# Knowing Your Rights: Implications of the Critical Legal Studies Critique of Rights for Indigenous Australians

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*Human rights are the foundation on which social justice rests, encompassing virtually every sphere of life – social, cultural, economic, political and civil. Name any issue of concern to Aboriginal people and it relates to human rights, because at the heart of social justice issues are the experiences and suffering of Aboriginal peoples and Torres Strait Islanders ... Everybody has a fair idea of what human rights means. Human rights are about having the opportunity to live as we would choose to live, without gross interference or violation, and having reasonable means to do so.*[1]

In much the same way that the United States civil rights movement engendered a deep sense of pride and solidarity amongst African Americans, indigenous Australians have been and continue to be empowered by a growing awareness of and resort to human rights discourse as a means of challenging systemic disadvantage and discrimination. While the civil rights movement was very much an organic, African American freedom struggle, the human rights movement claims legitimacy through its appeal to universal, inalienable truths. According to Robert Williams, a Lumbee Indian and Professor of Law, 'the global movement for human rights is redefining the world as we know it'.[2] Indigenous peoples, cognizant of the inherent limitations of international law remedies, consider that international law will be integral to the establishment of minimum standards for governments and will provide opportunities for indigenous peoples to take action when governments fail to meet those standards.[3]

Indigenous Australians have far greater access to rights discourse and norms than ever

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1 Dodson M, 'Aboriginal and Torres Strait Islander People and Human Rights', speech delivered to Wollongong University, 7 September, 1993.

2 Williams R, 'Encounters on the frontiers of international human rights law: redefining the terms of indigenous peoples' survival in the world' (1990) 4 *Duke Law Journal* 661 at 662.

3 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Third Report 1995* AGPS, Canberra, 1995 p 60.

before. There is a multitude of materials on rights available, ranging from government community awareness packages, to self help guides produced by non-government organisations such as the Australian Youth Foundation.[4] As shall be discussed, the effect of this 'grass roots' spread of human rights has normative implications for the indigenous community. The rise of rights awareness has been accompanied by a persuasive school of legal thought that highlights the inherent problems associated with reliance upon rights discourse by those involved in the ongoing struggles of social movements. In contemporary legal thought, the Critical Legal Studies (CLS) theorists have developed a reputation as vehement and sophisticated opponents of rights discourse. While it is important to avoid generalising the complexity of CLS literature, it is possible to identify a common belief amongst CLS theorists that rights discourse is not just a diversion from 'real' (political) issues, but is positively harmful to oppressed groups.[5] CLS scholars pose a challenge to oppressed minorities to abandon rights discourse in favour of more 'constructive' efforts to build social movements aimed to the elimination of all forms of oppression. One aspect of this change of approach is the need to avoid the terminology of rights in favour of arguments for 'material needs'.

Professor Kimberley Williams Crenshaw, an advocate of critical race theory, rejects the calls by the CLS theorists for a return to the use of emotive arguments about the 'material needs' and plight of oppressed peoples. In her view, while such arguments may support awareness-raising strategies, their value in transforming the law is questionable. Crenshaw argues that even though rights discourse may have legitimated racial inequality, that same discourse has been effectively used to secure entry into forums of power as formal equals and in the empowerment of minority 'movements' in the face of constant state oppression. She observes that the:

> critics are correct in observing that engaging in rights discourse has helped to deradicalise and co-opt the challenge. Yet, they fail to acknowledge the limited range of options presented to Blacks in a context where they were deemed 'other' and the unlikelihood that specific demands for inclusion and equality would be heard if articulated in other terms.[6]

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4 See for example, Gawler J, *Tracking your rights*, 2nd ed, Human Rights and Equal Opportunity Commission, Sydney, 1997 reprint. See also Barker B, *Getting Government to listen: A guide to the international human rights system for Indigenous Australians*, Australian Youth Foundation, Sydney, 1997.

5 Crenshaw K W, 'Race, Reform and Retrenchment: Transformation and Legitimization in Anti Discrimination Law' (1988) 101 *Harvard Law Review* 1331, 1352-56. See Williams R 'Taking Rights Aggressively: The Perils and Promises of CLS for People of Colour' (1987) 5:1 *Law and Inequality* 103.

