THE CRITIQUE AND PRAXIS OF RIGHTS

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The critique of rights has played a crowning role in critical philosophy. From Hegel to Marx, to Foucault and beyond—Duncan Kennedy, Christoph Menke, the contributors to this Symposium—the critique of rights has always represented an essential and inescapable step in the critique of modern Western society.[1] The reason is plain: conceptions of natural rights, human rights, and civil rights have been central to the founding of modern political thought (from Hobbes, Locke, and Wollstonecraft forward), to the birth and flourishing of legal and political liberalism (in Rawls and Habermas), to the establishment of regimes of civil and political rights, and to the institutionalization of international human rights. Rights are the principal foundation for the discourse and practices of Western liberal democracies. Thus, the critique of rights is an indispensable step in challenging the failures of liberal political theory and liberal legalism. Of this, there is little doubt.

The trouble, though, arises in the relation between the critique of rights and critical praxis. The critique of rights often is either too theoretically rigid and autonomous to allow for a constructive dialogue with critical praxis, or too plastic and malleable to engage praxis in a productive way. This problem tends to coincide, on the one hand, with an overly technical philosophical critique of rights, or, on the other hand, with an overly porous juridical critique of rights.

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1. *See generally* G.F.W. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1820); Karl Marx, *On the Jewish Question*, *reprinted in* 3 MARX AND ENGELS: COLLECTED WORKS 146 (Lawrence & Wishart eds. 2010); MICHEL FOUCAULT, PENAL THEORIES AND INSTITUTIONS: LECTURES AT THE COLLÈGE DE FRANCE, 1971–1972 (Bernard E. Harcourt ed., 2019); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) (1998); CHRISTOPH MENKE, CRITIQUE OF RIGHTS (Christopher Turner trans., Polity Press 2020) (2015); ELIZABETH S. ANKER, ON PARADOX: THE CLAIMS OF THEORY (forthcoming); JUSTIN DESAUTELS-STEIN, THE JURISPRUDENCE OF STYLE: A STRUCTURALIST HISTORY OF AMERICAN PRAGMATISM AND LIBERAL LEGAL THOUGHT (2018); Symposium, *The Stakes for Critical Legal Theory* 92 U. COLO. L. REV. 945 (2021).

At one extreme, an overly technical philosophical critique of rights can lead to theoretical heights that do not leave room for constructive engagement with critical practice. It often produces a critique that is too abstract to be in conversation with more mundane legal struggles. It may result, for instance, in a new conception of rights, even perhaps a "new right" tied to political community, that leaves few, if any, resources for engagement on the real legal terrain structured around individual rights. Or it may produce a conception of law as superstructural, in which case legal interventions become superfluous at best or a hindrance at worst: along these lines, the real struggle for emancipation takes place on the political battlefield beyond legal praxis; even worse, incremental legal improvements may delay or hinder the achievement of genuine social transformation. The overly philosophical critique often makes it difficult or impossible to initiate a productive conversation with critical legal practice.

At the other extreme, an overly porous or plastic juridical critique of rights may result in an instrumental or weaponized conception of rights that offers little purchase for critical legal practice. It may produce an empty or hollow view of rights, in which case the critical theoretical contribution no longer has anything to offer legal practice. Liberal rights become purely rhetorical tools or strategic weapons that can be deployed in court in any manner to achieve a desired political objective; but the critique of rights offers little guidance on how to deploy them. The critique is no longer in conversation with how to craft those rights claims, nor how their deployment will contribute to achieving the broader political objectives. Here, rights become pure tactics. What this calls for, then, is just legal expertise—skilled trial or appellate lawyers—who need not even engage in critical theory.

