JURISPRUDENCE
CLASSICAL AND
CONTEMPORARY:
FROM NATURAL LAW TO
POSTMODERNISM

Second Edition

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Chapter Three

LEGAL REALISM

INTRODUCTION

1. Formalism and Realism

The debate between positivists and natural law theorists is in substantial part a debate about legitimacy: what declarations might legitimately be called "law," what features of those pronouncements afford them legitimacy as "law," and what sources of authority confer that legitimacy. A second vital jurisprudential debate takes place on a somewhat different axis; it is a debate less about the proper demarcations of law and more about the process of solving problems in and through law.1 It is a debate, in a sense, not about law's legitimacy, but about its certainty:2 how can we identify and describe with certainty the premises to use in legal problem-solving; how can we be certain that we employ the correct processes in solving the problem; how can we be certain that the solution we obtain is correct?

For this second debate we may posit two contrasting approaches, presented here for introductory purposes in admittedly crude caricature.3

1. Cf. Brian Leiter, Positivism, Formalism, Realism, 99 Colum. L. Rev. 1138, 1144 (1999) (book review) ("Whereas positivism is a theory of law, formalism is a theory of adjudication, a theory about how judges actually do decide cases and/or a theory about how they ought to decide them.").

2. See, e.g., Karl N. Llewellyn et al., The Case Law System in America, 88 Colum. L. Rev. 980, 1005 (1988) ("The words 'legal certainty' seem to evoke in most lawyers' minds an image of simply being able to apply an existing rule of law deductively. We are used to thinking like this, particularly since judicial opinions and legal discourse must always be dressed up in this way so as to be socially acceptable. My claim would be, though, that for the cases which occasion difficulties, this kind of legal certainty never has existed and never will exist; that to strive for this kind of certainty is a waste of time; that legal certainty in reality consists of something quite different; and that, once we understand what legal certainty consists of, a good part of the debate about whether a judge is bound by legal rules or is free when deciding cases will disappear on its own.").

3. Indeed, the suggestion that the jurisprudential inquiry into certainty can be understood in simple antinomic terms as the debate between "formalism" and "realism" is itself something of a crude caricature of the history and contemporary state of jurisprudence. See Neil Doherty, Patterns of American Jurisprudence 2-3 (1995). See also Thomas Grey, Modern American Legal Thought, 106 Yale L.J. 493, 517 (1996) ("It is a separate issue from formalism versus antiformalism, for instance, whether substance or process should be the main focus.")
Under the one approach, which we will call "formalist," legal problem-solving takes place entirely within the insular realm of law: the major premises in our problem-solving scheme are no more (and no less) than the rules of law; the processes consist exclusively of formal logic; and the correctness of our results is to be verified by an "internal" analysis, i.e., by asking whether the result coheres with the truths offered by law. Under the second approach, which we shall call "realist," legal problem-solving is situated in the actual experience of the problem-solver: the scheme embraces the full realm of practical and theoretical knowledge; the processes are ultimately pragmatic; and the correctness of the result is to be measured by (what the formalist at least would consider) an "external" analysis, i.e., by asking whether our claims cohere with experience.

Thus understood, several very basic differences separate the formalist and the realist. One difference focuses on the parameters of "law," and the dispute thus overlaps to some extent (but does not track) the debate between positivists and natural law theorists. For formalists, a clear divide separates the conceptual realm of the law and the realms of knowledge available through other disciplines: to take the most notable illustration, the teachings of the sciences—hard and soft—are extra-legal, their lessons of no direct value to legal problem-solving. The realist, by contrast, denies this rigid boundedness to law, and insists instead that law is a multi-disciplinary project: the teachings of the sciences, then, may be very valuable to legal problem-solving.

A second difference between formalists and realists centers on the importance of legal rules in legal problem-solving. For the formalist, rules are of prime importance: indeed, they comprise the major premises in every problem-solving scheme. Moreover, because internal coherence is the goal of each problem-solving endeavor, rules provide both the means and the measure of the problem-solving effort. The realist, by contrast, harbors a distinct skepticism toward the value of rules; indeed, a functional appraisal convinces the realist that rules are of only marginal value either in predicting what problem-solvers will do or in prescribing what problem-solvers should do. Moreover, rules may be dangerously abstracted from the real world and thus offer little promise of coherence with experience; in such cases, rules may even be counter-productive to the problem-solving effort.

of legal study; on this dimension, the Classi-
cists, Progressives, and Moral Philosophers
are joined against the Realists and the Pro-
cess jurists. Another aspect of the debate is
the "rule of law" issue: whether independ-
ent judges have a distinctive and impor-
tant role to play in the polity. Classi-
cists, Process jurists, and Moral Philosophers
have tended to believe so, and Progressives
and Realists have in general disagreed. Oth-
er important themes in American legal
thought have included the extent to which
jurists regard law as autonomous from oth-
er disciplines and modes of thought, and
the relative emphasis given to description
and prescription in the study of law.

5. See, e.g., Grant Gilmore, The Death of
Contract 97-98 ("The basic idea of the
Langdellian revolution seems to have been
that there really is such a thing as the one
ture rule of law, universal and unchanging,
always and everywhere the same—a sort of
mystical absolute.").
6. See Stephen M. Feldman, American Le-
gal Thought from Premodernism to Postmo-
A third difference (partially, but not completely, the flip side of the second) has to do with the significance of context to the legal problem. For the formalist, the only portions of the context that are material to the problem-solving effort are those that may fairly be described as part of the legal context: the procedural posture, the institutional setting, and the facts of the dispute, insofar as these last are made relevant by the rules of law—which is to say, quite typically, insofar as they are needed to permit proper categorization of the case. Above all, the formalist insists that the political context of the dispute—the political interests, and the alignment of those interests with the formal parties to the dispute—is and should be utterly immaterial to legal decision-making. For the realist, no portion of the context is necessarily immaterial: as a positive matter, any fact that might have an influence on the decision-maker must be accounted for, and as a normative matter, many facts—beyond those made relevant by the rules—ought to be considered by the decision-maker because they might produce better (read more effective, or more “just”) results. Accordingly, the realist manifestly refuses to elide politics from the decision-making process: descriptively, it accounts for too much to be ignored, and prescriptively, insofar as it helps describe the just society, its aspirations are too important to ignore.

2. A Brief Intellectual History

The classical legal theory that dominated the late nineteenth and early twentieth centuries was largely formalist. Formalism reigned in the legal academy, where Christopher Columbus Langdell, Dean of the Harvard Law School from 1870 to 1895, set the pace. Langdell’s case study method emphasized the formal connections (inductive and deductive) between rules of law and case holdings, and helped reinforce the notion of law as a self-contained system—a science—in which decisions flowed necessarily from a limited number of discoverable and foundational concepts or doctrines. Formalism reigned too on the bench, where beliefs in conceptual order supported the sharp separation of public and private spheres and the maintenance—through the judicial enforcement of laissez-faire—of an almost inviolable scheme of pre-political property rights.


References and Citations vii (1871). See generally Thomas C. Grey, Langdell’s Orthodoxy, 45 U. Prr. L. Rev. 1, 2 n.6 (1963) (Langdell believed “that legal judgments are made by applying pre-existing law to facts.”).
10. See, e.g., R.F. Caba, The Science of Law and Lawmaking 3 (1898) (law “as one of the family of sciences, [is] subject like the rest to certain fundamental principles”).
At the turn of the twentieth century, two intellectual developments combined to cast doubt on the classical account of (and prescription for) law. The first was the rise of the Progressive movement. As G. Edward White notes:

Progressivism began with the assumptions that society was in a constant state of flux and that man had the capacity to progress by directing this inevitable change toward beneficial ends . . . Progressives criticized judges for being unresponsive to social and economic conditions and asked them to take greater notice of the casualties which unregulated industrialism created.

