klare and Lynd positions and argues in favor of the Klare position. The views Kennedy succinctly presents are at the core of the Critical legal attack on liberal rights.

Kennedy begins by noting that both Klare and Lynd agree on a great deal. This agreement, he believes, is enough to constitute an emergent Critical labor theory. Both papers "are concerned with the coopting and demobilizing effect of the rules of modern labor law, and with the way labor law as ideology operates to provide rationales for the course of antilabor decisionmaking under the existing labor statutes."[32] Both focus critically on the justifications for the existing rules, and both imply "criticism of the dissolution of left labor theory into the prevailing conservative ideology of American capitalism."[33] Both pretty much agree up to this point but thereafter present "quite strikingly different Critical strategies. . . . The choice between them is fraught with implications."[34]

The first alternative, presented by Lynd, is "to criticize labor law doctrine on the ground that it is false to the basic ideals and norms of liberal political theory—to argue against labor law doctrine on the ground that it fails to do what liberal theory says all law should do, namely, guarantee people their rights."[35]

Klare's alternative is to understand labor law as

> an instance of the incoherence of liberal theory, and of its conservative bias in practice, rather than an instance of betrayal of liberal ideals. Klare argues that industrial pluralist ideology attempts to adapt earlier forms of rights theory to modern conditions, and that

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31. *See* Kennedy, *Critical Labor Law Theory: A Comment,* 4 INDUS. REL. L.J. 503 (1981); Klare, *supra* note 18; Lynd, *Government Without Rights: The Labor Law Vision of Archibald Cox,* 4 INDUS. REL. L.J. 483 (1981).

32. Kennedy, *supra* note 31, at 504.

33. *Id.*

34. *Id.*

35. *Id.*. Kennedy continues:

> The lie of labor law, then, is that it pretends to guarantee people their rights while in fact sacrificing them to the illegitimate interests of management and union bureaucracy. . . . [L]abor law has to do not with the rights of individual workers, but with labor peace through the creation of a viable but limited union counterforce to management. In Lynd's view . . . what we need is a view "which begins *and ends* with workers' rights."

Id. at 504-05.

it fails because there exists no coherent rights theory to be adapted.[36]

What does Kennedy say of these alternatives? Despite his acknowledgement that there are strong arguments for Lynd's point of view on workers' rights— including the fact that a positive program of social struggle and improvement in the workers' situation may emerge from it—Kennedy opposes "liberal rights theory" as "wrong" and "incoherent."[37]

Suppose, as my colleague Sylvia Law suggests, the word "limited" were substituted for "wrong," and "imperfect" for "incoherent," leaving the assertion that "liberal rights theory is 'limited' and 'imperfect.' " The thrust of the criticism, of course, would then shift markedly. Would it be more accurate? Not strong enough to take into account radical critique? Suppose we said: "Liberal rights theory is not only limited and imperfect; it is often contradictory and certainly cannot adequately reflect the needs of human freedom until individual rights are placed within the context of a community life that nourishes individuals capable of acting upon their freedom." Would this more adequately take into account the Kennedy and Klare critique without destroying the validity of the "workers' rights" notion?

Unfortunately, even such a restatement does not appear to satisfy the purpose of the critique. For one thing, this restatement would not serve the "delegitimating" function quite as well as Kennedy's actual formulation because my suggested revision leaves something of liberal rights to respect. On the other hand, it would have the advantages Kennedy concedes to "liberal rights" for purposes of a continuing social struggle.

Kennedy, however, adds a second reason for agreeing with Klare

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36. *Id.* at 505. Kennedy continues:

> We study labor law not to detect deviations from the line dictated by a genuine adherence to the ideal of workers' rights, but to demystify all attempts to justify the status quo by manipulation of the empty liberal categories. For example, Klare points out that coherent reasoning from liberal premises requires one to be clear whether the entity one is talking about is public or private, since all kinds of consequences flow from the characterization. But liberal theory can't tell us whether labor unions are public or private. The theory provides good arguments either way, as well as for a hybrid classification. In consequence, labor ideologists can and do manipulate liberal rhetoric, switching unions back and forth, between public and private, as legitimation needs vary from case to case.

Id. at 505 (footnote omitted).

37. *Id.* at 506. In support of this conclusion, Kennedy cites, among other works, Marx's *On the Jewish Question* and *Critique of the Gotha Programme.* I discuss these works at notes 44–74 *infra* and accompanying text.

rather than Lynd: "[T]he left doesn't need a counter-theory that *ends* with rights" because "our program for the future must emerge dialectically from our past, rather than as a deduction from it."[38] This point causes me some concern. Kennedy is no longer talking about rights *theory* but about *rights themselves*. His refusal to develop a counter-theory which "ends" with rights is due not merely to the inadequacy of rights alone to protect and improve the workers' situation; that could be achieved by making clear that much more is needed, even for the adequate functioning of the rights themselves. Rather, his refusal is based on a disavowal of an ongoing (one might say "principled") commitment to rights.[39]

What "our program for the future" is must emerge "dialectically" (rather than as a "deduction" from our past). Does this mean that Kennedy's "future program" may *not* include the right of working people to organize? This very possibility is why—given the deductions from past history and present experience discussed later in this essay—some of us feel it is appropriate to make a principled commitment to the legal right of working people to organize and engage in concerted activities, just as we would make a commitment to the right to dissent. We cannot trust future programs that emerge "dialectically," but which are not based on at least limited deductions from our past.

Kennedy's final argument also abandons reference to rights theory and is concerned with rights themselves or, more accurately, rights rhetoric. He argues that his critique does not imply "that the

38. Kennedy, *supra* note 31, at 506.

39. [T]he left doesn't need a counter-theory that *ends* with rights. We need utopian thinking, but the short-term, practical and creative manner, rather than in the form of rationalist "end-of-history" deductions of the ideal state of mankind. It is desirable rather than tragic that our program for the future must emerge dialectically from our past, rather than as a deduction from it. Even if the critique of labor as ideology can do nothing more than free us for this kind of utopian enterprise, the critique is well worth doing.

Finally, the critique of rights as liberal philosophy does not imply that the left should abandon rights rhetoric as a tool of political organizing or legal argument. Embedded in the rights notion is a liberating accomplishment of our culture: the affirmation of free human subjectivity against the constraints of group life, along with the paradoxical countervision of a group life that creates and nurtures individuals capable of freedom. We need to work at the slow transformation of rights rhetoric, at dereifying it, rather than simply junking it. And on this plane, it seems to me that Klare and Lynd are once again in complete accord. They represent the emergence of a new left intelligentsia committed at once to theory and to practice, and to creating a radical left world view in an area where once there were only variations on the theme of legitimation of the status quo.

Id.

left should abandon rights *rhetoric* as a *tool* of political organizing or legal argument."[40] From this it is fair to infer that he would abandon the notion of a principled right, an inalienable right of working people to organize and engage in concerted activity. Instead, he would "work at" the "slow transformation of rights rhetoric" by "dereifying it, rather than simply junking it."[41]

But is it bad to "reify"? In Marxist thinking, to reify a concept such as a right is to invest it with qualities over and above those of the particular human beings who created or use it. It is as if the right had a life of its own. It exists independently of the particular social setting from which it came and continues regardless of the conscious choices of the people in a later setting.

Reification, as a general proposition, can have serious and negative consequences but not all "reifying" is necessarily bad. It is true that when we characterize a certain legal right as "universal" or "inalienable," we are reifying it. But this may have a legitimate purpose. For example, we may fear that some group may in the future dominate our society and attempt to stifle all dissent. We should protect as best we can against such an event by today acknowledging that dissent is a human value that needs protection. In so doing, we *reify* the legal right to dissent in order to protect the human right of self-expression and free conscience. We should do the same with certain rights of working people. In spite of the difficulties of drawing a "coherent" line as to what is "inalienable" and what is not, concern for the human values of free conscience and mutual association, coupled with a deduction from history about what happens in the absence of such legal rights, justifies such an effort.[42]

Unhappily, in the exchange on rights between Klare, Lynd, and Kennedy, the lines are not clearly drawn. Lynd presents only a very limited defense of the role of basic rights. In his afterword, Lynd stresses that he "might agree" with the Klare–Kennedy view that

40. *Id.* (emphasis added).

41. *Id.* Kennedy recognizes the manner in which "liberal rights rhetoric" is a part of the culture of the working class and others. This, of course, is part of the reason he wants to "slowly transform" the rhetoric rather than "junk" it. Yet he fails to grasp how *deep* the commitment is to certain "liberal rights"—such as the right of working people to organize and act—among most liberal to left Americans. Kennedy's extreme attack on "liberal rights" for the purpose of delegitimizing liberal doctrines will not, as time goes on, build a strong left intelligentsia around Critical legal thinking nor ally that intelligentsia to a broad and vital social movement from which it learns and to which it contributes. Instead, the attack on rights may simply split the left (as it has in the past) and lead to its isolation from the social movement that Kennedy would like to see. This conclusion, too, is a deduction from history.

42. *See* notes 44–107 *infra* and accompanying text.

"the liberal conception of workers' rights cannot be restated in such a way as to provide working people the legal protection they need" if that conception was "merely a 'political theory of possessive individualism.'" But Lynd argues that the right to engage in concerted activity for mutual aid is "profoundly different from the inalienable rights enumerated in the Declaration of Independence." Unlike the latter rights, the rights set forth in Section 4 of the Norris-LaGuardia Act and in Section 7 of the Wagner Act are "collective rights," even when exercised by single individuals. The right to engage in concerted activity is a translation into law of "the labor movement concept of 'solidarity,' or more fully articulated, that 'an injury to one is an injury to all.'" It is thus unlike rights "in which one person's right subtracts from, or at most is separate from, another person's right."[43]

It would be unfortunate if Lynd is too readily accepting a narrow conception of such rights as speech and dissent. Such rights do not necessarily subtract from or function separately from "the right to engage in concerted activity for mutual aid." Indeed, the former rights are indispensable to the maintenance of the latter right. Where would the right of working people to unionize and strike be without the right to free speech?

Later, after considering Marx, we will see that at another time Staughton Lynd expressed other thoughts on the fundamental rights articulated in the Declaration of Independence.

B. *The "Rights of Mankind"*

1. *Marx's "On the Jewish Question" and its aftermath.*

Marx's 1843 essay, *On the Jewish Question,*[44] is cited by leading Critical legal theorists as a source for their philosophic analysis of rights and liberalism.[45] Marx's essay—and its historical aftermath—

43. Lynd, *supra* note 31, at 494.

44. K. MARX, *On the Jewish Question,* in KARL MARX: EARLY WRITINGS 1 (T.B. Bottomore trans. & ed. 1963).

45. *See, e.g.,* Frug, *supra* note 4, at 1059 n.1; Kennedy, *supra* note 31, at 506 n.4; Kennedy, *supra* note 13, at 1712 n.73; Kennedy, *supra* note 16, at 210 n.2. For a less direct use of the essay, see Lynd's attempts to distinguish the "individual" rights Marx critiques from the "solidarity" rights which Lynd defends in the exchange with Klare and Kennedy. Lynd, *supra* note 31, at 494; *see also* Klare, *Critical Theory and Labor Relations Law,* in THE POLITICS OF LAW, *supra* note 4, at 65, 83 (where Klare refers to the manner in which his views "perhaps evoke" an antistatist perspective which "links up with the strand in Marx that teaches that freedom consists in the complete subordination of the state to civil society").

sheds light on the tragic ambiguities which have been accepted in much Critical legal thinking and writing on rights.

In the essay, Marx furthered his critique of the Hegelian philosophy of right, began the development of his own conception of the state, and analyzed the difference between political emancipation and human emancipation. It constituted an integral part of Marx's developing political philosophy. The essay is complex in its thought as well as in its articulation, and only some of his ideas will be discussed here.

In his long term vision for a communist society, Marx was anti-state. Ultimately, he believed, human beings, in their "species-life"[46] as cooperatively acting, sharing, self-administering people, would manage their own social affairs. There would be no need for a state once the social relations that give rise to class struggles had been altered and a classless society developed. In the meantime, states would continue to represent the interests of one class against others.[47]

For Marx, however, the modern state not only represented the interests of the ruling class, it also divided the life of the human being into that of private person and public person—a division that allows certain forms of political emancipation but frustrates the full emancipation of the human being. The modern state splits the human being between political life, which is public and communal in spirit, and civil life, where the human being is an individual pursuing private purposes including private gain:

> The perfected political state is, by its nature, the *species-life* of man as *opposed* to his material life. All the presuppositions of this

46. The term "species-life," according to Bottomore, is derived from Feuerbach who argued that

> [M]an is to be distinguished from animals not by "consciousness" as such, but by a particular kind of consciousness. Man is not only conscious of himself as an individual; he is also conscious of himself as a member of the human species, and so he apprehends a "human essence" which is the same in himself as in other men. According to Feuerbach this ability to conceive of "species" is the fundamental element in the human power of reasoning: "Science is the consciousness of species." Marx, while not departing from this meaning of the terms, employs them in other contexts; and he insists more strongly than Feuerbach that since this "species-consciousness" defines the nature of man, man is only living and acting authentically (i.e., in accordance with his nature) when he lives and acts deliberately as a "species-being," that is, as a *social* being.

K. MARX, *supra* note 44, at 13 n.2 (editor's note).

47. *See, e.g.,* K. MARX & F. ENGELS, *Manifesto of the Communist Party,* in MARX AND ENGELS: BASIC WRITINGS ON POLITICS AND PHILOSOPHY 6, 29 (L. Feuer ed. 1959) [hereinafter cited as BASIC WRITINGS]; K. MARX, *Critique of the Gotha Program,* in BASIC WRITINGS, *supra,* at 112, 127–28.