At both extremes, there is a disjuncture between the critique of rights and the critical practice of rights. And for those of us critical theorists who also engage in critical legal practice, this disjuncture is not only problematic—it is unbearable. The gap between critical theory and praxis can be utterly agonizing because there inevitably arise times when critical legal praxis *necessarily entails* deploying individual rights claims within a liberal legal framework. Whether these involve the representation of women or men sentenced to death and awaiting execution on death row, or of men indefinitely detained at Guantanamo

Bay, there is often no way to avoid engaging in liberal rights discourse. There is no option but to claim liberal rights. To be sure, the deployment of rights will always take place within the larger context of political struggles and community organizing; but in order for these women and men to stay alive, literally, there is often no choice but to engage in litigation that draws on traditional liberal conceptions of due process and equal rights. There is simply no alternative.

And here, neither the overly philosophical critique that may point toward a new conception of rights or toward abstractions that are untethered from the courtroom, nor the overly juridical critical position that, in the end, turns rights into mere tactics, helps in the actual struggle or advances the cause of justice.

It is for this reason that contemporary critical thought requires a more constant confrontation between *theoria* and *praxis*. The two must nourish each other—and nourish the critical values that have been at the source of critical philosophy since its inception. In effect, the critique of rights must constantly confront and be confronted by critical praxis.

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Let me illustrate this by discussing several cases that I am presently litigating, involving men who are on death row or detained at Guantanamo Bay.

By way of background, it is important to emphasize that their confinement is the product of waves of procedural reforms that have reshaped the rule of law in the United States—from the Antiterrorism and Effective Death Penalty Act of 1996 to the USA PATRIOT Act of 2001. These legal reforms have restructured due process rights, but within the framework of the rule of law. As I argue elsewhere, they do not amount to a state of exception; instead, they have transformed the rule of law in the United States, in a fully legal manner.[2] All of the mechanisms (effectively denying habeas review on the merits, permitting indefinite detention) have been implemented *legally* and are *justified* by the federal courts. They have all been made part of the rule of law—not just by a conservative president like George W.

2. *See generally* BERNARD E. HARCOURT, THE COUNTERREVOLUTION: HOW OUR GOVERNMENT WENT TO WAR AGAINST ITS OWN CITIZENS 213–32 (2018) (chapter on "A State of Legality").

Bush, nor a white nationalist president like Donald Trump, but by liberal rule-of-law presidents like Bill Clinton and Barack Obama as well.[3]

Despite that, the only legal arguments I have on behalf of these men on death row or at Guantanamo Bay rest on claims to individual rights, specifically claims to due process of law, the right to have one's case heard and considered by a tribunal; or claims to rights guaranteed by the Suspension Clause, the right not to have the ancient writ of habeas corpus withdrawn arbitrarily; or claims to the right to effective assistance of counsel under the Sixth Amendment, and so on.

From a critical theoretic perspective, then, the pressing question is how the critique of rights can enter into dialogue with the demands of such litigation. How can the critique of rights enrich critical legal praxis? If the answer ultimately boils down to: "Well, rights are just tactics, so use the best legal argument you can, knowing that these are just rhetorical tools," then there is no longer any need for critique—just for litigation skill. Alternatively, if the answer is that civil and political rights are of little value compared to true human emancipation, or that we should imagine a new conception of rights that is tied to the broader political community and not the individual, then again, the critique of rights offers no purchase for my political and legal struggles.

The only way forward is to confront critical theory and praxis. Not to apply theory to practice, nor to allow praxis to drive theory, but instead to constantly counter the two in a type of relentless confrontation that, hopefully, nourishes both but does not dictate any directionality from one to the other. This could be described as a dialectical opposition, but without reconciliation—more of a confrontation imagined through the lens of pure negativity, as in Adorno's negative dialectics, yet a negative dialectics that is nevertheless productive (which may well have been a contradiction in terms for Adorno).[4] The important point here is that critical theory should not "guide" praxis, any more than praxis should "dictate" theory. There has to be a constant back-and-forth, so that theory challenges praxis, and

3. *Id.* at 10–12.

4. *See 7/13: Theodor Adorno,* Negative Dialectics, COLUM. CTR. FOR CONTEMP. CRITICAL THOUGHT (Dec. 18, 2019), http://blogs.law.columbia.edu/critique1313/7-13/ [https://perma.cc/X9QN-GRCS] (presentation by Martin Saar at The Institute for Social Research (Institut für Sozialforschung, IfS)).

simultaneously praxis confronts critical theory—and in that encounter, both are transformed and enriched.

