ABSTRACT

This thesis will aim to understand how the establishment and subsequent development of Western human rights frameworks as the solution to social inequality has catalyzed neoliberal hegemony within The United States. By conceptualizing individual sovereignty through civil liberties and the right to private property, how has the instrumentalization of human rights fostered the liberal dimensions of progressive thinking and action? Using Karl Marx's distinction between political and human emancipation as a basis for this piece, I will analyze and historicize his critique of rights with the contradictions of "universal liberty" demonstrated by the struggle for rights-based recognition fought not only by the bourgeois but marginalized and colonial identities during The French Revolution and The Haitian Revolution. I will then evaluate the post-socialist shift in the 1960-70s where class politics were joined by the emerging language of cultural recognition, examining the rise of Critical Legal Studies as a contemporaneous school of jurisprudential thought to understand how the critique of rights have either been extended or resisted by legal scholars in the advent of postmodernism. With the decline of rights critique in the 1960s, civil rights, in combination with the politicization of identity and multicultural meritocracy, have been instrumentalized to further what Nancy Fraser describes as a hegemonic bloc within the liberal-left called "progressive neoliberalism". Drawing from Fraser's claim that "cultural domination [supplanted] exploitation as the fundamental injustice", I explore how rights frameworks can be remodeled to bridge between political and class struggle within the increasingly fragmented political landscape of The United States.

Beyond Recognition: Reconsidering Equality Under a Liberal Rights Framework

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INTRODUCTION

The 1960s-70s marked a new epoch for the American Left: with the disillusionment of the Soviet Union's authoritarian leadership and the global rise of countercultural movements, a new iteration of left-wing politics emerged in the United States that would gradually erode class politics in favor of a politics of cultural recognition. The dialectical approach to class struggle which initially comprised the bourgeois and proletarian imploded to refer more broadly to a power struggle between identity groups. The identification of the latter's struggle which focused on advancing cultural recognition in the form of political and legal rights rather than combating class exploitation laid the groundwork for a mass movement that pushed civil freedoms for African-Americans, women, the LGBTQ+ community, and other marginalized groups that have been contractually deprived of them.

While there was a growing dependence on the state for legal recognition, progressives simultaneously critiqued the state as a "repressive" force which propelled them to retreat to the civil sphere in search of power. There was also an emerging fragmentation within the New Left regarding how meaningfully they believed the welfare state could address the other growing economic problem of the 1970s: stagflation. While the left successfully acquired legal protections, the solution to economic malaise remained unclear up until the inauguration of Ronald Reagan who'd jettisoned the Keynesian economics-based policies previously institutionalized by FDR in favor of a neoliberal economic framework. In his January 20, 1981 inaugural address, Reagan emphasized that "government is not the solution to our problem; government is the problem"; this was accompanied by a proposal advocating economic "policy that aimed to reduce government regulation, lower taxes, and promote free-market capitalism as a means to stimulate economic growth and increase individual wealth" (Reagan 1981).

In the disavowal of a liberal welfare state to bolster the notion of a revived economy, Reagan emphasized an economic project based on anti-discrimination and equal opportunity, principles that interestingly mirror not only the language used by the left in the countercultural movements of the sixties but in the very rights that have grounded the formation of this country. How can Reagan, a political figure notorious for his conservative economic policies, utilize language akin to that of the New Left while seemingly advocating a different political agenda? While Ronald Reagan is often scapegoated for being the primary political figure responsible for fostering neoliberal hegemony, historian Gary Gerstle makes the counterpoint that the collapse of the Soviet Union between 1989 and 1991 which was followed by Bill Clinton's presidential inauguration in 1993 was key to securing neoliberalism as a crosscutting ideology between the Republican and the Democratic party (Gerstle 2002:20). Clinton emphasized a neoliberal project that valued cosmopolitanism: "it saw in market freedom an opportunity to fashion a self or identity that was free of tradition, inheritance, and prescribed social roles" (Gerstle 2002:13).

In his analysis of the New Left, American historian Terence Renaud writes:

"A strange symmetry exists between the phenomena of neoleftism and neoliberal capitalism. Neoleftist-style formations… always end in entropy and decline, much as neoliberalism has atomized social communities and decimated public services around the world… Sooner or later, every new left succumbs to the assimilatory new spirit of capitalism" (Renaud 2022:14).

I will expound on this claim with my own perspective to argue that within a social formation grounded in a capitalist mode of production, the symmetry between the two which encompasses entropy, decline, and atomization, is *anything* but unusual; it is, in fact, the consummation of freedom within a liberal rights framework. While the content of the New Left's politics might seem incompatible with the sort of social formation neoliberalism would mold into, especially in contrast with the "human rights" promulgated by the left, their convergence,

incidental or otherwise, is ultimately rooted in a classical liberal ideology that freedom can be achieved through civil rights.

For historically marginalized groups in America during the 1960s-70s, the acquisition of political and civil rights was a necessary step towards a more inclusive social egalitarianism – but the rejection of class struggle as the means of dismantling economic injustice meant that solutions to social problems of inequality and marginalization largely shifted to the sphere of liberalism. The shift from economic redistribution to recognition-based politics that emerged at this time corresponded to the rise of reformist strategies which sought social equality under capitalism rather than its abolition. This shift paved the way for the coexistence of social egalitarianism and neoliberalism and, as we look towards the early twenty-first century, their co-constitution.

While the study of neoliberalism has experienced a relatively recent upsurge in political discourse and academia, its realization can be ideologically traced back to the natural rights inscribed during the Enlightenment period. These rights were formalized in The French Declaration of Rights of Man and Citizen, one of the first major human rights documents drafted in the history of Western liberal civilization alongside The Bill of Rights. By naturalizing the right to private property, Western rights frameworks have manufactured "the sovereign individual" who Marx critiques for acting in his private self-interest at the expense of a collective, class-based interest. This thesis aims to historicize the role of human rights in shaping a cultural bloc for the liberal-left that has fused progressivism with neoliberalism.

I will begin in Chapter One by historicizing the emergence of rights frameworks during The French Revolution and The Haitian Revolution. While Fraser discusses the politics of recognition after the 1960s, I contend that the struggle for recognition has been central to the

realization of a universal rights framework. What did it mean for France to constitutionally uphold the ideals of "universal liberty" while simultaneously legitimating the right for its citizens to own slaves? In utilizing the slogan of "liberty and equality" for their anti-colonial struggle, how did the enslaved people of Saint-Domingue either challenge or assimilate into the liberal order? In his essay "On the Jewish Question" which was written in response to Bruno Bauer regarding the civil rights of Jews within Prussia, Marx asks the question of whether or not the acquisition of civil rights for Prussian-Jews would have provided them with rights of "man". While civil rights could be a tool of political emancipation, he argued that this was not *true* human emancipation, for rights helped to create civil society and thus, formally legitimated a public sphere grounded in egoism; furthermore, relations between individuals were defined by their differences rather than their similarities. Throughout this chapter, I will explore various questions about the law's role in not merely "recognizing" individuals but in doing so, interpellating them into liberal subjects of the state by classifying them as rights-bearing private citizens. In the acquisition of civil rights, which liberties are gained and which others are sacrificed?

Chapter Two aims to re-contextualize Marx's analysis of rights with the evolution of jurisprudence from the 1960s. While some theorists within the leftist tradition adopted the structural Marxist perspective that rights were inherently bourgeois, others within the left-liberal stand presented a more revisionist view of rights that emphasized their capacity to appropriate progressive content, socialist or otherwise. The structural division between the two is classified by legal theorist Akbar Rasulov as "Scientific Marxism" and "Critical Marxism" (Rasulov 2014:3). Known as Critical Legal Studies (CLS), this was an organizational locus in legal theory that emerged as an outgrowth of American Legal realism in the 1970s and was inspired by the

sociopolitical movements associated with the New Left. CLS scholars critiqued rights for formally legitimating social inequality through reflecting the interests of both the ruling class and dominant social groups; while founders of the movement drew inspiration from Marx in their critique of rights, scholars have argued that the second-wave of CLS scholars abandoned Marx as well as the structural critique of rights altogether. With the decline of rights critique emerged strands of post-socialist jurisprudence. In this context, I examine Kimberlé Crenshaw's "intersectionality" and Catharine MacKinnon's "feminist jurisprudence" as examples of attempts to codify identity into legislature.

Chapter Three historicizes the factors that have shaped the alliance between human rights and progressive neoliberalism. Dubbed by Olúfẹ́mi O. Táíwò as "elite capture", Táíwò uses this term to describe the neoliberal co-optation of identity politics to advance the political project of economic elites. He separates this appropriation from the "core" of identity politics, which is rooted in a project built to aid marginalized groups towards a coalitional politics rather than to aid tokenized individuals meant to represent them.

While equal opportunity is framed as a natural human right, equal opportunity does not render itself to redistributive equality; moreover, redistributive equality exists in intrinsic and arguably irreconcilable tension with the constitutional right to private property. This tension has only become more apparent since the decline of The Old Left and the concurrent rise of The New Left and neoliberal governance. Nancy Fraser writes that in the late twentieth century, a tension has emerged between the politics of redistribution and the politics of recognition. She calls for an egalitarian project that combines both. Can the rights frameworks be reconstructed to combine the two or does this combination Fraser deploys require a more radical project that looks beyond legal struggle?

LITERATURE REVIEW

By interrogating the naturalization of human rights as the cure-all for social inequality through Marxist critique, we can deepen our understanding of how wealth inequality can co-exist with social equality within a liberal framework. In 1964, The Civil Rights Act was enacted which outlawed identity-based segregation and discrimination in public spaces. Since then, there have been several acts such as The Voting Rights Act of 1965 and the Fair Housing Act of 1968 that have been established in order to secure civil rights for historically marginalized groups. Subsequent policies relating to affirmative action, reparations, and DEI initiatives have also been put forth in order to redress historical inequalities. Yet, economic inequality has only increased. While cultural recognition for all groups has been sought after, liberalism still constitutionally legitimates wealth inequality under the right to private property.

I contend that to understand the role of rights in facilitating a hegemonic bloc within the liberal-left that Fraser dubs as "progressive neoliberalism", we must reckon with Marx's critique of rights, the state, and the limitations of political emancipation in his 1843 essay "On the Jewish Question" (Marx 1843 [1978]). This essay, which was written in response to Bruno Bauer's denouncement of civil rights for Prussian-Jews, has been criticized as being antisemitic as it rhetorically suggests a link between Judaism and egoism. I do not ignore or undervalue this interpretation but seek to provide due consideration to Marx's more general critique about how religion can be an oppressive tool as it is depoliticized within the civil sphere (vis-à-vis "the right to religious freedom"). While Marx specifically discusses religion, his argument can be applied to the demand for identity-based rights during the countercultural movements of the 1960s and progressive politics hitherto.

In this literature review, I will briefly discuss some of the major critiques of rights that have characterized political sociology and legal thought. I will then address the limitations of my study in light of the political and social critique that I develop. I stress that there is an enormous literature on these topics, and I can only touch on several main points.

The struggle for recognition dates from the moment The French Declaration of Rights of Man and Citizen was established. While its preamble formally upholds the "the natural, unalienable and sacred rights of man", it excluded various identity groups and, in presupposing the right to slaves [as private property], complicated the prescriptive acclaim to universal equality and liberty. The first chapter of the thesis explores this contradiction and draws primarily from William Doyle, a British historian of The French Revolution, and C.L.R James, a Trinidian-Marxist historian who writes about the struggle for liberty and equality during The Haitian Revolution (Doyle 2002; James 1938). James addresses how the ideals of the Revolution were re-interpreted as the enslaved populace of Saint-Domingue struggled for their right to self-determination. While Chapter 2 and 3 primarily focus on the evolution of rights critique and application in the United States, Chapter 1 attempts to historicize Marx's critique of The Declaration of Rights of Man and Citizen in both the revolutionary history of France and Haiti. Contradictions of liberty and the struggle between civil and social rights are furthermore explored in The Universal Declaration of Human Rights (UDHR).

The dialectic of the struggle for recognition and the acquisition of liberal rights informs my discussion of identity politics and its evolution following the 1960s. The term politicized identity will be used recurrently in both Chapter 2 and Chapter 3. Wendy Brown uses the term "politicized identity" in two primary texts: *States of Injury: Power and Freedom in Late*

Modernity and "Wounded Attachments" (Brown 1995; Brown 1993). [1] Brown defines politicized identity as the "rights of 'inclusion' as well as rights of 'difference' currently sought for people of color, homosexuals, and women in the late-twentieth-century" (Brown 1995:100). The context of politicized identity I utilize is "the averred interest of politicized identity in achieving emancipatory political recognition in a posthumanist discourse" (Brown 1993:390).

Several of the political theorists I cite such as C.L.R James, Wendy Brown, Nancy Fraser, Duncan Kennedy, Paddy Ireland, and Olúfẹ́mi Táíwò all draw from Marx to varying degrees. I contrast both materialist understandings of jurisprudence and politics with poststructuralist approaches, the latter of which I conceive through the pivot towards rhetoric, knowledge production, and epistemology. This shift has remodelled emancipation to be reconceived in mostly cultural terms and is discussed in greater depth by Nancy Fraser who claims in her 1995 essay "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age" that in the late twentieth century, "Cultural domination supplants exploitation as the fundamental injustice. And cultural recognition displaces socioeconomic redistribution as the remedy for injustice and the goal of political struggle" (Fraser 1995:69).

There are various limitations to this study. The first is that there is a large breadth of legal scholars within the genealogy of Marxist rights' critique such as Evgeny Pashukanis and E.P. Thompson who I've excluded[2] due to the historical scope of my research being limited from the 1960s-70s to the present-day. While I hoped to discuss Marxist Legal Theory in greater detail, such as addressing Pashukanis' commodity-form theory of law, I wanted to prioritize my discussion of post-Marxist jurisprudence at a time when Marxian thought was in decline. For the

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[1]The specific version of "Wounded Attachments" I cite is her essay written in 1993; while there is a chapter of this in Brown's book *States of Injury*, I've found her discussion of ressentiment to be more thorough in the earlier version and therefore incorporate it.