> egoistic life continue to exist in *civil society outside* the political sphere, as qualities of civil society. Where the political state has attained to its full development, man leads, not only in thought, in consciousness, but in *reality,* in *life,* a double existence. . . . He lives in the *political community,* where he regards himself as a *communal being,* and in *civil society* where he acts simply as a *private individual,* treats other men as means, degrades himself to the role of a mere means, and becomes the plaything of alien powers.[48]

What then are the rights of humankind in relation to the state? According to Marx, they are the rights of members of civil society, in their pursuit of individualistic, egoistic purposes, to protection from the state as the communal setting for public man: "[T]he so-called *rights of man,* as distinct from the *rights of the citizen,* are simply the rights of a *member of civil society,* that is, of egoistic man, of man separated from other men and from the community."[49]

These "so-called *rights of man,*" as set forth in various French declarations and American constitutions quoted by Marx,[50] include "equality," "liberty," "security," and "property." Marx assesses the "liberty" which, quoting from the Declaration of the Rights of Man and of the Citizen of 1793, consists of being able to do "everything which does not harm others":

> It is a question of the liberty of man regarded as an isolated monad, withdrawn into himself. . . . But liberty as a right of man is not founded upon the relations between man and man, but rather upon the separation of man from man. It is the right of such separation. The right of the *circumscribed* individual, withdrawn into himself.
>
> The practical application of liberty is the right of private property.[51]

In similar fashion, Marx assesses the other "rights of man" and concludes, "None of the supposed rights of man, therefore, go beyond the egoistic man, man as he is, as a member of civil society; that is, an individual separated from the community, withdrawn into himself, wholly preoccupied with his private interest and acting in accordance with his private caprice."[52]

In this manner, Marx develops the perspective, deeply imbedded in contemporary Critical legal thinking, that the "inalienable rights" of each person, articulated in our Declaration of Independence and

48. K. MARX, *supra* note 44, at 13 (footnote omitted).
49. *Id.* at 24.
50. *Id.* at 22–24.
51. *Id.* at 24–25.
52. *Id.* at 26.

the Constitution, are rights which subtract from those of other persons or, at best, separate people from one another.[53] Even Lynd, in his dispute with Kennedy over liberal rights and the workers' struggles, seems to accept this point of view.[54]

While it is easy to understand how one person's right to separately possess property limits another person's separate possession of property, I fail to see how one person's exercise of, for example, free speech and dissent *necessarily* limits another person's. Quite the contrary; the exercise of these latter rights can increase the next person's ability to exercise them. It is not the social legitimization which flows from the formal recognition of rights that inhibits transformative, humanizing social struggle. Many factors impede such struggle. But rights such as free speech and dissent *protect* the ability of groups of people—including working people—to change their society, better their group situation, and expand their human freedom.

Although Marx's analysis of the difference between human and political emancipation is brilliant, his conclusion about the *inherently* "egoistic" nature of political liberties is, I believe, wrong. In arriving at this conclusion, Marx, in *On the Jewish Question,* notes an apparent contradiction. According to the various revolutionary rights-of-man declarations he quotes, *political* life exists to protect civil, private rights against state power. However, as soon as these rights of man come into conflict with the revolutionary political practice of those who have gained power, the rights are limited or terminated—including the rights to freedom of speech and press: "Even if one decided to regard revolutionary practice as the correct expression of this relation, the problem would remain as to why it is that in the minds of political liberators the relation is inverted, so that the end appears as the means and the means as the end?"[55]

Marx assures us, however, that "the problem is easily solved."[56] The prior political emancipation he wrote of was a shattering, a dis-

53. Marx's analysis in *On the Jewish Question* may also be seen as the original statement of the "public/private" distinction which plays so large a role in contemporary Critical legal theory. Political rights are set forth only as guarantees to private individuals in their dealings with the state. Thus, the right to free speech is guaranteed against state action but is not protected against the oppressive power of private entities such as large corporations. The right to vote for a legislator is protected, but no protection exists, even under the National Labor Relations Act, for the employee who demands a vote on the critical economic issues and other decisions which shape his or her life in the workplace and in civil society.

54. *See* Lynd, *supra* note 31, at 494.

55. K. MARX, *supra* note 44, at 27.

56. *Id.*

solution of the old feudal society. Class relations were changed, social organization was altered, and the pursuit of property and trade was enhanced. But the political emancipators did not accomplish their stated goals, and the conditions for genuine human freedom were not achieved.

> Human emancipation will only be complete when the real, individual man has absorbed into himself the abstract citizen; when as an individual man, in his everyday life, in his work, and in his relationships, he has become a *species-being*; and when he has recognized and organized his own powers (*forces propres*) as *social* powers so that he no longer separates this social power from himself as *political* power.[57]

Marx suggests that the rights of man will inevitably be transgressed by political force until man as "species-being" is reunited with man in civil society. Two views might be taken as to the contradiction between the revolutionary goals of human emancipation and the repressive practices of political emancipators. According to one view, those rights of man that deal with political liberties such as speech and association should be extended within civil (private) society, not merely as a goal but as a continuing means. Thus, the distortion of "ends" and "means" in the type of "revolutionary practice" which was the subject of Marx's comment in *On the Jewish Question* should be rejected. Some Critical legal theorists are explicit on the subject. Kairys, for example, writes:

> The basic principle that individuals and groups have the ability to express different and unpopular views without prior restraint or punishment is a necessary element of any democratic society. To the extent that we have enforced this principle . . . we can and should be proud. I do not question the principle, its realization in recent years, or its importance and validity under any system of social relations.
>
> . . . .
>
> . . . However, in the private sphere, which encompasses almost all economic activity, we allow no democracy or equality and only the freedom to buy and sell.[58]

A second view regards political rights in a capitalist society as merely rhetoric, perhaps to be used for practical purposes, but never to be defended as universally applicable to *any* system of social relations in the modern and future world.[59]

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57. *Id.* at 31.

58. Kairys, *Freedom of Speech,* in THE POLITICS OF LAW, *supra* note 4, at 140, 163.

59. *See, e.g.,* Kennedy, *supra* note 31, at 506 (Kennedy's commentary on the Klare-Lynd exchange).

Which view did Marx himself take? Some thirty years after the important but somewhat ambiguous statements in *On the Jewish Question,* Marx wrote his *Critique of the Gotha Programme*.[60] Gotha was the site of an 1875 congress which united the two then-existing German socialist parties, one of which was led by followers of Marx and the other by followers of Ferdinand Lasalle. Lasalle's followers prevailed in the program for a unified party.[61] Although Marx approved of the unification, he sharply criticized parts of the Gotha program, such as its conception of the state and its articulation of political demands and rights: "Its political demands contain nothing beyond the old democratic litany familiar to all: universal suffrage, direct legislation, a people's militia, etc. They are a mere echo of the bourgeois People's party, of the League of Peace and Freedom ."[62]

"Bourgeois 'freedom of conscience' " (including "religious freedom of conscience") was also proposed in the Gotha program and was among the rights criticized by Marx.[63] Marx objected not to the demand for such rights in the modern capitalist state but rather to the Gotha program's conception of the future state and the future society for which socialists were supposed to strive. He also objected to the failure of the Gotha program to reflect an understanding of the nature of the period of transition between capitalist and communist societies: "Between capitalist and communist society lies the period of the revolutionary transformation of the one into the other. There corresponds to this also a political transition period in which the state can be nothing but *the revolutionary dictatorship of the proletariat.* "[64]

Years later, Lenin struggled with Kautsky for the soul of the socialist movement in their dispute over the role of "bourgeois rights" in a socialist state. Lenin, in *State and Revolution*[65] and *The Proletarian Revolution and the Renegade Kautsky,*[66] argued against "peaceful" transition and against a transition in which "bourgeois rights," including the rights of free speech, press, and political dissent, were recognized in the socialist state.

Relying on Marx's analysis of the state and rights, utilizing

60. K. MARX, *Critique of the Gotha Programme,* in BASIC WRITINGS, *supra* note 47, at 112.
61. *See id.* at 112 (editor's note).
62. *Id.* at 128.
63. *Id.* at 130.
64. *Id.* at 127.
65. V.I. LENIN, STATE AND REVOLUTION (2d ed. 1932).
66. V.I. LENIN, THE PROLETARIAN REVOLUTION AND THE RENEGADE KAUTSKY (International Publishers ed. 1934).

Marx's reference to "dictatorship of the proletariat," and supported by Engel's less ambiguous writings,[67] Lenin alleged that Kautsky sought to transform Marx "into a common liberal."[68] Although Lenin conceded that Marx allowed that such nations as England and America might be possible exceptions to the general requirement for revolutionary violence, he argued that even those exceptions had since lost the conditions which made them exceptional.[69] As for "democracy," he asserted," 'Pure democracy' is the mendacious phrase of a liberal who wants to fool the working class. History knows of bourgeois democracy which takes the place of feudalism, and of proletarian democracy which takes the place of bourgeois democracy."[70]As for "bourgeois rights," under proletarian democracy, according to Lenin, "[f]reedom of the press ceases to be hypocrisy, because the printing presses and stocks of paper are taken away from the bourgeoisie."[71]

Lenin's view, of course, prevailed in the Soviet Union. Socialist and Communist parties around the world split, formed temporary coalitions in particular places, and then split again with the issue of the role of certain "rights of mankind" at the heart of the dispute. I trust the reader has some familiarity with what has happened in those countries, "capitalist" and "socialist," where such rights have been denied.

In recent years, there has been much flux and movement within the Marxist analysis of the state.[72] Many, if not most, Marxist scholars in Western Europe and in America see the Soviet example as a tragic perversion of socialist theory and practice. The questions of how to democratize economic and social relationships rather than simply transfer power from one group to another and how to expand direct democracy within both the political and economic spheres have become major issues of scholarship and debate. An important and related question is whether the state's roles of, on the one hand, protecting capital, and, on the other, providing a broad-scale social

67. V.I. LENIN, *supra* note 65, at 22–25. I do not wish to suggest that Marx was antidemocratic. On the contrary, I consider him to be one of the greatest of democratic humanists. I do not consider him error-proof, however. Some of his writings have contributed to great historical tragedy, even while they often contained great humanist insight.

68. V.I. LENIN, *supra* note 66, at 24.

69. *Id.* at 21.

70. *Id.* at 25.

71. *Id.* at 30.

72. Flacks, *Marxism and Sociology,* in THE LEFT ACADEMY, *supra* note 2, at 9; Kesselman, *The State and Class: Trends in Marxist Political Science,* in THE LEFT ACADEMY, *supra* note 2, at 82. Both provide a useful introduction to contemporary Marxist theory.

welfare program embody contradictions that must alter the prior Marxist theory of the state. While Marxists have sharply criticized the social democratic states of Western Europe for their failure to effectively shift control over production from capital to workers, many Marxists are also concerned with the improvement rather than the destruction of democratic political forms. For example, speaking of the Marxist-oriented "Critical political scholarship," Kesselman argues that "[t]he most urgent goal (one where there have been few contributions) is to prove, before a skeptical and informed audience, that democratic socialism is possible."[73]

Critical legal scholars support this concern for democracy. They support a socialism based on decentralized, participatory democracy and thus one quite different from the Soviet example. In this context, the harshness of some Critical legal theorists' attacks on "rights" theory, and their denial of "universal" and "inalienable" rights, is particularly unfortunate. These Critical legal scholars might reply that when you talk about systems of "inalienable rights"—just as when Lenin talked about absolute "laws of history" that required state suppression of opposition—such a universalism itself can and does lead to oppression. Indeed, universalistic pieties about rights are used in today's capitalist society to avert the eyes of citizens from the concrete injustices in social relations, just as "laws of history" are used in state socialist societies to squelch demands for participation and to rationalize state oppression. Besides, says our not-so-hypothetical Critical legal scholar, it's just not true that such "universals" exist. We need to liberate our thinking from such "universals," look to concrete situations, and open our eyes to new visions.

This conclusion brings us back to the difference between the Kairys formulation that emphasizes the importance of free speech to *any* system of social relations and the Kennedy formulation that challenges the inalienable and universal character of any of our rights, at the same time as it stresses the use of rights rhetoric for purposes of slow transformation. The Kennedy view is deeply ingrained in much Critical legal consciousness. It is derived from some of the most important and humanistic writings of Marx. But it is wrong. Some rights are inalienable and universal and should be legally recognized and protected always. Democratic theorists should be *explicit* about this. The right to dissent, one such inalienable right, was necessary

73. Kesselman, *supra* note 72, at 107.

yesterday (even though it was regularly ignored or expressly violated) and will be necessary tomorrow (even in a society otherwise transformed). It is indeed a right "for all seasons."[74]

2. *The "Rights of Mankind" revisited: Staughton Lynd as historian.*

How do we reconcile a statement of universal and inalienable rights with what we know to be the historically conditioned nature of ideas and the inevitable interplay between changing social contexts and our understanding of rights and liberties? How is it that we may go back to 1776 for a conception of human rights that still has validity today and argue that it will still have validity two hundred years from today, even while we argue that the full realization of such rights requires both a radical expansion of the conception of the rights and an alteration of the institutional settings in which they function?

The work of Staughton Lynd, new left historian of the 1960's, may provide insight into these issues. We have already seen Lynd, the Critical labor law theorist and practitioner of more recent years, defending the collective rights embodied in section 7 of the Wagner Act against the rights critique of Klare and Kennedy.[75] Yet Lynd emphasized that the section 7 right to organize is different from the individual inalienable rights enumerated by the Declaration of Independence.[76]

74. One of the other inalienable human rights, in my view, is the "right of conscience," of religious liberty, which was the specific subject of Marx's critique in *On the Jewish Question.* Marx brilliantly discussed the difference between political and human emancipation, but in his treatment of the religious issue one can now easily discern the dangers which follow a relaxation of the rights which constitute political emancipation. According to Marx, political emancipation means, insofar as religion is concerned, that the state ends official preference for one religion (or even atheism) over another. But this, according to Marx, means only the liberty of "egoistic man" to pursue his own course. But since Marx believed religion to be illusion, for him the flowering of religions only serves to separate people from one another on a false basis. It is only when individual persons become "species-beings" that people will become truly emancipated. *See* K. MARX, *supra* note 44, at 8–17.

Marx's notion of human emancipation with respect to religion would only be valid if three conditions are met: (1) his view of religion as illusion is true; (2) his view of religion as inherently *disabling* to human life is true; and (3) his view that a "species-life" can emerge which will not *impose* an atheism on members but will instead free its members to recognize their own social powers (which contradict religious need) is true. I have some doubts about the first proposition, more doubts about the second, and I have no doubt that the third is wrong *unless* there is an "inalienable" right of free religious conscience.

Thus, the argument turns full circle. Political emancipation may not be equivalent to human emancipation. But it is an indispensable ingredient of such emancipation.

75. *See* notes 31–41 *supra* and accompanying text.