Confrontation, contradiction: this is ultimately the only viable space for the critique and praxis of rights. In my decades representing condemned men in Alabama, I have constantly confronted the contradictions within liberal legalism, never resolving them but ultimately growing and expanding my critical praxis to challenge not just the ineffective assistance of counsel that so often saturates these death cases, but also the broader punitive society that is the condition of possibility of pervasive racial, class, poverty, sexuality, and other injustice. My critical practice has evolved over years, *in confrontation with critical theory*, to the point where today I embrace an abolitionist democracy ambition aimed not only at ending the death penalty in the United States, but also at the larger goal of abolishing our punitive paradigm of governing—of abolishing our punitive society more broadly—and replacing it with a just society.[5]

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This constant confrontation has led me to reconceptualize my own litigation and deployment of rights discourse through the lens of W.E.B. Du Bois's idea of "abolition democracy." It has opened new pathways to rethink critical practice, even to reimagine legal arguments about individual due process rights.

The framework of abolition democracy, developed in the writings of W.E.B. Du Bois, Angela Davis, and others, seeks to abolish racial injustice and extractive logics in order to instantiate a coöperationist future infused with solidarity, equality, and social justice.[6] Du Bois coined the term "abolition democracy" in

5. I develop this at greater length in chapter 18 of my book CRITIQUE & PRAXIS: A CRITICAL PHILOSOPHY OF ILLUSIONS, VALUES, AND ACTION (2020).

6. *See generally* W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA, 1860–1880 (Free Press 1998) (1935); ANGELA DAVIS, ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE (2005) [hereinafter DAVIS, ABOLITION DEMOCRACY]; ANGELA DAVIS, ARE PRISONS OBSOLETE? (2003); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015); MARIAME KABA, WE DO THIS 'TIL WE FREE US (Tamara K. Nopper ed., 2021); Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAG. (Apr. 17, 2019), https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html [https://perma.cc/5CNM-JDBW]; Amna A. Akbar, *The Left Is Remaking the World*, N.Y. TIMES (July 11, 2020), https://www.nytimes.com/2020/07/11/opinion/sunday/defund-police-cancel-

his study *Black Reconstruction in America*, published in 1935, to denote the ambition necessary to achieve a racially just society. Du Bois argued that the reconstructive work necessary to achieve a racially just society, begun in 1867, was aborted with the demise of Reconstruction in 1877. The result was that the abolition of slavery was only accomplished in the narrow sense that chattel slavery was ended; but the true ambition of abolition, namely the creation of a racially just society, was never realized. The true ambition required the construction of new institutions, new practices, new social relations that would have afforded freed Black men and women the economic, political, and social capital to live as equal members of society.

The vision of a full and uncompromised reconstruction of American society is what Du Bois called the project of "abolition democracy." That project was thwarted by white resistance and terror during the decade following the end of the Civil War, and ultimately abandoned due to the political compromise of 1876 that resulted in the negotiated election of President Rutherford B. Hayes and the withdrawal of federal troops from the South. As Du Bois and Davis argued, the full ambition of abolition democracy also requires reimagining the economy from the ground up. It entails rethinking the profit motive and the circulation of wealth. In this sense, the ideal of abolition democracy must be understood to include—in addition to the (negative) abolition of institutions of domination and the (positive) creation of new social institutions—the radical transformation of our political economy.