The second development was the rising importance of the behavioral and social sciences. The growing belief that human behavior was the product of complex psychological and sociological stimuli made problematic the formalist suggestion that legal decisions resulted merely from rules and logic.

The result was the development of a sociological jurisprudence, one that focused on the social influences on, and social effects of, legal decisions. Challenging formalist orthodoxy in 1897, Judge Oliver Wendell Holmes insisted that law does not consist of "a deduction from principles of ethics or admitted axioms," but is instead "prophecies of what the courts will do in fact." A decade later, Roscoe Pound dismissed the classical methodology of the nineteenth century as "mechanical jurisprudence." He suggested that legal scholars abandon the notion that law was a self-sufficient discipline, and urged interdisciplinary inquiry into "economics and sociology and philosophy" to promote understanding of law. Pound's "sociological jurisprudence"—an extension of German legal philosopher Rudolph von Jhering's "jurisprudence of realities"—stressed that lawyers should "look the facts of human conduct in the face."

During the next three decades, a host of scholars began to pursue these themes and ultimately developed a sustained methodological attack on formalism. The "legal realists" were far from a cohesive group; indeed, they were united largely by a negative, i.e., by the rejection of the Langdellian tradition. But some common themes emerge from their

17. Id. at 35.
18. See Karl Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 Harv. L. Rev. 1222, 1235–36 (1931); see also Roscoe Pound, The Call for a Realist Jurisprudence, 44 Harv. L. Rev. 697, 700–06 (1931). As with all of the presentations of "schools" or movements of jurisprudence in this book, this Introduction concentrates on the shared ideas of the theorists of this era.
writings. Realists criticized the classical view that legal reasoning consisted solely of the syllogistic application of rules and precedents. They challenged the determinacy of legal rules and emphasized the range of choices presented to a judge in a given case: the choice of adopting one case or another as precedent; the interpretation of precedent; and the range of possibilities in applying the selected rule to the present facts. As a consequence, they insisted above all that the keys to legal understanding were to be found not in rules or concepts, but in the full range of particulars that uniquely defined each legal problem.

Since realists believed legal rules of limited use in deciding most controversies, they probed for other explanations for decisions. Some realists focused on the individual judge, emphasizing the role of intuition, hunch, or other personal idiosyncracy in determining how judges decided cases. Others cast the net more broadly and suggested that decisions were driven by a complex interplay of personal, cultural, social, ideological, political, and economic factors. In either event, the course of the law could be determined more-or-less empirically: examinations of judicial behavior would permit predictions about future court decisions, and the accuracy of generalizations about laws could be tested by evaluating patterns of decisions.

In similar fashion, the impact of legal decisions could be assessed through empirical examination of responses to those decisions: law’s efficacy could thus be measured in the real world.

Importantly, several realists and later followers and critics of realism focused on the ideological functions of classical theory: pointing out,

19. "Every decision is a choice between different rules which logically fit all past decisions but logically dictate conflicting results in the instant case." Felix Cohen, Ethical Systems and Legal Ideals 35 (1933).


His own past may have created plus or minus reactions to women, or blond women, or men with beards, or Southerners... Those memories... may affect the judge’s initial hearing of, or subsequent recollection of, what the witness said, or the weight of credibility which the judge will attach to the witness’ testimony.

Id. at 106. See also Jerome Frank, Courts on Trial, Myth and Reality in American Justice (1949).

22. Indeed, a caricature of realism suggested that decisions were the result of gastronomic jurisprudence: a judge’s dispositions—in both senses—were strongly driven by “what the judge ate for breakfast.” Ronald Dworkin, Law’s Empire 36 (1986).


25. Walter Wheeler Cook, Williston on Contracts, 33 ILL. L. REV. 497, 506 (1938) ("The ‘realists’ will of course at once inquire whether... broad generalizations will ‘account for’ the ‘law’ as it is found in the decisions. From their point of view that is the acid test of the validity of any generalization.").

for instance, how "freedom of contract" arguments on behalf of unregulated wage-labor arrangements were illusory, because the workers essentially had no choice other than to contract at the offered wage. More broadly, the realist movement, with its insights into the bidirectional relationship between legal decisionmaking and distributions of economic power, paved the way for legal acceptance of significant social and economic reforms. The realists thus helped make possible the New Deal, even if they were largely absent from its administration. And by the 1940s, legal realism had substantially supplanted classical theory in the legal academy and on the bench of the United States Supreme Court.

By the 1950s, legal realism had—depending on one's perspective—either run its course or effectively carried the day. In either event, the school, at least as a discrete intellectual movement, gradually ceded center stage to legal process theory. Legal process theory developed in significant part as a reaction against perceptions that realism destabilized law and undermined its integrity. Without abandoning all of the insights offered by the realists, legal process theorists sought to modify the realist depiction of judging as idiosyncratic—or at least unrestrained—a depiction that challenged the legitimacy of the legal process. The focus shifted, in process theory, from the substance of decisions to the process of decisionmaking. An important component of the evolving legal process theory became the notion of institutional competence—the idea that appropriate exercise of power would occur if various branches of the legal system adhered to their institutional roles. To guide adjudication, Professors Henry Hart and Albert Sacks advanced the theory that if judges engaged in "reasoned" elaboration of the legal precedents relied on in each case, this would substantially constrain judicial discretion; judicial decisionmaking would thus be legitimized through the demonstration of reasoning.

During the 1960s and 1970s, students of Hart and Sacks attempted to modify process theory to serve the needs of a society in which social consensus was increasingly elusive and ideological and cultural conflict increasingly the norm. Some—such as Alexander Bickel and John Hart Ely—continued to emphasize the paramount importance of process in democratic theory; others—like Ronald Dworkin—sought to elaborate explicit normative foundations for democratic theory, grounding jurisprudence in substantive "rights."
The realist legacy at the start of the twenty-first century is somewhat paradoxical. On the one hand, legal realism as a distinct movement was relatively short-lived, its tangible achievements in charting the course of the law remarkably modest. On the other hand, each school of thought represented in the subsequent chapters of this text is in some ways a response to the realist movement, with some proudly presenting themselves as the natural descendants of their realist predecessors. And though the answers each arrives at may be different, it seems clear that nearly every contemporary jurisprudential inquiry pursues the very types of questions that the realists said should matter. In this sense, at least, it may well be the case that "We are all legal realists now."

3. Preview

The materials that follow provide a brief introduction to the history and enduring legacy of the realist movement. Part A presents the work of the sociological jurisprudences: it begins with a summary of classical theory and then offers excerpts from the groundbreaking work of Oliver Wendell Holmes, Jr. and Roscoe Pound. Part B introduces the realists: it features significant realist works from Karl Llewellyn, Jerome Frank, and Felix Cohen, as well as the contemporary appraisals (some quite approving, some not) by Dean Pound, Lon Fuller and Morris Cohen. Part C offers a brief historiography, as well as a partial sampling of responses to the realist legacy: a summary of the law and society movement, perhaps the clearest intellectual heir of realism, and a recent defense of formalism, an account influenced by—but not persuaded by—the work of the realists. Finally, Part D presents the ongoing debate between formalists and realists in the context of constitutional adjudication: it examines the debate over the value of rules (in due process cases), the utility of categories (in commerce clause cases), and the possibility of a neutral "legal process" (in equal protection and free exercise of religion cases).