76. Lynd, *supra* note 31, at 494.

As a historian in the 1960's, however, Lynd gave us a far richer view of the human rights proclaimed in the Declaration of Independence and of their meaning in subsequent periods of American history. In his book, *Intellectual Origins of American Radicalism,*[77] Lynd describes an American "tradition" that led to and followed from the 1776 Declaration. This tradition regarded the proper bases for government to be certain universal rights "self-evident" to human beings; it considered freedom to be "a power of personal self-direction which no person can delegate to another" (i.e., it is "inalienable"); and it held that "the purpose of society is not the protection of property but fulfillment of the needs of living human beings."[78]

Lynd then taught us that this tradition was later given new meaning and fulfillment by the abolitionist movement.[79] It inspired, and was expanded by, early twentieth century socialists such as Debs.[80] He also reminded us that the tradition had continued:

> Existential radicals of the mid-twentieth century have rediscovered the central affirmations of the older tradition. They have learned in the concentration camp or the American South that no external circumstances can deprive man of his capacity to be a free moral agent. At the Nuremberg Tribunal and elsewhere, they began to talk once more about the attributes of man as man: to use Jefferson's language, about "the common rights of mankind."[81]

Lynd also reviewed the critique of the Declaration of Independence offered by the young Marx in *On the Jewish Question,* particularly Marx's emphasis on the manner in which the Declaration's rights separated person from person and person from community. Lynd concluded:

> Marx's analysis of the eighteenth century's "rights of man" was brilliant but one-sided. He exaggerated his own intellectual distance from the French and American manifestos, for he too built his intellectual system on the concept of "alienation" . . . which he took from Hegel. . . . "Alienation" as described by Marx has a good deal in common with the Declaration's description of government as a creation of men designed to secure their "inalienable" rights, which on occasion becomes destructive of the ends for which it was designed.[82]

By "one-sided," Lynd did not mean that Marx was entirely

77. S. LYND, INTELLECTUAL ORIGINS OF AMERICAN RADICALISM (1968).
78. *Id.* at vi.
79. *Id.* at 100–60.
80. *Id.* at 6, 156, 160–73.
81. *Id.* at 10.
82. *Id.* at 11.

wrong. Some of America's "founding fathers" favored the "separation" of human beings. Their concern for property and slavery, and their fear of the poor, led them to adopt a language of rights which they hoped would protect their privileged positions. At the same time, concern for a common "public" life, for a functional as well as formal equality, for small-scale democratic self-government, and for human self-determination led those in a more radical tradition to use a different language of rights. As Lynd notes, there was "latent tension within the natural rights philosophy of the Declaration of Independence between an outlook on society based on property and a contrasting perspective built on conscience, or on self-determining human activity."[83]

The differences in views and concerns among the founding fathers were, of course, great. The Declaration was supported by a coalition. And no one in the coalition, not even Tom Paine, who might be described as being on the "left" of his day, was against the institution of private property.[84] How property was to be utilized by society was, however, a subject of great debate, as was its exact ordering in the realm of legal rights. Lynd notes that Jefferson did not use the word "property" in the Declaration, substituting instead the phrase "pursuit of happiness."[85] Moreover, when presented by Lafayette with a draft of the French Declaration of the Rights of Man, Jefferson "struck the word 'property' from the rights itemized by Lafayette, putting in its place: 'the power to dispose of his person and the fruits of his industry, and of all his faculties.' "[86]

Subsequent work has confirmed the great wealth of differing concerns and meanings which underlie the language of rights in the Declaration, and later, when the coalition was no longer the same, that entered the dispute over the Constitution. For example, Nedelsky notes that "[t]he Anti-Federalists wanted a government in which the

83. *Id.* at 67.

84. Paine, while not opposed to the institution of private property, nevertheless eloquently condemned the "barbarous system" by which the state oppressed the poor, and the "pretenses" by which that system was maintained. He singled out the poor-relief system of the day, including the workhouse, for condemnation. He noted that it is the poor who are executed, the poor who fill the jails, and the poor who are subject to "legal barbarity" and "the intrigue of the courts." He condemned huge war-related expenses and the imposition of large taxes upon poor and laboring people, and he proposed the establishment of an income maintenance system that was far in advance of that which we have today. *See* T. PAINE, *The Poor and Their Relief,* in THE RIGHTS OF MAN, *reprinted in* BURKE AND PAINE: ON REVOLUTION AND THE RIGHTS OF MAN 248 (R. Dishman ed. 1971).

85. S. LYND, *supra* note 77, at 84.

86. *Id.* (footnote omitted).

people would take an active, responsible part. This scheme required equality among the citizens and a general capacity for public virtue, both inconsistent with the Federalist vision of a large, commercial republic."[87] Quoting Storing, Nedelsky points out that for the Anti-Federalists devotion to the public good meant "a society in which there are no extremes of wealth, influence, education or anything else."[88] While Lynd makes clear that the Anti-Federalists wanted neither socialism nor the abolition of private property, he also shows that their goals were not in fairness subject to the separatist, private, egoistic, anticommunal inferences which Marx drew.[89]

Lynd, the new left historian, answered the question of how we reconcile a statement of universal and inalienable rights with what we know to be the historically conditioned nature of ideas. He understood that the radical dissenters of revolutionary days conceived of human beings in association for the common good, a common good which supported and recognized the inherent right of human beings to direct themselves. Later, the Abolitionists were to extend this concept and use it to confront the social institution of slavery.

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87. Nedelsky, Book Review, 96 HARV. L. REV. 340, 344 (1982).

88. *Id.*

89. Lynd summarizes the "radical dissenters" view on property during the period leading to the Declaration: (1) the earth was given by God to mankind in common; (2) each person has only that natural right to that property he or she needs for subsistence; that which is superfluous for subsistence is, in the first instance, the property of the public to be arranged and disposed of as the public sees fit; and (3) inheritance of private property is as subject to social regulation as inheritance of political power. S. LYND, *supra* note 77, at 69–70. As Benjamin Franklin put it:

> Private Property . . . is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it, even to its last Farthing; its Contributions, therefore to the public Exigencies are not to be considered as conferring a Benefit on the Publick, entitling the Contributors to the Distinctions of Honour and Power, but as the Return of an Obligation previously received, or the payment of a just Debt.

Id. at 71.

In *On the Jewish Question,* Marx recognized that radical Americans both during and after the Revolution had sought and at times won "the political suppression of private power." But he noted that such suppression "not only does not abolish private property; it actually presupposes its existence." The "perfected political state" of the American radicals did not eliminate the "egoistic life" of civil society. K. MARX, *supra* note 44, at 12–13.

American reform strategies continued to accept the Critical division of public and private person. Marx's criticism is thus strong. However, Marx too quickly bypasses the point that the American radicals were led to suppress private property by their concern for the individual, "inalienable" human and political rights. These rights were in *opposition* to "egoistic life" even as they presupposed such life. The contradiction between the inalienable "rights of man" and private property gives strength to a critique of the *insufficiency* of recognized individual rights. But this contradiction does not support the view that the rights themselves are necessarily based on an "egoistic" and anticommunal conception of man.

Today, we ask whether the market and bureaucratic structures which dominate our lives are consistent with the common good and individual self-direction.

Social conditions have, of course, changed enormously between 1776 and the present. The core notion expressed in 1776, that each person has certain inalienable rights, is no longer sufficient to address the needs of our time. But although the notion is insufficient, it is indispensable because it proclaims and defends our human self-assertion and because it builds on the past while recognizing what is positive in the present, leading thereby to the possibility of a future for which we can struggle in the present.

> The intellectual origins of the American radical tradition were rooted in men's efforts to make a way of life at once free and communal. What held together these dissenters from the capitalist consensus was more than ideology: it was also the daily practice . . . in institutions of their own making. . . . Within the womb of the old society—it is Marx's metaphor—the new society is born.[90]

By reaching deeply into the character of our traditions and early expressions of inalienable rights and by understanding their complex and diverse nature, Lynd came to appreciate the dialectics of struggle which builds upon the best of what has gone before.

We would do well to follow the radical approach of building upon our core human rights tradition, demonstrating the contradiction between that tradition and our social institutions, and developing ways to fuse human rights into new cooperative institutions of our own making. Such work requires a concern for theory which feeds social movement, but successful social movement comes from the struggle for the realization of our basic rights, not from their disparagement.

C. *Why I Am So Sure*

> One must step outside the liberal paradigm into a realm where truth may be experiential, where knowledge resides in world views that are themselves situated in history, where power and ideas do not exist separately.[91]

Why am I so sure about the "universal" and "inalienable" nature of the rights to free speech and political dissent? Why am I so convinced that *legal* articulation is so indispensable to the protection of these inalienable rights? I will try to reflect on these questions in

90. S. LYND, *supra* note 77, at 173.

91. Freeman, *Truth and Mystification in Legal Scholarship,* 90 YALE L.J. 1229, 1237 (1981).

personal, experiential terms because that is where the source of my conviction will be found. I do this with some sense of caution and discomfort; I do not care for the narcissism behind much contemporary self-revelation. I hesitate also because of this thought: I learn from my experience, and, similarly, everyone else learns in terms of her or his experience, not mine.[92]

I reject these concerns, however, because sometimes we can and do share experience. Certainly, my experience is hardly unique. It is a part of 20th century history, experienced by many thousands of people in every part of the world. This widely shared experience can be a part of our mutual learning, or so I prefer to hope.

Like so many others, as a youth just into college, I became concerned with the condition of the less fortunate. Too many people were too poor. Too much racial and ethnic discrimination existed, too much — (you can fill in the blank), a fairly standard set of issues, all of which are still with us.

Dissatisfied with both the Democratic and Republican parties of the day, I joined Henry Wallace's third-party revolt and went to the South in 1947 as a would-be organizer of textile workers for Wallace. I returned some months later, shaken to my core, radicalized, as were many others a generation later in the civil rights and antipoverty movements. What so shook me were my encounters with textile workers who were paralyzed with fear; with gaunt twenty-five-year-old mothers in the textile communities who looked as if they were forty years old; with one-time militant labor organizers who—literally—had had their life essence beaten out of them by thugs; with black poverty which surpassed my imagination (but whose victims somehow maintained themselves within communities of warm life and mutual support to which I would flee occasionally for respite). I also encountered young white men who followed me from place to place, calmly assuring me that they were going to kill me; decent

92. My hesitation reminds me of the story of Siddhartha who, worried about his young son's arrogance and afraid that the youth would repeat all of Siddhartha's own mistakes, exhorted his son to follow a different path. When the youth repeatedly ignored him, Siddhartha, deeply troubled, asked the advice of his friend. The friend said gently:

> Do you . . . really think that you have committed your follies in order to spare your son them? Can you protect your son from . . . living his own life, from soiling himself with life, from loading himself with sin, from swallowing the bitter drink himself, from finding his own path? Do you think, my dear friend, that anybody is spared this path? Perhaps your little son, because you would like to see him spared sorrow and pain and disillusionment? But if you were to die ten times for him, you would not alter his destiny in the slightest.

H. HESSE, SIDDHARTHA 98 (H. Rosner trans. 1951).

moderate political leaders who warned me that violence was planned against me but who would not openly speak against it; and raging mobs that would not let Henry Wallace speak but drove him out of town after town in danger of his life. These experiences changed my life. Poverty, discrimination, fear and violence, and the absence of the freedom of speech I had assumed existed in our country became the issues to which I wanted to devote my life's energies. A socialist America began to make sense to me.

I returned to my college, the City College of New York, which was alive with liberal and left-wing student activities. The Communist Party section on campus, with some 200 members at the time, vigorously recruited students, but I and others resisted. Dissent, I argued, was not permitted by the Party, and I believed in free speech and dissent; my experience in the South had convinced me not that free speech was a specious value because it was so readily violated but that it was important and vital.

At the same time, City College itself was torn by well-documented charges of anti-Jewish and anti-black discriminatory practices committed by particular faculty and administrators. Soon, working with a coalition of liberals, socialists, Communists, many otherwise "apolitical" students, and some faculty, a well-supported sit-down strike was held, followed by a college-wide vote to have a general student strike—the first such strike on a major American campus since the nineteen-thirties. My life, in those months, became the work of the "movement" that had developed on campus.

We lost. We had sung "we shall not be moved," but it was the college administration that would not move. The thousands of striking students became discouraged and went back to classes. The two main perpetrators of discriminatory activity were retained (one was promoted), the two chief faculty supporters of the strike were "let go" (neither having tenure), and I, in a move whose swiftness was surprising even to me, joined the Communist Party. Why?

At the time I joined, I had not changed my mind about the importance of free speech and dissent. Instead, I said to myself, I would suspend thought on the question until I could study it further. Bitterness towards and disillusionment with a college administration that I once believed embodied the best of liberal values was an element in my decision to join. Observing how the Communist students had worked for our mutual cause while others gave up in despair was another. But I believe something more profound had taken hold of me.

My life before had been that of an individual with a keen awareness of his individual weakness and a sense of terror at his fragile existence. In the year I spent working closely with the Communist students, I shared their lives, and they shared mine. I shared their passions and felt my own spirit to be alive. Yet, my spirit seemed to transcend myself. I had become part of a larger whole. I had found "community" and "solidarity."

I had not realized then that there are many routes to and forms of community and that the directly political forms are sometimes the most transient. Nor did I know that the concern for speech and dissent which I had suspended would later revive and cause me and thousands of others wrenching pain as we abandoned our community. I would not have agreed then, as I do today, that the community I found within the Party tyrannized me and my fellow members at least as much as medieval town communities tyrannized their members.[93] But these later discoveries have not altered my apprecia-

93. Frug writes:

> If we could look today at a medieval town, the idea of the town as a community would appear to us largely as a cover for the advancement of particular interests, and the value of town autonomy, although apparent, would be overshadowed by real and potential internal conflicts. But, although conflicts within the town surely were apparent to its inhabitants, they could see an importance and value in communal association that we do not. We must try to understand how even those subjected to the power of others within the town could look at their town, describe it as a community and defend the importance of its autonomy. . . .
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> . . . [T]he idea of community was maintained by the complex idea of "city peace": [quoting Pirenne] "[c]ity peace was a law of exception, more severe, more harsh, than that of the county districts. It was prodigal of corporal punishments: hangings, decapitation, castration, amputation of limbs. It applied in all its rigor the *lex talionis*: an eye for an eye, a tooth for a tooth. Its evident purpose was to repress derelictions, through terror. All who entered the gates of the city, whether nobles, freemen or burghers, were equally subject to it. Under it the city was, so to speak, in a permanent state of siege. But in it the city found a potent instrument of unification . . . . [T]he peace created, among all its members, a permanent solidarity."

Frug, *supra* note 4, at 1085–86.

In countries such as ours, where the Communist Party did not have state power, physical terror and abuse were not an available means for tyrannizing the membership. But like the medieval town, the Party community did serve as a cover for the advancement of conflicting personal and ideological interests, and those interests were often apparent to affected members. Members adhered to the Party, nevertheless, and surrendered their personal autonomy not because of physical abuse but because the community and the cause had given a character, a peace, and a purpose to their lives that overshadowed everything else. The greatest threat—and it was a very compelling threat—the Party could exercise over a dissident member was the threat of expulsion. An expelled member was a traitor, an enemy. A spouse, for example, would leave an expelled member, rather than be infected by or even tolerate traitorous thought and conduct.

tion of what those days in the Communist Party taught me about the joy and human fulfillment to be found in shared concern, endeavor, and sacrifice.