[2]In my second chapter, I cite Paddy Ireland who discusses E.P Thompson as a frame of reference in contrast to other Post-Marxists within Critical Legal Studies; nevertheless, Thompson is not a primary figure that I deal with beyond the incidental context of Ireland's critique about the loss of the critique of capitalism in CLS.

purposes of understanding rights critique during the fall of Soviet communism and the rise of countercultural movements, poststructuralist thought, and The New Left, I therefore decided to focus on the development and decline of Critical Legal Studies (CLS) which emerged contemporaneously in 1977. The two primary tenants of CLS I discuss in Chapter 2 are the "indeterminacy thesis" and the notion that the rule of law is not above politics. Just as the rule of law and rights can be politicized, so has identity; Brown's critique of politicized identity is crucial as it can be applied not just to the development of jurisprudence but discursive production and its role in either facilitating or severing the relationship between knowledge production and praxis within the civil sphere. These applications are discussed in my second and third chapters, respectively. My discussion of politicized identity in the third chapter is recontextualized in light of Fraser's analysis of progressive neoliberalism, Táíwò's "elite capture", and Brown's discussion of ressentiment (Fraser 1995; Táíwò 2022; Brown 1993). Brown's examination of politicized identity and Duncan Kennedy's exploration of identity-based rights informed my analysis of Kimberlé Crenshaw's "intersectionality" and Catharine MacKinnon's "feminist jurisprudence" as examples of post-socialist jurisprudence (Crenshaw 1991; MacKinnon 1989).

My analyses of both theorists are largely theoretical and thus, more philosophically than practically oriented. While I discuss intersectionality within the scope of Crenshaw's piece "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color", I do not discuss the term in the broader scholarship of identity politics that have preceded before and evolved after her nor do I examine the practical application of intersectionality within legal anti-discrimination cases. Patricia Hills Collins writes: "intersectionality constitutes a new term applied to a diverse set of practices, interpretations, methodologies and political orientations, [therefore] we cannot assume that we are studying a fixed body of knowledge"

(Collins 2015:2). While recognizing that the term has been redefined and recontextualized, I adhere to Crenshaw's definition of intersectionality from the essay in which she coined it and thus, differentiate it from identity politics which I stress has a more radical and complex history that predates its more symbolic, assimilationist, and/or bourgeois co-optations. The origins of identity politics can be traced to The Combahee River Collective, a movement in the New Left I discuss in my third chapter.

Other conceptual terms that are key to this study are Táíwò's "elite capture","deference politics", "constructive politics", and "standpoint epistemology". Like Fraser, Táíwò discusses the limitations of a politics anchored in progressive neoliberal ideology. Whereas elite capture describes the co-optation of socially progressive politics, deference politics in combination with standpoint epistemology is the corresponding political framework Táíwò critiques to reveal the mechanisms by which this co-optation occurs. Constructive politics is the counter-strategy that he advocates for.

Drawing from Nietzsche, Brown writes about the "politics of ressentiment" in her essay "Wounded Attachments" which is also connected to my general discussion of politicized identity. Her discussion of ressentiment provides critical insight about how epistemic understandings of marginalization can reproduce the oppressive structures it aims to critique and fix. While Brown's discussion is important, I advise against a deterministic reading of her analysis as an ahistorical application of ressentiment can inadvertently succumb to an idealism which reduces the appeal of individual liberties to marginalized groups as being rooted in the moralizing desire to enact revenge rather than a practical acquiescence to the constraints of political emancipation under the liberal order itself. The paradigm of settling for personal freedoms and protections under liberal reform versus constructing a liberatory politics that critiques capitalism and looks

to move beyond it has been an ongoing struggle not just for marginalized groups seeking the right to recognition but for the working class acquiescing to better working conditions through the right to a minimum wage and the right to bargain. While Brown's analysis of ressentiment provides psychological insight into Táíwò's conception of deference politics and Fraser's "progressive neoliberalism", ressentiment should not be understood as the primary or sole driving force in the politics of recognition. Additionally, while my thesis largely critiques the operationalization of postmodern frameworks for progressive politics in the advent of The New Left, I do not denounce the role of ideology or consciousness in its capacity to shape a class-based politics altogether. Withstanding my critique of standpoint epistemology and its tendency towards reifying oppression, there are various Marxian theories of identity such as social reproduction theory that are able to account for class-based analyses of identity and its role in reproducing unequal class relations. While I do not discuss them in greater depth, two contemporary theorists I believe have been able to concretely bridge the relationship between political economy and racial subjectivity are legal scholar Cheryl Harris and political philosopher Vanessa Wills in their essays "Whiteness as Property" and "What Could It Mean to Say, 'Capitalism Causes Sexism and Racism?'", respectively (Harris 1993; Wills 2018).

Two contemporary scholars who have explicitly discussed the relationship between human rights and neoliberalism are political theorists Jessica Whyte and Samuel Moyn. In her book *The Morals of the Market,* Whyte keenly points out the convergence between civil rights and neoliberalism as they both uphold individual emancipation in regard to the formation of the liberal subject and their engagement with the free-market (Whyte 2019). This claim, which I supplement with the historicization of neoliberalism after The New Deal, serves as the backdrop to my analysis of how civil rights rhetoric has complemented the rise of progressive neoliberal

thinking within the liberal-left. My analyses are less explicitly drawn from Whyte and Moyn but moreso from David Harvey and Gary Gerstle, both of whom write about the history of neoliberalism in *A Brief History of Neoliberalism* and *The Rise and Fall of the Neoliberal Order*, respectively (Harvey 2005;Gerstle 2022).

The last notable limitation of my study is that progressive neoliberalism has not only undergone hegemonic decline within the past couple of years but has been rejected altogether by the federal administration under Trump's second term. On January 20, 2025, Trump signed Executive Order 14151: "Ending Radical And Wasteful Government DEI Programs and Preferencing" (Trump 2025). While the turn to economic and cultural nationalism within the United States has evolved beyond the particular bloc of progressive neoliberalism I analyze, I contend that my research on the indeterminacy of rights and the limitations of political recognition under liberalism is key to understanding the contemporary political landscape which has revealed the necessity for both a structural critique and transformation not just of rights but of a more holistic lens to conceive of class struggle.

A great deal of literature has been conducted on the limitations of legal and cultural recognition under the liberal framework of rights. My work is distinctive in its attempt to revive Marx's critique of the right to private property, the state, and the civil sphere in the context of the more contemporary turn to a politics grounded in the acquisition of the civil rights that emerged in the 1960-70s and thereafter. My work is also distinguished in its reconceptualization of political emancipation within the liberal order as a tool that has historically evolved to be wielded in *opposition* to rather than as a bridge towards human emancipation. A thematic paradigm I grapple with throughout this thesis is that of specificity versus universality. This is reflected in the tension of political versus human emancipation, universal rights versus

identity-based rights, and recognition versus redistribution-based solutions to social and cultural inequalities.

While reformism/Marxist revisionism and revolution are often framed as a binary, I contend that this paradigm is overly reductive and also ignores Marx's dialectical understanding of liberalism and rights as a tool towards human emancipation. With regard to liberal rights in a transnational context such as The Haitian Revolution, The Anti-Apartheid movement in South Africa, and the Free Palestine Movement, rights frameworks have also been used by the subaltern populace in order to assert their right to self-determination. Within an international context, the historical necessity of the struggle for legal recognition is highlighted. While the topic of international liberalism extends beyond the scope of my thesis, it is a feature of rights I nevertheless highlight to emphasize the anti-imperial dimensions of political struggle through rights.

My thesis primarily focuses on the development of rights frameworks in The United States after the 1960s and its role in shaping neoliberal hegemony as a result of the interpretive pivot towards property rights; yet, it still recognizes the necessity of civil rights and maintains a cautious optimism about their capacity to be utilized in conjunction with more liberatory agendas that exist outside of the current social order.

CHAPTER 1. Political versus Human Emancipation: Historicizing the Development of Rights through Marxist Critique

Western constructions of human rights serve as the ideological foundation for the bourgeois freedoms Marx critiques in his seminal essay "On the Jewish Question". The inscription of the right to "liberty, property, security, and resistance to oppression" in the Declaration of the Rights of Man and Citizen by the National Assembly not only incited the French bourgeois in their class revolt against the feudal system but propelled the rise of the modern liberal state, grounding its formation with the corresponding ideal of universal democracy. Variations of human rights have predated the Enlightenment period but the French Revolution was marked by its geopolitical significance, with the framework of rights not only being structurally integrated into the model of French governance but spreading throughout continental Europe and beyond.

In the years leading up the French Revolution, the bourgeois was growing in size and economic clout without the political power to match it. In the social formation of feudalism where power was based on nobility and monarchy, the idea of natural rights challenged the premise that any sort of privileges, whether in regards to social or socioeconomic status, should be accredited to heredity.[3] In recognition of this unjust arbitrariness, the new conception of freedom would be grounded in civil liberties which not only protected the rights of man but also ideologically paved the way for a model of meritocratic egalitarianism. This ideal is articulated in Article 1 of The Declaration where men are framed as equal in birth but implied to be "unequal" on other grounds: "Men are born and remain free and equal in rights. Social

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[3]In Chapter 5: Property from "The Second Treatise of Government", John Locke suggests that the natural right to private property was legitimated not by the status of one's birth but by whether or not an individual could appropriate natural resources with his labour. The notion of private property as a natural right has largely influenced not only The Declaration of Rights of Man and Citizen but has also legitimated colonial acts such as land dispossession and expropriation by proprietors in the name of "the common good".

distinctions may be based only on considerations of the common good" (National Constituent Assembly 1789).

Much like the rest of The Declaration, the abstraction of this quote prompts several questions. *Who* is recognized as being part of "the common good" and who or which entity is legitimating this recognition? Inversely, what are the material conditions that ground these social distinctions? In striving towards a governance based on popular sovereignty, the National Assembly came up with a representative system where citizens could vote; yet, to whom citizenship applied was incredibly restricted. The ideal of universal equality for men was immediately compromised by the exclusion of women, slaves, and other groups who neither owned property nor paid taxes. Women were relegated to roles within the domestic sphere and could not formally participate in politics. Slaves were not only denied the possibility of citizenship but denied personhood through their status as private property.

In *Black Jacobins*, C.L.R James writes that "The slave-trade and slavery were the economic basis of the French Revolution" (James 1938:47). The development of industry during the French Revolution relied heavily on either the use of or the trade of slaves as commodities. In the pursuit of liberty, the bourgeoisie's incipient power over the aristocrats *relied* on the exploitation of slaves as a component of their economic foundation. Through the lens of both the French aristocrats *and* the bourgeoisie, slavery was rarely heeded as a legitimate concern or contradiction to universal democracy. The ownership of slaves was the citizens of France exercising their right to own private property.[4] While Britain, France's biggest imperial rival at the time, would be the first of the two nations to abolish slavery, Britain's motives were less an

[4]While condemning slavery, Jean-Jacques Rousseau, a key political theorist during the Enlightenment, also wrote that slavery was not necessarily *antithetical* to the conception of liberty if "the right to own slaves" was deemed the general will of the people within the nation-state: "Is liberty maintained only with help from slavery? It may be so. Extremes meet. Everything that isn't in the course of nature has its drawbacks, especially civil society. There are some unhappy circumstances where we can't keep our liberty except at others' expense, and where the citizen can be perfectly free only when the slave is most a slave" (Rousseau 1762 p. 50).

attempt to reconcile freedom and servitude and more so to undercut the economic and political strength of France: “The British found that by the abolition of the mercantile system with America, they gained instead of losing” (James 1938:51). Had the abolition of slavery not economically benefited the British bourgeois, it is dubious which other conditions independent of Britain’s material gains would have catalyzed the granting of the freedom of the enslaved.

Neither women nor the enslaved had rights. Who did? Even within the demographic of white male French citizens, rights were intrinsically affixed to the bourgeois. A British historian of the French Revolution, William Doyle writes that “Property would define the class of Notables who ruled France, as electors, from the Consulate down to the late nineteenth century… The great gainers from the redistribution of church and noble property were the bourgeoisie” (Doyle 2002:407). Beyond interrogating the narrow constituency of whom citizenship was granted, Doyle also emphasizes the inseparability of property rights and equality. Egalitarianism then, was understood as the right of equality of opportunity with little to no bearing regarding the equality of conditions. If anything, these two were mutually exclusive.

Antagonisms by the French revolutionaries were not only directed towards the preceding feudal order but towards the prospect of a more socially-oriented one as well. According to Doyle, an insignificant number of political activists in the 1790s advocated for the equality of property and/or fortunes (Doyle 2002:419). In March 1793, a death penalty was proposed by the Convention for anyone who suggested the forcible redistribution of private property from their owners (ibid). Five months later on August 22, 1793, a new constitution was approved by the Convention where the drafting committee made a distinction between civil equality and “absolute” equality with the latter understood pejoratively:

“Civil equality, in fact… is all that a reasonable man can claim. Absolute equality is a chimera; for it to exist, there would have to be absolute equality in intelligence, virtue, physical strength,

education and fortune for all men . . . We must be governed by the best; the best are those who are best educated and most interested in the maintenance of the laws: yet, with very few exceptions, you find such men only among those who, owning a piece of property, are devoted to the country that contains it, to the laws that protect it, to the tranquillity that maintains it, and who owe to this property and to the economic security it provides the education that has made them capable of discussing with wisdom and exactitude the advantages and inconveniences of the laws that determine the fate of their native land. The man without property, on the other hand, requires a constant exercise of virtue to interest himself in a social order that preserves nothing for him, and to resist actions and movements that hold out hope to him . . . A country governed by non-proprietors is in a state of nature" (Doyle 2002:319).

According to the committee, absolute equality would have only worked on the condition that everyone was equal in merit. One's merit was determined by their educational background, commitment to maintaining the law, and whether or not they were a proprietor. Those who did not possess these qualities were regarded as lacking in merit and moral virtue. Bearing in mind the exclusionary mechanisms by which merit was defined, Doyle contests the French Revolution's conception of freedom when he writes: "If asked to sum up their cause in one word, the men of 1789, and perhaps most of their compatriots down to 1802, even, would have responded: liberty… But what did 'liberty' mean? In everyday practice it appeared to mean whatever those in power wanted" (Doyle 2002:418).

One of the most significant critiques of liberal rights is presented by Karl Marx in his essay "On the Jewish Question". "The Jewish Question" was a term that originated in the nineteenth century to discuss what full citizenship would look like for German Jews who faced discrimination because of their religion. Bruno Bauer, one of the fellow Young Hegelians to whom Marx responds in his essay, criticized Jews who sought political and civil emancipation in Prussia while remaining committed to Judaism. Bauer claimed that the right to practice religion constituted a "special" emancipation that would not resolve the issue of religious oppression as a whole. In order for Jewish people to be emancipated as citizens, he then proposed that Jews

renounce their Judaism. (Marx 1843 [1978]: 29).[5] Marx counters with the argument that the right for Jewish people to practice Judaism within civil society and under a secular state while attaining full citizenship rights was *not* to be discounted. This signified a form of political emancipation.

Marx follows this with a distinction, however, between political and human emancipation. While political emancipation was actualized through the development of rights within the social order of the time that came from the abolition of feudalism, human emancipation *necessitated* the unification of social and political power; this could not have been made possible through the depoliticizing effect of rights which construct the civil sphere. Marx argued that within a secular state, religious privileges would maintain themselves in the civil sphere through one's right to privately practice religion.

