

RACE, RIGHTS AND RETERRITORIALIZATION

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Critical race and neo-Marxist perspectives treat rights or “rights discourse” with a somewhat similar and complex ambivalence, but with distinctly different weightings and emphases in how they theorize rights functioning within systems of liberal democracy and racialized capitalism. On the one hand, both approaches identify a subject formation function¹ of liberal rights discourse that may be informed by dominant ideology—racialized in the case of critical race theory (CRT) and disciplinary or abstract universalist² in the case of neo-Marxism. On the other hand, this scholarship acknowledges a politically progressive or liberatory subject-formation and equalizing/redistributive function by which rights discourse may potentially

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¹ The notion of “subject formation” suggests the importance of power and social processes, including law, in effecting human subjects and subjectivity. See, e.g., ALAN HUNT AND GARY WICKHAM, *FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE* 28-29 (1994) (explaining the claim that social processes “give rise to subjectivity,” which results from a combination of individual agency and “outside” power).

² Abstract universalist conceptions of rights may be thought of as those that propound an imaginary equality under law as a universal condition of citizenship in liberal democratic states. Critics view such conceptions as abstracting from the material inequality and exclusions of civil society. Disciplinary conceptions of the subject formation function see rights as, in part, reinforcing the subject formation processes that modern disciplinary societies rely upon for maintenance of order and hierarchy. See Kenneth Baynes, *Rights as Critique and the Critique of Rights: Karl Marx, Wendy Brown, and the Social Function of Rights*, 28 POL. THEORY 451, 453-57 (2000) (discussing disciplinary and abstract universalist problems identified from left, or what the author refers to as, “neo-Marxist” perspectives).

ground resistance and transformation.³ Almost no one writing from these traditions is likely either to categorically deny the desirable and defensible political possibilities that attach to rights or to celebrate rights as the necessary and sufficient guarantor of universal equality and justice.⁴

This Essay considers the possibility of a political and dialectical theory of rights that builds on these critical traditions through revision of formal Marxian approaches and in light of racialized forms of accumulation and anti-systemic struggle. This Essay borrows from the CRT and neo-Marxist traditions in arguing for the centrality of both political contestation and structural economic-materialist conditions in forging a progressive politics of rights. This can be contrasted to a critique of human rights in the international context that sees the discourse itself as depoliticizing insofar as rights become the prime possession of those who are denied a political space in which to assert their claims. The metaphor of rights (re)territorialization captures these concerns, while foregrounding the ongoing importance of race in grounding various aspects of global capital accumulation and concomitant political formations.

If there are poles in this discursive field, CRT has come to represent the positive subject formation and emancipatory meanings of rights in the context of the Civil Rights Struggle and racial formation generally. But CRT is also the source of an intersectionality critique that identifies problems of white-normative racial subjectification at work in some areas of rights protection.⁵ CRT has also challenged a fundamental liberal rights shibboleth with its critique of property that traces the mutually constituting relationship between race and property.⁶ These CRT

³ See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 149 (1991) (arguing that rights have been an “effective form of discourse for Blacks” despite not being ends in themselves).

⁴ Such nuanced race conscious and neo-Marxist understandings of rights differ from either so-called racialist or economically deterministic approaches that are said to essentialize rights and the rule of law generally to some form of instrumental function, perhaps masking but always “serving” white or, alternatively, capitalist interests. For use of the term racialist, see *Introduction*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT HAVE FORMED THE MOVEMENT* xiii, xxi (Kimberlé Crenshaw et al. eds., 1995).

⁵ See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241 (1991).

⁶ Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1710 (1993).

positions theorize rights as political while using a recent historical cases as sources of practical insight, and in the sense of ferreting out the particularistic content of rights (the white content of property rights, for example). These are aspects of critical race theory that are different from concerns about the formal constraints of rights (as derived from an underlying set of social relations) or their indeterminacy.