6 Crenshaw K W, above, 1355.

Thus, while the critical race theorists oppose the preference of the liberal legalists for 'patience, vigilance, liberal legalism and measured progress' at the expense of human rights gains, CLS scholars on the other hand suggest that human rights gains will never address the underlying causes of subjugation and alienation of society's oppressed. Williams, rejecting the rhetoric of the CLS school, argues that 'why any legal academics would discount the usefulness of such proven, liberating forms of discourse in the particular society they serve from their positions of privilege is a curious and contentious question'.[7] Despite these theoretical jousts about the value of rights, indigenous peoples remain committed to their pursuit.

## Rise of rights

*International human rights law is founded on the concept of a universal moral imperative. This ethical foundation, however, is tempered with a practical knowledge of human nature and history.*[8]

Rights discourse is considered to be an essential element of indigenous peoples claims as it:

- Provides for an empowering framework through which claims for justice may be asserted.

- Provides an alternative to the logic of 'welfarism' (that is, needs based claims for justice) that so pervade indigenous communities. Numerous indigenous rights advocates have commented that:

  > however benign the intention [of governments], policies which rest on the perception of need, are forms of destructive paternalism which subtly reinforce [indigenous] powerlessness. By contrast, the recognition of an entitlement to a right establishes a relationship of respect and is itself an act of empowerment.[9]

- Obliges states to recognise minimum standards of treatment based on inalienable and universal rights, which are not merely conferred at the

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7 Williams R, 'Encounters on the frontiers of international human rights law: redefining the terms of indigenous peoples' survival in the world', (1990) 4 *Duke Law Journal* 661 at 662.

8 Moses T, 'Address to Plenary Session 2: Indigenous Self-Determination' in Australian Council for Aboriginal Reconciliation, *Human Rights and Indigenous Australians: Proceedings of the Australian Reconciliation Convention, 26-28 May 1997(Book 3)* (1997) p 20.

9 Aboriginal Torres Strait Islander Social Justice Commissioner, *First Report 1994, APGS, Canberra, 1994 1, 38.*

discretion of a benevolent government or dependent on public good will. Only legitimate countervailing interests may derogate from such standards.

- Recognises the entitlement of indigenous peoples to distinct and equal rights. In practical terms, indigenous people can expect to be treated in a non-discriminatory manner in the enjoyment of rights and pursue their distinct rights, such as the right to self-determination. [10]

## International movement for indigenous rights

As a result of the persistence and skillful advocacy by indigenous peoples representatives on the international stage, various governments and United Nations treaty-and charter-based bodies are increasingly acknowledging the significance of indigenous peoples rights claims. It is possible to regard this process as a gradual recognition of indigenous norms within a positivist setting. Professor Richard Delgado regards counter-narratives to be a powerful means by which oppressed groups can undermine governing presuppositions that make social structures seem fair and natural. He suggests that 'the cure is story: telling counter-stories which challenge the received wisdom'.[11] Delgado's thesis may be applied to an indigenous context. The cultural norms of indigenous peoples, evident in oral cosmology and customary law, are the source of indigenous 'counter stories'. Such stories are effectively used in the native title process to legitimise claims to traditional connection to land. The 'received wisdom' of the common law now recognises indigenous stories as a valid basis of claim to traditional land. At the international level, the 'counter stories' of indigenous people may infuse, challenge and graphically stir positivist logic in ways which more conventional discourse cannot. 'They are the

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10 Professor Anaya, Special Council, Indian Law Resource Centre, regards the right of self-determination as a critical, distinct right of all indigenous peoples. Anaya asserts that the right of self determination, 'is an extra-ordinary regulatory vehicle in the contemporary international system, broadly establishing rights for the benefit of all peoples, including indigenous peoples it enjoys the incidents and legacies of human encounter and interaction to conform with the essential idea that all are equally entitled to control their own destinies. Self determination especially opposes, both prospectively and retroactively, patterns of empire and conquest.' See Anaya S J, 'Address to Plenary Session 2: Indigenous self-determination' in Australian Council for Aboriginal Reconciliation, Human Rights and Indigenous Australians: *Proceedings of the Australian Reconciliation Convention, 26-28 May 1997*,AGPS, Canberra 1997 pp 13, 18.