By relegating the conduct of life to the civil sphere, political emancipation in the form of rights recognizes man only as an individual, an egoist separated from others and following his own self-interest (Marx 1843 [1978]:43). The egoist runs counter to a man who, in his species-being, does not perceive others as a *threat* but as a necessity to the full realization of his sovereignty and humanity. Only in connection rather than competition with others can a man constitute as a "species-being", a man who Marx defines "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" (Marx 1843 [1978]:46).

Marx lays out the paradox of political emancipation when he cites the precursor to the natural rights inscribed in Article 2 of The Declaration: "The end of every political association is

[5] This argument which is posited by Bauer and partially affirmed by Marx in his overarching critique of religion has received backlash for being antisemitic. Without undercutting the antisemitism that underlies the assertion that Judaism must be renounced for universal liberty, I reassert that this thesis will reckon with the broader sociopolitical argument about liberal rights as a tool of political emancipation and the limitations thereof.

the preservation of the natural and imprescriptible rights of man" (ibid). That the state is ultimately a means to protect the civil liberties of an individual allows a relation of domination/subordination to exist between different people with no moral bearing on these inequalities, redistributive or otherwise.

This egoism Marx argues is propagated by civil liberties is underlied by the constitutional rights written in the 1793 Declaration of the Rights of Man. Article 4 states that "Liberty consists in being able to do anything that does not harm others" which Marx claims is practically applied through one's right to private property (Marx 1843 [1978]:42). Marx then turns to Article 16 which states: "The right of property is that which belongs to every citizen of enjoying and disposing as he will of his goods and revenues, of the fruits of his work and industry" (ibid). In Lockean fashion, the framing of one's property as "the fruits of his work" not only morally justifies the ownership of property and wealth but also individualizes the process by which the "fruits" are acquired. A constitutional theorist who championed civil rights, Emmanuel Joseph Sieyès wrote a pamphlet entitled "What Is the Third Estate?" to argue that The Third Estate was responsible for the activities that preserved a functioning nation. He cites these activities of the Third Estate, everyone who was not a noble or clergyperson, as a combination of private employments and public services which the privileged order benefitted from without contributing to them (Sieyès 1789:96). While he ascribes equal value to all substrata of The Third Estate ranging from the agricultural workers to the petty bourgeois (i.e the merchants and dealers), Sieyès underestimates the interplay between bourgeois privilege and property ownership developed in The Declaration. By creating a paradigm that divides the privileged order from the Third Estate, there is no substantial reckoning with the privileges between different strata of the bourgeois. The neglect of bourgeois privilege by condemning all privileges

as being reaped by the aristocratic class is demonstrated when he writes: "The ownership of legal entitlements of this kind is the same for everyone, irrespective of the different amounts of real property making up every individual's fortune or the assets they enjoy" (Sieyès 1789:111).

If one's property is a reflection of his hard work, then the implication is that those within the Third Estate such as the peasants and san-culottes who fell in the lower tier were not [hard-working]. While the industrial revolution did not impact France until the mid-19th century, the rise of the bourgeoisie that was solidified through the French revolution set an ideological precedent that justified their eventual monopoly of the nation through owning the new means of production. In the ruins of the class antagonism between nobility and the Third Estate came the new class antagonism between the bourgeois and proletariat. In a rights framework, these groups are "equal" individuals guaranteed by the formal freedoms granted by the constitution.

Unlike Bauer, Marx is more sympathetic to the role of rights in political emancipation; he only argues that this is *insufficient*, functioning if only as a partial step towards human emancipation:

> "Political emancipation certainly represents a great progress. It is not, indeed, the final form of human emancipation, but it is the final form of human emancipation within the framework of the prevailing social order. It goes without saying that we are speaking here of real, practical emancipation" (Marx 1843 [1978]:35).

If real, practical emancipation corresponds to human emancipation, then the implication is that political emancipation is both "unreal" and "impractical". The practical distinction between political emancipation and human emancipation Marx highlights is clarified in his distinction between an individual being granted religious freedom and being freed from it. In the following excerpt, he suggests that man recognized as a citizen of the civil sphere allows him to act on the basis of self-interest:

"The liberty of egoistic man and the recognition of this liberty, however, is rather the recognition of the unrestrained movement of the spiritual and material elements which form the content of his life.

Hence, man was not freed from religion, he received religious freedom. He was not freed from property, he received freedom to own property. He was not freed from the egoism of business, he received freedom to engage in business" (Marx 1843 [1978]:45).

This distinction resembles that of Jean-Jacques Rousseau's whose conception of the social contract distinguishes between natural liberties and civil liberties. In "The Civil State", Rousseau writes that by entering a social contract, a man must give up his natural liberties in exchange for "civil liberties", which are "limited by the general will" (Rousseau 1762:9). In contrast to Marx, Rousseau envisioned the civil sphere through a more optimistic lens as a means by which man could think about himself as a citizen within a communal sphere. While Rousseau did not critique private property to the structural extent that Marx did, he also expressed preliminary concerns about the role of private interests in corrupting "the general will":

"Nothing is more dangerous than the influence of private interests in public affairs; it leads to the corruption of the legislator, which is an even worse evil than the abuse of the laws by the government; it makes a substantial change in the state, and all reformation becomes impossible" (Rousseau 1762:34).

Without necessarily abolishing material inequalities between different social groups, liberal rights have nevertheless played an important role in providing political emancipation for oppressed groups. On a global level, the language of Western rights has been used to resist colonialism. The concept of national sovereignty through the intermediary of the state launched a ripple of political uprisings from those who had been suffering under colonial rule. As Michael E. Tigar writes:

"Some of this talk [of public concern with 'human rights'] is simply the false rhetoric of metropolitan countries, seeking to cloak the imposition of their will upon weaker states. But an impressive amount of this discussion has expressed the aspirations

of people seeking liberation, as in South Africa, where human rights debates were central themes of anti-apartheid ideology" (Tigar 1977).

A prime example of anti-colonial ideology through the instrumentalization of rights can be seen in the The Haitian Revolution. Two years after the French Revolution, a revolt was initiated in 1791 by Toussaint Louverture in the French colony of Saint-Domingue. As with any revolutionary feat, the long struggle for independence did not reflect a passive claim to inclusivity within the French Declaration's decree of universalizing the rights of man. It involved an organized slave rebellion, massacre, and dissent about the role of liberalism in the enslaved population's fight for self-determination.[6] While France first abolished slavery in 1794, Napoleon Bonaparte eventually reversed its abolition in 1802. The right to self-determination for residents of France's colonies was nullified by Bonaparte's decree that slaves were "private property". James writes: "... the liberty and equality which these blacks acclaimed as they went into battle meant far more to them than the same words in the mouth of the French. And in a revolutionary struggle these things are worth many regiments" (James 1938:306). The economic benefits that French citizens would have reaped from the restoration of the right to own slaves outweighed the moral dimension of granting the enslaved population their right to self-determination.

Rousseau's critique of private interests corrupting the general will is demonstrated through Bonaparte's reinstatement of slavery. Yet, Rousseau's critique also highlights the tension that can emerge between the general will of two national groups.

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[6] In *Black Jacobins*, the shortcomings of liberalism as a tool towards self-determination is best exemplified in the differences of leadership between Toussaint Louverture and Jean-Jacques Dessalines. While Louverture was more loyal to the ideals of liberty and equality proclaimed by France, Dessalines envisioned a liberatory agenda for the enslaved population of Saint-Domingue that necessitated the ethnic cleansing of rather than cooperation with the white population in Haiti (James 1938 p. 370).

Haiti was the only nation-state that emerged from the slave rebellions but the role of human rights in anti-colonial and anti-apartheid ideology has had a long history thereafter. Apart from The Haitian Revolution and the example of South Africa that Tigar cites, Ireland used the French Revolution as their model to break away from Great Britain. The slogan of "freedom and equality" would transcend Europe, inspiring revolt in Latin-America (Doyle 2002:413).

During the Civil Rights Movement within the United States, rights became the basis by which collective freedom for African-Africans and other marginalized groups such as women and the LGBTQ+ community could be attained. Since the French Revolution, however, the tension between social equality and the right to private property had only become more prominent. What were the implications of rights being universalized when it assumes material inequalities as an a priori? While the language of rights has been reinterpreted to extend beyond the demographics of which they initially applied, its turn towards real universality – that is, one that substantively exists beyond the written word – has been contested by the increasingly apparent and seemingly irreconcilable contradictions inherent in the rights the oppressed are demanding.

One of these contradictions is presented in Article 2 of The Declaration which declares both the right to private property *and* the right to resist oppression. The rhetorical joining of these two alongside the right to liberty and security not only naturalizes class inequality but an a priori state of social inequality between an oppressor and oppressed. Rights naturalize the notion that external entities, whether it's another individual or the state itself, *is* a threat to the individual. If one is entitled to property and other civil liberties, then any entity that opposes an individual's ability to acquire either of these *is* the oppressive force. *Who* resists these oppressive forces? According to Marx, state-sanctioned resistance is accomplished through the police:

"Security is the supreme social concept of civil society; the concept of the police. The whole society exists only in order to guarantee for each of its members the preservation of his person, his rights and his property. The concept of security is not enough to raise civil society above its egoism. Security is, rather, the assurance of its egoism" (Marx 1843 [1978]:43).

While the unequal distribution of wealth and income can be seen as a detriment to the implementation of a more egalitarian and communal social order, the existence of private property in of itself has become so hegemonic within the liberal order that some stratification is not only anticipated but a prerequisite for the merit-based egalitarianism that the French revolutionaries envisioned. The only theoretical issue, then, is not embedded with an unequal class system which is inherent in private property ownership but the extent to which inequality would impact someone's standard of living. Even so, the question of what constitutes an "adequate" standard of living is contested amongst those in power. With regard to the responsibilities of the state and governmental policy, what does an adequate standard of living materially entail? Is it the right to basic necessities such as food, water, and housing? How are these "rights" curtailed by the rights endowed by those who own private property and the means of production?

Published on December 10, 1948, The Universal Declaration of Human Rights (UDHR) was created as a response to the aftermath of World-War II. In contrast to The French Declaration of Rights of Man and Citizen, its preamble explicitly outlines that the subsequent articles are applicable to *all* human beings rather than men and stresses the importance of internationalizing human rights law.

One of the more notable distinctions compared to its French precedent, Article 22 and the articles thereafter use language ensuring the right for individuals to social security as realized through the state. Article 23 ensures workers the right to employment with social protections; subarticle 3 ensures the right to remuneration for not just for the individual but "his family" and

subarticle 4 ensures the right for the individual to either form or join a trade union. Finally, subarticle 1 of Article 29 states: "Everyone has duties to the community in which alone the free and full development of his personality is possible".

The atomistic nature of rights that Marx critiques is tentatively challenged by this development; yet, the crux of inequality which Marx ascribes to private property is maintained. In The UDHR, Article 17 preserves the right for an individual to not only own property but to not be arbitrarily deprived of it. The right of the property-owning individual supersedes the right of others, be it the state or individuals who do not have the sufficient funds to own property. Article 26 guarantees the right to education, but the type of education one is entitled to is distinct from the type of education one can receive. While education is not only free but compulsory on an elementary level, "types" of higher education, such as technical and professional education are deemed "equally accessible to all on the basis of merit". Much like The Declaration of the Rights of Man And Citizen, this document maintains language that, while striving towards inclusivity and equal opportunity, is still individualizing. The UDHR adaptation of rights progresses towards the premise of a welfare state but still frames employment based on merit as the means to achieve a good standard of living, thus creating a sense of personal responsibility and deservingness as central to a person's economic conditions. While the state may address the undesirable living conditions of those who don't own wealth, it ultimately protects both the people and the system that creates the conditions the state only *retrospectively* fixes.

Nearly two decades after the publication of The UDHR, the UN General Assembly created two international treaties in 1966: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). In addition to the UDHR, these Covenants were adopted in order to distinguish

between civil and socioeconomic rights respectively, and resulted from ideological differences between Western nations and the Soviet Union about what human rights entailed and the extent to which the government should be involved with the lives of its citizens (Schrijver 2016:2). While the Soviet bloc diverged from civil rights in favor of labour rights, Western nations followed the trajectory of civil rights. Schrijver views the adaptation of these covenants as "the heart of the Cold War [and] a large extent a result of then prevailing East-West rivalry" (ibid). In spite of its association with the Soviet Union, the preamble of the ICESCR remarkably draws from FDR in its definition of freedom as the "freedom from fear and want".

Both Covenants were intended to render the ideals of the UDHR enforceable; yet, the United States only ratified the ICCPR in 1992. While the treaty was signed by former president Jimmy Carter in 1977, The United States still has yet to ratify the ICESCR and is among the minority of member states within the UN to not have ratified it. Consequently, while a Human Rights Committee was formed to monitor the ICCPR and hold the states accountable for human rights violations, there was no corresponding body for the ICESCR within the United States. Without discrediting the ideals enlisted in the UDHR and its advance towards a more social model of egalitarianism, its significance is undercut by the treaty ratification being contingent on the jurisdiction of the respective member state. If the Western model of human rights is ultimately understood as an assimilationist framework for nations that transform their population into private citizens, then they become "free" but only in the ideal, illusionary sense associated with civil rights. While the UDHR integrates more collective understandings of human rights unfounded in The Declaration of the Rights of Man and Citizen, it does not circumvent the critiques Marx makes of political emancipation as a whole. The right to private property being intact means that the civil sphere is still the basis of society.

Marx writes that “the political suppression of private property not only does not abolish private property; it actually presupposes its existence” (Marx 1843 [1978]:33). Therefore, the state can be understood not merely in opposition to but as an apparatus to maintain the interests of the ruling class. Rights do not call for the abolition of social privileges so much as the right to acquire them on the basis of “merit” which has been historically linked to property and wealth ownership. Practically speaking, the distinction between rights and privileges is inconsequential when the presuppositions involved in the formation of rights was that some humans were simply not entitled to them. While the incremental granting of rights to identity-based groups that have previously been deprived of them is aimed to render these groups more equal to one another, these political gains neither dismantle the inequalities presupposed by private property nor eliminate the intermediary (i.e the state) that can revoke these rights as equally as it can grant them.

The establishment of The Declaration of the Rights of Man and Citizen was the product of the bourgeois’ desire for recognition and political power. Since then, this fight has extended to other forms of recognition as other types of oppression came to light. While some of these rights were in the pursuit of economic security for the working class such as the right to trade unions or the right to a minimum wage, the focus would eventually pivot towards legal recognition and protections for historically marginalized identities during the 1960s. This shift has been classified by Nancy Fraser as “cultural domination [supplanting] exploitation as the fundamental injustice” (Fraser 1995:68).