Neo-Marxists, in a much more luke-warm relationship with rights, retain the core of a formalist critique of liberal rights, insofar as rights are understood to reflect the ideology and structure of the commodity form.⁷ A subject formation process, foreshadowed by Marx' distinction between two types of rights subject (bourgeois and citizen), now reacting also to the demands of a depoliticized and disciplinary framework under (neo)liberal democratic capitalism, Empire, etc. may overwhelm the political meaning and domain of rights. And if depoliticization through civil rights might be a problem "within" democratic polities, consider the consequences of this kind of analysis for human rights—deterritorialized and thus existing everywhere, but in a sense demarking a political nowhere.⁸

Marx saw the commodity form as a mystification of the unequal social relations of production in capitalism.⁹ But the commodity form comes itself to represent a kind of mystifying, bifurcated thinking about political economy—the move of deriving a general form from specific content. And, indeed, we should ask to what extent Marx' notion of the commodity form may fail to capture fully the underlying content (here, the social relations of production under varying conditions of capitalist accumulation). The commodity form never was intended to represent the whole of capitalist accumulation and is less likely to

⁷ See Karl Marx, *Capital, Volume One*, in THE MARX-ENGELS READER 294, 320 (Robert C. Tucker ed., 1972). For Marx, the commodity form in capitalism served to mask the social relations of production (labor and class relations) behind an abstract form of those production processes: the commodity; see also Baynes, *supra* note 2 (discussing the left's critique and partial embrace of rights).

⁸ See Jacques Rancière, *Who is the Subject of the Rights of Man?*, 103 S. ATLANTIC Q. 297 (2004); see also Slovoj Žižek, *Against Human Rights*, 34 NEW LEFT REV. 115 (2005).

⁹ See Marx, *supra* note 7 (discussing how the commodity form masks social relations of production in an apparently objective entity, the commodity).

do so under late or postmodern, post-industrial, globalized capitalism. Rights, therefore, should be theorized politically and dialectically in relation to forms and processes characteristic of the current “conjuncture” of capital accumulation (displacing, dispossessive, neoliberal, globalized, imperial, racialized, gendered, etc.). Moreover, resistances to these particular forms and processes may bring together, under the rights discourse, elements of political economy, political contestation and subject formation process.¹⁰

Of course, definitively tying the meaning and critical evaluation of rights and rights discourse to underlying “movements” (organized collective subject positions under mobilization) that demand rights recognition assumes, and in some sense should be required to theorize, how rights (and the underlying movements) matter politically and dialectically. That is, that rights and their political meaning amount to something more than a certain dead-end, seducing through the ruse of universalist legal reason. In its stronger form, the argument might be that somehow rights and movements may mutually constitute one another and form part of a dialectic within capitalism that grounds political challenge in response to certain contexts and conjunctures within broader systems of power and accumulation. Without a relatively strong connection between rights and movements, rights might seem merely an optional or sometimes even negative feature of movement formation, and their meaning not linked “formally” to anti-systemic social or political action. This latter linkage requires explaining how social movements may actually be anti-systemic (i.e., in traditional

¹⁰ I was recently compelled to grapple with my own critical understanding of rights in response to a simple-sounding question that arose in a class on social movements. A student asked whether civil rights and human rights were not really just different names for the same thing, with the label of human rights being used mainly in “other countries” and civil rights more commonly used in the United States. The “organic” impromptu answer I wish I had given would have focused on the differences and similarities between civil rights and human rights based on characteristics of the “underlying” movements themselves and the socio-political goals those movements sought to achieve, and against which kinds of inequality and exclusion they struggled etc. I instead alluded generally to the substantive differences between human rights treaty law and statutory civil rights law and, thus, contributed to the process of abstraction. The preferred answer would have given the students an analytic of some practical and normative value in thinking about the meaning of rights as they operate within contexts of political struggle under conditions of globalizing capital accumulation.

Marxist terms) and how they relate to the overarching project of political and even human emancipation.

Slavoj Žižek grapples with these questions in a piece he somewhat misleadingly entitles “Against Human Rights” (since in the end, Žižek seems to support a possible counter-hegemonic function for a converted or perverted form of human rights discourse, along the lines of indigenous appropriation and recirculation of Christian cultural forms).¹¹ Žižek, drawing directly from Marx, critiques the abstract universalist form human rights assume under global capitalism by tying this form to the increasingly all-encompassing system of global commodity exchange.¹² Žižek identifies a dual negative effect of human rights discourse in the simultaneous depoliticization (removal of people’s claims from the political realm) and renaturalization (e.g., culturalization or ethnicization) of conflict that occurs under the hegemonic influence of abstract universalism.¹³ For Žižek, abstract universalism and essentialization of political difference (reduced through mystification to naturalized differences of “culture”) are suited counterparts to a world organized conceptually and materially according to the logic of commodity exchange.¹⁴ Žižek, following Rancière, understands the universal “rights of man” or human rights (as distinguished from the rights of citizens or perhaps “civil rights”) as representing something more than the problem of reification of exploitative social relations that Marx identified.¹⁵ Rather, the idea of human rights presupposes the complete negation of politics and grounds the law and politics-defeating assertion of a realm of Manichean and self-serving ethics. This concept was captured, for example, in the Bush administration’s post-9/11 rhetoric of “infinite justice” and “good” versus “evil.”¹⁶ We speak of people possessing “universal human rights” usually in those contexts where the people have, in fact, no rights and no way to assert rights. For these thinkers the problem of human rights lies in how they