11 Delgado R, 'Storytelling for oppositionists and others: a plea for narrative' (1989) *87 Michigan Law Review* 2411.

other half – the destructive half – of the creative dialectic.'[12]

Before the creation of the UN draft declaration on the rights of indigenous peoples,[13] indigenous 'counter stories' had been largely ignored. It is no surprise then that International Labour Organisation (ILO) Conventions 107 and 169, the only conventions to deal explicitly with indigenous rights, are imbued with paternalistic overtones. ILO Convention 169, adopted in 1989, was intended to overcome the inherent flaws of ILO Convention 107 (1954) on the 'protection and integration of indigenous and other tribal and semi-tribal populations in independent countries.' ILO Convention 169 contains a number of positive features such as the recognition of indigenous peoples' rights to culture and land — however, it is fundamentally flawed by its failure to recognise indigenous peoples' rights to self-determination. Even if the Convention were to be ratified by Australia, CLS theorists would be likely to challenge such a move on the basis that the Convention represents an unacceptable compromise, at most a shallow victory, which should not be tolerated

## CLS Challenges to rights discourse

*Rights talk can be useful only until people discover the critique of rights. And no matter how hard the 'party of humanity' tries to hide the truth, its market value will lead our opponents to discover it.*[14]

The US 'branch' of the CLS movement grew out of and in reaction to social and political turmoil taking place across the globe in the 1960s and 1970s. The liberal ideal of the law as an abstract, neutral system based on shared social values did not reflect the deep political and racial divisions in US society. Those with an interest or participation in radical Marxist critiques of the social order, the civil rights

12 *Ibid.*

13 Responding to the perceived need to develop international standards which address the specific rights of indigenous peoples, between 1985 and 1994 the UN developed a Draft Declaration on the Rights of Indigenous Peoples. The Working Group on Indigenous Populations of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities sought, from its earliest meetings, to ensure direct indigenous participation in the process. As the Draft ascends through the levels of United Nations, the potential for indigenous influence will most likely be severely circumscribed. Despite these limitations, the Draft Declaration in its current form reflects the aspirations of indigenous people from around the world and lays the foundation for creating a space for indigenous 'counter stories' in a positivist setting.

14 Tushnet M 'An Essay on Rights' (1984) 62*Texas Law Review* 1, at 386.

movement, public law and anti-Vietnam moratoriums were particularly attracted to a new legal discourse which sought a more adequate explanation of the role of law in a racially and economically divided society.

The CLS movement has been described in various ways. Kennedy and Klare describe CLS as '... [a movement] generally concerned with the relationship of legal scholarship and practice to the struggle to create a more humane, egalitarian and democratic society. CLS scholarship has been influenced by a variety of currents in contemporary radical social theory, but does not reflect any agreed upon set of political tenets or methodological approaches'.[15] Tushnet characterises CLS as '... a political location for a group of people on the Left who share the project of supporting and extending the domain of the Left in the legal academy'.[16] Sparer celebrates CLS as the arrival of '... a left in legal academia, equipped with nascent theory.'[17] Hunt on the other hand, questions whether the CLS movement achieves a new, imaginative and liberating theoretical synthesis or if it is simply a form of 'jumbled, incoherent ecleticism.'[18]

While it is difficult to achieve a complete synthesis of theoretical views, considering the diverse traditions upon which the CLS authors draw, Hunt suggests that at minimum the CLS movement establishes the 'compatibility of the theoretical elements that are combined'.[19] CLS scholars confront the internal logic of law from a range of angles, drawing on legal realism and Marxism to introduce a new language and novel theories into the debate about law. Their project can be captured

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15 Kennedy D & Klare K E, 'A Bibliography of Critical Legal Studies' (1984) 2 *Yale Law Journal* 461. See also Kennedy D, 'Toward an Historical Understanding of Legal Consciousness: The Case of Critical Legal Thought in America 1850 – 1940' in Spritzer S (ed), *Research in Law and Sociology* ,vol 3, JAI Press, Greenwich, 1980 pp 3-4. See Kennedy D, 'Cost Benefit Analysis of Entitlement Problems : A Critique' (1981) 33 *Stanford Law Review* 387.