If we combine Marx’s critique of rights with Doyle‘s skepticism of liberty appearing as no more than the manifestation of power, then power can be understood as the co-constituting forces between the bourgeois, the state, and rights. If those who own capital disproportionately

represent the state, then how universal can rights necessarily be? When the acquisition of power for one individual necessitates the disempowerment of another, how does this change our understanding of human rights and the groups who have fought to attain them?

The Haitian Revolution is retrospectively considered a model of a black revolutionary liberation movement but the restrictive dimensions of liberalism were constitutionally maintained. In drafting the constitution for Haiti, Louverture "authorised the slave-trade because the island needed people to cultivate it" (James 1938:370). While workers were financially compensated for their labour in the wage-form, they were nevertheless subject to harsh working conditions in the name of maintaining their economy. Louverture contended that "the salvation of San Domingo [laid] in the restoration of agriculture" which necessitated the exploitation of workers, even if they were free in the formal, anti-colonial sense (James 1938:155).

Marx's 1843 critique of rights as a bourgeois form of limited freedom remains relevant today. In the struggle for recognition of personal freedoms sought by marginalized groups within the United States, the struggle between political emancipation under liberalism and the ideal of a human emancipation based on a classless society continues to be in tension.

There have been several rights theorists following Marx within both leftist and left-liberal strands who have developed and critiqued his perspective, exploring law and rights as both the cause and effect of social inequalities. The next chapter will focus on the development of the Critical Legal Studies (CLS) Movement in the 1960s. Drawing from the civil rights and anti-war movements of the time and following from the legal realist approach to law in the 1930s, CLS advances the distinction between descriptive and prescriptive understandings of the law while discerning where rights fits into the paradigm of reform and revolution.

CHAPTER 2. The Decline of Rights Critique in Critical Legal Studies: Towards A Post-Socialist Jurisprudence

In Chapter 10 of *Capital* on "The Working Day", Marx famously writes: "Between equal rights, force decides" (Marx 1893). David Harvey clarifies Marx's intended meaning in his companion book of *Capital*, writing that "there is no way to adjudicate 'fairly' between equal rights (both bearing the law of exchange). All you have to do is fight for your side of the argument" (Harvey 2010:138). These two rights are classified by Marx as the right for the capitalist as a purchaser to prolong the working-day to increase his profit and the [equal] right for the laborer to work to the extent that it does not negatively impact his health.

The role of force in the adjudication between "equal rights" is highlighted within a more explicitly jurisprudential context in both American Legal Realism (ALR) and Critical Legal Studies (CLS). CLS is distinguished from ALR in its incorporation of progressive historiography which, drawing from the Marxist theory of historical materialism, attempts to understand the role of economic interests in shaping the development of law. Its origins can be traced in 1968 in an emerging affiliation between legal scholars Duncan Kennedy and David Trubek at Yale University (Trubek 2015:57). Kennedy was Trubek's student but the two eventually collaborated as close friends and colleagues, identifying kinship in a shared critique of law that Trubek argued was underdeveloped within jurisprudence (ibid). Mark Tushnet, another one of the key figures associated in the development of CLS, pins the origins of CLS to a conversation between Kennedy and Trubek wanting to develop an "organizational locus" through which other legal scholars could develop the critique of law (Tushnet 1986:505). Since the first conference in 1977 hosted at the University of Wisconsin-Madison, conferences were held on an annual basis and, occasionally, in the summer. The scholars invited by Kennedy were composed primarily of legal

sociologists and legal theorists from Harvard and Yale (Krever et. al. 2015). Tushnet ultimately introduces the underpinning of CLS as a critique of the "liberty of contract" and "property rights" (Tushnet 1986:505).

The exact definition of CLS is contested; Tushnet resists the two common categorizations that classify it as either a movement or a school of thought and suggests that it should alternately be understood as "a political location for a group of people on the Left who share the project of supporting and extending the domain of the Left in the legal academy" (Tushnet 1991:1516). Positing that law is not ahistorical but rather a social construction based on the social order of the respective time period, CLS interrogates the inalienability of rights by examining how various groups (the ruling class or otherwise) either influence or benefit from certain interpretations of the law. Provided how abstractly the language of rights is formulated, a primary tenant of CLS is that the material outcome is less contingent on "the rule of law" and more so on its interpretation which varies depending on the political interests of the parties involved in the adjudication. An overarching tenant agreed upon by the first wave of CLS scholars, this uncertainty is referred to as "the indeterminacy thesis" (Rasulov 2023).

The indeterminacy thesis is significant for the reason that it challenges a Marxist Legal Theory (MLT) postulate that law is a superstructural outgrowth of the economic base rather than a component of it. We can see this firsthand in Marx's example of the working day. While the law *may* be used as a form of domination for the ruling class, that the working class can attempt to change the conditions of their labour by negotiating the length of the working day and socially necessary labour time contests the notion of law as inherently favoring the bourgeois. While the act of balancing the rights of labour against the rights of capital does not structurally change the nature of exploitation itself, it is still a form of class struggle that allows workers to see

themselves as a collective (as opposed to atomistic individuals or "egoists") and may further radicalize them into developing class consciousness: "Taking their cue from legal realists, both Tushnet and Kennedy criticise MLT for its inability to recognise law's fundamental indeterminacy both as regards its content (eg the doctrine of consideration can mean many different things) and as regards its form…" (Rasulov 2014:14).

While it may have greatly influenced the development of CLS, progressive historiography and Scientific Marxism eventually became inconsequential in the late 1970s and was replaced by proponents of "Critical Marxism" (Rasulov 2014:3). This strand was mainly taken up by a second-generation wave of CLS scholars comprising "femcrits, critical race scholars, linguistic turn postmodernists, and so on and so forth" (Rasulov 2014:8). The extent to which rights can be seen as a form of emancipation has long been debated among CLS scholars but it is perhaps this generational divide that concretized rights as a necessary bridge towards dismantling social inequity rather than an impediment to it.

Although CLS scholars were unified in their skepticism towards how law favored certain interest groups over others and thus, could not be depoliticized[7], the emerging poststructuralist emphasis on the indeterminacy of legal doctrine nullified the critique of rights in idealist terms. Put alternately, that the poststructuralist emphasis on the relationship between language and power neglects the critique of law as a structurally and class bound oppressive tool in of itself catalyzed the attribution of the emancipatory and subjugative potential of rights to questions regarding rhetoric, representation, and instrumentalization instead.

[7] The anti-formalist approach which contends that the rule of law is inherently political is, in addition to the indeterminacy thesis, one of the tenets that most CLS scholars can agree with.

The role of postmodernism in CLS is further explored by Paddy Ireland in his review article "History, Critical Legal Studies and the Mysterious Disappearance of Capitalism". A current Professor of Law at University of Bristol Law School, Ireland writes:

"... postmodernists have abandoned… [economic] determinations altogether, making the autonomy of these spheres absolute and all but eliminating historical causality and the idea of history as process. In place of mechanical economic determinism we have absolute contingency; one form of idealism has replaced another" (Ireland 2000:125).

Ireland suggests that the Althusserian theory that advocated for the "relative autonomy" of the superstructure (and thus, the relative autonomy of law) was revised with the advent of postmodernism so that law became fully separate from the economic base (ibid). This revision can be understood as the one-sided reading by poststructuralists of "historical materialism" as "economic determinism". While a more sociological reading against legal formalism vis-à-vis the invocation of Weber may have initially accounted for a more holistic and empirical account of culture as a driving force within legal outcomes, this resulted in what Tushnet describes as "the critique of the sociology of law [directing] attention to problems of ideology and consciousness" (Tushnet 1991:1525). Therefore, critiques of the structural and economic elements of legal structures such as the principles inscribed in the constitution to the federal court systems were dissolved into inquiries of the individual, their social positionality, and whether or not they had access to or were represented within the rights framework. Moreover, the cultural-radical strand of CLS emphasized the role of moral consciousness and agency in the 1970s that gave rise to the counterculture movements of this era which were concerned with issues such as race and gender. Several of these scholars believed classical social theory[8] did not adequately account for the emancipatory potential of organizing around identity rather than class.

[8] In this context, Tushnet defines "classical social theory" as a precursor to when CLS scholars had begun to formulate ideas surrounding indeterminacy within legal doctrine. Tushnet frames this determinacy as the pessimism of Marx's historical "determinism" and Weber's understanding of rationality via the modernization of the state as an "iron cage".

The consequence of a legal framework that undermines historical materialism is that it not only naturalizes capitalism as a transhistorical phenomenon but in doing so, deradicalizes the critique of law as well. Its solutions to social problems shift towards the realm of discursive construction rather than material production. If power relations are constructed by language, then the natural conclusion is that they will ultimately be "fixed" by language and miscellaneous ways of knowing with negligible consideration of the material forces at play[9].

Rasulov expands on the role of discursive construction within CLS in a 2023 article where he presents two models of the indeterminacy thesis: the conceptualist model and the phenomenological model. While the first model seems more closely aligned to a conception of indeterminacy and is more explicitly inspired by legal realism on the grounds of how social arrangements determine outcome, the second model locates indeterminacy in "the phenomenological state of the person who interacts with [the given rule/concept]" (Rasulov 2023). Rather than focusing on superstructural factors which can be understood empirically, it pivots towards the role of individual consciousness which Rasulov dubs as "a pile of interpretative debris that one day seems to be virtually immoveable [and] can be simply forgotten or pretended away the next day" (ibid). Therefore, while both may be submodels of "discursive construction", the phenomenological approach exhibits a more idealistic interpretation of indeterminacy that severs any sort of materialist analysis about structural forces outside of consciousness.

Some CLS scholars such as Duncan Kennedy and Mark Tushnet may have been more influenced by Marx in an attempt to make sense of capital as a primary cause of oppression;

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[9] From a Marxist-Weberian interpretation of materialism, this can be understood within the context of the social formation. See Harnecker, M. (1980). "Mode of Production, Social Formation and Political Conjuncture". *Marxism Today*. Here, Harneckder defines the mode of production as a combination of "the economic structure, the juridico-political structure (laws, the state, etc.), [and] the ideological structure (ideas, customs, etc)" and expands on the notion of relative autonomy.

nevertheless, the critique of capital withered away later in the 1980s rendering Marx as a figure who, while having contributed significantly to the development of modern social theory, had become irrelevant. Even Tushnet himself who suggested in the first 1977 CLS conference that "no serious theory of law is possible without the labour theory of value" abandoned this claim thereafter (Krever et. al. 2015).

Rasulov attributes the disavowal of Marx in CLS to a couple of reasons. While part of this severance was due to legal scholars wanting to maintain respectability in light of the Reagan era, Rasulov also cites the influence of a rising heterogeneous culture of political activism which combined "French structuralism, feminist criticism and Foucault" and rejected the Marxist conception of emancipation altogether (Rasulov 2014:5). The fusion of these approaches were favored over its Marxist precedent, the latter deemed overly deterministic and, in its association with Stalinism, totalitarian. Echoes of this critique have endured to the present-day with various leftists and left-liberals alike accusing Marxism of engaging in class-reductionism.

It is perhaps the cultural turn in the 1970s that solidified a more emancipatory interpretation of the indeterminacy thesis; if the law doesn't result in a definitive outcome, then there is no guarantee that it will always be used in favor of the powerful at the expense of the marginalized.

Duncan Kennedy wrote that some feminists and critical race theorists in legal theory who took issue with the critique of rights did not believe that the Marxian critique of law was necessarily totalitarian but rather "demoralizing" (Kennedy 2002:184). While sympathizing with the structural critiques of law, some theorists believed these critiques also denoted a disregard for the gradual progress made by the legal protections afforded by expanded rights. Subsequently citing the success of progressive liberalism in the post-1960s, Kennedy notes that an oppositional

reading and critique of rights could have not only been read as demoralizing but socially reactionary. Put alternatively, what place do rights critique have when the enactment of federal legislation provided legal protections for African-Americans and other marginalized groups where there were none before? As Patricia Williams writes: "For me, stranger-stranger relations are better than stranger-chattel" (Williams 1991, as cited in Brown 1995:125). While rights do not solve the issue of privatization and economic inequality, they nevertheless mitigated the oppression that several groups faced. Over time, any of the critiques Marx might have posed about rights as being bourgeois were disregarded in favor of the personal freedoms that liberal rights promised.

After the 1960s, the abandonment of capital as being the root cause of oppression within legal thought has obscured the inadvertent means by which rights have actually perpetuated rather than resolved identity-based oppressions. The naturalization of rights occurred concurrently with the transformation Duncan Kennedy cites as "the left" becoming the "liberal-left".

In "The Critique of Rights in Critical Legal Studies", Duncan Kennedy posits that there are three left-liberal sub-discourses of rights that have evolved in left legal thought spanning between 1975-1985: liberal constitutionalism, fancy reconstructive rights, and identity-based rights (Kennedy 2002:179). All of these theories have endorsed the rights model and developed what Kennedy writes as a unified remembrance of the 1960s as a time of triumph where liberalism was re-interpreted in a progressive light. The distinction between these sub-discourses lies in how these groups believe rights should be interpreted.

For the purpose of this thesis, I will focus on the tension between "fancy reconstructive rights" and "identity-based rights" as they reveal how rights, withstanding their formal

inalienability, are also subject to the indeterminacy thesis. While advocates of reconstructive rights aimed to universalize human rights' claims, advocates of identity-based rights focused on expanded legal recognition for marginalized groups. In the attempt to universalize human rights, the particularity of certain identities become susceptible to neglect; inversely, the legal recognition of specific identities rendered itself to a form of valorization[10] antithetical to the neutral application of universal rights. The tension of "equal versus special treatment" was reflected within internal disputes of "formal versus substantive equality" with substantive equality referring to policies that affect identity groups in a way that may not be universally applicable (e.g police violence disproportionately affecting black men or abortion rights disproportionately affecting women). The indeterminacy of rights' interpretation is one of Kennedy's key critiques of legal rights and liberalism. Because rights interpretation necessitates balancing which is inextricable from ideology, the inalienability of rights is merely reduced to policy (Kennedy 2002:201).

Of the three liberal subcourses Kennedy defines, it is perhaps the call to identity-based rights that have become the most hegemonic within contemporary political discourse. If the call for equal rights is actualized through representation in the form of politicized identity[11], then the focus inevitably shifts towards advocating for more power to marginalized individuals within the civil sphere. Taking into account Marx's critique of rights in his essay "On the Jewish Question", civil rights, withstanding their necessity, ultimately render itself to a bourgeois conception of liberty. In examining the original language of rights founded in "The French Declaration of

[10]I use valorization as the identity-based specification of Bauer and Marx in their discussion of Prussian-Jews acquiring rights on the basis of their religious identity rather than their humanity.