Du Bois demonstrated that the mere abolition of chattel slavery, without the ensuing effort to realize the ambition of abolition democracy, facilitated the reproduction of racial oppression and a slave-like society. With the demise of Reconstruction, the criminal law and its enforcement replaced property law as the key to confining freed Black women and men to a new condition of enslavement through the implementation of Black Codes that imposed severe punishments and labor restrictions on

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rent.html [https://perma.cc/ARP2-K9T4]; Alexis Hoag, *Valuing Black Lives: A Case for Ending the Death Penalty*, 51 COLUM. HUM. RTS. L. REV. 985 (2020); Derecka Purnell, *How I Became a Police Abolitionist*, ATLANTIC (July 6, 2020), https://www.theatlantic.com/ideas/archive/2020/07/how-i-became-police-abolitionist/613540/ [https://perma.cc/8RWF-KHGG]; *Abolition Democracy 13/13*, COLUM. CTR. FOR CONTEMP. CRITICAL THOUGHT (Jan. 21, 2021), http://blogs.law.columbia.edu/abolition1313/ [https://perma.cc/PT8W-2NYR].

African American women and men. Convict leasing and plantation prisons gave birth to new forms of slavery, protected by the exceptions clause to the Thirteenth Amendment.[7] "The whole criminal system came to be used as a method of keeping Negroes at work and intimidating them," Du Bois wrote.[8] Du Bois added:

> In no part of the modern world has there been so open and conscious a traffic in crime for deliberate social degradation and private profit as in the South since slavery. . . . Since 1876 Negroes have been arrested on the slightest provocation and given long sentences or fines which they were compelled to work out. The resulting peonage of criminals extended into every Southern state and led to the most revolting situations.[9]

The penal law served to transform American slavery into a system of peonage that, in some cases, exceeded the horrors of the Antebellum period. The enforcement of the criminal law reproduced a system of racial injustice in America that continues to the present. As brilliant critical thinkers have demonstrated since the publication of Du Bois's book in 1935—including Angela Davis, Michelle Alexander, Ruth Wilson Gilmore, Mariame Kaba, Dorothy Roberts, Bryan Stevenson, and many more—we live today in the continuing legacy of slavery and its aftermath.[10]

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The critical framework of abolition democracy not only confronts my own legal representation of men on death row or at Guantanamo—it offers a path to enrich it. I may be limited to

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7. Roberts, *supra* note 6, at 29, 68–70.
8. DU BOIS, *supra* note 6, at 506.
9. *Id.* at 698.
10. *See, e.g.*, DAVIS, ABOLITION DEMOCRACY, *supra* note 6; MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); KABA, *supra* note 6; KUSHNER, *supra* note 6; DOROTHY E. ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 22–55 (1997); Bryan Stevenson, *A Presumption of Guilt*, *in* POLICING THE BLACK MAN 3–30 (Angela J. Davis ed., 2017); KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2010); ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENTS (2020); McLeod, *supra* note 6.

arguing in court about individual due process rights, the Suspension Clause, or the right to effective assistance of counsel—given the case law and the procedural posture of, say, litigating a stay of execution—but the confrontation with critical theory has deepened and enriched how I can present those legal arguments.

Drawing on Dorothy Roberts's writings on "Abolition Constitutionalism," for instance, it is possible to cast due process rights in a new light, a more historicized light, that places them within a more robust framework of opposition to oppressive forms of punishment.[11] In her brilliant work, Roberts offers a new way to conceive of the Reconstruction Amendments and the history of their enactment. Roberts traces a history of the Thirteenth Amendment that demonstrates why the exceptions clause to the prohibition of slavery—"except as a punishment for crime whereof the party shall have been duly convicted"[12]—should be far more narrowly construed than it has been, and that its history actually provides evidence *for* penal abolition.[13] This interpretation has tremendous implications for due process rights more generally, including for the interpretation of the Eighth Amendment prohibition on cruel and unusual punishments incorporated to apply to the states through the Fourteenth Amendment Due Process Clause.