¹¹ See generally Žižek, *supra* note 8.

¹² *Id.* at 115.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See *id.*

¹⁶ Rancière, *supra* note 8, at 309.

negate the basis of real politics, law, and perhaps, even the possibility of political subjecthood itself.¹⁷

Marx and Pashukanis famously looked at liberal (or bourgeois) rights as standing in a direct and mutually constituting relationship with the commodity form of exchange under capitalism—taken to be the system’s elemental or signature economic form, through which social relations of production are given a mystifying, objective form (reification and the ontology of relations among things).¹⁸ But Marx also critiqued rights consciousness as a quasi-religious formation, requiring and producing alienated, abstractly equal and free (or sovereign) subjects who were, in fact, cut off from each other and their own species or social “nature” through the abstraction. Taking seriously the possibility of linkages between rights and an underlying “economic form” may appear objectionably deterministic and reductionist. But, the possibility of some kind of “formal” or structural understanding of the sort seems hard to separate from the possibility of rights consciousness being a factor either for, against, or even apart from, the pseudo-closures of bourgeois ideology, ontology, or disciplinary subject formation.¹⁹ Moreover, there is a tension to be explained between the Left’s theorizing rights as formally, ideologically or ontologically antithetical toward a transformative emancipatory project of equality and sociability through progressive political action and political subjecthood formation, and many leftists’ political support or at least restrained ambivalence toward rights discourse.

Indeed, Marx gave his political support to the liberal rights-based pursuit of a merely “political” (not “human”) form of emancipation as a stage in the progressive overcoming of alienation under capitalism.²⁰ Today, it is hard to find a left critic

¹⁷ See also Wendy Brown, *Suffering the Paradox of Rights*, in LEFT LEGALISM/LEFT CRITIQUE 420, 420-34 (Wendy Brown et al. eds., 2002) [hereinafter LEFT LEGALISM].

¹⁸ For a masterful recent application, defense and extension of commodity theory that has greatly informed my thinking about both Marx and Pashukanis, see CHINA MIÉVILLE, *BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW* (2005).

¹⁹ See generally Duncan Kennedy, *The Critique of Rights in Legal Studies*, in LEFT LEGALISM, *supra* note 17, at 178 (discussing the role of “rights consciousness” from a critical legal studies perspective).

²⁰ See Shlomo Avineri, *Marx and Jewish Emancipation*, 25 J. HIST. IDEAS 445 (1964) (explaining Marx’s support for Jewish emancipation despite his

of rights (even including the more suspect arena of human rights) who believes that the pursuit of movement-driven rights agendas is or has been politically undesirable or even theoretically indefensible. As theorist Costas Douzinas puts it in his book *The End of Human Rights*, the critical project should work toward a demythologized understanding of rights that reassesses “their promise away from the self-satisfied arrogance of states and liberal apologists and attempt[s] to discover political strategies and moral principles that do not depend exclusively on the universality of law, the archaeology of myth and the imperialism of reason.”²¹

The commodity-form way of looking at rights underwrites both a materialist and idealist story in the sense that it seeks the secret of rights, like that of commodities, in the ideological work of a form that is shaped dialectically through a particular kind of material social content: the relations of production under capitalism. Liberal rights systems were seen by Marx to function at the public level of the state/citizen culturally (like religion), while also instantiating capitalist social relations through their construction of private civil society. Rights are the legal form in which we experience and misapprehend our alienation under social relations that are hidden but embodied in the commodity form. But even beyond what Marx and Pashukanis sketched, the “realm” of commodity exchange suggests a socially and psychologically dense terrain that calls for different ways of theorizing politics and law on the ever-shifting and potentially “semi-autonomous” social grounds of circulation and exchange. Indeed, the commodity form was only ever meant to represent the pure (and egalitarian) logic of capitalist exchange (borrowed, in fact, from the classical liberal economists of the turn of the eighteenth century), but not constituting in any sense a statement of the entire logic of capitalist society, as Marxism has always taken capitalism to be a mix of accumulative forms and relations. More precisely, the mode of production Marxists refer to as capitalism is really better understood as a changing and uneven set of processes of capitalist accumulation, evincing both historical contingency and path dependency. Miéville captures

critique of mere “political” emancipation under liberal or bourgeois rights regimes generally, as conveyed in the essay “On the Jewish Question”).