[11]In this context, politicized identity can be understood as both the legal codification and discursive production of identity-based rights. In contrast to the "fancy reconstructionists" as per Kennedy's classification, advocates of identity-based rights and thus, [politicizing] identity aim for a pluralistic interpretation of rights that are based on the affirmation rather than denial of difference. Whether or not this ought to be aligned with the interpretation that rights should be universal is contested as universalism is also tied to Western imperialism.

Rights of Man and Citizen" and subsequent frameworks such as the Universal Declaration of Human Rights, there is no critical reckoning with the material inequalities that inevitably follow from the right to private property or the accumulation of wealth because they are both considered natural rights. Thus, the primary question that contemporary politics have since dealt with is one of inclusion for marginalized identities within a liberal framework of rights that has naturalized capitalism rather than any critique of liberalism itself.

To sum up the transformation the left intelligentsia had undergone in the 1970s, Kennedy cites critical race theorist Cornel West's analysis of the strategic difficulties that came about in calling for a unified politics. Entitled "The Struggle for America's Soul", West wrote this article in response to Robert Bellah et al., "The Good Society" which proposes participatory democracy as a solution to American individualism. While accepting their analysis and suggestion that politics should be built on trust rather than fear, West critiques them for being "short on strategy" (West 1991).

As progressive movements became more scattered and grounded in difference since the 1960s, West writes that the New Left "[lacked] both the vital moral vocabulary and the focused leadership that [could have constituted and sustained it]. Yet, it will [have been] rooted ultimately in… activities by people of color, by labor and ecological groups, by women, by homosexuals" (West 1991, as cited by Kennedy 2002:181). While the New Left became more inclusive to extend beyond the demography of white, working-class men and the issue of class exploitation, this resulted in the fragmentation and localization of strategy. The premise of a universal subject (i.e the working class) was undercut by the particularity of the issues different groups were encountering. As marginalized groups became the face of the progressive left, the white-working class not only came out of the limelight but, in the words of Kennedy, became "the core of the

enemy camp" (ibid). If class antagonism was abandoned, then it was, in the advent of The New Left, replaced by cultural antagonisms that located the wielding of power not through exploitation but through privilege.

The incoherence of the New Left is addressed by West but it is crucial to highlight that he does *not* denounce this so much as he frames it as an outgrowth of the Old Left's composition which, in its cultural homogeneity, neglected to address the distinctive problems and fears of various identity groups. As a self-proclaimed member of The New Left, Kennedy himself says: "If you want to do serious politics in America in the late 80s and 90s, you have to engage with these movements" (Krever et. al. 2015). Both West and Kennedy's commentary on the rise of politicized identity within jurisprudence and political strategy are practical outgrowths of Marx's claim that the politicization of identity vis-à-vis the right to religious freedom is a form of political emancipation – but the question remains: if the end-goal is human emancipation which necessitates the *abolition* of difference in the strive towards species-being, what does it mean to simultaneously vindicate the necessity of identity-based rights which emphasizes the differences between individuals rather than the similarities that unify them? What are the practical consequences of rejecting abstract rights in favor of identity-based rights?

The rest of this chapter will more closely examine the trajectory of progressive jurisprudence and more particularly, the emerging role of identity formation in the language of legal theory since the decline of Critical Legal Studies and the rise and fragmentation of the New Left. It will specifically look towards emerging theories founded by legal scholars who advocate for an identity-based jurisprudence. Working within the constraints of a liberal legal framework, what are some approaches that legal scholars have advocated in the fight against social inequality and what do they reveal about the role of law and rights in the contemporary political landscape?

Kimberlé Crenshaw is a legal scholar who is best known for founding the term "intersectionality" in her essay "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color". Grounded in the attempt to "[link] contemporary politics with postmodern theory", this specific essay examines intersectionality as the intersection of gender and class experiences that have impacted black women in a way that has been legally ignored by the single-axis analytical framework of gender-based and race-based discrimination within legal scholarship (Crenshaw 1991:1244).

Crenshaw's advocacy for intersectionality is built on the affirmation of identity as a social construct and may initially be read as antiessentialist; nevertheless, she introduces intersectionality by differentiating it from antiessentialism and claims that the framing of identity by anti-essentialists (which, in its vulgar form, can be read to claim that identity is "unreal" and therefore "unimportant") undermines the political relevance that identity has in shaping inequality. Complicating her initial assertion that identity is socially constructed, the inadvertent consequence of her antiessentialism critique is that oppression, with no analysis of where it originated apart from one's identity, becomes transhistorical. The essentialization of oppression occurs not through biological but historical constructs of racial identity.[12]

Crenshaw's methodology for understanding oppression and inequality is also not quantitatively measurable in a way that more holistic class-based analyses of oppression could be. While she emphasizes that there are other factors outside of the intersection of race and gender that impact how oppression and inequality can be understood, these factors such as class, sexuality, age, are merely footnotes that, had they otherwise been taken into account, arguably

[12]While essentialism is often associated with biological essentialism, I assert that essentialism can *still* occur through social constructions of identity whereby one's social positionality is understood through the level of privileges historically connoted with it without accounting for class domination/subordination. This social form of essentialism is linked with the reifying tendencies of identity-based legislation.

would have complicated the relationship she poses between identity and oppression. The poststructuralist foundation of intersectionality is perhaps best emphasized in two of Crenshaw's positions, the first which is her critique against "the universalizing rhetoric" associated with previous liberatory agendas within modernist movements and the second which is her advocacy for a reinterpretation of difference not as a "power of domination [but] the source of social empowerment and reconstruction" (Crenshaw 1991:1242).

Crenshaw writes: "The problem with identity politics is not that it fails to transcend difference, as some critics charge, but rather the opposite – that it frequently conflates or ignores intragroup differences" (ibid). By interpreting the delineation of difference in a positive light, the narrative of triumph becomes integral to her conception of "power [as]... reconstruction" (ibid). The premise of reconstruction, however, is inextricably tied to a presupposed state of disempowerment. Because the perception of one's identity as a "source of injury" presupposes the act of reconstruction, one can become vulnerable to the act of self-subversion.[13]

Not only does Crenshaw's presentation of intersectionality undermine the role of class as a tool of oppression but it also conflates it to an identity adjacent to "sexuality", thus reinforcing Ireland's earlier contention that the role of economic base is no longer integral to the analytical framework of oppression amongst the contemporary left. By rejecting a modernist conception of power as a tool of domination vis-à-vis exploitation, "power" under a liberal democracy is no longer relational but individualistic. One can be empowered without disempowering others and

[13]This critique does not escape Crenshaw who agrees that "categorization is itself an exercise of power" p. 1297. She complicates this, however, with a counterargument that because identity *can* be a site of resistance, that the subordinating feature of identity is not determinant; however, her insistence that identity can be a positive "anchor of subjectivity" rather than a "socially imposed identity" still operates not only on the presupposition of subordination but the assumption that a social identity is inherently imposed by an external entity (be it the state or a dominant social group) and thus, is in conflict with one's self-identification. The conditions for reconstruction necessitates the irreconcilability between these two.

one can dominate without subjugating.[14] It is by celebrating the right to difference *and* the right to acquire private property without any substantial reckoning of a liberatory agenda built around resolving class stratification that reinforces the oppressive dimensions of rights cited by Marx.

One of Marx's primary critiques of rights was that a secular state granting the right to religious freedom did not resolve the issue of [religious] oppression so much as it relegated it to the civil sphere (Marx 1843 [1978]:35). He cites the United States constitution as an example; while the state did not formally affiliate itself with Christianity, one's religiosity was nevertheless the means by which a man's moral virtue was measured provided that the majority of Americans were Christian.[15] Religious privileges and thus, the means through which it can subordinate minority groups within the civil sphere are not merely the effect but the consummation of political emancipation. I suggest this claim can be extrapolated to understand a breadth of identities outside of religion including but not limited to racial and gender identity – with the politicization of these identities through legal recognition, the separate components of man's identity supersede his humanity and thus, compromise his ability to connect with others. Both Bauer and Marx's shared critique of political emancipation built around one's self-identification rings a similar bell in contemporary critiques of identity-based rights.

In "Mapping the Margins", Crenshaw distinguishes between the claim "I am Black" and the claim "I am a person who happens to be black" with the former as an example of reconstructive power; by emphasizing racial identity rather than casting it to the side, categorization becomes a tool of self-empowerment: "At this point in history, a strong case can be made that the most critical resistance strategy for disempowered groups is to occupy and

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[14]The postmodernist reinterpretation of power as a "productive" force prizes the symbolic and affective dimensions of individual gains even if it is at the expense of a collective.

[15]Max Weber develops this idea in "The Protestant Ethic" where he argues that the values of Calvinism, a major branch of Protestant Christianity, was integral to the development of capitalism. In the mid-late 19th century, "Manifest Destiny" also became hegemonic and religion was a means by which to justify settler-colonialism of the Indigenous Peoples.

defend a politics of social location rather than to vacate and destroy it" (Crenshaw 1991:1297). While advocating for the historical necessity of preserving a politics that centers identity, she does not provide a material explanation for how to "escape" this necessity.

Wendy Brown, a political theorist and critic of liberalism, writes: "Indeed, the possibility that one can 'feel empowered' without being so forms an important element of legitimacy to the antidemocratic dimensions of liberalism" (Brown 1995:23). It would be reductive to claim that Crenshaw's proposal for an intersectional approach to jurisprudence is purely phenomenological; antidiscrimination law was fought for by marginalized groups in order to resist oppression that, while not explicitly being defined in terms of class, were still material. Her intersectional framework justly accounts for the role of co-constitutive identity markers in affecting adjudication that isn't reckoned with in the unilateral approach to identity in law; yet, intersectionality is ultimately a simultaneous call to politicize identity which, under a rights framework, paradoxically affirms the differential powers within the civil sphere. That Brown distinguishes between "the (experience of) empowerment and an actual capacity to shape the terms of political, social, or economic life" moreover begs the question of whether or not it is possible for an intersectional framework to shape economic life when it has become tied up to the narrative of overcoming rather than shaping it (ibid).

The politicization of identity in rights frameworks is further critiqued by Brown; she discusses this more explicitly with regard to Catharine MacKinnon, a legal theorist within the cultural-radical strand of CLS who, while drawing from Marxian thought, is sympathetic to the poststructuralist operationalization of epistemology as a site of either subjugation or resistance. Unlike Crenshaw, MacKinnon *does* uphold the end-goal of universal equality but simultaneously maintains the importance of politicized identity.

In *Towards A Feminist Theory of the State,* MacKinnon critiques both liberal and leftist conceptions of jurisprudence. She addresses the reifying tendency of liberalism to "[objectify] social life" but also critiques the left for being overly deterministic and radical in its critique of law and thus, unable to move beyond "radical paralysis" (MacKinnon 1989:241).

To reconcile the liberal and leftist approaches to law, she proposes a post-Marxist feminist approach which reformulates law to reflect "women's concrete reality"; to counteract the various gender-based inequalities women face, Mackinnon rejects abstract rights (which she claims inherently reflects the "masculinist state") in favor of substantive rights for women (MacKinnon 1989:244). Substantive rights constitute the integration of "experiential" features of womanhood into law.

Brown makes the counterargument that MacKinnon's proposal for an experiential approach to law consequently reduces "womanhood" into a monolithic[16] experience. Furthermore, MacKinnon's insistence that women are entirely the product of men's construction inadvertently serves as a form of self-subversion that paves the way for a recognition-based politics for women that can only be conceived in relation to the dominating forces of masculinity and thus, cements femininity as a subordinated social position. Similarly to intersectionality, MacKinnon's framework of a feminist jurisprudence does not necessarily seek to emancipate women but to assimilate them into the pre-existing regime of the state (Brown 1995:41). Brown suggests that MacKinnon's jurisprudence echoes a Foucauldian rejection of liberation which, in advocating for representation as a productive form of power, implies that "women are in greater need of social equality and political protection than of freedom" (Brown 1995:21).

[16]Monolith here is defined as a conception of womanhood that is experientially derived from white, middle-class women with no bearing of other strata that might change their experience of sexual subordination.

MacKinnon addresses Marx's critique of civil society and writes that within the constraints of liberal reform, a feminist approach to "law could emancipate women to be equal only within the 'the slavery of civil society'... They would not be liberated from the dialectic of economic and sexual dominance and submission, but freed to dominate" (MacKinnon 1989:240). She also maintains that "The goal is not to make legal categories that trace and trap the status quo, but to confront by law the inequalities in women's condition in order to change them" (MacKinnon 1989:242). Yet, her consideration of Marx does not preclude her from proposing a solution that fits within the liberal approach to jurisprudence she simultaneously critiqued for objectifying social reality.

Like intersectionality, her conception of change falls flat in its confines within the realm of consciousness-raising: "From the feminist point of view, the question of women's collective reality and how to change it merges with the question of women's point of view and how to know it" (MacKinnon 1989:241). Both Crenshaw and MacKinnon offer compelling accounts of how substantive equality can be achieved through considerations of identity. Whereas Crenshaw advocates an intersectional framework for anti-discrimination law, MacKinnon advocates for a transformation of both the state and rights to address the gender-based and sexual violence that women disproportionately experience compared to their male counterpart. However, the identitarian-affirmative approach both scholars propose is methodologically complicated by the determinacy they attribute to identity markers. While some critics of Marxists accuse them of class-reductionism, it is perhaps these forms of jurisprudence that concede to the opposing end which is both race and gender-reductionism.[17]

[17]In response to critics accusing him of "class reductionism", "race reductionism" is a term coined by Marxist scholar Adolph Reed to describe the phenomenon of reducing race into an analytical category as an explanation for social inequality. See Reese, H. (2021). Adolph Reed Jr.: The Perils of Race Reductionism. *JSTOR Daily*.

The turn to identity-based jurisprudence grounds Kennedy's earlier claim about why the 1960s was remembered as a time of triumph and why left-liberalism had replaced the left entirely. To the credit of progressive liberalism, the acquisition of social rights for identity groups was a revolutionary feat. If "political emancipation is… the dissolution of the old society [and] revolution of civil society", then the dissolution of the Old Left and the revolution of The New Left was a historically necessary continuation of the dialectic for a social egalitarianism that rejected the racial homogeneity of the white working-class in favor of a political party that recognized and fought to protect the interests of marginalized identities. (Marx 1843 [1978]:44). The pit-fall, of course, is that it not only rejected the racial homogeneity of the white working-class but it also rejected the validity of class struggle as a whole, diminishing class to another identity marker or level of status rather than a relation.