The Reconstruction Amendments, after all, were intended to radically transform the original interpretations of the Bill of Rights. As Roberts uncovers, Senator Charles Sumner originally proposed the Thirteenth Amendment without the exceptions clause;[14] and the Republican drafters of the amendment did not believe that the exceptions clause allowed for convict leasing or forced labor.[15] The history contradicts the dominant post-Reconstruction readings, which ended up being far more conservative.[16] As Roberts writes, "both the abolition constitutionalism that inspired the Thirteenth Amendment and the words and actions of its radical framers suggest we should read the Punishment Clause quite narrowly."[17] Roberts adds:

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11. *See* Roberts, *supra* note 6.
12. U.S. CONST. amend. XIII, § 1.
13. Roberts, *supra* note 6, at 66.
14. *Id.* at 65.
15. *Id.* at 67.
16. *Id.* at 68.
17. *Id.* at 69.

> [T]he antislavery origins of the Reconstruction Amendments have been obscured by a revisionist historiography that downplays the influence and importance of the abolitionist constitutionalism that preceded the Amendments' passage. Antislavery activists not only chose to fight on constitutional ground, but, in the process, also crafted an alternative reading of the Constitution that proved highly influential for a period of time.[18]

Today, this reading may also prove highly influential and useful to recast individual due process rights more broadly in habeas corpus litigation. By focusing on the abolition constitutionalism of the antislavery framers, and their larger opposition to punitive excess, it may be possible to reframe the protections afforded by rights to due process and to be free from cruel and unusual punishments.

In her work, Roberts effectively seizes constitutional law discourse and critically marshals it in support of an abolitionist agenda. Rather than cede the ground, Roberts identifies a path forward to use the history of the Reconstruction Amendments toward broader prison abolitionism. This reflects, in an interesting way, the journey that Frederick Douglass himself took during the earlier debates over the "usefulness" of the Constitution—over whether it was a pro-slavery document that could serve no purpose or rather a source of authority for an abolitionist future.[19]

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Through conflict and friction, and the constant back-and-forth between praxis and theory, it may be possible to enrich the critique and praxis of rights. Critical theory cannot just engage in critique or diagnose crises. Critical theory is not just about *Krise und Kritik*. It is also about *critique and praxis*—especially in these times of acute crises. What we need, then, is constant confrontation between the critique and the praxis of rights.

In many ways, this is precisely what we have witnessed in the United States in the wake of the police killings of George Floyd, Breonna Taylor, Carlos Ingram-Lopez, and so many other

18. *Id.* at 50 (citation omitted).
19. *Id.* at 58–62.

persons of color. Since that horrific eight-minute-and-forty-six-second video of the murder of George Floyd, we have seen an uprising for Black lives like we had rarely seen before, not only in the United States, but across the globe, and a reckoning—however too late and too little—with structural racism. This too is the product of the confrontation between critique and praxis.

In the wake of the renewed movement for Black lives, we are all quickly becoming familiar with a world of critical praxis and radical experimentation that has historically been outside the mainstream. Occupations, temporary autonomous zones, street riders, flash mobilizations, "walls of moms," and "leaf-blower dads"—new and creative forms of protest are becoming headline news on mainstream media across the country.

That's a change. A renewed and rejuvenated conversation over critical praxis is flourishing in the United States and elsewhere, inspired in part by the earlier experiments at Occupy Wall Street and #BlackLivesMatter, by Bernie Sanders's call for "political revolution," as well as by the Hong Kong protests, the Yellow Vest movement in France, and the occupations at Tahrir Square and Gezi Park earlier in 2011. These protest movements have breathed new life into political resistance—and also into critical theory.

It is high time. For too long now, critique has been distracted from its true ambition: to change the world. It had retreated to the earlier task of only interpreting the world—with Gramsci's idea of cultural hegemony, the Frankfurt School's critique of ideology, Louis Althusser's notes on ideological state apparatuses, Foucault's theories of knowledge-power and, later, regimes of truth, Derrida's deconstructive practices. Brilliant, all, but these theories distracted critique from its true ambition.

It is time to get back to the true ambition of critical theory. It is time—past time, I argue—to imagine a new *critical praxis theory* for the twenty-first century. This is the task: to counter decades of contemplative complacency and to return critical praxis to its central place in critical philosophy. This calls for a profusion of critical debate over not just the critique of rights, but the critical praxis of rights as well, because, in the end, the aim of critical philosophy is to change the world.