A. A SOCIOPOLITICAL JURISPRUDENCE

Thomas C. Grey
MODERN AMERICAN LEGAL THOUGHT

1

Modern American jurisprudence gains some of its unity from the large historical developments that frame the period. After the Civil War,

35. Cf. Kalman, supra note 7, at 1560 ("Realism left a complex array of feeble messages, but it profoundly affected American legal thought.").

36. See, e.g., John Henry Schlegel, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE: FROM THE YALE EXPERIENCE, 28 BURR. L. REV. 459, 462 (1979) ("And so, the question of whose values legal rules serve, a question highlighted in the realists' de-

struction of the formalist universe and in their attempts at legislative law-making, and believed to have been put to rest by post-Realist legal thought, has re-emerged, exactly where it was found forty years ago.").

industry rapidly developed, urban populations increased, the frontier closed, a modern transportation and communications network developed, masses of immigrants arrived, and the United States struggled unsuccessfully with the aftermath of African slavery. As a result, American law had to come to terms with an economy built around large corporations and powerful centralized financial markets, with the broad distribution of mass-produced consumer goods, with the social problems of urbanization and large-scale immigration, with industrial labor relations, and with tragic racial divisions.

Another part of the frame is supplied by a more parochial development: the establishment of the modern American system of legal education. Under Christopher Columbus Langdell’s model, instituted at Harvard in 1870, most American lawyers enter the profession by way of postgraduate study in a university-based law school staffed by full-time career teachers who are expected to write as well as teach. Of course the existence of a guild of teacher-scholars paid to write about law does not guarantee that the development of a nation’s legal thought will make an interesting story. Much professional legal scholarship simply catalogues legal doctrine for the use of lawyers, judges, students, and teachers, and lacks theoretical interest or political significance. But American law professors have as their object of commentary the legal system of the most law-permeated and court-centered society in history. By the time the modern law school arrived on the scene in 1870, American judges had already established both their power of constitutional judicial review and their habit of freewheeling common law judicial legislation, and so could hardly have failed to play a large role in the nation’s legal transition to modernity.

* * *

II

A. The Classicists

* * *

A good story requires a strong beginning, and this is provided by the Classical legal thought that arose, without much conscious theorizing, at the beginning of the modern period in the United States. The Classical legal thinkers supplied the fundamental negative precedent, a set of satisfyingly extreme dogmas against which their successors could define themselves by rebelling. The prototype of Classical thought, Langdellian legal science, was perhaps the purest kind of legalism on record. A more old fashioned group of jurists promoted the kind of laissez-faire constitutionalism epitomized by the Supreme Court’s decision in *Lochner v. New York*. The basic plot line of American legal modernity has been drawn from the responses to Langdell and to *Lochner*. 
Langdell and his academic allies at Harvard and elsewhere promoted a vision of law that seemed tailored to the new university-based model of legal education. The Langdellians treated law as an intellectual discipline independent of theology, moral philosophy, economics, or political science, one that involved the application of scientific methods to common law materials. Langdellian legal science was not only academically ambitious, but also, despite its apparently unworly character, had impressive practical advantages. After the collapse of the common law writ system, it delivered to American lawyers and judges a new classification and formulation of private law doctrine. As a pedagogy, it sorted law students out according to their facility in quickly making analogies and distinctions among fact situations, which tracked the analytical abilities needed in the corporate and financial work that had become the mainstay of big-city practice. Finally, Langdellism supplied to a conservative bar and bench a classically liberal (which by that time meant politically conservative) legal ideology, providing an up-to-date scientific basis for the common law system’s emphasis on the protection of property and on freedom of contract.

Langdellian legal theory has sometimes been treated as an intellectual joke, but it was in fact a relatively coherent jurisprudence that emphasized three qualities that many desire in a legal system. First, law should be formal, producing outcomes by the application of rules to facts without any intervening exercise of discretion. Second, law should be systematic, its rules descending deductively from a small number of coherently interrelated fundamental concepts and principles. Third, the resulting system should be autonomous, its principles derived from distinctively legal materials, not resting on politically or philosophically controversial claims or methods.

The first desideratum, the formal realizability of legal outcomes, is a goal common to many legal theories. But the Langdellians linked formality to systematicity and autonomy in a way that made theirs the most formal of formalisms. Langdell illustrated the character of his legal thought in his explanation of why a contract by mail could not possibly be formed when the acceptance was sent (the now-familiar mailbox rule), but only when it was received and read. An acceptance had to serve not only as an objective manifestation of the offeree’s intent, but also as a promise; otherwise no consideration would support the contract. The offeree could indeed objectively manifest intent to accept by mailing the acceptance, but because a promise by its nature had to be communicated, there could be no consideration until the letter was received and read by the offeror.

Langdell insisted on the logical necessity of this conclusion, which in his view rendered “irrelevant” any argument that the mailbox rule was fairer or better served the interests of the parties. The mailbox rule would fail the requirement of systematicity, which required that legal rules must follow from a few fundamental principles rather than from any weighing of practical and moral considerations. Because arguments of justice and convenience were extralegal, they could not be invoked to
justify an anomalous rule without violating the requirement of legal autonomy.

The claim that justice, efficiency, and indeed everything but the internal conceptual logic of the system were "irrelevant," dramatized the Langdellian legal scientist's principled neglect of the facts of human nature and culture; all the data of legal science were "contained in printed books," the appellate reports in the law library. Believing that this austere yet positivistic approach could only be applied in its full purity to substantive private law, the Langdellians adamantly excluded procedure, legislation, and even public law from the purview of their scholarship and from the core law school curriculum.

The public-law form of Classical thought, laissez-faire constitutionalism, was promoted by an important group of less resolutely pure and scientifically modern legal commentators who fell outside the orbit of Langdellian legal science. The 1888 treatise by law professor and judge Thomas Cooley, Constitutional Limitations, helped give the laissez-faire constitutionalist movement doctrinal formulation, and commentators like John Norton Pomeroy, John Dillon, and Christopher Tiedeman sustained that movement as it worked to overcome the traditional American judicial deference to regulation by state legislatures. Often using an old-fashioned natural-rights language that Langdellians rejected as unscientific and legally impure, the Lochnerians elevated the core of the private law of property and contract to higher-law status. After percolating for some years in the state courts and in treatises and dissenting opinions, laissez-faire constitutionalism was nationalized around the turn of the century by the United States Supreme Court in *Lochner v. New York* and other decisions.

**B. The Progressives**

The next chapter was written by the promoters of Progressive Jurisprudence which flourished between the late 1890s and early 1920s and maintained its influence through the New Deal. The movement took its philosophical inspiration from American pragmatism, its politics from the Progressive movement, and much of its vocabulary from the emerging social sciences. It began with Oliver Wendell Holmes's pragmatist critique of the Langdellian vision of law as an autonomous logical system in which considerations of fairness and utility were irrelevant. "The life of the law has not been logic: it has been experience," he famously responded, and later urged that "[t]he true science of the law ... consists in the establishment of its postulates from within upon accurately measured social desires instead of tradition." Roscoe Pound and Benjamin Cardozo were the most important of the many jurists who followed Holmes in seeing law as an instrument for the conscious pursuit of social welfare, an instrument whose master term was policy rather than principle, whose master institution was the legislature rather than the courts, and whose servants should devote themselves to social engineering rather than doctrinal geometry.
The pragmatists had argued that the primary process of human thought was instrumental problem solving rather than detached speculation, and Progressive jurisprudence recharacterized law and legal thought in the same spirit. First, law itself was no longer idealized as an abstract and autonomous system of norms, but was seen as a means to an end, a socially embedded and purposive set of activities aimed at satisfying human wants collectively expressed as public policies. In Cardozo’s words, “the final cause of law is the welfare of society.” Second, the Progressives retained but reinterpreted in pragmatist fashion the structure of abstract legal concepts and principles that had been the primary focus of Classical legal thought. No longer conceived as essences and axioms, these were now seen as pointers and guidelines meant to help decisionmakers resolve social problems in light of public policies. If the mailbox rule served the contracting parties, the principle of consideration was flexible enough and the concept of a promise fuzzy enough to allow convenience to prevail. “General propositions do not decide concrete cases,” as Holmes said—though he added that a sound general principle can “carry us far toward the end.”