²¹ COSTAS DOUZINAS, *THE END OF HUMAN RIGHTS: CRITICAL LEGAL THOUGHT AT THE TURN OF THE CENTURY* 8 (2000).

the dynamic interpenetration between contingent commercial and imperial forms of accumulation and forms of law by a reading of Pashukanis that places Roman imperial commercial relations at the origin point of the modern legal form itself—economically oriented engagements among nominally equal and independent or “free” subjects (of the empire).²²

What this suggests is how Left thinking about rights might contribute to conscious synthesis of critical race and semi-formalist Left accounts of political economy that give important context to the meaning of rights struggles and rights consciousness. If race is, among other things, a category of capitalism, then its “reality” may be best understood as in part akin to the pseudo-reality of Marx’s commodity form.²³ Race may serve as a form that both embodies and hides through reification (as natural, biological, cultural, etc.) of social relations under capitalism. Indeed, “imperial encounters” betray how race operates as an almost ideal social signifier within overlapping systems of power that utilize both sovereign powers of exclusion (force, possession, control) and disciplinary powers (governance, education, uplift, development, etc.).²⁴ Grappling with the myriad ways of understanding how race and economics, like law and the commodity form,²⁵ mutually constitute one another may not generate an exact logic through which dialectically to analyze rights as a legal form. Theorizing race and capitalism has occurred, nonetheless, for example, through anti-colonial revolutionary interventions that brought together an understanding of capitalism, racism and imperialism. In doing so, this thinking departs from Lenin’s systemic notion of intra-imperial rivalry in moving toward an understanding of dispossessive, colonial capitalism that relies on a splitting of society along racial lines. These half-century old approaches retain their appeal, as evidenced by the enduring popularity of

²² MIÉVILLE, *supra* note 18, at 130-31.

²³ Harry Chang originates this approach, according to the posthumous reconstruction of his work and influence. See Bob Wing, *Harry Chang: A Seminal Theorist of Racial Justice*, 58 MONTHLY REV., Jan. 2007, at 23, 29, available at <http://www.monthlyreview.org/0107wing.htm>.

²⁴ ROXANNE LYNN DOTY, IMPERIAL ENCOUNTERS: THE POLITICS OF REPRESENTATION IN NORTH-SOUTH RELATIONS 62 (1996).

²⁵ See Marx, *supra* note 7, at 320 (asserting that the commodity is “a mysterious thing, simply because in it the social character of men’s labour appears to them as an objective character stamped upon the product of that labour . . .”).

Fanon who writes of stretching Marxist analysis of the colonial problem where: “The cause is the consequence; you are rich because you are white, you are white because you are rich.”²⁶

Marx famously never returned with sustained attention to his early-phase formalist critique of rights, and indeed it may be quixotic to look for an essential “nature” in capitalism that generates homologous legal forms or that violates some aspect or another of our social nature. But we can and should consider how observable and theoretically understood accumulation processes relate to raced social hegemony, for example, in the shaping and function given to surplus or reserve populations of labor under globalization.²⁷ It is apparent that race can be shown to function as a kind of semi-autonomous political and economically consequential “system of inequality,” which infuses capitalism with specific shape and dynamics, or that capitalism is inseparable as a historical system from the inequality created through race. This may be seen through the fundamental roles played by slavery, colonialism and imperialism in the modern history of accumulation. We then should ask how such non-commodity but nonetheless capitalist forms—those based on race and dispossessive logic, for example—might be reflected or represented through a legal form such as rights in their relationships to social conflict.