To reject liberalism altogether would be to abandon a historical materialist analysis of the conditions in which emancipation can be created; the creation of the civil sphere following the revolution of the French bourgeois was acknowledged by Marx as a form of political emancipation from feudalism. In the same vein, the politicization of identity in the realm of jurisprudence and political strategy after the Civil Rights Movement can be acknowledged as an evolutionary form of political emancipation from a state that had previously failed to provide legal protections for let alone *recognize* the humanity of marginalized identities.

But what's after legal recognition? To the theoretical extent that social identities are formally protected under civil rights, so are material inequalities; a celebratory attitude towards rights without a structural critique of what rights entail or the private interests of those who are either enforcing or interpreting them has further entrenched progressives into a system of exploitation veiled under the language of multiculturalism under liberal democracy.

In the 1954 case of *Brown v. Board of Education*, The Supreme Court unanimously ruled that racial segregation between whites and African-Americans was a violation of the Equal Protection Clause of the Fourteenth Amendment, nulling the doctrine of "separate but equal" as unconstitutional; yet, structural factors independent of this ruling such as the pre-established racially segregated communities between whites and African-Americans were still intact. Additionally, the limited social mobility in regard to low-skilled jobs – those of which were primarily taken up by African-Americans – meant that the doctrine was practically insignificant.

In "The Continuing Struggle For Negro Equality: Will Supreme Court Ruling End Segregation?", Jean Blake, a contributor to a Marxist Magazine entitled Fourth International, pinpoints racial segregation as an issue that not only structurally prevailed beyond this ruling but as an issue that could *not* have been resolved through court decisions:

"The struggle for equal rights, like the struggle of the unions, is essentially a defensive struggle. In both, the problem is to hold on to gains already made, and to fight for their extension in order to counteract the efforts of the ruling class to restrict all progress that threatens its power and privileges. As long as these struggles are conducted within the limited perspective of isolated reforms – a legal decision here, a temporary wage increase there – the gains are superficial and transitory" (Blake 1954).

Blake's critique about the transitory nature of legal reform highlights an important limitation of the indeterminacy thesis. In his conceptualization of indeterminacy, Rasulov wrote that the outcomes of legal cases were based less so on the contents but the "intensity and lengths of the fights [had] over them" (Rasulov 2023). Rasulov makes the later claim in this essay that indeterminacy is a function of time, the legal struggle throughout the interim of which will have been determined not by any singular actor such as a judge or legal scholar but "the primary of collectivism". Collectivism and what Rasulov later defines as "collective intersubjective consensus" as a determining factor of legal outcome is an important homage to class struggle within the superstructural realm of law – but as Blake indicates, for as long as legal struggle is

predicated on the right to constitutional right to private property, then the determination thereof will ultimately serve to legitimate how labour and capital will have been balanced even if the outcome is partial to the side of labour.

Let us return to Paddy Ireland who attributes not only the decline of CLS but the decline of socialist politics to the advent of postmodernism:

"Left intellectuals turned to culture just as advanced capitalism did. And while the notion that the world can be changed by discursive reconstruction, with its suggestion that one can be thoroughly radical without leaving one's office, desk or text, has obvious attractions to academics, it has undoubtedly generated an unfortunate tendency for the politics of discourse to overshadow the real political struggles against such things as gender and racial oppression to which critical lawyers claim most passionately to be committed" (Ireland 2000:138).

Through a critical lens, Crenshaw's and MacKinnon's theories on intersectionality and feminist jurisprudence suggest that the politicization of identity without critique of the underlying structures that construct it renders political emancipation as the end-goal rather than as a bridge towards human emancipation. Ireland rightly calls out that the turn to discourse and analysis as a form of praxis rather than practical action has paralyzed the left.[18] Between equal rights, force decides – but where force was one more traditionally understood to be that of class struggle has now transformed into several cultural forces struggling for the right to recognition with limited critique of the underlying class structure.

The final chapter will look more closely at the operationalization of politicized identity not merely within jurisprudence but in the politics of the liberal-left within the confines of a neoliberal economy.

[18]Consider consciousness-raising which conceives of subordination on the level of epistemology; if power is constituted through knowledge, then to wield power is to articulate the perspectives of subjugated identities.

CHAPTER 3. The Neoliberal Capture of Human Rights: The Melting Pot of Multiculturalism and Meritocracy

A normative account of neoliberalism may contend that social equality is compromised by the economic rationalism of the market. Jessica Whyte, author of *Morals of The Market*, challenges this approach and argues that the rise of neoliberalism has inversely become tied up with the moralizing narrative that the free market was the basis of which classical liberalism could prosper. This oppositional framing might assume that "international human rights NGOs, with their focus on individual liberty, human dignity, freedom of conscience and bodily integrity, seem an important antidote to the unrelenting economisation of life" (Whyte 2019:14). Yet, rather than functioning as an antidote, the language of human rights has historically evolved to defend this economisation rather than counter it.

Nancy Fraser coined the term "progressive neoliberalism" to describe a new hegemonic bloc within the left grounded in the alliance between "emancipation and lethal forms of financialization" (Fraser 2017). Like Gary Gerstle and David Harvey, Fraser writes that progressive neoliberalism was "ratified with Bill Clinton's election in 1992" (ibid). While embracing the laissez-faire economics of Reagan, Clinton was able to integrate this with the culturally emancipatory ideals of the New Left. Progress that was previously understood in terms of economic equity under FDR was now replaced with a more inclusive "meritocracy" which, while providing legal protections and assimilating more historically marginalized identities into the civil and political spheres, also enabled their ability to participate in oppressive systems (e.g climbing up the corporate hierarchy) as proof of social progress and the formal equalities inscribed within the framework of universal rights. This legal recognition which, having carried over from the call for civil rights in the 1960s, had become increasingly abstracted

and co-opted so that progress was largely celebrated in its more symbolic forms with no structural changes to accompany it.

To understand the historical forces that have shaped progressive neoliberalism and allowed it to become a hegemonic bloc on the left, I will first explore the origins of neoliberal ideals through an analysis of The Mont Pèlerin Society (MPS) and later examine how they've become both widespread and institutionalized. While the advent of neoliberalism is largely attributed to the political alliance between Ronald Reagan and Margaret Thatcher in 1979-1980, its theoretical origins can be traced to the founding of The MPS in 1947 (Whyte 2019:36). Alternately dubbed as the "neoliberal thought collective", The MPS was founded by Friedrich Hayek and Milton Friedman as a critical response to the emergence of welfarist and state-interventionist theories such as Keynesianism which attempted to remedy the economic malaise of The Great Depression (Harvey 2005:20). In their founding statement, they suggest that human dignity and freedom have been "progressively undermined by extensions of arbitrary power", criticizing the growth of the federal government under FDR for suppressing individuals' right to private property (ibid). The constitutionality of various policies dating from this era will be determined in the legal struggle between civil and socioeconomic rights.

The practical application of Keynesianism in the United States is most notably demonstrated between 1933-1939 when 32nd U.S President Franklin D. Roosevelt (FDR) formulated a series of policies categorized as "The New Deal". The subsequent years of his presidency were successful to the extent that unemployment was reduced and protections for various groups such as industrial workers and the elderly (via labor protections and social security, respectively) were enacted. Even before its decline, however, The New Deal endured

criticism on the grounds of unconstitutionality and defying the very principles of liberalism that grounded the formation of The United States.

In 1934, the growing political force of the working class was bolstered by the enactment of the 1935 National Labor Relations Act (NLRA) which sought to provide workers with the constitutional right to strike and bargain for their share of profits. This acquired right, while strengthening legal protections for the working class, served to legitimate capitalism on the grounds of establishing a social contract whereby employers and workers could agree to the equivalence between the value of one's labour and their respective wage.[19] In 1937, the constitutionality of the NLRA was upheld in a 5-4 decision by the Supreme Court under the Roosevelt presidency.

The slim margin by which this case was decided corroborates Kennedy's claim that by virtue of their abstract formulation, rights are unstable thus rendering the indeterminate nature of legal outcome. While The Supreme Court may have ruled the NLRA as constitutional, there were other programs by FDR subject to civil-rights based criticism and revocation. Several of these cases were threaded by the supposition that FDR was overstepping his executive authority by creating policies that not only should have been delegated to the legislative branch but undermined the rights of businesses and employers.

The critique of the social welfare state moved beyond the MPS and was shared by other notable figures throughout and after FDR's presidency, such as Ohio senator Robert Taft and President Dwight D. Eisenhower. Taft shared a fear akin to that of The MPS that "the New Deal [was] a threat to America's liberty-enhancing political system" (Gerstle 2022:39). By 1936, he

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[19]This right can alternately be understood as the realization of Marx's "double-freedom" which claims that when one utilizes the right to sell their labour-power, they concede their freedom from the means of production.

warned that the expansion of the federal courts would pave the way for socialism which he'd rhetorically linked with fascism.

Taft's brief popularity which was marked by his anti-FDR rhetoric alongside his anti-labour legislation was curtailed by his isolationist foreign policy which sought to disengage from global affairs. To the skepticism of his Republican colleagues, he had no way to address the "looming threat of communism". However, defying a narrative of Keynesianism as "socialism-lite", scholars such as Gerstle argue that its implementation through The New Deal was meant to *save* capitalism from the destructive potential of it in its laissez-faire form rather than destroy it. In his Address at Chicago, III on October 14, 1936, FDR himself claims: "It was this Administration which saved the system of private profit and free enterprise after it had been dragged to the brink of ruin" (Roosevelt, as transcribed online by Peters and Woolley).

Apart from regulating capitalism, FDR also enacted The New Deal to "revive democracy" within the United States (Gerstle 2022:23). This dimension of The New Deal is most evident in Eisenhower's presidency; while he was a Republican, he acquiesced to The New Deal as a strategic move to resist the threat of Soviet Communism. By forging the link between fascism and communism, working-class populism was both condemned and contrasted with the civic freedoms of America which, by the late-twentieth century, had found a home in "heterodoxy" whereby a communitarian model of freedom was replaced by an individualistic model of freedom vis-à-vis the marketplace.

The attack on the New Deal was most successfully developed by Ronald Reagan. Accredited as the "architect of neoliberalism", Reagan's ideological drawings from Hayek combined with his resistance towards the movements of The New Left in the 1960s inspired a

conservative bloc of neoliberalism: "As his presidency became associated with market freedom on the one hand, it encouraged against civil rights advances on the other" (Gerstle 2022:8).

Margaret Thatcher, having been elected as the Prime Minister of the United Kingdom just a year before Reagan, also shared Reagan's neoliberal ideology and sought to deregulate finance. In 1980 and under the slogan of "The Right to Buy", she enacted "The Housing Act" which allowed council tenants to buy the council housing which they occupied at a discounted price. This not only leveraged more rights to the landlord-capitalist class of the UK but decimated social housing and further turned housing from a natural right to a commodity (Housing Act 1980).

David Harvey astutely notes the role of consent in securing neoliberal hegemony when he writes that "the neoliberal revolution usually attributed to Thatcher and Reagan after 1979 had to be accomplished by democratic means" (Harvey 2005:39).

Therefore, while Thatcher and Reagan may have been responsible for its initial institutionalization, the ideological dimensions of fiscal conservatism had become so powerful that even a bloc of the liberal-left bought into the rhetoric of emancipation through the market. Put alternately, if fiscal conservatism was *truly* ideologically confined to the conservative party, then there would have been more resistance to it; while Reagan was by no means a popular figure amongst the left, his economic ideas were not only acquiesced to but embraced with the supplementary language of multiculturalism by the Clinton presidency.

The democratization of neoliberalism was largely due to the emancipatory potential identified in cosmopolitanism; while embracing fiscal conservatism does not necessarily entail the embrace of social rights, Bill Clinton's presidency practically demonstrates the ways in which they can be co-constitutive. This is one of the primary arguments posed by American

historian Gary Gerstle who claims that "Bill Clinton's role in securing neoliberalism's triumph was in some ways more important than that of Reagan himself" (Gerstle 2022:11). By appealing to the rights language of both the New Left and liberal-left, he was able to facilitate the hegemonic turn to progressive neoliberalism. Despite this image, he'd mirrored Reagan in more material ways. Dick Morris, one of Clinton's advisors, "devised a strategy [that] entailed having Clinton appropriate Republican ideas and rework them into Democratic proposals" (Gerstle 2022:156). During a presidential campaign in 1992, he not only vowed to end welfare but also encouraged welfare recipients to take "personal responsibility" (Kim 2002:62).

In his analysis of neoliberal hegemony and its moral appeal to the left, Gerstle writes:

"The… moral perspective encouraged by the neoliberal order, which I label cosmopolitan… saw in market freedom an opportunity to fashion a self or identity that was free of tradition, inheritance, and prescribed social roles. In the United States this moral perspective drew energy from the liberation movements originating in the New Left—black power, feminism, multiculturalism, and gay pride among them—and flourished in the era of the neoliberal order. Cosmopolitanism was deeply egalitarian and pluralistic" (Gerstle 2022:13).

Harvey mirrors this analysis, writing that:

"The ruling elites moved, often fractiously, to support the opening up of the cultural field to all manner of diverse cosmopolitan currents. The narcissistic exploration of self, sexuality, and identity became the leitmotif of bourgeois urban culture" (Harvey 2005:47).

Whereas FDR had a politics based on economic equity whilst lacking a more explicit politics of legal and cultural recognition, Clinton, in the shadow of Reagan, developed the inverse which was a politics based on recognition whilst denouncing a politics of economic equity. The fiscal conservatism that was introduced in the Reagan era was masked by the language of meritocracy which, in revived Lockean and neo-Victorian fashion, pushed the narrative that hard work determined not only whether or not one was entitled to private property but whether or not one had any "moral character". This narrative spread concurrently with the obfuscation of class as a power relation and the rise of the middle class as a floating signifier to

which most people either aspired or identified with. The role of exploitation in class analysis was undercut by cultural theories of class advanced by sociologists such as Max Weber and Pierre Bourdieu who, in introducing concepts such as the distinction between status and class and social/cultural capital, enabled a more qualitative, experiential, and phenomenological basis by which people could interpret the reproduction of class relations.