I was a good and dedicated Communist for seven years. The Party was my community, and it determined where I lived and what I did. One of my jobs was to study and learn the theory which justified what I did. It was then that I studied Lenin and the critique of the "bourgeois" rights to free speech and dissent. And, of course, given my changed position and the task of rationalizing what I had already committed myself to—Lenin's attack on Kautsky, Lenin's building upon the phraseology of Marx and his use of Engels—all made sense.

Meanwhile, I was witnessing again the lack of respect for free speech in the United States. Joe McCarthy was in his heyday, and Communists, among many others, were hounded. Few of us in those days spoke freely, even inside our own homes, without covering our telephones with blankets and checking for other signs of electronic invasion. I had become a factory worker. It was not unknown for Communist factory workers, when their affiliation was discovered, to be thrown bodily out of the factory window. Life for a Communist in the United States was hard. But with our shared community (even though we were "underground" and rarely saw each other) and our steady work for a new society, it was worthwhile.

Free speech in the United States seemed to be a liberal myth, and even the liberals were beginning to concede this. The new lesson to me was that there were no "universals"; history and social relations determined political substance. In a socialist state, the workers would be free and the opponents of socialism suppressed. Later, after class differences had disappeared, state force would no longer be necessary.

Then, one day in the winter of 1956, I picked up a copy of the *New York Times.* There was the text of Nikita Khrushchev's "secret" speech to the 20th Congress of the Communist Party of the Soviet Union.[94] I experienced the shock that thousands of Communists the world over were experiencing then and had experienced in earlier periods of history as a result of analogous events. At first, I believed it to be a fabrication of the newspaper, but later confirmation from

94. The text has since been published in N. KHRUSHCHEV, THE ANATOMY OF TERROR: KHRUSHCHEV'S REVELATIONS ABOUT STALIN'S REGIME (1956). The text reprinted there was released by the U.S. Department of State on June 4, 1956. It follows a text released earlier by the *Times* and discussed in the *Daily Worker* and other left publications.

"our" sources revealed what the anti-Soviet "fabricators" had charged all along: a history of bloodshed, murder, terror, and suppression unparalleled in modern times except by Hitler. The charge was not "simply" the murder of "capitalists" and "enemies of socialism"; it was murder of leading Communist cadres,[95] Bolsheviks who made the 1917 revolution,[96] and Communist poets and artists. Exposed also were the deportations of whole peoples in the Soviet Union and other atrocities.[97] Murder and suppression, suppression and murder, of whites and reds, yellows and blacks. It made no difference.

In shock, I began to think again about the inalienable rights to

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95. Khrushchev quoted from the declaration of "Comrade Eikhe," a moving document in the history of courage in the face of terror: Comrade Eikhe was "one of the most eminent workers of the Party and of the Soviet government . . . a party member since 1905." N. KHRUSHCHEV, *supra* note 94, at 36. Eikhe, on the basis of falsehoods detailed by Khrushchev and protested by Eikhe in his declaration, was shot on February 4, 1940, after torture and a kangaroo trial. *See id.* at 38. Eikhe, of course, was just one from among the "[m]ass arrests and deportations of many thousands of people, [and the] execution[s] without trial and without normal investigation [which] created conditions of insecurity, fear and even desperation." *Id.* at 26.

96. [Of] the 139 members and candidates of the Party's Central Committee who were elected at the XVIIth Congress, 98 persons, i.e., 70 percent, were arrested and shot (mostly in 1937–38). . . .

. . . The same fate met not only the Central Committee members but also the majority of the delegates to the XVIIth Party Congress.

. . . We should recall that the XVIIth Party Congress is historically known as the Congress of Victors. . . . [M]any of them suffered and fought for Party interests during the pre-revolutionary years in the conspiracy and at the Civil War fronts.

Id. at 31–32.

97. The Karachai, the Balkars, and the entire population of the Autonomous Kalmyk Republic were deported from their homelands. "[T]he Chechen and Ingush people were deported and the Chechen-Ingush Autonomous Republic was liquidated." *Id.* at 52. Khrushchev added: "The Ukrainians avoided meeting this fate only because there were too many of them and there was no place to which to deport them. Otherwise, he [Stalin] would have deported them also. (Laughter and animation in the hall.)" *Id.* These were "wartime" measures in some cases reminiscent of our treatment of Japanese-Americans during World War II. Khrushchev notes, however, that these deportations took place at the end of 1943, *after* the Soviet military turnabout in World War II, and "were not dictated by any military considerations." *Id.*

I do not intend to portray Khrushchev as someone who studied such history and drew from it a lesson concerning the right to dissent. He drew no such lesson. For him, Stalin's misdeeds resulted from "the cult of personality" alone. Indeed, he feared open discussion even of the history he recited. He concluded his talk with the caveat:

We cannot let this matter get out of the Party, especially not to the press. It is for this reason that we are considering it here at a closed Congress session. We should know the limits; we should not give ammunition to the enemy; we should not wash our dirty linen before their eyes. I think that the delegates to the Congress will understand and assess properly all these proposals. (Tumultuous applause.)

Id. at 71.

free speech and dissent. On at least this issue, I concluded Kautsky, the "renegade," was right. Examples continue: Hungary in 1956, Czechoslovakia in 1968, the "cultural revolution" in China, Poland in 1982. This history is part of my experience and that of thousands of others in search of socialism and community.[98] The legally protected right to dissent is not opposed to socialism and community; it is instead necessary for their realization. The individualistic and liberal rights of speech and dissent do not have only a "privatistic" and "egoistic" content; they are necessary for social struggle and advancement in socialist as well as capitalist society.

I reiterate here that my purpose in reciting these experiences is *not* to suggest that there are Critical legal theorists who do not favor free speech and dissent. I know of no such people. It is the muddling of the significance of legal rights, the disparagement of inalienable rights, the silence in some Critical writing as to the lasting and universal significance of the great liberal contribution—the legal rights of speech and dissent—which have moved me, for better or worse, to write this section.

The rights to free speech and dissent must be understood as essential to the human condition that seems most explicitly valued in Critical legal writing: the state of "community," the experience of solidarity with one's fellow humans in common life and endeavor. On this point, Duncan Kennedy's formulation is one with which I completely agree:

> Embedded in the rights notion is a liberating accomplishment of our culture: the affirmation of free human subjectivity against the constraints of group life, along with the paradoxical countervision of a group life that creates and nurtures individuals capable of

98. The bleak history continues. The murder of socialists and democrats by the right in Chile, El Salvador, Guatemala, and other countries matches the murder by Stalin. None of these countries recognizes the right to dissent. The U.S. State Department recently reported that the leftist government in Suriname shot 35 opposition leaders who had pressed for the creation of democratic institutions. *See* Weinraub, *Suriname Assailed for Dec. 9 Killings,* N.Y. Times, Dec. 15, 1982, at A5, col. 1. There was no trial, of course, but why would a trial matter? A little earlier, Cuba, which is one of the more unusual socialist nations, released Armando Villadares, a poet who spent 22 years in prison for criticizing Fidel Castro. Mitterrand, the Socialist Premier of France, and Gabriel Garcia Marquez, the Colombian Nobel Laureate, were instrumental in the long campaign for his release. *See Cuban Poet, Jailed 22 Years, Arrives in Paris,* N.Y. Times, Oct. 23, 1982, at 3, col. 1. A little later, the papers announced the release and deportation of Kim Dae Jung, South Korea's leading opposition figure and a democrat. He had served two and a half years in prison for sedition. His "sedition" consisted of criticisms of a dictator. *See* Stokes, *Kim Dae Jung Arrives in the U.S. After Being Freed By South Korea,* N.Y. Times, Dec. 24, 1982, at A1, col. 1; Goldman, *Seoul's Constant Critic,* N.Y. Times, Dec. 24, 1982, at A4, col. 5.

freedom.[99]

The "liberating accomplishment" and the "paradoxical countervision" fit together as parts of a whole. One task of scholarship, in my view, should be to deepen our understanding of the kinds of group life and conditions for group life and community which nourish individual freedom and broaden its public base. It is a tragic mistake to ignore historical experience and undermine the notion of "the inalienable rights of mankind" which are part of the essence of that individual freedom.

Of course, when I say "historical experience," I do not mean historical experience devoid of values. Historical experience teaches no lessons by itself. The values I sought in my early life—the values I still seek to advance today—concern both individual self-expression and communal support and solidarity. Over the last half-century, the experience of diverse societies, many thousands of Communists, socialists, and just plain democrats counsels that the protection and enhancement of those values require many things, especially the legal right to free speech and dissent.[100]

For the past 25 years, I have tried to follow a fairly consistent direction. I have not abandoned my search for community, for the assertion of political dissent, or for ways of advancing economic democracy and socialism. In the 1960's and early 1970's, I again experienced periods of solidarity and community before the defeat of that era's movements. Those people I worked and shared with in those movements, however, were able to focus on a democratic content; others, reacting to the defeat of those movements, have moved in directions closer to my route in the late 1940's. Still others remain uncertain. I believe that we can learn from those defeats, just as we can learn from the failures and frustrations of generations before. We can advance the struggle for both socialism and liberty, for both community and autonomy, in ways which unify those values and ourselves.

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99. Kennedy, *supra* note 31, at 506.

100. It is not accidental that the most mature modern movement for a decentralized and open socialism fully recognized the relationship of the rights of free speech and dissent to genuine workers' control and yet dubbed itself "Solidarity." Nor is it surprising that the leadership of a state socialist tyranny found it necessary to use guns and bayonets to suppress that movement, claiming it was pro-capitalist.

An American television reporter had asked an unnamed Solidarity leader: "What will you do, now that Solidarity is smashed and you cannot speak or openly organize?" The reply was in English: "We will find a way to overcome." CBS Evening News broadcast (Dec. 23, 1982). In that one statement, the Solidarity leader reaffirmed his own autonomy and that of his community of millions in Poland and the world.

At least, I choose to live my life as if this were true, for there is no other result that is acceptable to me. More important, perhaps, there is no other way I can live and still feel that I am respecting and expressing myself.

D. *The Fundamental Contradiction*

Central to the argument I have made thus far is the notion that individual autonomy and community are not contradictions at all; rather, they shape and give meaning and richness to each other. Kennedy and other Critical legal theorists of the dominant school recognize the latter thought. At the same time, they argue that the very interdependence of these concepts leads to the fundamental and seemingly unresolvable contradiction they embody. In an oft-quoted passage, Kennedy states:

> Even when we seem to ourselves to be most alone, others are with us, incorporated in us through processes of language, cognition and feeling that are, simply as a matter of biology, collective aspects of our individuality. Moreover, we are not always alone. We sometimes experience fusion with others, in groups of two or even two million, and it is a good rather than a bad experience.
>
> But at the same time that it forms and protects us, the universe of others (family, friendship, bureaucracy, culture, the state) threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad rather than good. A friend can reduce me to misery with a single look. 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. Through our existence as members of collectives, we impose on others and have imposed on us hierarchical structures of power, welfare, and access to enlightenment that are illegitimate, whether based on birth into a particular social class or on the accident of genetic endowment.
>
> The kicker is that the abolition of these illegitimate structures, the fashioning of an unalienated collective existence, appears to imply such a massive increase of collective control over our lives that it would defeat its purpose. Only collective force seems capable of destroying the attitudes and institutions that collective force has itself imposed. Coercion of the individual by the group appears to be inextricably bound up with the liberation of that same individual. If one accepts that collective norms weigh so heavily in favor of the status quo that purely "voluntary" movement is inconceivable, then the only alternative is the assumption of responsibility for the totalitarian domination of other people's minds—for "forcing them to be free."
>
> Even this understates the difficulty. It is not just that the world of others is intractable. The very structures against which we rebel are necessarily within us as well as outside of us. We are implicated

> in what we would transform, and it in us. This Critical insight is not compatible with that sense of the purity of one's intention which seems often to have animated the enterprise of remaking the social world. None of this renders political science impossible, or even problematic: we can identify oppression without having overcome the fundamental contradiction, and do something against it. But it does mean proceeding on the basis of faith and hope in humanity, without the assurances of reason.[101]

Kennedy's statement is moving and compelling. Indeed, the contradictory nature of autonomy and community not only exists in society; it also is implicated within us individually. Yet, Kennedy's phrasing of the contradiction is noteworthy: "A friend can reduce me to misery with a single look"; "coercion" by the group seems necessary to liberate the individual, so strong are the existing institutions which impose other values; perhaps we can proceed to help ourselves and the world "on the basis of faith and hope in humanity," but it will be "without the assurances of reason."

Kennedy, in his deepest feelings and expressions, would appear to embody all the dualities that some Critical legal scholars (including Kennedy himself) find embodied in liberal ideology. One wonders, for example, why either "reason" or "faith and hope in humanity" are the necessary conditions for "do[ing] something against identified oppression." Somewhat like Kennedy, Brest writes that only

> the truly courageous—or the most fool-hardy—among us might go the next step and, grasping what we understand of our situation, work toward a genuine reconstitution of society—perhaps one in which the concept of freedom includes citizen participation in the community's public discourse and responsibility to shape its values and structure. Those who explore this route may discover that in escaping one set of contradictions they have just found themselves in another. But we will not know, until despair or hope impels us to explore alternatives to the world we currently inhabit.[102]

Certainly, one who finds "hope" or the "assurance of reason" in the success of the struggles for justice, freedom, human liberation, or simply for a better human life for all has a source of support that more uncertain people, among whom I include myself, might envy. (I doubt if anyone is moved to actually "do something" against oppression only by despair.) But could not one lack the assurance of reason, the support of hope, or any faith in the general progress of humanity and yet be moved to "go the next step" because that very effort becomes a means of realizing one's *own* humanity, enabling one

101. Kennedy, *supra* note 16, at 212–13.

102. Brest, *supra* note 17, at 1109 (footnote omitted).

to touch the "other" through building some small piece of a new life here and now? Just as "[w]e are implicated in what we would transform, and it in us," so too is reforming and reshaping ourselves implicated in the struggle to transform the world around us.

Changing the world, after all, involves changing ourselves in some small or large way and doing and changing in the world now—in at least a small way—what we would like to see happen on a larger scale. Within the womb of this contradictory and oppressive society, can we give birth to the transformative pieces of a new society? Can we alter how we perceive others, including friends whose glances can cause us misery? There are those who have done so, at least to some extent, at least for a while. *That* is worth struggling for. It is a struggle for life, to live one's own life and act out of a concern for others and for all of society.

"All real living is meeting," Martin Buber taught, and I agree. Living is found in relationships and mutuality, between "I" and "thou," "we" and "them." Every effort to meet others results in some mutuality. Buber asks, however, whether relationships can always be entirely reciprocal.