Alan Hunt admonishes Marxist legal theory to look to the forms of social conflict in capitalist societies to best understand how legal forms relate to projects of transformation (or retrenchment).²⁸ Hunt wants us to inquire into the forms of social conflict under capitalism and has researched the relationship between social movements and rights under hegemonic social conditions.²⁹ This way of theorizing rights works from social conflict that can be said to reflect the contours of (raced) accumulationist patterns, constructed and resisted through normative (including rights) discourse that shapes a field of conflict between dissenting group-based movements and some

²⁶ FRANTZ FANON, *WRETCHED OF THE EARTH* 40 (1963).

²⁷ See Michael McIntyre, *Race, Surplus Population, and the Marxist Theory of Imperialism*, 43 *ANTIPODE* 1489 (2011).

²⁸ Alan Hunt, *Marxist Legal Theory and Legal Positivism*, 46 *MOD. L. REV.* 236, 241-42 (1983).

²⁹ See Alan Hunt, *Rights and Social Movements: Counter-Hegemonic Strategies*, 17 *J. L. & SOC'Y* 309 (1990).

semi-closed notion of the majority. These have been and continue to be movements for inclusion, movements, as Wallerstein says, to expand the democratic majority—the currently hegemonic way of imagining legitimate political community. Wallerstein views rights-based and other movements of group-based inclusion as an indispensable part of a progressive strategy for the foreseeable future, suggesting the centrality of a movement-oriented analysis of rights discourse.³⁰

In the face of a depoliticizing abstract universalism, how might we understand a project to repoliticize/denaturalize conflict (in Žižek’s terms), and redeem the possibility of transformative politics and historical subjecthood? CRT theorizes rights and politics from a “place in the world” of political subjecthood. Marxism provides an impetus to think dialectically about rights in light of patterns and systems of accumulation. Everyone who works critically on race and law can benefit by addressing these polarities.

Marxism pushes us to think dialectically about how social and legal processes like the securitization of race and racialization of security relate to the (de)territorialized processes of globalizing capitalist accumulation. We should expect to understand rights best as discourse or legal form dialectically, contingent upon these processes but also (re)constituting them and (re)articulating their sociality. For the mid-term, it would seem rights may be expected to retain linkages to the reterritorializations of politics that follow from race-based or peoples-based movements for inclusion and equality. How those political “forms” relate to the systems of accumulation is itself a dialectical question that will be answered “formally” only through an appreciation that social conflict is the process through which political meaning is created from an accumulationist and disciplinary substrate. The key to understanding how such legal-political paradoxes are resolved is to see intervention and violence both as constitutive of law and as fundamental to existing and ascendant forms of accumulation. Beyond just the problem of rights “embourgeoisement” under the rubric of universal rights of man (per Marx), the new (post-1960’s) human rights rights-forms may hide and, thus, contribute to modern relations of global capitalist domination and

³⁰ See Immanuel Wallerstein, *Remembering Andre Gunder Frank While Thinking About the Future*, 60 MONTHLY REV., June 2008, at 50, 58, available at <http://www.monthlyreview.org/080630wallerstein.php>.

imperialism. Under such circumstances, all manner of “humanitarian” intervention, but also unapologetic national security hypertrophy, should be seen less as violations of the principle of state sovereignty, or assertions of the right of the powerful to exercise violence with impunity, but instead as the affirmation of a basic communitarian ethical point of origin to be asserted/defended almost religiously (as naturally “consensual”) by its interventionist champions.³¹ This masking of real relations of capital imperialism, in turn, becomes a mechanism for deepening and extending those relations.

One can learn from the democratic movements that have recently shaken the foundations of global order in countries such as Tunisia and Egypt. While it is still too soon to tell what kinds of lasting changes may come from these movements, what is clear is how protestors mobilized behind ideas of freedom and political rights discourse. In addition, however, these movements deployed those ideas and discourse as part of an anti-imperialist politics and ethic. The protestors demanded both political rights and the dignity of economic subjecthood, the ability to live without the stresses of basic food and shelter insecurities. These rights-based movements were quite material in that they grew not from a professional, international class of human rights technocrats, but from the novel and unprecedented demands of rights-bearers themselves. Moreover, we should not assume these movements fit neatly into western categories as they have retained their local and cultural specificity (“Arab,” “Islamic,” Egyptian, etc.). Calls from western political leaders and human rights groups for democracy and political freedom in the Arab world seem beside the point of these highly territorialized efforts to marshal rights discourse for social transformation.

³¹ See Rancière, *supra* note 8, at 308-09.