The liberatory agenda that once sought not only to critique but abolish capitalism was abandoned as rights became the cure-all for social inequality. The call to civil rights that emerged after the 1960s has shaped a political landscape where, as Fraser suggests, "cultural domination supplants exploitation as the fundamental injustice" (Fraser 1995:68). The abandonment of class politics in favor of rights-based recognition by the liberal-left has manufactured a particular mode of multiculturalism that, in embracing the language of meritocracy, has fractured the sort of social solidarity that was sought after by intersectional-politics based groups such as The Combahee River Collective. Because meritocracy prizes hard work and skill as the justification for wealth and property ownership, individuals are depoliticized to believe their access to either is a consequence of their choices independent of the limitations imposed by the society in which they live. Therefore, while the civil rights legislation that were established in the 1960s may have provided legal protection in the form of antidiscrimination policy, it also propelled an individualizing psyche where man is – in the words of Marx – "withdrawn into himself, wholly preoccupied with his private interest and acting in accordance with his private caprice" (Marx 1843 [1978]:43).

Olúfẹ́mi O. Táíwò, a political philosopher and current professor at Georgetown University, argues that this psyche has resulted in "elite capture." He defines elite capture as "when the advantaged few steer resources and institutions that could serve the many toward their

own narrower interests and aims "(Táíwò 2022:22). A particular subset of elite capture is the neoliberal co-optation of identity politics to promote bourgeois politics. Citing an example from Princeton professor Keeanga-Yamahatta Taylorbook *From #BlackLivesMatter to Black Liberation*, Táíwò discusses the cosponsorship of Ronald Reagan's 1986 Anti-Drug Abuse Abuse Act by the Congressional Black Caucus. These black members of the United States congress supported a program that not only contributed to mass incarceration but also cut welfare programs that disproportionately impacted working-class African Americans (Taylor, as cited by Táíwò 2022:25). In this example, the limitations of power vis-à-vis cultural recognition in an electoral context are revealed: class interests are not always shared by those with the same identity marker.

Akin to Crenshaw's theory of intersectionality which falls into the trap of reifying oppression through politicizing identity within anti-discrimination law, Táíwò points out another pitfall of identity politics in that it is amenable to a politics grounded in deference rather than constructivism (Táíwò 2022:12). While a constructive approach to politics focuses on outcome and goals, a deference-based approach focuses on "moral or aesthetic principles" (ibid). These principles are grounded in a recognition rather than solution-based approach whereby the claim to knowledge is, above all else, determined by identity. The prime example Táíwò cites is the emergence of demands about "listening to the most affected" or "centering the most marginalized" in discussions of inequality (Táíwò 2022:70). Akin to Paddy Ireland's earlier critique in Chapter 2 that the field of Critical Legal Studies has turned to discursive construction rather than material production as the fundamental constitutive practice of social life, like Taiwo, I argue that the same transformation has occurred with the turn to symbolic forms of representation as the constitutive means by which someone's politics are legitimated. By turning

to rhetoric and representation, there is no reckoning with the incoherence amongst several viewpoints and goals that are rooted in the "same" identity; moreover, it does not necessitate a more holistic recontextualization of these viewpoints with the material conditions that ground each individual's "lived experience" or distinctive privileges. This approach grounds politics in an essentializing idealism which does not merely suggest that identity shapes knowledge so much as it argues that identity *determines* it.

Táíwò does not explicitly discuss the relationship between elite capture and the individualizing language of rights; yet, it is unsurprising that the emerging call to legal recognition – an outgrowth of which is a subdivision of legal scholars advocating for codifying politicized identity into legislation – bears thematic resemblance to a politics of deference which prizes the principle of identity-based claims with limited bearing on their content. The theoretical framework from which deference politics is built upon is standpoint epistemology which he states is composed of three ideas:

"1) knowledge is socially situated, 2) marginalized people have some advantages in gaining some forms of knowledge, and 3) research programs (and other areas of human activity) ought to reflect these facts" (Táíwò 2022:71).

Epistemically speaking, Táíwò is not opposed to these ideas and provides the example that a black person may generally be better equipped to talk about police brutality and incarceration than a non-black person; yet, he also suggests that identity-based claims about knowledge and desires for inclusivity should not be the ultimate goal of politics and on their own, may well indeed be apolitical (Táíwò 2022:78). By framing marginalization through the lens of experience, the marginalization of those whose experiences aren't articulated "in the room" (e.g those without the experiential privilege of having attended higher education and – in

Táíwò's words, are "pipelined to prisons" rather than PhDs) is disregarded (Táíwò 2022:77). One of Táíwò's other key critiques is that:

> "the deferential orientation, like that fragmentation of political collectivity it enables, is ultimately anti-political… To opt for deference, rather than interdependence… may undermine the goals that motivated the project—and it entrenches a politics that does not serve those fighting for freedom over privilege, for collective liberation over mere parochial advantage" (Táíwò 2022:82).

By deferring political goals to the increasing particularity of intersectional identities, then coalitional politics are sacrificed in favor of immaterial forms of praxis such as consciousness-raising and, as illustrated in the third component of standpoint epistemology which focuses on accommodating research programs and other institutional appendages to reflect identities, knowledge production. In its tendency towards fragmentation, deference politics is not so much a politics of change but a general project of understanding. Were it framed in a way that rendered itself to intersubjectivity or interdependence crosscutting identity, then its potential for an emancipatory politics would be more feasibly achieved; however, a politics of deference much like intersectionality both relies on and celebrates the delineation of difference. Whereas intersectionality advocates creating new categories upon which legal antidiscrimination can be understood, deference politics advocates for a politics made by and for the particular group of marginalized people. Apart from being anti-universalist, the issue with perspective is that: "Elites from marginalized groups can benefit from deference in ways that are at least compatible with social progress" (Táíwò 2022:74). Therefore, the call for group solidarity is not only co-opted in support of the ruling class but can also be weaponized against those who are perceived as comparatively privileged regardless of their politics. Deference politics, then, can become instrumentalized to further entrench people in cultural antagonisms without looking towards a politics that will transcend them.

Táíwò notably distinguishes freedom from privilege and collective liberation from parochial advantage. Whereas freedom and collective liberation can be understood in the terms of human emancipation (where man is not egotistical but rather, a species-being), privileges and parochial advantages – as they are achieved through the civil sphere – are the consummation of political emancipation. Social inequality is justified on the grounds of one's merit and an individual practicing their civil right not just to private property but to "do everything which does not harm the rights of others" (Marx 1843 [1978]:42).

Táíwò briefly touches upon the affective appeal of deference politics at the end of *Elite Capture* when he writes that trauma can inform the attachment to identity; therefore, the sectarian approach to politics which may purposely exclude or undermine others by virtue of identity is – while perhaps counterproductive – an affectively sensible means to self-preservation (Táíwò 2022:120). While sympathetic to this, Táíwò also writes that a politics based on trauma "asks the traumatized to shoulder burdens alone" (ibid).

Táíwò cites Nick Estes who writes: "The cunning of trauma politics is that it turns actual people and struggles, whether racial or Indigenous citizenship and belonging, into matters of injury. It defines an entire people mostly on their trauma and not by their aspirations or sheer humanity" (Estes, as cited by Táíwò 2022:120).

Táíwò's citation of Este pinpoints another dimension of elite capture; when the attachment to a past ridden with trauma supersedes the possibility of an emancipated future, then the acquisition of power becomes more deeply entrenched into the civil sphere and a depoliticized collective identity. To better understand Estes' conception of "trauma politics", we will consider Wendy Brown's framing of "ressentiment".

Drawing from Nietzsche who discusses ressentiment within the context of slave-morality, Wendy Brown defines ressentiment as “the moralizing revenge of the powerless” (Brown 1993:390). She also defines politicized identity as a product of this affect and, akin to Táíwò’s allusion of deference politics as unconstructive, claims that “ressentiment itself is rooted in ‘reaction’ rather than action (Brown 1993:402):

> “... in its attempt to displace its suffering, identity structured by ressentiment at the same time becomes invested in its own subjection. This investment lies not only in its discovery of a site of blame for its hurt will, not only in its acquisition of recognition through its history of subjection (a recognition predicated on injury, now righteously revalued), but also in the satisfactions of revenge that ceaselessly reenact even as they redistribute the injuries of marginalization and subordination in a liberal discursive order that alternately denies the very possibility of these things or blames those who experience them for their own condition” (Brown 1993:403).

The moral dimension of progressive neoliberalism is emphasized in Brown’s analysis of ressentiment; as it pertains to the historically marginalized stratum of the bourgeois, the practical application of “displacement” vis-à-vis “revenge” materializes in taking on the role of the oppressor within a system that marginalizes and oppresses; yet, their role as the oppressor is discounted because their victimhood is essentialized. Of course, this does not mean that the narrative of victimhood is fictive[20] but to assert that within a liberal order and within the particular narrative of “progressive neoliberalism”, identity politics can easily be weaponized in favor of those who benefit from the deference politics Táíwò sought to critique.

In “Chapter 5: Rights and Losses” of her book *States of Injury*, Brown notably writes of the “... irony that rights sought by a politically defined group are conferred upon depoliticized individuals; at the moment a particular ‘we’ succeeds in obtaining rights, it loses its ‘we-ness’ and dissolves into individuals” (Brown 1995:98).

[20] Here, it might be important to clarify that one can simultaneously be a victim of oppression while being in a position to structurally oppress or exploit others. The distinction and relationship between class-based exploitation and identity-based oppression is discussed further by Vanessa Wills. See Wills, V. (2018). “What Could It Mean To Say, ‘Capitalism Causes Sexism and Racism?”. *Philosophical Topics*.

While it is unclear whether or not Brown is specifically discussing “the acquisition of recognition” in a legal or discursive context in her discussion of ressentiment, it is made clearer by pointing out the irony within identity-based rights that the marginalized individual is interpellated into a liberal subject when they are assimilated into the civil sphere. While Patricia Williams framed this assimilation as the transformation from “stranger-chattel” to “stranger-stranger”, I assert that this transformation which is appended to the general post-1960s celebratory attitude of rights is also an understated form of legitimation for the sustained proletarianization of oppressed groups within a neoliberal “democracy”. By granting constitutional personhood and thus, the right to private property, the mass of marginalized individuals continue to undergo structural forms of oppression and exploitation in the wage-labour form while the few that are able to climb the ladder – all the while enacting structural harm to a population of whose identity marker(s) they share – are tokenized as “proof” that racial oppression no longer exists.

Mirroring Williams’ advocacy for embracing the legal protections provided by rights within the context of wage labour, Frederick Douglass wrote: “experience demonstrates that there may be a slavery of wages only a little less galling and crushing in its effects than chattel slavery, and that this slavery of wages must go down with the other” (Douglass 1886:13). Nevertheless, the semblance of economic security under capitalist oppressive conditions was still advantageous compared to the distant promise of true liberation from slavery in both the chattel and wage-labour form.

Now, under the guise of formal equality for marginalized identities, exploitation has been increasingly veiled not just by the acquiescence to capitalism but the celebration of what rights can promise on an individual level. The grounding subjectivity of the “I” defines emancipation

not on a structural but a phenomenological level. What “is” good on a material level is substituted for what “feels” good on a symbolic level even if those choices reproduce the exploitative or ideologically oppressive structures of capital. That the working class stratum of marginalized identities can symbolically identify with the “elite” stratum of whomever is supposed to represent them (whether that’s in regards to shared racial/gender identity or otherwise) can furthermore override any material demands for solidarity.

On the level of production, the deindustrialization of the labour force and the subsequent expansion of the “middle class” and forms of cultural production that started in the 1980s has also muddied the antagonisms between the bourgeoisie and the proletariat. As the workforce became more fragmented due to the onset of post-fordism – a period characterized by “flexible accumulation” vis-à-vis new production methods and technological advancements, solidarity amongst the working class dissipated (Harvey 2005:53). In a 1987 interview with the magazine “Woman’s Own”, Margaret Thatcher claimed that there was “no such thing as society, only individual men and women” (Thatcher, as cited by Harvey 2005:82). While coming from the opposite end of the ideological spectrum in her advocacy for this approach, she unintentionally mirrors Marx’s critique of civil society’s individualization:

> “The right of property is, therefore, the right to enjoy one's fortune and to dispose of it as one will; without regard for other men and independently of society. It is the right of self-interest. This individual liberty, and its application, form the basis of civil society. It leads every man to see in other men, not the *realization*, but rather the *limitation* of his own liberty. It declares above all the right ‘to enjoy and to dispose *as one will*, one's goods and revenues, the fruits of one's work and industry’” (Marx 1843 [1978]:42).

Extrapolating from Rousseau’s theory of the social contract, the natural liberties that one is endowed with upon acquiring citizenship is sacrificed in exchange for the civil liberties granted by the state. When these liberties are constitutionally defined as “life, liberty, property, and the pursuit of happiness”, the elite capture of rights as a moralizing dimension to progressive

neoliberalism appears to be the natural outcome in historical tandem with the expansion of the groups to which rights are formally granted.

While elite capture is contextualized with Táíwò's critique of identity politics, what Terence Renaud describes as "the assimilatory new spirits of capitalism" is historicized by earlier theorists who analyze the loss of capitalist critique in The New Left (Wood 1998; Boltanski & Chiapello 1999). In *The New Spirit of Capitalism*, sociologists Luc Boltanski and Ève Chiapello distinguish between the social movements of 1968-78 versus 1985-95, with the second period characterized by a focus on:

"humanitarian aid; a disorientated trade unionism that has lost any initiative for action; a quasi-obliteration of reference to social class (including in sociological discourse), and especially the working class, whose representation is no longer guaranteed, to the extent that some famous social analysts can seriously assert that it no longer exists" (Boltanski & Chiapello 1999:167-8).

Their subsequent claim that the force of capitalism is "obliged" to assimilate into the social world is echoed by American-Canadian Marxist Ellen Meiksins Wood who claims that "the totalising logic of capitalism" is *indifferent* to identity (Wood 1998, as cited by Ireland 2002:139). The co-constitution of civil rights and progressive neoliberalism is illustrated by these theorists' reference to the logic of capital which can adapt to what is socially hegemonic, whether that serves in support of or in opposition to legal rights for marginalized identities. The New Left's radicalism ceased with the co-optation of cultural empowerment to exist primarily within the realm of the deferential identity politics Táíwò discussed.

Contrast Crenshaw's theory of intersectionality and a politics built on standpoint epistemology and deference politics with that of The Combahee River Collective. A black feminist lesbian socialist organization that was founded by Barbara Smith in 1974, this collective asserts in their mission statement that: "... the liberation of all oppressed peoples necessitates the

destruction of the political-economic systems of capitalism and imperialism as well as patriarchy" (Combahee River Collective 1977). While sharing the intersectional approach of identity that grounds Crenshaw's legal critique of antidiscrimination law, this collective locates oppression in the material exploitation of both capitalism and imperialism; in this instance, the particularity of lived experience does not sacrifice so much as it serves as a bridge towards the universal claim of equality. As a socialist rather than a liberal approach to emancipation, the Combahee River Collective's conception of a liberatory politics necessitates not just the abolition of identity-based oppression but class-based exploitation. Inversely, it also suggests that we can not absolve ourselves of class exploitation without seriously taking into account how it is interwoven with identity-based oppression.