> Can it always be, may it always be? Is it not—like everything human—delivered up to limitation by our insufficiency, and also placed under limitation by the inner laws of our life together?
>
> . . . From your own glance, day by day, into the eyes which look out in estrangement of your "neighbor" who nevertheless does need you, to the melancholy of a holy man who time and again vainly offered the greatest gift—everything tells you that full mutuality is not inherent in men's life together. It is a grace, for which one must always be ready and over which one never gains an assured possession.[103]

Is not the equality we seek on earth, the autonomy of human self-realization, and the communal support which will nurture it, defined and limited in analogous ways? Social democratic critique of radical transformative thinking has been concerned, quite properly, with the maintenance of classical democratic liberties. But such criticism—when it has argued that radical transformation is *inconsistent* with such liberties—has sometimes assumed that the world to be divided is merely one of finite, material *things*. Given an egoistic world of self-seekers, only tyranny can succeed in imposing and maintaining a perfect equality of things.[104] But humanity's most important re-

103. M. BUBER, I AND THOU 131 (1958).

104. *See, e.g.,* N. MACCORMICK, LEGAL RIGHT AND SOCIAL DEMOCRACY (1982). MacCormick argues that the maintenance of classical rights and liberties *requires* private property

sources—love, trust, and support of others—are infinite in their potential. When we learn how to share those resources and how to construct and experience equality in relationships, we may begin to experience the "meeting" in society that is at the heart of a radical transformation. Concern for autonomy, the underlying value of the classical democratic liberties, is inherent to the search for mutuality. Greater equality in things, to be sure, is something which is part of, and also a consequence of, the struggle for such change in relationships. But concern for autonomy need not be "egoistic," and things are neither the goal nor the sole point of departure toward the goal.

How can we transform society to produce greater mutuality in relationships, when inequality in personal relationships is the hallmark of every society we know? Consider as one of the many examples the relationship of doctor to patient.

> "A very important point in my thinking is the problem of limits," says Martin Buber in a taped dialogue with the therapist, Carl Rogers. The inherent limitation of meeting in a doctor-patient situation is that doctor and patient are not equal. He says to Rogers, "You are able to do something he is not able. You are not equals and cannot be. You have the . . . great self-imposed task to supplement this need of his. . . ." "No," says Rogers, "to help the patient, I have to appreciate his or her separate experience, see him or her in a life of 'equal authority' even if distorted." "That is not my point," says Buber. "The point is that you see from your side, but he or she does not see from his or hers—the relationship is not equal and is inherently limited." The argument-dialogue moves back and forth.
>
> Rogers moves to a different emphasis. The doctor recognizes the patient, allows him "to be" as a human being. The mutuality, the meeting and the quality come in the moment when the doctor recognizes the patient's humanity and the patient recognizes the doctor reaching and appreciating the patient as a person. "Which is a little different from bestowing something on [the patient]," says Rogers. "In the meeting is a healing." Buber says, "I'm with

because its abolition, paired with a goal of equality, would have the result that "any attempt to prevent unequal outcomes supervening upon the original scheme of equal distribution must involve the erection of a tyrannical form of government to maintain a perpetual inquisition into every possible cause of supervening inequality, and a perpetual redistribution of the fruits thereof." *Id.* at 4. MacCormick thus seeks a reconciliation of legal rights, formal equality, and a fair, minimum subsistence level of material goods. "Perfect" material equality need not be the goal of a radical democratic socialism. An equality based on relationships and participation, where autonomy is protected by legal rights (even while it is nourished as well as contradicted by community), where *greater* equality in things is simply one aspect of social mutuality, is what I and many other self-defined radicals seek.

you."[105]

We are plagued by the problem of limitation. But recognition of the other—the real meeting—is possible. The task of social reconstruction is that of creating opportunities for the realization of such relationships in society.

Let us continue to consider, for example, the problem of mutuality and limitation in health care. If we are to approach health care delivery on a systemic basis, we confront at least two aspects to these problems. First, there is the problem of achieving financial and institutional *structures* that are consistent with greater equality and mutuality in relationships. Entrenched as the class system may be, the articulation of these structures is comparatively easy. Both the theoretical knowledge and the beginnings of practical cooperative examples exist now.[106]

The second and more difficult part of the problem is transmuting the *forms* of a consumer-responsive and cooperatively controlled health care structure so that the living experience of mutuality becomes the lasting and dominant hallmark of the health care relationship. I am not sure whether it will ever be possible to achieve permanent "success" in this. Yet the very struggle to reconstruct health care, organized along mutual aid lines which stress cooperative and caring relations, helps to provide a grace (in Buber's terms) and character to society and to each person who struggles for it.

Consider the problem of limitation in the context of death, both the death of each of us as individuals and that of everyone we know and love. Does not death pose an even more fundamental contradiction to our lives than that which exists between autonomy and community? It demonstrates that we are limited beings. An appreciation of death as the certain limit on our lives, however, could help us to live more fully, more richly, and more lovingly, or we may choose instead to allow death to overwhelm and narrow our lives long before it comes. Similarly, we may allow the fundamental contradiction of which Kennedy and Brest speak to overwhelm and disarm us. But if it does, it will be because of the way we have *chosen* to

105. Excerpts from the taped dialogue are reproduced in THE WORLDS OF EXISTENTIALISM: A CRITICAL READER 485-97 (M. Friedman ed. 1964).

106. *See, e.g.,* Sparer, *Gordian Knots: The Situation of Health Care Advocacy for the Poor Today,* 15 CLEARINGHOUSE REV. 1, 22-23 & n.92 (1981). For a good start towards a statutory setting for a democratic, decentralized, and cooperative health care system expressed in legislative form, see the discussion by Representative Ronald Dellums of The Health Service Act in 125 CONG. REC. H1455-62 (daily ed. March 19, 1979).

think and act in the face of the limitation imposed. That choice shapes who and what we are.

Some may contend that the notion that we can affect the nature of our lives and the lives of people with whom we seek to "meet" requires a certain kind of faith and hope. Certainly, reason alone is an insufficient ground for such a belief. Perhaps, however, it can be demonstrated by experiential engagement, which crosses the lines among faith, hope, and reason. But yet again, some hope and faith in humanity is required even if, and while, an underlying skepticism exists. Maynard Solomon, Beethoven's biographer, notes:

> [I]t is the conflict between faith and skepticism, the struggle between belief and disbelief—which Goethe described as the most important theme of world history—that creates those dynamic tensions which tend to expand and threaten to burst the bonds of form. The *Eroica* is Beethoven's elaboration of that theme in the closing hours of the Enlightenment.[107]

We will have to struggle to burst the bonds of our forms, of our own conflicts and internalized contradictions. We are limited and may never fully break through. But perhaps some day, if we struggle with ourselves and others, we will be able to receive the harsh glance of a friend and not be reduced to misery but rather extend compassion to him or her. What we are if we reach for that possibility seems to me better than what we are if we do not. Such reaching is what freedom is all about.

II. LAW AND THE SOCIAL MOVEMENT: DOES CRITICAL LEGAL THEORY MAKE THE CONTRIBUTION NEEDED? IF NOT, WHY NOT?

A. *Introduction*

"The philosophers have only *interpreted* the world, in various ways; the point, however, is to *change* it."[108] The commitment to theory which contributes to, and in turn is informed and developed by, social practice concerned with changing the world, is a theme occasionally encountered in Critical legal writing.[109] In this essay, I use

107. M. SOLOMON, BEETHOVEN 142 (1977).

108. K. MARX, *Theses on Feuerbach, Thesis XI,* in BASIC WRITINGS, *supra* note 47, at 243, 245.

109. For example, Kennedy wrote the following in his comment on Klare and Lynd: "They represent the emergence of a new left intelligentsia committed at once to theory and to practice, and to creating a radical left world view in an area where once there were only variations on the theme of legitimation of the status quo." Kennedy, *supra* note 31, at 506.

the word "praxis" to refer to such a unity of theory and action.[110] The need for praxis should be self-evident to scholars such as those in Critical studies, whose view is that domination and exploitation of human beings characterizes our social life, since mere tinkering with a legal system misleads us. Therefore, fundamental transformation of social relations, including those involved in the production process, is necessary. Richard Flacks, a sociologist, puts it this way:

> [I]t seems urgent for academic radicals and Marxists to develop a more reflexive understanding of the implications for and relevance of their intellectual work to political practice. It may be a characteristic of late capitalism that even Marxism can become nothing more than a token in the game of professional achievement.[111]

Despite such a warning, the practical relationship of Critical legal theory to social movement and struggle in the United States today is, at best, very limited. Neither lawyers nor political activists receive much enlightenment from Critical legal theory with regard to their actual work. Nor is Critical legal theory itself much affected by the practical work of such people. While there are exceptions to these generalizations,[112] the absence of *praxis* in current Critical legal work seems to be one of its most marked features. Gordon, a Critical legal theorist, writes:

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110. "Praxis" is one of the "CLS mystifications" which appears to disturb my colleague Schwartz. *See* Schwartz, *supra* note 3, at 443. Nevertheless, praxis is a rich, philosophic concept which, for good reason, has been the subject of much study and comment. I believe that Klare uses the term appropriately in the quotation critiqued by Schwartz. I emphasize, however, that I am using it in this essay solely as a shorthand term for the theory-practice-social change relationship described in the text. For a discussion of the various meanings of praxis in philosophy, see generally R. BERNSTEIN, PRAXIS AND ACTION (1971). Also see the philosophical journal, PRAXIS INTERNATIONAL.

111. Flacks, *Marxism and Sociology,* in THE LEFT ACADEMY, *supra* note 2, at 9, 46. Ollman and Vernoff, the editors of this volume, expand on the point:

> [W]ithout a clear, ongoing link to working class politics, there is the constant danger of Marxist ideas breaking down into a patchwork of synonyms, reworked, relabeled and married off to one of the many ideological suitors that inhabit the corridors of any university. Revolutionaries as well as revolutionary ideas get tamed in this way.

Ollman & Vernoff, in THE LEFT ACADEMY, *supra* note 2, at 3 (editor's introduction).

112. For example, the work of Frug and Klare has great significance for social movement practice. Frug's exploration of "The City" lays the basis for significant practical exploration of decentralized power. See, for example, his discussion in *The City as a Legal Concept, supra* note 4, at 1126–28. Frug is able to do this, however, precisely because he utilizes "liberal" concepts such as rights, even while he attacks liberalism and rights as obstacles to social change. Klare's work constitutes a major contribution to the labor struggle in the United States. *See* Klare, *supra* note 4. Klare's contribution is limited, however, by his rigid position on rights and rights theory. Other Critical scholars, such as Bellow and Rosenblatt, exemplify a more full and explicit appreciation of the use of law as an instrument in social movement. *See* note 161 *infra.* Taub and Schneider, in a different way, show that law does make a difference. *Id.*

> At every meeting of the Conference on Critical Legal Studies, one can sense these barriers of puzzlement or irritation being raised between political allies who see themselves for the occasion mainly as "theorists" or "practitioners." It is not—not at all—that the "practitioners" are against theory. They are hungry for theory that would help make sense of their practices; that would order them meaningfully into larger patterns of historical change or structures of social action; that would help resolve the perpetual dilemma of whether it is or is not a contradiction in terms to be a "radical lawyer," whether one is inevitably corrupted by the medium in which one works, whether one's victories are in the long run defeats, or one's defeats victories; or that would suggest what tactics, in the boundless ocean of meanness and constraint that surrounds us, to try next.[113]

Gordon attempts to explain why the "practitioners" do not get what they are looking for and why what is produced by the "theorists" is appropriate. My contention, however, is that the "theorists" *should* be attempting to give the "practitioners" theory which is relevant to their concerns. Because they are not, the "theory" as well the "practice" suffers. Worse, if Critical legal theory's underlying social concerns about domination and exploitation are valid—and I believe they are—we all suffer from this failure in praxis.

I do not approach the matter of why Critical legal theory is so divorced from social practice with a sense of impatience or easy condemnation. It is very difficult for any complex social theory to relate helpfully to practice and, in turn, be illumined by practice. Critical legal theory is concerned with radical social change at a time when even liberal social movements appear to be at a standstill. And, of course, it is particularly difficult for what is essentially a nascent legal theory to accomplish a praxis which has historically eluded most other radical theory in the United States.

Nevertheless, my argument is that Critical legal theory is frequently divorced from and useless to social practice for reasons which are closely related to the attack on rights discussed in Part I.

The first reason for Critical legal theory's separation from practice is the view of some leading Critical scholars that so sweeping is the hold of liberalism's belief systems and so instrumental are rights notions to the maintenance of dominance and oppression that only negative critique aimed at delegitimation constitutes a useful path for theory today. This focus on delegitimation, including the attack on rights, hinders Critical theorists from pursuing affirmative pro-

113. Gordon, *New Developments in Legal Theory,* in THE POLITICS OF LAW, *supra* note 4, at 281.

grams. A second reason for the practice–theory separation is that, despite the emphasis on dualities and contradictions in Critical legal theory, Critical theorists have not grasped the *dual* nature and potential of legal rights and entitlement programs. As much as rights are instruments of legitimizing oppression, they are also affirmations of human values. As often as they are used to frustrate social movement, they are also among the basic tools of social movement.

On the one hand, these weaknesses in Critical legal theory help to account for the gulf between Critical theory and social movement. On the other, the divorce of Critical theory from social movement reinforces much of the weakness in Critical theory. Thus, in evaluating doctrinal reforms, some Critical theorists tend to divorce their evaluation of the reform from any analysis of social conflict that would assess the possibility for underlying social change. Below, I will illustrate this tendency in the context of Critical legal discussion of welfare entitlement theory.

B. *Delegitimation and the Separation of Critical Legal Theory from Social Movement*

> Let me return to trashing, a fancier term for which might be "delegitimation" (another might be "demystification"). Why defend it? For one thing, trashing is fun. I love trashing. . . .
>
> The goal of trashing, however, is not liberation into nihilist resignation. I am no nihilist. . . . The point of delegitimation is to expose possibilities more truly expressing reality, possibilities of fashioning a future that might at least partially realize a substantive notion of justice instead of the abstract, rightsy, traditional bourgeois notions of justice that generate so much of the contradictory scholarship. One must start by knowing what is going on, by freeing oneself from the mystified delusions embedded in our consciousness by the liberal legal world view. I am not defending a form of scholarship that simply offers another affirmative presentation; *rather, I am advocating negative, Critical activity as the only path that might lead to a liberated future.*[114]

The first reason that Critical legal scholarship contributes so little to those engaged in social change efforts and learns so little from social change practice is its deeply held belief that delegitimation of liberal legal scholarship (which includes virtually all scholarship outside the Critical legal camp) is the *principal* contribution that it can make to significant change. The reasoning is that only by breaking the hold that current liberal thinking has on our minds can we

114. Freeman, *supra* note 91, at 1230–31 (emphasis added) (footnote omitted).

even begin to create a vision of the sort of society towards which we should be struggling. Because the principal ideological support of our current social structure is liberalism, exposing that ideology is the obvious task for scholars seeking to end the oppression and domination that characterize present society.