The Progressives saw technological and industrial innovations as social advances, but advances that required intelligent collective action to ameliorate their harmful side effects. The legal version of Progressivism adopted the social theory and the politics of the movement. Change had become too rapid to be dealt with any longer by the glacial and unconscious process of case-by-case common law adaptation. Scientific legislative reform, guided by experts pursuing shared public values, had to replace analogical judicial reasoning from preceitdents at the center of the legal process. Judicial resistance to democratic reforms was retrograde, whether it took the aggressive form of laissez-faire constitutionalism or stemmed from legal consequentialism stemming from an inattention to legislation and obsessive focus on the details of private law doctrine. The “mechanical jurisprudence” of the Classical thinkers misrepresented the nature of law in the service of reactionary politics. Courts should defer to legislatures in constitutional cases, should ascertain and promote legislative purpose in interpreting statutes, and should draw on the policies reflected in statute law to sublegislate the fields left by legislatures to common law development. If freely elected and guarded against corruption by special interests, legislators could be counted on to reflect the consensus values of an essentially unified popular sovereign.

In pursuing the reform agenda, the legal Progressives believed that lawyers had to learn the facts about society. Designing legal doctrines and institutions to meet public needs required lawyers to become “social engineers,” systematically investigating social problems, familiarizing themselves with the available methods of reform, and testing whether these had the intended effects. Progressive lawyers wrote “Brandeis briefs” compiling evidence on the adoption and effectiveness of social legislation in other industrial countries to show courts that these were indeed reasonable (hence constitutional) exercises of the police power, and argued for the relaxation of laissez-faire constitutional restrictions.
on social reformist legislation on the ground that this would allow the states to serve as "laboratories" of reform.

Langdellian legal science and laissez-faire constitutionalism both survived the Progressive era, however, and the 1920s found old Classical jurists uneasily sharing control over American legal thought with middle-aged Progressives. The legal establishment founded the American Law Institute in 1923 with the Progressive Benjamin Cardozo as its first president, and launched its Restatement of Contracts with the Langdellian Samuel Williston as reporter and the Progressive Arthur Corbin as his assistant. A Supreme Court headed by the laissez-faire Chief Justice William Howard Taft continued to invoke liberty of contract to strike down reformist state legislation, over the opposition of the constitutional Progressives Holmes, Louis D. Brandeis, and Harlan F. Stone.

C. The Realists

Into this scene, a younger generation of legal theorists brought a second wave of modernist jurisprudence, Legal Realism. The Realists carried on the Progressive jurists' critique of Langdellian legal science and shared both their desire to bring the methods of social science to the study of law and their generally favorable attitude toward government regulation of the economy. But despite these similarities, Realism was very different in emphasis and spirit from Progressive jurisprudence. The Realists shifted the focus of legal study back from legislation to the judicial process, particularly the common law process in private law cases, but with an iconoclastic and revisionist account of what judges did and how they did it.

Notes

1. As Professor Grey notes, Langdellian legal theory conceived of law as an autonomous system and viewed practical and moral considerations as "extralegal." But is the latter a necessary consequence of the former: might a closed system of law view questions of efficacy and justice as within law's domain? Would such a system still be formalist?

2. Langdellian theory also insisted upon the systematicity of law, and eschewed rules or results that were, within that system, anomalous. But again, is the latter a necessary consequence of the former: might a system of law embrace dissonance, paradox, or incoherence? Would such a system be formalist?

3. Professor Grey distinguishes two forms of classical thought: the private-law form represented by Langdellian legal science, and the public-law form represented by laissez-faire constitutionalism. Despite their differences, what attributes do the two forms share? In what sense was laissez-faire constitutionalism also formalist?

4. Professor Grey notes the correlation between classical legal thought (in both its private and public form) and political formalism; similarly, "sociological" jurisprudence and legal realism were closely aligned with political progressivism. Is this more than historical coincidence, i.e., is there some intrinsic connection between legal formalism and political conservatism, on the one hand, and legal realism and political progressivism, on the other?
All of which I tried to explain to a colleague of mine who was profoundly skeptical of this thing called critical race theory. He was decidedly uncomfortable with the notion that race should matter; it was fundamentally inconsistent, he said, with the ideal of a color-blind society. Whatever happened to the melting pot, he would ask, are we trading it in for separate cuisines?

But there is a difference, I would say, between aspiration and reality, and we need to recognize both. And I would tell him the story of the law student and the high school class in an effort to illustrate the point.

But his take on the story was different from mine.

"So ultimately they all got along quite fine. no?" he asked.

"That’s right."

"And no color line kept her from teaching, or the students from learning, is that right?"

"Yes, and they learned from one another."

"Then she was right, after all: race was irrelevant. There were no racial perspectives, no ‘different voices.’ Race really did not matter. She knew it all along; they simply had to learn it."

"No," I would say, "I don’t think that is what happened. Race was not at all irrelevant, and she learned that from them. Together, they were then able to make it less relevant—in some contexts—but only because they first acknowledged the truth of it, and the truth of their differing perspectives on the matter."

"Well, that’s the construction you choose for the story."

"Honestly, it’s what I believe."

"Well, of course you do. It’s part of your mindset."

"No, I don’t think so. I am not compelled to accept the notion of a distinct minority perspective, but I do find it persuasive all the same."

"Well, compelled or not, it is perfectly predictable, coming from you. You know, where you end up is merely a reflection of where you start."

On that score, I thought he was right. But then again, I thought that was the whole point.

The materials that follow are intended to explicate and expand on this dialogue. Christened at the initial meeting in 1989 as Critical Race Theory (CRT), this school is the most recent—and perhaps most rapidly

1. The first conference on critical race theory was held in June 1989 in a small seminar outside Madison, Wisconsin. Richard Delgado, Legal Scholarship: Insiders, Outsiders, Editors, 63 U. COLO. L. REV. 717, 721 n.34 (1992). The thirty participants chose the names “Critical Race Theory” or “New Race Theory,” id. at 721 n.35; the former took hold. Although the school was, in this sense, formalized in 1989, its central themes had been expressed for some time. Notable earlier works include Derrick A. Bell, Jr., Brown v. Board of Education and the Interest-Convergence Dilemma, 93 HARV. L. REV. 518 (1980); Richard Delgado, The Imperial Scholar: Reflections on a Review of
proliferating, of the poststructural jurisprudences. It is also, for some, the most promising, "uniquely situated" by context and content to illuminate the struggle for justice.