Apart from its roots in a politics that calls for economic equity, the collective – while centering a politics of identity – resists succumbing to the sort of racial ontology advocated by defenders of deference politics and contemporary left-liberal discourse. However, the co-constitutive relationship between oppression and exploitation has since been undermined in favor of the narrative that emancipation can be achieved through individual freedoms rather than collective liberation.

CONCLUSION

Marx asserts in "On the Jewish Question" that "the practical application of the right of liberty is the right of private property"; while neoliberalism is understood as a relatively contemporary phenomenon, the application of Marx's logic suggests that the increasingly pervasive economisation of the civil sphere is not merely a possible outcome of but the revival and historical consummation of classical liberalism and thus, political emancipation. Because the constitutional subject to which rights are granted is the individual, then any argument that could be made in favor of legal indeterminacy and the social rights that have come as a result of either class or legal struggle is compromised[21] as both the legal presupposition of the individual and the defense of their natural right to liberty (private property) supersedes collective rights. For as long as the constitution guarantees the individual right to private property, whichever entity or set of actions threaten its existence renders a seemingly never-ending struggle between civil and socioeconomic rights and, analogously, the struggle between capital and labour.

In discussing socioeconomic rights rights as an "ideal", I emphasize that while the natural right to basic needs alongside miscellaneous forms of social security has been intermittently expressed as an aspiration, it is neither legally binding nor fixed. In regard to its practical application, we can identify this in the Universal Declaration of Human Rights which, while expressing the right to social security, cedes jurisdiction to both the state and the forces within the civil sphere to determine how this right is practically applied through policy; yet, there are no "forces" recognized under rights, merely individuals who are all "equal" under the rule of law. Note, for example, the Supreme Court ruling in the 2010 case of Citizens United v. Federal Election Commission which allowed corporate expenditures to be regarded as free speech

[21]I use the word compromise not to discount the importance of class struggle alongside its historical role in legally institutionalizing labour rights but to emphasize that its constitutionality, by virtue of its partial contingency amongst those who are in state power, is unstable.

(*Citizens United v. FEC* 2010). Responding to a critique made by a court in Austin regarding the "corrosive and distorting effects of immense aggregations of wealth" in its legitimation of corporate personhood, the Supreme Court contended that Austin's rationale:

> "interferes with the 'open marketplace of ideas' protected by the First Amendment… [a]ll speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech, and the First Amendment protects the resulting speech" (ibid).

Apart from social rights not being binding in any determinant manner, the constitutionality of various policies are always subject to recall. Policies associated with The New Deal have eroded over the last couple of decades with the alliance of financialization and individualistic conceptions of emancipation. This erosion, while exemplified under the Reagan presidency, became hegemonic under Clinton under the banner of civil rights. Withstanding the progress made for marginalized groups in acquiring legal protections, systemic oppression continues to prevail. Finally, not only is the UDHR not a legally binding document apart from its associated covenants but as of February 4, 2025, two weeks after the start of Donald Trump's second term, Trump withdrew the United States' membership from the UN Human Rights Council. This not only signifies a symbolic rejection of civil and social rights altogether but it also corroborates the fragility of rights with regard to the political orientation of the state.

In this historical moment – one which is characterized by the federal administration's assault on liberalism and the executive branch's defiance of the judiciary – the importance of constitutional rights should not be abandoned altogether; yet, it is equally important to understand how liberalism has also served to legitimate the legislative and ideological grounds on which Trump has been re-elected.

In a recent interview conducted by Daniel Bessner, Samuel Moyn criticizes the emerging use of the phrase "constitutional crisis" to describe Trump's exercise of power and offers an

alternative interpretation: "The problem with the law is not mainly that Trump threatens to break it, but that it has produced Trump in the first place and allows him to get away with so much, with more to come" (Bessner 2025). Contrary to the binary framing of liberalism and fascism, Moyn suggests that the presidency's centralization of power to serve both reactionary and private interests is, perhaps, not merely more the rule than the exception but also facilitated by liberal democracy. While the expansion of rights should not be discounted, the past couple of decades have demonstrated that a meritocratic conception of equality that lacks the critique of capital and has only sought to make it more inclusive has made it significantly more difficult to resist elite capture and organize around a coalitional politics.

One of the biggest questions Marx leaves us with is: how can we *concretely* bridge the gap between political emancipation and human emancipation? While Marx defines and critiques political emancipation in great detail, his conception of human emancipation is vague. At the end of the essay, he claims it will be accomplished when 1) man is no longer an egoist but a "species-being" and 2) his [social] powers are no longer separate from his political powers (Marx 1843 [1978]:46). The second point is echoed in Thesis 10 from "Theses on Feuerbach": "The standpoint of the old materialism is civil society; the standpoint of the new is human society or social humanity" (Marx 1975).

Here, Marx is calling for the abolition of civil society. While the practical application of civil rights may indeed be the acquisition of private property, there are other manifestations which, to the credit of Marx, are still important in the ideal – but are *destroyed* as soon as the state decides to do so. For example, "the right to liberty [vis-à-vis the "unlimited freedom of the Press" and relatedly, "the right to free speech"] ceases to be a right as soon as it comes into conflict with *political* life, whereas in theory political life is no more than the guarantee of the

rights of man" (Marx 1843 [1978]:44). While contending the structural critique of the state as an entity that can *suppress* free speech if it designates it as a threat to the social order, he supports the ideal of free speech as a right that should be maintained and protected as a form of legal protection against an authoritarian government.

In "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age", Nancy Fraser coins the "redistribution-recognition dilemma" to describe the struggle between class and cultural politics that have permeated the left since the 1960s. To address this dilemma, she argues for solutions that affirm the struggle for recognition while simultaneously transforming the political economy. In addition to Fraser's proposal that we must combine a politics of redistribution and recognition, I also integrate her conception of "counterhegemony" with the Marxian notion of "political struggle" to explore how human emancipation might look.

While Marx has been subject to critique for being overly "deterministic" in his focus on class struggle as the driving force of history, the relationship between the base and superstructure is not unidirectional; it is dialectical. Therefore, the superstructure as it is partially composed of ideology, legality, and culture should be seriously regarded as a site of political struggle . While this should be tied to the objectives of changing the class structure, the distinction between organizing around political versus class struggle is important to highlight in conceiving of an organized *and* inclusive left. While both strategies should be combined, one without the other is insufficient. Class struggle with no bearing of political struggle falls into the realm of economic determinism and can render itself to a disregard for the oppression faced by marginalized identities. On the other hand, political struggle that isn't rooted in class analysis can become aimless, apolitical, and subject to reifying oppression as a product of identity rather than class.

In "Developing the Subjective Factor", a piece written in 1979 by The National Network of Marxist-Leninists, the network writes: "While class struggle is the underlying determinant, the political struggle – particularly the struggle for state power – is the actual battlefield upon which the working class struggles to realize its class objectives" (Saba & The Party Building Line of the National Network of Marxist-Leninist Clubs 1979).

The political struggle is subsequently defined as "the party [representing] the crystallization of the subjective forces, the conscious element" (ibid). The operationalization of political struggle (in contrast to more depoliticized or individualized struggles built on ressentiment, deference, and identity-based antagonisms) can be a tool to concretely bridge towards Fraser's conception of "counterhegemony". Fraser writes that in order to resist neoliberalism, it must be counteracted with a progressive-populist bloc that "[combines] emancipation with social protection" (Fraser 2017). At the time Fraser wrote this article, she was discussing the collapse of progressive neoliberalism with regard to Trump's first term. Nearly one decade later, he has been re-elected. His re-election exemplifies the failures of progressive neoliberalism and the premise that freedom can be achieved solely through civil liberties. Moreover, it has also demonstrated the consequences of a political struggle that is not unified on party lines. As we conceive of a politics that centers the working class, the issue of identity can not be disregarded and is necessary for mobilizing a mass movement that comprises the *totality* of the working class. This is where the necessity of political struggle comes in.

In an essay from 1987 entitled "Blue Election, Election Blues", Stuart Hall writes – in historically paralleled uncanniness – about Margaret Thatcher's re-election campaign. He writes what, almost three decades later, sums up the hamartia of the left: "The problem the left now faces is structural and organic" (Hall 1987). According to Hall, the affective pull of Thatcher –

who had run a campaign on British nationalism – had undercut the material appeal of the Labour campaign's policies. In sum, Hall suggests the same root of the problem for the Left that Fraser does, which is its insufficiency in building any sort of unified ideological bloc. While the conservative party of the United States has become more organized over time,the left has become more divided. In her piece on progressive neoliberalism, Fraser gives credit to Bernie Sanders for reviving "democratic socialism" and the language of working class politics back into the left. Fraser claims that in order for a counterhegemony to form, it must be able to unify the current left with members of the conservative party who, while perhaps having advocated for Trump, are aligned with the left's anti-neoliberal project. In conceiving what a counterhegemony ought to look like, Hall's emphasis on electoral politics with regard to political struggle offers us some insight:

"Electoral politics - in fact, every kind of politics - depends on political identities and identifications. People make identifications symbolically: through social imagery, in their political imaginations. They 'see themselves' as one sort of person or another. They 'imagine their future' within this scenario or that. They don't just think about voting in terms of how much they have, their so-called 'material interests'. Material interests matter profoundly. But they are always ideologically defined.

Contrary to a certain version of Marxism, which has as strong a hold over the Labour 'centre' as it does on the so-called 'hard left', material interests, on their own, have no necessary class belongingness. They influence us. But they are not escalators which automatically deliver people to their appointed destinations, 'in place', within the political ideological spectrum" (Hall 1987).

Since the start of Trump's second term, Senator Bernie Sanders and Congresswoman Alexandria Ocasio-Cortez (AOC) have collaborated and begun a tour headlining "Fighting Oligarchy". The waning popularity of progressive neoliberalism has been met with the revival of an anti-capitalist and pro-working class rhetoric. Since the start of this tour, both Sanders and AOC have gathered a turnout of thousands who have expressed discontent with Trump's authoritarian takeover alongside the lack of opposition from the Democratic Party. While the

turn-out provides some initial promise, it is not only up to Bernie Sanders as a figure but a new party to mobilize and unify the working class towards a politics that will crosscut the deferential tendencies that have defined the struggle for recognition in the advent of progressive neoliberalism.

Of course, the electoral dimensions of class struggle is just one of the many issues that the left must work to unite around. Apart from intranational conflict, there is also the issue of global solidarity that the left must confront regarding the genocide of the Palestinian people. That both Biden and Trump expressed pro-Israel sentiments during their 2024 presidential campaign demonstrates that The United States, not withstanding its insistence on being a democracy, benefits from being an imperial power. The insistence by Democratic politicians, Sanders included, to legitimize the rhetoric of Israel having the right to defend itself, undercuts the international solidarity that several progressives have been fighting for in the face of the United States' collusion in genocide. With the advent of Trump's tariffs, there is also a growing consciousness amongst those who live in the United States about how much of their material comforts rely on the exploitation of workers outside of the United States. Therefore, progressive neoliberalism should not only be understood to the detriment of the working class within the United States but to the detriment of international workers of whom are exploited due to the deregulation of labour laws under the banner of free trade and globalization. By applying an international lens to class struggle, the anti-imperialist struggle towards human emancipation is put to the foreground.

As we re-examine the struggle for recognition by the left on the levels of class and politics, it is integral to incorporate more international forms of solidarity. If we are to live up to the ideal of rights as having any sort of emancipatory potential outside of their bourgeois and

liberal form, then, to echo the language of the Combahee River Collective, human emancipation must "[necessitate] the destruction of the political-economic systems of capitalism and imperialism as well as patriarchy" (Combahee River Collective 1977). Through maintaining the critique of capitalism *and* imperialism, it may be possible to envision true liberty and equality outside the confines of liberalism.

In *Social Reform or Revolution?*, Marxist revolutionary Rosa Luxemburg critiques Eduard Bernstein who wrote that "The Final goal, no matter what it is, is nothing; the movement is everything" (Luxemburg 2020:1). In opposition to Bernstein's emphasis on expanding the consciousness of the proletariat within the existing social order without a concrete objective, Luxemburg warns of opportunism and petty-bourgeois inclinations co-opting the social-democratic movement into becoming indiscernible from bourgeois democracy. This would reinforce social reform in the form of trade unions or parliamentary struggle as a means to "[realize] the capitalist law of wages" rather than a means to transform or destroy it (Luxemburg 2020:21). To the extent that personal grievances can be politicized in favor of worker rights, the actual process of production itself can remain unchanged. In advocating for a mass movement that is anti-capitalist, Luxemburg highlights re-integrating scientific socialism into a historical materialist strategy for the labour movement which recognizes capitalist development as prone to crisis and collapse and is thus unstable. Her critique highlights that to the extent that judicial reasoning can be "balanced", this balance can only ever speed up or slow down in correspondence with the struggle between capital and labour.

Luxemburg is critical of Bernstein but like Fraser and Hall, she maintains the necessity of both a labour movement and the politicization of class struggle that includes "the participation of all political strata in political life" (Luxemburg 2020:65). Rather than framing legislative reform

and revolution at odds with each-other, she suggests that they are different factors within the development of a class society that can either complement or contradict each other depending on the stage of development (Luxemburg 2020:61). With regard to the role of legislation within the paradigm of reform and revolution, Luxemburg writes:

"Every legal constitution is the product of a revolution. In the history of classes, revolution is the act of political creation, while legislation is the political expression of the life of a society that has already come into being. Work for reform does not contain its own force independent from revolution" (ibid).

Her claim that legislation is an *expression* rather than an apparatus for change within the state complements another claim she makes which is that exploitation – which is inherent to the system of wage-labour – is "not fixed by legislation but by economic factors" (Luxemburg 2020:64). In looking towards a future that upholds socioeconomic rights, Luxemburg's response to Bernstein's proposal of a social democracy serves as a reminder for the left to resist projecting an uncritical melancholia onto the welfare capitalist reform sought by FDR and the legislative reforms leading to the acquisition of labour rights. If the left is to realize human emancipation, it has to recognize its struggle not merely in legal but in combined political and class terms. This means that the objective through which the struggle for identity-based recognition is fought must be understood in tandem with a critique of bourgeois political economy. As Ireland claims in Chapter 2, this sense of dual purpose, of the acquisition of civil rights in combination with a critique of class inequality and exploitation, has been lost with the hegemonic postmodern emphasis on language, rights, and culture that have influenced the politics of the New Left and the liberal-left. By reviving the critique of capitalism in jurisprudence and politics, it becomes more viable to envision a struggle for recognition that is grounded with Marx's vision of human emancipation.

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