Not all Critical legal theorists subscribe to this formulation. Kennedy, for example, is insistent that "the critique of liberal legalism is only a small contribution to a valid strategy of legal leftism."[115] He seeks "a unity of theory and practice" and has some specific suggestions as to what scholars might do in the law schools themselves.[116] But even he has little to say about theory's use in transformative social struggle in the world outside the law schools. This silence results because Kennedy and many other Critical scholars agree with the crux of Freeman's formulation. They do not see what else theory can effectively do, and thus they concentrate on the inadequacies of liberal doctrines (broadly defined) and on the ways liberal ideology rationalizes the way things are.[117] But the situation remains unsatisfactory, and I cannot help but believe that some of the same Critical legal scholars who justify the divorce of theory from the world of social struggle know this. They know this even when they seek to evade it.

Consider Robert Gordon, whose sensitive, expository piece on Critical legal theory begins with remarks on the "barriers of puzzlement or irritation" experienced by practitioners at Critical Legal Studies Conferences.[118] In his essay, Gordon provides a kind of intellectual biography of the type of lawyer and law teacher who came to

115. Kennedy, *Cost-Reduction Theory as Legitimation,* 90 YALE L.J. 1275, 1282 (1981).

116. *See id.* at 1283.

117. Roberto Unger, who has a broad vision of socially transformative activity, which includes a role for rights, nevertheless encourages a narrow approach when he writes:

> We teach . . . by pushing the negative lessons to the extreme point at which they start to become constructive insights. We hold up the image of a form of conceptual and practical activity that exemplifies a way of living in civil society without capitulating to it. Ours may seem a narrow terrain on which to develop and defend so important a lesson. But part of the point to the lesson is that no ideal of conduct or form of insight counts until it has penetrated the specialized areas of conduct and thought. Once penetrated, the separate areas turn out to present significant analogies. Thus, the response has a pertinence that outreaches the small, privileged domain of professional practice and academic life with which it immediately deals. It has a broader application in a world of broken dreams and paper-pushing, of abstractions that have long ceased to be living theory and that, once routinized and mutilated, turn into the guiding principles or the empty slogans of forms of social practice to which they lead the spurious semblance of sense, authority, or necessity.

Unger, *The Critical Legal Studies Movement,* 96 HARV. L. REV. 561, 670 (1983).

118. Gordon, *supra* note 113, at 281.

be engaged in Critical legal theory: a person "who first started thinking seriously about law as a student in law school in the late 1960's"; who there experienced a kind of "toned-down" Legal Realism and surface "policy analysis"; who went on to engage in the social struggles of the late 1960's and early 1970's when the "march of historical progress was in trouble"; who then experimented with "the emerging vocation of the liberal but antiestablishment, activist reform lawyer, who would deploy the techniques of the system against the system." But disappointment, experience, and reflection raised problems. "[D]octrinal victories peaked all too early," the "most favorable rule outcomes [were obtained] just where enforcement of them seemed most hopeless."[119] Such lawyers and law teachers began to push for more and deeper explanations.[120]

From this background, Gordon traces an emerging "interpretative" Critical legal theory that emphasizes the role of legal doctrine in "belief-systems that people have externalized and allowed to rule their lives."[121] It is "belief systems" that count, even though "many constraints on human social activity," such as finite resources, do exist. Given these belief systems, not even the "organization of the working class or capture of the state apparatus will *automatically*" produce conditions which lead to "the utopian possibilities of social life." He then concludes:

> Of course, this does not mean that people should stop trying to organize the working class or to influence the exercise of state power; it means only that they have to do so pragmatically and experimentally, with full knowledge that there are no deeper logics of historical necessity. . . . Yet, if the real enemy is us—*all* of us, the structures we carry around in our heads, the limits on our imagination—where can we even begin? Things seem to change in history when people break out of their accustomed ways of responding to domination, by acting as if the constraints on their improving their lives were not real and that they could change things; and sometimes they can, though not always in the way they had hoped or intended; but they never knew they could change them at all until they tried.[122]

Gordon's conclusion is profound. But it contradicts the view that a negative attack on liberal legal doctrine is the key path to a liberated future.[123] *People break out of their accustomed ways of responding to*

119. *Id.* at 282–84.

120. *Id.* at 290.

121. *Id.* at 290.

122. *Id.* at 291–92.

123. To be more accurate, in my view Gordon's conclusion is both profound and ob-

domination by acting as if they could change things. "Acting as if they could change things" does *not* mean confining scholarly endeavor to negative doctrinal analysis, even though negative doctrinal analysis may be one helpful step towards acting. Acting means struggling for and living a different way, even if only "experimentally," and this requires praxis, theory which guides and is in turn influenced by action.[124] Yet the whole of Gordon's piece, until his conclusion, is an exposition which becomes a polemic—almost an apology—for the negative Critical analysis which constitutes virtually the sole response to the practitioners' yearning for helpful theory.

Consider also Peter Gabel, whose works are among the most sophisticated in Critical legal writing. In his critique of Dworkin's *Taking Rights Seriously,* Gabel stresses the need to look at the real world, the world of concrete, specific events:

> Here in the concrete we do not find a group of abstract "citizens" engaging in lively moral discourse, but rather a group of dispersed

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scure. With regard to the latter, consider Gordon's statement, directly preceding the above-quoted paragraph. He suggests that organization of the working class and the capture of state power will not "*automatically* lead to utopia." On the one hand, no one, not even the most hoary state socialist, would contend that "organization of the working class" or "capture of the state" would *automatically* bring about Utopia. On the other hand, the statement by Gordon may have intended to imply that the "capture of the state" *by* "the working class" has proved inadequate to the hopes of socialists. This observation is particularly confusing because, as of this date in history, *no* state has ever been "captured" by the "working class" (at least not in the sense of a broadly participatory state in which workers are the real owners-managers of their works). Most "socialist" states are "captured" by small party hierarchies. Most social democratic states have yet to displace private ownership and financing as Critical elements in economic control. Gordon's statement thus does not justify the simple conclusion that the "main enemy is us—*all* of us." The main enemy remains private or state bureaucratic, economic, and political power ruling the political and civil life. Those with such private or state power impose formidable obstacles to the removal of this power; and they are very real.

124. The American Populists had a slogan which expressed this point. The people, they used to say, have "to see themselves in action." They must learn, through cooperative endeavors, that cooperative ways of living are possible. They can escape from their accustomed domination by others only when they start acting in different ways. Populist movement activity helped them to act in different ways; the farmers' cooperatives were but one example. Populist theory suggested where and how such action might take place, and where it might lead. The activity itself forced revision of theory. There are even issues in lawyering from the Populist days from which lawyers might learn today. For a useful and illuminating book on Populist history, see L. GOODWYN, DEMOCRATIC PROMISE: THE POPULIST MOMENT IN AMERICA (1978).

Gordon is thus correct when he concludes that the greatest obstacle to change is our failure—the failure of radical critics and also the mass of people—to have learned a different way of living, working, and governing ourselves, one which is cooperative in its nature and allows each of us to recognize himself or herself in all other persons. Acting to change ourselves includes building different kinds of life in the midst of our exploitative institutional and economic life. This endeavor will help us learn that we can be different.

> and isolated *persons* impotently linked through the cycle of production and consumption that determines their social existence. We find the mechanical functioning that most people call work, the packaged emptiness of fast food, the obsessive manipulation of appliances that occupies the boredom of leisure time, and the sort of "love" that attempts to realize desire through ambivalent dependency and pornographic fantasy. The unhappiness and sense of hopelessness embedded in these processes are not simply the consequence of "psychological problems" as popular culture keeps insisting in despair; *these concrete processes constitute the social totality within which the psyche is formed and finds itself in difficulty. And it is the effects of these processes that express the true morality of our political institutions.* [125]

Gabel is entirely right when he insists on understanding people and social relations in the real, concrete, specific world in which they exist. But surely that part of the concrete world he summarizes with such eloquence is not "the social totality within which the psyche is formed." At least a fair number of people do have experience with a more genuine, personal love. Some people do seek something better in "work" than "mechanical functioning," at least when they are assured of a job to support their existence. People, at least a fair number, are frequently dissatisfied with the "packaged emptiness" on which they spend their wages.[126]

I agree with Karl Klare when he writes: "I regard as inaccurate the view that . . . it is possible to describe the working class as in any sense satisfied with current standards of living in either the material or cultural aspects."[127] But if this is so, then it should be possible to struggle *now* over the conditions which Gabel describes. Nevertheless, neither Gabel's work nor that of most other Critical legal theorists provides theory that can aid such struggle. Indeed, it does not even recognize the need for new directions in scholarship which

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125. Gabel, *supra* note 23, at 311–12 (emphasis added).

126. Gabel's description of our world reminds me of Marx's early writings. In an 1844 essay, Marx wrote of love with extraordinary insight:

> Let us assume *man* to be *man,* and his relation to the world to be a human one. Then love can only be exchanged for love, trust for trust, etc. If you wish to enjoy art you must be an artistically cultivated person; if you wish to influence other people you must be a person who really has a stimulating and encouraging effect upon others. Every one of your relations to man and to nature must be a *specific expression,* corresponding to the object of your will, of your *real individual* life. If you love without evoking love in return, i.e., if you are not able, by the *manifestation* of yourself as a loving person to make yourself a *beloved person,* then your love is impotent and a misfortune.

K. MARX, *Money,* in KARL MARX: EARLY WRITINGS 189, 193–94 (T.B. Bottomore ed. 1963).

But however true this commentary on love, there are many who consciously strive for and do experience the love Marx recognizes.

127. Klare, *supra* note 4, at 267–68 n.10.

would aid such struggle. In the course of constant efforts at delegitimation, some Critical legal theorists begin to think and talk about "the law" as if it were no more than litigation, doctrines, and case outcomes—precisely the narrow view of most conventional legal theorists. Critical theorists rarely conceive of legal strategies to employ outside the courtroom for the purpose of building social movement. Somehow, the affirmative relationship of law to social movement becomes lost.[128]

C. *The Artificial Struggle over Entitlement Theory and the Legalization of Welfare*

My contention is this: The notion of "legal right" is one which can affirm and defend human autonomy and solidarity or merely give the appearance of such autonomy and solidarity while in fact excusing oppression. Various kinds of legal rights and entitlements may be used in a manner that helps to develop social movement, which in turn leads to expanded opportunities for a more humane society, or they may be used to help frustrate social movement by legitimating existing relationships. The meaning of a right or entitlement depends upon the way in which it intertwines with social movement.

Some Critical legal thinking, however, has considered entitlement program rights apart from social movement. This type of thinking has led to an artificial dispute. Examining the dispute as it appears in welfare law will illustrate the point.

On the one side, presumably, are some liberal theorists who have argued that "rights," "entitlements," and "legislation" of welfare are

128. Gabel's writing illustrates this narrow view of the law as litigation:

> In my opinion, the law has virtually no instrumental function, at least to the extent that the word "instrumental" is meant to refer to the economic significance of the legal outcome. The vast majority of legal outcomes have no serious impact on the economic structure as a whole, and certainly do not directly serve the interests of a dominant class. On the contrary, the legal outcome must in fact be uncertain until the judge reasons to a decision—otherwise there would be no appearance of justice and so no legitimation. Sometimes the owner wins, sometimes the workers wins, and meanwhile the real world, of which legal practice is buy a tiny part, goes on.
>
> . . . .
>
> In the rare case, when the outcome does seriously affect the economic structure (such as perhaps was the case in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)), the dogmatic Marxists may be right: perhaps the decision can go only one way. But such cases are very rare, and it may be that the whole body of law (including law schools, law books, lawyers, and legal thinking) is in a certain sense preparing for them, in the same way that daily prayers are meant to leave no doubt about the just outcome on judgment day.

the keys to a fairer, more responsive welfare system both for welfare recipients and society. Welfare, in this view, would be protected by a set of rights, entitlements, and procedures which would take away the authority of welfare caseworkers to exercise their independent judgment as to whether the poor person should get the assistance requested.[129] Legal rules would spell out who would get what, and arbitrary exclusions would be attacked under equal protection concepts. The welfare department would give a person aid if the rules said the person was entitled to aid, for the rules would state an "entitlement" that could not be taken away unless specific conditions were demonstrated in a fair procedure. Ideally, the entitlement would "vest" in the recipient and a "new property" would be recognized. Of course, the very recognition of this new property form would broaden the distribution as well. Thus, the "legalization" of welfare would be an enormous step forward in improving the situation of the poor.

But the legalization of welfare did not quite accomplish what its advocates had hoped. Notions of "rights" and "entitlements" were accepted; the Supreme Court articulated due process protections for welfare recipients.[130] Welfare was legalized, routinized, and bureaucratized. But along the way, new rules were created which narrowed eligibility and imposed burdensome, if not impossible, demands on welfare clients. The fair procedures articulated by the Court have become a labyrinth which requires enormous energy to negotiate. Caseworkers were once authorized to exercise independent judgment (and they sometimes did so to help poor people), but now they have been deprived of their authority and replaced by "eligibility technicians" who can utilize the myriad of new rules to limit eligibility. All of these factors combine with current federal law to cut welfare grant levels and remove eligibility for major groups of

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Gabel, *supra* note 23, at 313 n.18.

129. *See, e.g.,* Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues,* 74 YALE L.J. 1245 (1965); Reich, *The New Property,* 73 YALE L.J. 733 (1964). Moreover, the statement in the text reflects common assumptions held by many legal service and other lawyers practicing in the area. *Cf.* Greenberg, *Litigation for Social Change: Methods, Limits and Role in Democracy,* 29 REC. A.B. CITY N.Y. 320 (1974). Some of my own work, including my earliest writing on welfare law, might appear to lend credence to such an approach. *See, e.g.,* Sparer, *Social Welfare Law Testing,* 12 PRAC. LAW. 13 (1966). I was, however, trying to build a legal involvement which I at least thought would follow a different approach. *Cf.* Sparer, *Welfare Reform: Which Way is Forward?,* 35 NLADA BRIEFCASE 110, 144 (1978) [hereinafter cited as Sparer, *Welfare Reform: Which Way is Forward?*]; Sparer, *supra* note 106.