Like the other postrealist schools, critical race theory is complex, nuanced, dynamic, and in continual dialogue with the other movements. Still, as a discrete school it manifests at least three broad distinctive features. (Other critical race theory themes are listed below.) The first is a persistent effort to broaden the substantive scope—or sharpen the analytical focus—of the dialogue on justice. Critical race theorists articulate concerns that may have been ignored or marginalized by the dominant discourse; call into question concepts that seem otherwise immune from scrutiny; and suggest resolutions that are frequently at odds with the prevailing demands of convention or fashion. Thus critical race theorists focus their writings on the struggle for racial justice, on the persistence of racial hierarchy, and on other issues of special importance to minority communities. They challenge the efficacy both of liberal legal theory and of communitarian ideals as vehicles for


3. Anthony E. Cook, The Spiritual Movement Towards Justice, 1992 U. Ill. L. Rev. 1007, 1008; see also Charles R. Lawrence III, The Word and the River: Pedagogy as Scholarship as Struggle, 65 S. Cal. L. Rev. 2231, 2239 (1992) ("We are gifted by an ability to imagine a different world—to offer alternative values—if only because we are not inhibited by the delusion that we are well served by the status quo.").


6. Cf. Delgado & Stefancic, Bibliography, supra note 2, at 462–63 (identifying ten themes of critical race thought).

7. E.g., Derrick Bell, Jr., And We Are Not Served (1987); Richard Delgado, The Rodrigo Chronicles (1995). For a comprehensive survey, see Delgado & Stefancic, supra note 2.


10. E.g., Derrick Bell, Reconstruction's Racial Realities, 23 Rutgers L.J. 261 (1992) (effect of Reconstruction Amendments is severely limited by implicit rules of race relations law); Alex M. Johnson, Jr., The New Voice of Color, 100 Yale L.J. 2007, 2055–60 (1991) (ethos of individualism, evident in some voices of color, may condemn racial groups to pluralism's "zero-sum game");
racial progress, destabilize the supposedly neutral criteria of meritocracy and social order, and call for a re-examination of the very concept of "race." Their proposals, at a theoretical level, entail a fundamental rethinking of personhood, community, and equality; at a doctrinal level, they may resist the tide of conventional opinion in condemning racist speech, defending the use of racial quotas, or rejecting the requirement that the equal protection plaintiff prove discriminatory intent.

A second feature of critical race theory finds expression in the recurring call to modify the form of jurisprudential dialogue in order to accommodate marginalized voices. Critical race theorists have stressed the limitations of legal discourse, and the ways in which conventional ways of talking and listening may mute some voices and elide their messages. Accordingly, they have emphasized the need for interdisciplinary studies to expand the bounds of "law talk," as well as the need for

Charles R. Lawrence III, Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment, 37 VALL. L. REV. 787, 801 (1992) ("First Amendment doctrine and theory have no words for the injuries of silence imposed by private actors.").


12. See, e.g., Patricia J. Williams, Metro Broadcasting v. FCC: Regrouping in Singular Times, 104 HARV. L. REV. 525, 542-44 (1990) ("Racism inscribes culture with generalized preferences and routinized notions of propriety. It is aspiration as much as condemnation; it is an aesthetic. It empowers the mere familiarity and comfort of the status quo by labeling that status quo as "natural.").


19. Margaret M. Russell, Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and
new modes of discourse—new histories, stories, narratives, and countermysthxxxx—to challenge the pervasive hegemony of the dominant voice. Underlying this challenge is both an epistemological and metaphysical premise: first, that different voices are capable of expressing discrete perspectives, and second, that these different voices—all voices—can and should be heard, engaged, and heeded. See Chapter Six: Law and Literature.

A third distinctive feature is the belief that racism is extremely common, much more so than most people think. It is ordinary, not aberrational—the “normal science” of everyday life. So deeply embedded that it is practically invisible, like the air, our system of white-over-black/brown ascendency will only yield to exceptionally diligent efforts, ones that will entail real costs.

The materials in this section are intended to illustrate, explicate, or critique these dominant features of the critical race theory movement. The extent to which a genuine racial perspective exists, the usefulness and propriety of narrative to convey the racial critique, and the merit of the particular doctrinal and philosophical positions advanced in the quest for racial justice—all are subjects of a complex debate. That debate is far from resolution; it may be, in fact, that resolution is not possible. For where you end up in the debate may well depend on where you begin.

Other themes that most—but not all—crt scholars would subscribe to are:

- Interest—convergence and economic determinism—the notion that the interests of white elites are what determine the shifts of fortune for groups of color;
- The social construction of race—the idea that race is not objective, biological or fixed, but rather conjured up by the majority to serve various purposes;
- Differential racialization—the recognition that Asian Americans, Latinos, blacks, Native Americans, and other groups are understood in different ways at different times, in response to differing social forces and needs;


Essentialism and intersectionality—the belief that categories such as white and black are not unitary and indivisible, but that the identities of members of these groups are multiple and complex. For example, a Latina may be a single parent, female, with black skin; as such, she may share the characteristics of several groups and differ in her situation and needs from a white woman or professional-class black man.

For a discussion of these themes, the school’s history, and its various spin-off movements, see CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT. Introduction at xiii (Kimberle Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995); Richard Delgado & Jean Stefancic, CRITICAL RACE THEORY: AN INTRODUCTION 6-11, 16-32 (2001).

A. CRITICAL RACE THEORY AND THEORY: CHALLENGING THE DOMINANT CONCEPTIONS OF THE REAL AND REALIZABLE

Derrick Bell
FOREWORD: THE CIVIL RIGHTS CHRONICLES
99 Harv. L. Rev. 4, 4-8, 68-71 (1985).

A committee planning the bicentennial anniversary of the Constitution finished a long session reviewing the lives of the men who wrote and signed this nation’s basic legal document. Later, the committee’s lone minority group member told a wise friend of a recurring fantasy in which he is transported back through time to give the framers a preview of the two centuries of developments in American constitutional law. “If that were to happen,” he wondered, “Where should I begin so major a teaching task?”

The friend’s response was kind. “First,” she said gently, “you would have to explain to the framers how you, a black, had gotten free of your chains and gained the audacity to teach white men anything.”

I. A PRELUDE TO THE CHRONICLES

The contemporary question, raised more perfactorily each year, of why issues of racial justice no longer hold a priority position on the nation’s agenda or on the Supreme Court’s docket deserves an historical response. At the nation’s beginning, the framers saw more clearly than is perhaps possible in our more enlightened and infinitely more complex time the essential need to accept what has become the American contradiction. The framers made a conscious, though unspoken, sacrifice of the rights of some in the belief that this forfeiture was necessary to secure the rights of others in a society embracing, as its fundamental principle, the equality of all. And thus the framers, while speaking through the Constitution in an unequivocal voice, at once promised freedom for whites and condemned blacks to slavery.
4. Does Butler’s proposal violate the rule of law? Invite anarchy?

5. How would the various jurisprudential schools you have studied view Butler’s proposal for jury nullification?

6. Most jurisdictions forbid lawyers from mentioning to a jury that they have the power to disregard a judge’s instructions and the law and vote to acquit when the evidence of guilt is overwhelming. Suppose a lawyer, like Butler, simply went on black talk radio and publicized the idea of jury nullification?

7. Consider that:

America’s white citizens average roughly twice the income of its black citizens; its black citizens are unemployed at over twice the rate. Its white citizens are more than twice as likely as its black citizens to live in a family with an annual income in excess of $50,000; its black citizens are roughly three times more likely to live in poverty. Its white citizens have substantially lower mortality rates; its black citizens are more likely to be murdered as young adults.

Robert L. Hayman, Jr. & Nancy Levit, The Constitutional Ghetto, 1993 Wis. L. Rev. 627, 675-78. Name a few laws or legal practices that sustain this inequity. Are such laws immoral? Do they deserve to be respected as “law”? Cf. Regina Austin, “An Honest Living”: Street Vendors, Municipal Regulation, and the Black Public Sphere, 103 Yale L.J. 2119 (1994) (“I, like many blacks, believe that an oppressed people should not be too law abiding, especially when economics is concerned. The economic system that has exploited us is not likely to be effectively exploited by us if we pay too much attention to the law.”).

Derrick Bell
RACIAL REALISM


The struggle by black people to obtain freedom, justice, and dignity is as old as this nation. At times, great and inspiring leaders rose out of desperate situations to give confidence and feelings of empowerment to the black community. Most of these leaders urged their people to strive for racial equality. They were firmly wedded to the idea that the courts and judiciary were the vehicle to better the social position of blacks. In spite of dramatic civil rights movements and periodic victories in the legislatures, black Americans by no means are equal to whites. Racial equality is, in fact, not a realistic goal. By constantly aiming for a status that is unobtainable in a perilously racist America, black Americans face frustration and despair. Over time, our persistent quest for integration has hardened into self-defeating rigidity.

Black people need reform of our civil rights strategies as badly as those in the law needed a new way to consider American jurisprudence prior to the advent of the Legal Realists. By viewing the law—and by extension, the courts—as instruments for preserving the status quo and only periodically and unpredictably serving as a refuge of oppressed people, blacks can refine the work of the Realists. Rather than challenging the entire jurisprudential system, as the Realists did, blacks’ focus must be much narrower—a challenge to the principle of racial equality.
This new movement is appropriately called Racial Realism, and it is a legal and social mechanism on which blacks can rely to have their voice and outrage heard.

Reliance on rigid application of the law is no less damaging or ineffectual simply because it is done for the sake of ending discriminatory racial practices. Indeed, Racial Realism is to race relations what "Legal Realism" is to jurisprudential thought.

* * *

Legal precedents we thought permanent have been overturned, distinguished, or simply ignored. All too many of the black people we sought to lift through law from a subordinate status to equal opportunity, are more deeply mired in poverty and despair than they were during the "Separate but Equal" era.

Despite our successful effort to strip the law's endorsement from the hated "Jim Crow" signs, contemporary color barriers are less visible but neither less real nor less oppressive. Today, one can travel for thousands of miles across this country and never come across a public facility designated for "Colored" or "White." Indeed, the very absence of visible signs of discrimination creates an atmosphere of racial neutrality that encourages whites to believe that racism is a thing of the past.

Today, blacks are experiencing rejection for a job, a home, a promotion, anguish over whether race or individual failing prompted their exclusion. Either conclusion breeds frustration and eventually despair. We call ourselves African Americans, but despite centuries of struggle, none of us—no matter our prestige or position—is more than a few steps away from a racially motivated exclusion, restriction or affront.

* * *

Traditional civil rights law is highly structured and founded on the belief that the Constitution was intended—at least after the Civil War Amendments—to guarantee equal rights to blacks. The belief in eventual racial justice, and the litigation and legislation based on that belief, was always dependent on the ability of believers to remain faithful to their creed of racial equality, while rejecting the contrary message of discrimination that survived their best efforts to control or eliminate it.

Despite the Realist challenge that demolished its premises, the basic formalist model of law survives, although in bankrupt form. Bakke,\(^1\) as well as numerous other decisions that thwart the use of affirmative action and set-aside programs, illustrates that notions of racial equality fit conveniently into the formalist model of jurisprudence. Thus, a judge may advocate the importance of racial equality while arriving at a decision detrimental to black Americans. In fact, racial equality can be used to keep blacks out of institutions of higher education, such as the one at issue in Bakke. By reasoning that race-conscious policies derogate the meaning of racial equality, a judge can manipulate the law and arrive

at an outcome based upon her worldview, to the detriment of blacks seeking enrollment.

The message the formalist model conveys is that existing power relations in the real world are by definition legitimate and must go unchallenged. Equality theory also necessitates such a result. Nearly every critique the Realists launched at the formalists can be hurled at advocates of liberal civil rights theory. Precedent, rights theory, and objectivity merely are formal rules that serve a covert purpose. Even in the context of equality theory, they will never vindicate the legal rights of black Americans.

Outside of the formalistic logic in racial equality cases, history should also spur civil rights advocates to question the efficacy of equality theory. After all, it is an undeniable fact that the Constitution’s Framers initially opted to protect property, including enslaved Africans in that category, through the Fifth Amendment. Those committed to racial equality also had to overlook the political motivations for the Civil War Amendments—self-interest motivations almost guaranteeing that when political needs changed, the protection provided the former slaves would not be enforced. Analogize this situation with that presented in Bakke. Arguably the Court ruled as it did because of the anti-affirmative action rhetoric sweeping the political landscape. In [conformity] with past practice, protection of black rights is now predictably episodic. For these reasons, both the historic pattern and its contemporary replication require review and replacement of the now defunct racial equality ideology.

Racism translates into a societal vulnerability of black people that few politicians . . . seem able to resist. And why not? The practice of using blacks as scapegoats for failed economic or political policies works every time. The effectiveness of this “racial bonding” by whites requires that blacks seek a new and more realistic goal for our civil rights activism. It is time we concede that a commitment to racial equality merely perpetuates our disempowerment. Rather, we need a mechanism to make life bearable in a society where blacks are a permanent, subordinate class. Our empowerment lies in recognizing that Racial Realism may open the gateway to attaining a more meaningful status.

Some blacks already understand and act on the underlying rationale of Racial Realism. Unhappily, most black spokespersons and civil rights organizations remain committed to the ideology of racial equality. Acceptance of the Racial Realism concept would enable them to understand and respond to recurring aspects of our subordinate status. It would free them to think and plan within a context of reality rather than idealism. The reality is that blacks still suffer a disproportionately higher rate of poverty, joblessness, and insufficient health care than other ethnic populations in the United States. The ideal is that law, through racial equality, can lift them out of this trap. I suggest we abandon this ideal and move on to a fresh, realistic approach.
Casting off the burden of equality ideology will lift the sights, providing a bird’s-eye view of situations that are distorted by race. From this broadened perspective on events and problems, we can better appreciate and cope with racial subordination.

While implementing Racial Realism we must simultaneously acknowledge that our actions are not likely to lead to transcendent change and, despite our best efforts, may be of more help to the system we despise than to the victims of that system we are trying to help. Nevertheless, our realization, and the dedication based on that realization, can lead to policy positions and campaigns that are less likely to worsen conditions for those we are trying to help, and will be more likely to remind those in power that there are imaginative, unabashed risk-takers who refuse to be trampled upon. Yet confrontation with our oppressors is not our sole reason for engaging in Racial Realism. Continued struggle can bring about unexpected benefits and gains that in themselves justify continued endeavor. The fight in itself has meaning and should give us hope for the future.

I am convinced that there is something real out there in America for black people. It is not, however, the romantic love of integration. It is surely not the long-sought goal of equality under law, though we must maintain the struggle against racism else the erosion of black rights will become even worse than it is now. The Racial Realism that we must seek is simply a hard-eyed view of racism as it is and our subordinate role in it. We must realize, as did our slave forebears, that the struggle for freedom is, at bottom, a manifestation of our humanity that survives and grows stronger through resistance to oppression, even if that oppression is never overcome.

Notes

1. Consider the following responses:

   I agree, in principle, with Bell’s timely philosophy. [It is risky to rely] on a system of constitutional equality that excludes so much and so many from its reach. Moreover, the adherence to, and faith in, a system of rights without an understanding of the politicization of those rights foreshadows political immobilization and impotence. The complexities of current civil rights events underscore the need for an ideological approach and perspective that incorporates our post-Brown experiences into a civil rights strategy for the millennium.

   Linda S. Greene, Civil Rights at the Millennium—A Response to Bell’s Call for Racial Realism, 24 Conn. L. Rev. 499, 500 (1992).