130. *See* Goldberg v. Kelly, 397 U.S. 254 (1970).

poor people.[131] Thus, it may be argued, the reification of rights and other abstract legal notions does not help people.

Some Critical legal writers even go a step further and argue that the struggle for one or another right may alleviate an immediate problem but—in the end— will actually do more harm than good. For example, Tushnet writes:

> Acts that alleviate the immediate problem may, by reducing political pressure, delay the rectification of other, perhaps greater injustices. Examples of recent constitutional law from the campaign against segregation and from the welfare rights movement reveal the necessity of careful political analysis: constitutional decisions like *Brown v. Board of Education* amplified the political forces seeking equality, while decisions like *Goldberg v. Kelly* at least arguably diminished those forces, first by deflecting them into a fruitless struggle against a bureaucracy that readily swallowed the Court-prescribed dose of due process without any change in symptoms, and second by bolstering the idea that fairness was not far away in the American welfare state.[132]

The generalizations that underlie Tushnet's statement are true, of course. Some constitutional (and other) decisions can mislead people into thinking that "fairness" is not far away and may deflect political forces seeking equality into fruitless struggle.[133] Careful political analysis *is* needed. But *Goldberg v. Kelly*[134] was, in fact, litigated only after a very careful political analysis had been made. The decision to pursue litigation and other efforts to gain recognition for a welfare recipient's constitutional right to a hearing prior to termination of benefits was part and parcel of the *organizing* strategy of the welfare rights movement, designed to amplify the organized forces—particularly the organized welfare recipient forces—of the movement.[135]

The effort to legalize a pretermination hearing was precipitated by a stark reality: A welfare recipient, in one way or another encouraged by the welfare rights organization, would talk back to a welfare case agent; the agent would terminate or suspend the grant; months later, if then, the recipient would "win" and her grant would

131. The Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, tit. XXIII, 95 Stat. 357, 843- 60 (amending scattered sections of 42 U.S.C.), among other things, eliminates AFDC eligibility for most of the "working poor" who had been eligible under prior laws.

132. Tushnet, *supra* note 7, at 708-09 (footnotes omitted).

133. These generalizations, of course, are as easily applied to Brown v. Board of Educ., 347 U.S. 483 (1957), as to Goldberg v. Kelly, 397 U.S. 254 (1970).

134. 397 U.S. 254 (1970).

135. I was involved with the development of this strategy within the movement from its inception.

be restored. But what would happen to her in the meantime? She and her children would go hungry. Because recipients knew this, their willingness to resist was limited. With a prior hearing, recipients could talk back and resist and still have some protection. The agitation for prior hearing rights spread rapidly, precisely because of its extreme importance to the movement's organizing efforts.

My point in recounting this piece of welfare rights movement history is twofold: First, the particular legal right involved a recognition of the *fundamental human right* of the recipient to dissent and resist; second, the legal right was important to movement building, i.e., to the attempt to shift political forces so that basic social and economic reforms could be made. To put this another way, the historical portrait that is suggested today of liberal lawyers seizing upon "liberal" notions of "rights" and "entitlements" to solve the welfare problem is not entirely accurate. *Some* liberal lawyers and law professors did that, but others were working with a social movement, using notions of rights both instrumentally and in a principled sense.

To be sure, even the latter group of lawyers made only a limited theoretical and practical contribution to the movement. And the movement itself was limited, both by political difficulties which were beyond its capacity to affect and by unnecessary limitations of theory and practice. The questions of what these unnecessary limitations were, what lessons can be drawn today from such movements of yesterday, and what special contributions legal analysis might make seem to me to be among the most important issues for Critical theorists to address. Tushnet's remarks on *Goldberg* are at least relevant to such concerns, but I think his tentative conclusion is wrong.[136]

More typical of Critical legal commentary generally is a brief but thoughtful essay on welfare rights, rules, and entitlements by Bill Simon.[137] Unhappily, because his commentary is totally divorced from social movement analysis, it abstracts the issues discussed, makes his-

136. Even Piven and Cloward, who have written much about the National Welfare Rights Movement's efforts and their deflection into legislative and bureaucratic struggles, consider the "rights" litigation to have been of prime importance to the street movement activities they consider vital. *See* F. PIVEN & R. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 271–72 (1977) [hereinafter cited as F. PIVEN & R. CLOWARD, POOR PEOPLE'S MOVEMENTS]; F. PIVEN & R. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 306–20 (1971) [hereinafter cited as F. PIVEN & R. CLOWARD, REGULATING THE POOR].

137. W. Simon, Working Paper on the Legal Services Institute, 1981 (presented at the panel on "Critical Legal Theory and the Social Science Tradition" at the annual meeting of the Law and Society Association, June 1981, and at the panel on Welfare at the March 1982 Conference on Critical Legal Studies) (on file with the *Stanford Law Review*).

torical errors, and misassesses rules, entitlements, and standards issues.[138]

Simon starts out "to discuss some ways in which Critical interpretation of legal doctrine might be applied to understanding in the welfare area."[139] He notes the legalization of welfare, including discussions of the "formalization of entitlement" and related themes concerning bureaucratic administration and agency workforce developments.[140] He comments that the "cumulative impact" of the legalization developments has both helped and hurt recipients.[141] He explains how some of the themes of legalization have been "coopted and adapted by conservatives."[142] His principal interest is not with "the ultimate impact" of these developments on recipients but with "legal doctrines" and "liberal legalism."[143]

Simon applies Duncan Kennedy's analysis of "the dialectic of formal versus substantive rationality" to the welfare area.[144] He notes that "those who identify legality with rules tend to appeal to values such as autonomy, privacy and predictability; those who identify legality with standards tend to appeal to values such as altruism and efficiency." The result is a dilemma, one of the contradictions of liberal thought: "[N]either version of legality is satisfactory alone: yet each seems incompatible with the other."[145]

This is fairly standard Critical legal stuff. There is some trenchant analysis. Simon ranges over welfare history and the thoughts of major legal writers in the welfare area such as Handler and Mashaw. He criticizes the abstracted nature of their argument "which reasons from the norm of legal formality to the goal of limiting worker discretion."[146] He pulls in a little Weber.[147] He discusses with considera-

138. Professor Sparer's comments are based on a short paper by Professor Simon, *id.*, which was an early draft of a work that Simon has since considerably altered and developed into a full-length article. *See* Simon, *Legality, Bureaucracy, and Class Welfare in the Welfare System*, — YALE L.J. — (1983) (forthcoming). —Eds.

139. W. Simon, *supra* note 137, at 1.

140. *Id.* at 2.

141. *Id.* at 4.

142. *Id.* at 5.

143. *Id.* at 4–5.

144. *Id.* at 5.

145. *Id* at 6.

146. *Id.* at 9. Simon criticizes Handler's "argument for the separation of social services and financial systems." *Id.* at 8. He sees it as linked to reasoning "from the norm of legal formality to the goal of limiting worker discretion to the prescription of reforms involving bureaucratization or proletarianization, all on a rather abstract level." *Id.* at 9. It should be noted, however, that from his earliest writings, Handler expressed his doubt that *beneficiary-enforced* "welfare rights" could ever be effective for the beneficiary. *See, e.g.,* Handler, *Control-*

ble insight separation of powers issues.[148] He applies basic Critical legal thinking on "contradiction" to the welfare area.[149] Because he is not looking closely at social movement, he occasionally makes errors of characterization which fit his theme.[150] And—far more serious—in the end, he leaves things at the same hopeless level of abstract argument on rules-legality versus standards-discretion at which he found them.[151]

Simon does articulate "an alternative vision" to that of the liberals' insistence on rules. At the core of the alternative version are "standards" which require "individualized judgment which links broad social purposes to the particular circumstance of the claimant."[152] His alternative vision, he argues, is "a valuable corrective to the deficiencies of the dominant one." But he concedes that "the jurisprudence of standards is vulnerable to a critique as powerful as the one it makes against the jurisprudence of rules": "The standard form is appealing only to the extent one assumes the content of the standards will be benignly interpreted. But the history of the modern welfare system is full of examples of the potential for abuse of

ling Official Behavior in Welfare Administration, 54 CALIF. L. REV. 479, 494–99 (1966). In my view, Handler's work, which is among the very best in the social welfare arena, is related to Simon's, at least with regard to what I label the "artificial struggle" over rights. Neither is oriented towards developing theory which is helpful to the development of social movement.

147. *See, e.g.,* W. Simon, *supra* note 137, at 11.

148. *Id.* at 18–20.

149. *See, e.g., id.* at 10.

150. For example, Simon writes: "Many of the major legal developments of the late 1960's and early 1970's, including the consolidation of special grants . . . represented the flowering of [the effort by liberals to limit discretion through rules]." *Id.* at 7. In fact, the opposite is true. Liberal lawyers and their recipient allies had been using the special grants as a major *organizing* issue. They wanted to maintain the special grant system (which formerly had been greatly abused by welfare agents who used their discretion to help only favored clients) because, by applying notions of "rights" to it, they could win grants for new (and old) organization members and thus build organization even while more income was redistributed. The effort to seek consolidation was conservative, though liberal themes (condemning discretion as it had been exercised) were used to help justify the consolidation. *See* J. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM 156–61 (1978); F. PIVEN & R. CLOWARD, POOR PEOPLE'S MOVEMENTS, *supra* note 136, at 286–87, 305–07. The main argument for consolidation, of course, was that it reduced costs. The main legal case in which the battle was waged was Rosado v. Wyman, 397 U.S. 397 (1970), which, in relevant part, the liberal lawyers and the welfare recipients lost.

A comparable critique can be made of Simon's statement, *supra* note 137, at 7, that "the liberal program" supported the separation of eligibility determination and services. Liberal lawyers associated with the Welfare Rights Movement in New York City, for example, opposed the separation, as did the Movement and the Caseworkers' Union.

151. W. Simon, *supra* note 137, at 23.

152. *Id.* at 14.

lower level bureaucratic discretion."[153]

The situation is even worse. The history of modern and ancient welfare is full of examples of the abuse of upper and intermediate as well as lower level bureaucratic decisionmaking. Indeed, every abuse of "rules" that Simon finds has its counterpart in spades in the welfare of "discretion" that ruled until either 1935 or the 1960's (depending upon how you read history)[154] and which is reemerging with President Reagan's help today.[155] The alternative vision Simon writes about is hardly new; it is old, and, as applied to welfare at least, it constitutes one of the major horrors of history. It is simply a recasting, in alternative language, of the same problems the "liberals" have left us.

The underlying issue is not "rules" versus "standards." Obviously, there is a place for both. The issues that need the devoted attention of Critical legal theorists include what the purposes and content of welfare should be and whether legal theory and analysis can be helpful to social movement which affects the politics of welfare—that is, social movement for better content and, indeed, for major income and power redistribution.

There are Critical legal theorists who recognize and work towards linking theory to social movement practice.[156] But social-practice-oriented scholarship is a risky endeavor and not simply because of the real obstacles in the world. It is risky because any social struggle today is inevitably a reform endeavor and one in which the reform theorist or practitioner undergoes the risk of developing a theory to promote not a "transformative" reform but a "coopting reform"—one in which the reformer helps sustain the belief system which supports what is wrong in the world.

Social-practice-oriented scholarship is risky also because it means the legal theorist must emerge from the comfortable world of doctrinal analysis and enter the strained world of small political efforts and more massive, apolitical social life. Moreover, the former world is one familiar to the scholar; the latter may be one in which she or he

153. *Id.* at 17.

154. Basic reading in the history of welfare should start with the 1909 Report of the Royal Commission on Poor Laws, ROYAL COMM'N ON THE POOR LAWS AND RELIEF OF DISTRESS, REPORT (1909), and continue with at least W.BELL, AID TO DEPENDENT CHILDREN (1965); F. PIVEN & R. CLOWARD, REGULATING THE POOR, *supra* note 136; M.E. RICHMOND, SOCIAL DIAGNOSIS (1917); and possibly, Sparer, *Welfare Reform: Which Way is Forward, supra* note 129.

155. *See* note 131 *supra.*

156. *See* note 161 *infra*; note 164 *infra* and accompanying text.

is a novice and in which she or he feels unsafe. Many Critical legal theorists, of varying perspectives, enter this strained world as citizen-activists. But not so many enter as both activists and pursuers of theory for action. This unfamiliar role is not only specially difficult in its nature, but it also creates special cause for disapproval from other law professors as an allegedly inappropriate form of scholarship. Besides, it is not "fun," although "trashing" is "fun."

And so, whatever the rationales, for most Critical legal theorists writing today, the principal contribution to the "unity of theory and practice" remains that of critique, a critique which exposes and "delegitimates" other theory, thereby "freeing" us for a liberated future. Duncan Kennedy writes that his intuition is that negative critique provides "liberating energy" (not demoralization or nihilism) and that it moves people to the left (and not to the right).[157] Perhaps, but I have my doubts. Assuming he is correct, however, his theory is that "when defensive maneuvers dissolve, people begin to address more real questions."[158] When is that, if not now? When does Critical legal theory move to "more real questions" which include, I assume, those of developing theoretical contributions to social movement practice?[159]

III. LINKING THEORY TO PRACTICE: THE RESPONSIBILITY OF THE RADICAL LAW TEACHER

> At the same time, the struggle over the form of social life, through deviationist doctrine, creates opportunities for experimental revisions of social life in the direction of the ideals we defend. An implication of our ideas is that the elements of a formative institutional or imaginative structure may be replaced piecemeal rather than only all at once. Between conserving reform and revolution (with its implied combination of popular insurrection and total

157. Kennedy, *supra* note 115, at 1283.

158. *Id.*

159. Fairness to Simon requires noting that he concludes his paper with reference to various liberal strategies and goals, including the development of "alliances with the poor" and the "inclu[sion of] the organized working class in the alliance." The final statement in his paper is:

> My point is only to distinguish the kinds of analyses these goals demand from another type of analysis which recurs in the literature, an analysis which attempts to reason from an abstract conception of welfare legality to a prescription regarding the organization structure or class status of welfare law enforcers.

W. Simon, *supra* note 137, at 22–23. My point, however, is that when Simon critiques the latter type of analysis with an analysis which is conceptually unrelated to efforts to increase the political power of the poor, he leaves us with as inadequate an approach as that which he criticizes.