   Racial Realism fails to examine the transformative role of equality. Worse, it does not seriously address any alternative. While Professor Bell is aware of the dangers of rights rhetoric, he does not acknowledge the risk in giving up this language. This latter risk is all the more problematic, given the [existing] racial power imbalance. Professor Williams, in her critique of the [cls] attack on rights, reminds us that it is not the exercise of false rights that has injured blacks, but the denial to blacks of rights extended to others. Bell’s idealism causes him to

The following materials offer further ways to look at white innocence and privilege.

**Stephanie M. Wildman, with Adrienne D. Davis**

**Making Systems of Privilege Visible, in**

**Privilege Revealed: How Invisible Preference Undermines America** 9-24 (Stephanie Wildman et al., 1996).

**How Language Veils the Existence of Systems of Privilege**

Race and gender are, after all, just words. Yet when we learn that someone has had a child, our first question is usually “Is it a girl or a boy?” Why do we ask that, instead of something like “Are the mother and child healthy?” We ask, “Is it a girl or a boy?” according to philosopher Marilyn Frye, because we do not know how to relate to this new being without knowing its gender. Imagine how long you could have a discussion with or about someone without knowing her or his gender. We place people into these categories because our world is gendered.

Similarly, our world is also raced, and it is hard for us to avoid taking mental notes as to race. We use our language to categorize by race, particularly, if we are white, when that race is other than white. Marge Shultz has written of calling on a Latino student in her class. She called him Mr. Martinez, but his name was Rodriguez. The class tensed up at her error; earlier that same day another professor had called him Mr. Hernandez, the name of the defendant in the criminal law case under discussion. Professor Shultz talked later with her class about her error and how our thought processes lead us to categorize in order to think. She acknowledged how this process leads to stereotyping that causes pain to individuals. We all live in this raced and gendered world, inside these powerful categories, that make it hard to see each other as whole people.

But the problem does not stop with the general terms “race” and “gender.” Each of these categories contains the images, like an entrance to a tunnel with many passages and arrows pointing down each possible path, of subcategories. Race is often defined as black and white; sometimes it is defined as white and “of color.” There are other races, and sometimes the categories are each listed, for example, as African American, Hispanic American, Asian American, Native American, and White American, if whiteness is mentioned at all. All these words, describing racial subcategories, seem neutral on their face, like equivalent ‘titles. But however the subcategories are listed, however neutrally the words
are expressed, these words mask a system of power, and that system privileges whiteness.

* * *

Other words we use to describe subordination also mask the operation of privilege. Increasingly, people use terms like “racism” and “sexism” to describe disparate treatment and the perpetuation of power. Yet this vocabulary of “isms” as a descriptive shorthand for undesirable, disadvantageous treatment creates several serious problems.

First, calling someone a racist individualizes the behavior and veils that racism can occur only where it is culturally, socially, and legally supported. It lays the blame on the individual rather than the systemic forces that have shaped that individual and his or her society. Whites know they do not want to be labeled racist; they become concerned with how to avoid that label, rather than worrying about systemic racism and how to change it.

Second, the isms language focuses on the larger category, such as race, gender, sexual preference. Isms language suggests that within these larger categories two seemingly neutral halves exist, equal parts in a mirror. Thus black and white, male and female, heterosexual and gay/lesbian appear, through the linguistic juxtaposition, as equivalent subparts. In fact, although the category does not take note of it, blacks and whites, men and women, heterosexuals and gays/lesbians are not equivalently situated in society. Thus the way we think and talk about the categories and subcategories that underlie the isms allows us to consider them parallel parts, and obscures the pattern of domination and subordination within each classification.

Similarly, the phrase “isms” itself gives the illusion that all patterns of domination and subordination are the same and interchangeable. The language suggests that someone subordinated under one form of oppression would be similarly situated to another person subordinated under another form. Thus, a person subordinated under one form may feel no need to view himself or herself as a possible oppressor, or beneficiary of oppression, within a different form. For example, white women, having an ism that defines their condition—sexism—may not look at the way they are privileged by racism. They have defined themselves as one of the oppressed.

Finally, the focus on individual behavior, the seemingly neutral subparts of categories, and the apparent interchangeability underlying the vocabulary of isms all obscure the existence of systems of privilege and power. It is difficult to see and talk about how oppression operates when the vocabulary itself makes these systems of privilege invisible. “White supremacy” is associated with a lunatic fringe, not with the everyday life of well-meaning white citizens. “Racism” is defined by whites in terms of specific, discriminatory racist actions by others. The vocabulary allows us to talk about discrimination and oppression, but it hides the mechanism that makes that oppression possible and efficient.
It also hides the existence of specific, identifiable beneficiaries of oppression, who are not always the actual perpetrators of discrimination. The use of isms language, or any focus on discrimination, masks the privileging that is created by these systems of power.

Thus the very vocabulary we use to talk about discrimination hides these power systems and the privilege that is their natural companion. To remedy discrimination effectively we must make the power systems and the privileges they create visible and part of our discourse. To move toward a unified theory of the dynamics of subordination, we have to find a way to talk about privilege. When we discuss race, it needs to be described as a power system that creates privileges in some people as well as disadvantages in others. Most of the literature has focused on disadvantage or discrimination, ignoring the element of privilege. To really talk about these issues, privilege must be made visible.

* * *

WHAT IS PRIVILEGE?

* * *

When we try to look at privilege we see several elements. First, the characteristics of the privileged group define the societal norm. Second, privileged group members can rely on their privilege and avoid objecting to oppression. For both reasons, privilege is rarely seen by the holder of the privilege.

The characteristics and attributes of those who are privileged group members are described as societal norms—as the way things are and as what is normal in society. This normalization of privilege means that members of society are judged, and succeed or fail, measured against the characteristics that are held by those privileged. The privileged characteristic is the norm; those who stand outside are the aberrant or “alternative.”

* * *

Members of the privileged group gain greatly by their affiliation with the dominant side of the power system. This affiliation with power is not identified as such; often it may be transformed into and presented as individual merit. Legacy admissions at elite colleges and professional schools are perceived to be merit-based, when this process of identification with power and transmutation into qualifications occurs.¹ Achievements by members of the privileged group are viewed as the result of individual effort, rather than privilege.

* * *

Members of privileged groups can opt out of struggles against oppression if they choose. Often this privilege may be exercised by

1. Eds. note: Legacy admissions allow in sons and daughters of wealthy alums or donors.
silence. At the same time that I was an outsider in jury service, I was also a privileged insider. During voir dire, each prospective juror was asked to introduce herself or himself. The plaintiff's and defendant's attorneys then asked additional questions. I watched the defense attorney ask each Asian-looking male prospective juror if he spoke English. No one else was asked. The judge did nothing. The Asian American man sitting next to me smiled and flinched as he was asked the question. I wondered how many times in his life he had been made to answer it. I considered beginning my own questioning by saying, "I'm Stephanie Wildman, I'm a professor of law, and yes, I speak English." I wanted to focus attention on the subordinating conduct of the attorney, but I did not. I exercised my white privilege by my silence. I exercised my privilege to opt out of engagement, even though this choice may not always be consciously made by someone with privilege.

Depending on the number of privileges someone has, she or he may experience the power of choosing the types of struggles in which to engage. Even this choice may be masked as an identification with oppression, thereby making the privilege that enables the choice invisible. The holder of privilege may enjoy deference, special knowledge, or a higher comfort level to guide societal interaction. Privilege is not visible to its holder; it is merely there, a part of the world, a way of life, simply the way things are.