> transformation) lies the expedient of revolutionary reform, defined as the substitution of one of the constituent elements of a formative context. . . .
>
> . . . We would fall into an error that we criticize in our adversaries if we imagined our conceptual activities as a substitute, even a substitute source of insight, for practical conflict and invention.[160]

Roberto Unger expounds upon the notion of a "transformative reform," a reform which at once helps to destabilize (rather than reinforce) the old order and provides a step toward the democratic transformation of social life. Is it possible for significant numbers of scholars, including legal scholars, to make theoretical contributions to transformative reform? Certainly the dearth of such contributions by legal scholars stands as eloquent testimony to its difficulty. Nevertheless, I think contributions can be made, and, as already indicated, such people as Bellow, Rosenblatt, Taub, Schneider, and Abel demonstrate that it is possible to move in such a direction.[161]

This essay is not the place to detail my own perspective on an affirmative Critical scholarship, but some questions and brief generalities may be appropriate. Analysis of the history of American social movements for change on behalf of the dominated majority (and its various segments: the "poor," the "minorities," the "working class," the rural dispossessed, etc.) is a starting point: Why do social movements fail? What are the Critical ingredients for "success," "transformative" and otherwise? What roles have "law," "legal rights," and lawyers played in the failures as well as the successes? The works of such scholars as Goodwyn[162] and Piven and Cloward[163] may serve

160. Unger, *supra* note 117, at 666–67.

161. Bellow, of course, is an eminent—perhaps the most eminent—example of the practitioner-law professor. He has over the length of his career attempted to unify theory and practice. Among his concerns has been that of developing a theory and practice regarding the relevance of individual legal services to organizational development. *See, e.g.,* G. Bellow, Comments on Our Situation (March 6, 1982) (unpublished manuscript prepared for the Conference on Legal Services). Rand Rosenblatt, working in the area of health and welfare law, has attempted to show the relevance of law to social movement. *See, e.g.,* Rosenblatt, *Health Care Reform and Administrative Law: A Structural Approach,* 88 YALE L.J. 243 (1978); Rosenblatt, *Legal Entitlement and Welfare Benefits,* in THE POLITICS OF LAW, *supra* note 4, at 262. Nadine Taub and Elizabeth Schneider have analyzed the relevance of law to the situation of women in a way that suggests a significant law reform orientation. *See* Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law,* in THE POLITICS OF LAW, *supra* note 4, at 117. In addition, as emphasized earlier, *see* note 5 *supra,* some work by Critical theorists in the "dominant" strain here criticized, particularly that of Klare and Frug, is clearly relevant to the directions social movement in the United States is already pursuing. *See also* Abel, *supra* note 5, at 695, 726–54 (a highly useful analysis of worker ownership experiments in the United States). There are, of course, other significant starts in the direction of such scholarship.

162. L. GOODWYN, *supra* note 124.

163. *See* note 136 *supra.*

as an introduction to these questions. Yet, notwithstanding my great respect for these works, I believe them to be no more than an introduction.

From such a starting point, there are any number of important questions: Can we generalize about the ways in which law and bureaucratic institutional life have succeeded in "dehydrating" social movement? Or the ways in which American social welfare programs have been structured to divide the dominated majority and turn the interests of its various segments against each other? Can we analyze whether and how such programs can be used to unify rather than split the less affluent majority? Can we learn, in short, how "law" can be used to support movement, rather than to stifle it? My guess is that unless and until we do, law will continue to be used to stifle movement.

From my own analyses of the above questions,[164] I have become convinced that a major task of theory and practice concerns the development of new institutional bases for social movement. I refer to institutions which are rooted in nonalienated work opportunities and/or the provision of superior social and health services to people; which are decentralized and controlled by the people they serve; which unite people across the divisive barriers created by the New Deal-Great Society social welfare programs; and which are financially viable without being dependent on grants from government or foundations. Such institutions, I believe, could serve as bases for movement and for further transformative reform, particularly as new movements of social resistance develop. There is movement in the United States right now, as people struggle to build examples of such institutions.[165] The practice of such movement is fledgling, and the theory is even more inchoate; yet, these efforts are the closest thing we have to Unger's "opportunities for experimental revisions of social life."

In my discussions with Critical legal adherents, I have sometimes encountered expressions which imply that the function of social theory is *not* that of aiding the development of social action practice.

164. Sparer, *supra* note 106; *cf.* Abel, *supra* note 5.

165. For examples related to the building of workers' cooperatives, the work of the Philadelphia Association for Cooperative Enterprise (PACE) should be examined; *see also* D. ZWERDLING, WORKPLACE DEMOCRACY (1980) (describing current examples of the democratization of workplaces in the United States and Europe). For examples related to health care institutions, see Sparer, *supra* note 106, at 23 n.92. A recent example is the plan of tri-Community Neighbors, Inc. (Philadelphia) with regard to a maternity center which meets the characteristics outlined in the text.

Other times, such views are rejected.[166] Even such philosophic progenitors of Critical theory as Horkheimer and Unger are not in agreement on this issue.[167] It is time for this matter to be explicitly addressed by the mainstream of contemporary Critical legal theory. Much more importantly, I urge that those of us who believe in the

166. The author's statement is based on discussions and correspondence with Critical legal adherents, not on published works. To the limited extent that published works do comment on this issue, they favor the notion of unity of theory and practice. *See, e.g.,* note 109 *supra*.

167. Compare the negative views of Horkheimer with the more recently expressed views of Unger. Horkheimer writes:

> Above all, however, Critical theory has no material accomplishments to show for itself. The change which it seeks to bring about is not effected gradually, so that success even if slow might be steady. . . . [T]he first consequence of the theory which urges a transformation of society as a whole is only an intensification of the struggle with which the theory is connected.
>
> Furthermore, although material improvements, originating in the increased powers of resistance of certain groups, are indirectly due to the Critical theory, the groups in question are not sectors of society whose steady spread would finally bring the new society to pass. Such ideas mistake the fundamental difference between a fragmented society in which material and ideological power operates to maintain privileges and an association of free men in which each has the same possibility of self-development.

M. HORKHEIMER, CRITICAL THEORY: SELECTED ESSAYS 218- 19 (1972). For a discussion of the ambivalence within the Frankfurt School on this issue, see R. GEUSS, THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL 72-88 (1981).

Unger writes: "The banal idea of the participation of societal theory in the history it describes must be pushed so far that politics and social theory come to seem like a continuous field in which the imagination and the will break society open to themselves." R. Unger, Politics-Introduction: The Context of Social Theory at the Close of the Twentieth Century 19 (unpublished manuscript available at the Harvard Law School Library). See Unger's discussion of transformative or revolutionary reform, *supra* note 117, at 666-67. In another passage, Unger states:

> This kind of transformative effort cannot establish its own aims. It requires guidance.
>
> . . . .
>
> Our theoretical ideas are connected at every level to the way we exercise this form of political practice. The ideas provide the opportunity: a practice of rights-definition that constantly raises anew the central problems of what the relations among people should be like in the different spheres of social existence. More specifically, the opportunity is the struggle that takes place over the legal categories and entitlements that define the concrete institutional forms of the market and the democracy.

R. Unger, *supra,* at 212-13.

A different type of theoretical work, written "as a step toward culling the historical wisdom that might inform lower-class political mobilization in the future" is F. PIVEN & R. CLOWARD, POOR PEOPLE'S MOVEMENTS, *supra* note 136, at xxiii. For a theoretical approach intended to generate action, see Boyte, *Recasting Our Strategy: Toward a Communitarian Approach,* SOCIALIST FORUM (Discussion Bulletin of the Democratic Socialists of America, No. 1) 36-40.

unity of social theory and practice go ahead and work to produce a movement-oriented scholarship.

Ed Greer, a Critical legal practitioner and scholar, is accurate in stating, "The most common obstacle to convincing someone to become a socialist is not disagreement with the ideal of the 'socialist commonwealth' but the profoundly held notion that true socialism is impossible because the *inherently* acquisitive nature of humans will quickly turn such a society into a tyranny."[168]

This obstacle will not be overcome unless and until, in the womb of this society, we act to build cooperative institutions which meet the real and current needs of people and thereby demonstrate that people can work for *mutual* rather than separate interests. The theoretical and practical questions surrounding any such social action are sitting and waiting for serious contributions to be made toward their answer.

In any event, one can almost sense the winds of change within Critical Legal Studies. There is increasing concern to be responsive both to social movement and to those many practitioners who, in Gordon's words, are "hungry for theory." This concern explains, at least in part, why the spring 1983 Conference on Critical Legal Studies concerned itself with "reconstruction" rather than only with negative theory.

Perhaps one of the reasons for this increasing concern about responsiveness to practitioners involves the Critical legal theorist law professor's daily need to be responsive to her or his students. One of the most poignant of all commentaries by Critical legal scholars is that of Alan Freeman as he addresses the question of law school teaching by a left radical.

> What is one supposed to do in teaching this [civil rights law] course? The simplest, but perhaps too facile, answer is: tell the truth. Yet if the truth seems so hopeless and dismal, and the generation of more legal argument so pointless, then one is dealing with something other than the usual law school enterprise of helping students to fashion a measure of craft, skill, and insight to deal with the needs and hopes of social life.
>
> The dissonance becomes more striking when one considers the students who typically take a course in civil rights law. Based on my own eight years of teaching the course, I can report that the students who elect it tend to be the most committed to the goal of seeking social justice through law, the most believing in the possi-

168. Greer, *Antonio Gramsci and 'Legal Hegemony,'* in THE POLITICS OF LAW, *supra* note 4, at 304, 305.

> bility of such an outcome. Thus, one finds oneself not only offering a cynical perspective on one of the most idealist areas of legal endeavor, but sharing that perspective with the students most likely to carry on with the endeavor in the future.[169]

Freeman could have been talking about almost any area of law that explicitly deals with the plight of poor and oppressed peoples in the United States. After the teacher tells "the truth," examines "presuppositions," and "delegitimates," then what? Freeman suggests various possible teaching strategies, each of which in some fashion "preserves the myths of liberal reform."[170] He adds:

> To avoid those myths, one must simultaneously consider civil rights doctrine as immersed in social and historical reality. Such an approach assumes that negative, Critical activity that self-consciously historicizes areas of legal doctrine like civil rights law will lead both to more self-aware and effective employment of legal forms and to a more realistic appraisal of the comparative utility of mechanisms for social change.[171]

He concludes that it is not enough to show the need for historicization; the law teacher should attempt to offer a concrete historical account to replace what is exposed as inadequate. Finally, he offers such an account for the civil rights area.[172]

Oddly, however, Freeman says nothing about the law teacher's responsibility to shed some light—to at least *try* to shed some light—on what more "self-aware and effective employment of legal forms" might be. Nor does he comment on an analogous responsibility to show how "a more realistic appraisal of the comparative utility of mechanisms for social change" leads to the improvement of those mechanisms. Rather, he appears content with assuming that negative Critical insight will offer sufficient guidance.[173]

Therein lies the source of the real sadness (a word more accurate here than "cynicism") of some Critical legal theorists who are also

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169. Freeman, *supra* note 30, at 1886.

170. *Id.* at 1887.

171. *Id.*

172. *Id.* at 1887–95.

173. Compare the insightful commentary of a Harvard Law student's note:

> Abstract doctrinal criticism, particularly if disassociated from demonstrations of existing social injustice *and unaccompanied by a substantive vision that suggests avenues for its implementation,* is likely to be disregarded. Relentlessly pursued, contradiction can be self-perpetuating—the end product of a scholarship that disables the critic from utopian speculation, prey to his own devices. Indeed, Critical scholarship could reinforce cynicism in the profession without generating the social and legal change the radical scholars would advocate.

Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship,* 95 HARV. L. REV. 1669, 1685 (1982) (emphasis added) (footnotes omitted).

law school teachers. In some respects, of course, what we address here is essentially a continuation of the praxis issue discussed in the last part. But it is more. The Critical legal professors are not only scholars; they are also teachers. The people they teach are, in the main, not going to be scholars. They are going to be practitioners. Do the Critical legal professors have anything to say to these students—except that they assume the students will discover in their practice those successful methods of change which the teachers not only have not found but do not care to seek? The more logical assumption, by far, is that such law teaching will 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?

The radical law teacher's responsibility is not simply to expose doctrinal incoherencies and build historical accounts. It is to point the way to a different kind of practice, one which utilizes that historical account. The practice needed is not one which focuses *primarily* on the law school, however much change in the law school is needed. It is a practice located "out there," in the world outside the law school, where injustice, legal procedures and programs, incipient protest, and social movement constantly intermingle.[174]

174. The statement in the text has prompted some criticism in personal communications to the author. The contention is that I downgrade the significance of struggle within the law school, that I ignore the insight learned in the 1960's that people (including law teachers) have to have their own personal stake in social change, that I seem to consider lawyers and law professors merely tools of other people's struggles (without need to express concern over their own lives and work), and that I do not appreciate CLS's law-school-oriented work as a form of social change endeavor.

Certainly, I spend a significant segment of my own time on various kinds of struggles inside the law school, inside the legal profession, and inside the university. I need not detail them here. The point of my comment in the text concerns the appropriate primary focus on theoretical-social-movement-related activities. What leads me to study law, and moves me as a lawyer and law teacher, is the significance of legal structure and ideology within the world "out there." When I work as a teacher and as a lawyer, when I struggle for theory with regard to the world out there, I *am* expressing myself—not just allowing myself to be a "tool of other people's struggles." When I struggle for more teaching and more theorizing in law schools about the world "out there," I am struggling with the character of the institution and profession in which I work, with the character of the world in which I live, and—in my own way—I am struggling with my own character. I not only appreciate that CLS is a form of political struggle, but I respect and admire the CLS activists and theorists who built the Conference and engaged the attention of so many in the legal academy and profession. I only urge a shift in the primary focus of CLS. If I did not think that CLS—and the law schools—were important institutions, I would not bother with them.

The radical teacher's responsibility is to study such practice, analyze its conditions, and demonstrate it, if need be, by personal example. When I say the "radical law teacher's" responsibility, I do *not* mean, of course, the responsibility of *each and every* law teacher who professes a radical faith. Not everybody does everything. I do mean that it is central to the tasks of radical law teachers, just as are the activities and study Freeman espouses. Without at least a collegial relation to those engaged in social movement practice and theory, the radical teacher will lead more students *away* from, rather than into, the social struggle to reconstruct our world by democratizing our civil life.

I believe that the social struggle is what the radical law teacher's special vocation should be about. But even if, in the final analysis, there is no effective radical practice for the radical law teacher as teacher to exemplify and demonstrate to her or his students, there is still another task: to demonstrate concern and ways of working—doing legal work—that at the very least are helpful to some oppressed human beings, regardless of their impact on oppressive *systems.* This, of course, is a "liberal" task as well. But that is no reason for radicals to dismiss such an effort. Caring about their fellow human beings is the beginning of both the radical and liberal faiths. Take that "caring" away, remove the impulse always to help your fellow human being (in a small way if you cannot do it in a more systemic way), and the radical becomes a hollow fake, a dangerous imposter. We cannot build a new society of caring human beings if we do not act to help our fellow humans now. However small the ways, we are what we do.