Although different privileges bestow certain common characteristics (membership in the norm, the ability to choose whether to object to the power system, and the invisibility of its benefit), the form of a privilege may vary according to the power relationship that produces it. White privilege derives from the race power system of white supremacy. Male privilege and heterosexual privilege result from the gender hierarchy. Class privilege derives from an economic, wealth-based hierarchy. Examining white privilege from the perspective of one who benefits from it, Peggy McIntosh has found it "an elusive and fugitive subject. The pressure to avoid it is great." She defines white privilege as

an invisible package of unearned assets which [she] can count on cashing in each day, but about which [she] was "meant" to remain oblivious. White privilege is like an invisible weightless knapsack of special provisions, assurance, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks.

McIntosh identified forty-six advantages available to her as a white person that her African American coworkers, friends, and acquaintances could not count on. Some of these include being told that people of her color made American heritage or civilization what it is; not needing to educate her children to be aware of systemic racism for their own daily protection; and never being asked to speak for all people of her racial group.

* * *
The identification of class structures and class privilege is rendered difficult in modern American society because of the myth that the United States is a classless society. Discrimination based on race, sex, and other power systems is considered illegal, but discrimination based on wealth has been interpreted as permissible by the Constitution. In a society where basic human needs, such as food, clothing, and shelter, can be met only with money, the privilege of class and wealth seems clear.

In spite of the pervasiveness of privilege, antidiscrimination practice and theory have generally not examined it and its role in perpetuating discrimination. One notable exception is Kimberlé Crenshaw, who has explained, using the examples of race and sex, that

Race and sex ... become significant only when they operate to explicitly disadvantage the victims; because the privileging of whiteness or maleness is implicit, it is generally not perceived at all.

Antidiscrimination advocates focus only on one portion of the power system, the subordinated characteristic, rather than seeing the essential links between domination, subordination, and the resulting privilege.

Adrienne Davis writes:

Domination, subordination, and privilege are like three heads of a hydra. Attacking the most visible heads, domination and subordination, trying bravely to chop them up into little pieces, will not kill the third head, privilege. Like a mythic multi-headed hydra, which will inevitably grow another head if all heads are not slain, discrimination cannot be ended by focusing only on subordination and domination.

Subordination will grow back from the ignored head of privilege, yet the descriptive vocabulary and conceptualization of discrimination hinders our ability to see the hydra head of privilege. What is not seen cannot be discussed or changed. Thus to end subordination, one must first recognize privilege. Seeing privilege means articulating a new vocabulary and structure for antisubordination theory. Only by visualizing this privilege and incorporating it into discourse can people of good faith combat discrimination.

**Visualizing Privilege**

For me the struggle to visualize privilege has most often taken the form of the struggle to see my white privilege. Even as I write about this struggle, I fear that my own racism will make things worse, causing me to do more harm than good. Some readers may be shocked to see a white person contritely acknowledge that she is racist. I do not say this with pride. I simply believe that no matter how hard I work at not being racist, I still am. Because part of racism is systemic, I benefit from the privilege that I am struggling to see.

Whites do not look at the world through a filter of racial awareness, even though whites are, of course, members of a race. The power to
ignore race, when white is the race, is a privilege, a societal advantage. The term "racism/white supremacy" emphasizes the link between discriminatory racism and the privilege held by whites to ignore their own race. As bell hooks explains, liberal whites do not see themselves as prejudiced or interested in domination through coercion, yet "they cannot recognize the ways their actions support and affirm the very structure of racist domination and oppression that they profess to wish to see eradicated." . . . All whites are racist in this use of the term, because we benefit from systemic white privilege. Generally whites think of racism as voluntary, intentional conduct, done by horrible others. Whites spend a lot of time trying to convince ourselves and each other that we are not racist. A big step would be for whites to admit that we are racist and then to consider what to do about it.

* * *

Privilege can intersect with subordination or other systems of privilege. Seeing privilege in this way is complicated by the fact that there is no purely privileged or unprivileged person. Most of us are privileged in some ways and not in others. A very poor person might have been the oldest child in the family and exercised power over his siblings. The wealthiest African American woman, who could be a federal judge, might still have racial, sexist epithets hurled at her as she walks down the street. The experience of both privilege and subordination in different aspects of our lives causes the experiences to be blurred, and the presence of privilege is further hidden from our vocabulary and consciousness . . . . An African American woman professor may act from the privilege of power as a professor to overcome the subordination her white male students would otherwise seek to impose on her. Or a white female professor may use the privilege of whiteness to define the community of her classroom, acting from the power of that privilege to minimize any gender disadvantage that her students would use to undermine her classroom control. Because the choice to act from privilege may be unconscious, the individual, for example, the white female professor, may see herself as a victim of gender discrimination, which she may in fact be. But she is unlikely to see herself as a participant in discrimination for using her white privilege to create the classroom environment . . . .

Imagine intersections in three dimensions, where multiple lines intersect. From the center one can see in many different directions. Every individual exists at the center of these multiple intersections, where many strands meet.

* * *

No individual really fits into any one category; rather, everyone resides at the intersection of many categories. Categorical thinking makes it hard or impossible to conceptualize the complexity of an individual. The cultural push has long been to choose a category. Yet forcing a choice results in a hollow vision that cannot do justice.
Justice requires that we see the whole person in her or his social context, but the social contexts are complicated. Subordination cannot be adequately described with ordinary language, because that language masks privilege and makes the bases of subordination themselves appear linguistically neutral. As a result the hierarchy of power implicit in words such as “race,” “gender,” and “sexual orientation” is banished from the language. Once the hierarchy is made visible, the problems remain no less complex, but it becomes possible to discuss them in a more revealing and useful fashion.

Notes

1. Is minority racial status possible only in a society where whiteness is the norm and white privilege quietly reigns? In other words, are whiteness (preferred/privileged) and blackness (despised/stigmatized) mutually dependent notions that can only be understood, and that only operate, in reference to each other? If they would not exist without each other, it might seem that the first order of business for a society committed to antiracism is to come to grips with whiteness and its dominance. For a classic discussion of white privilege, listing several dozen specific situations in which white people may count on convenient, civilized, or courteous treatment that their nonwhite counterparts cannot always be sure of, see Peggy McIntosh, White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences through Work in Women’s Studies (1988).

2. Can any useful comparisons be drawn between the unearned privilege Wildman discusses and contract theories of unjust enrichment and equitable estoppel? How does the unearned privilege granted whites and men of color compare to the unearned privilege allegedly bestowed upon beneficiaries of affirmative action?

3. But coming to terms with whiteness may collide with forces running the other way. Consider the words of Ian Haney López:

Careful examination of the prerequisite cases [for citizenship] . . . leads to the argument for a self-deconstructive White race-consciousness. This examination suggests as well, however, a facet of Whiteness that will certainly foreclose its easy disassembly: the value of White identity to Whites. The racial prerequisite cases are, in one possible reading, an extended essay on the great value Whites place on their racial identity . . . (D)isturbing facets of judicial inquietude, clearly evident in Osewa and Thind, arguably belie not simple uncertainty in judicial interpretation but the deep personal significance to the judges of what they had been called upon to interpret, (namely) the terms of their own existence. Wedded to their own sense of self, they demonstrated themselves to be loyal defenders of Whiteness . . . . The value of Whiteness to Whites probably insures the continuation of a White self-regard predicated on racial superiority.

Ian F. Haney Lopez, White by Law, in Critical Race Theory: The Cutting Edge 626 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000). (Eds. note: Osewa v. United States, 260 U.S. 178 (1922), and United States v. Thind, 261 U.S. 204 (1923), are Supreme Court decisions in the “racial prerequisite” line mentioned supra.)