16 Tushnet M, 'Critical Legal Studies: A Political History' (1991) 5 *Yale Law Journal* 1515, 1516. Tushnet acknowledges the heterogeneity of the movement: '... critical legal studies can be understood as a political location notwithstanding the disagreement among participants in the movement'. (at 1517)

17 Sparer J, 'Fundamental human rights, legal entitlements and the social struggle: A friendly critique of the critical legal studies movement' (1984) 36 *Stanford Law Review* 509 at 574. See also Hutchinson A, and Monahan P, 'Law, politics and the critical legal scholars: The unfolding drama of American Legal Thought' (1984) 36 *Stanford Law Review* 199-246.

18 Hunt A, *Explorations in Law and Society: Towards a Constitutive Theory of Law*, Routledge, New York, 1993, p 222.

19 *Ibid* p 236.

in the phrase 'law is politics'.[20] Whilst the scope of the CLS critique of law and rights is constantly contested a number of dominant theoretical elements prevail, namely;

1. CLS challenges the idea that the law and the rights discourse is premised on universal truths. They assert that in fact the law reflects certain historical phenomena. This is exemplified by the notion that the recognition of particular rights is dependent on the presence of a certain set of social circumstances. CLS highlights the ongoing tension and contradiction between universal objectives and the desire to make abstract rights principles applicable to all particular needs, across all cultures.

2. The movement is highly critical of the manner in which the legal system seeks to protect and promote rights and creates a social environment in which rights are seen as a neutral and rational means of overcoming social inequalities. The state entices citizens to believe that rights are the dominant and legitimate normative mechanism for overcoming inequality and oppression. As a correlative, social movements are dissuaded from challenging the institutional and systemic causes of inequality that underlie the liberal social order. These so-called political forces are relegated to being invalid and radical. Thus 'rights' discourse is motivated by an underlying political agenda (including the promotion of a false consciousness and the pacification of dissent) to engender in 'the party of humanity' a desire for what is merely possible and not what is.

3. CLS scholars assert that rights are a contingent, unstable, controllable, and non-objective 'false representation' of the needs of the 'party of humanity', despite the rhetoric of law suggesting that all valid claims for rights can be balanced in a rational manner. Rights are established to appear to deliver neutral, predictable results through the construction of mechanisms that provide access for all. However, in reality they ultimately serve to strengthen the position of those in control. Any set of rights can be used to produce and justify competing or contradictory results. CLS scholars argue that humanities fantasy connection with rights is misplaced; in their view, rights can never really produce a particular result. Thus the rights discourse emerges from and helps to maintain the alienated character of our current social relations.[21]

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20 See Tushnet M , 'Critical Legal Studies: A Political History' (1991) 5 *Yale Law Journal* 1515 at 1517. Tushnet interprets this phrase to mean that once 'one understands the moral, epistemological, and empirical assumptions embedded in any particular legal claim, one will see that those assumptions operate in the particular setting in which the legal claim is made to advance the interest of some identifiable political groupings.' (at 1517)

21 Gabel P, 'The phenomenology of rights consciousness and the pact of the withdrawn selves' (1984) 62 *Texas Law Review* 1563 at 1567.

4. CLS recognises that rights discourse is inherently alienating. Rights are granted by and under the surveillance of the state. The state sanctions certain actions that are only permitted as an 'exercise of rights'.

The movement is not devoid of critics; critical race theorists such as Williams, Delgado and Bell have criticised the inability of the majority of white, male theorists to adequately reflect culturally relativistic opinions by their oversimplified and highly problematic dismissal of rights. Critical Race Theorists (CRT) allege that CLS theorists fail to recognize the hypocrisy of their universalising assumptions which are informed by their very own value judgments and world view.[22] These ideas will be explored in the critique of rights debate below.

## CLS critique of law and rights

According to traditional liberal theory, rights are the assertion of a moral and perhaps legal entitlement, and are essential for the functioning of social order.[23] The Jeffersonian notion of law as protector of the individual from state encroachment is constantly reinforced in popular discourse and by the legal system, which reifies notions of democracy, individual rights and negative freedoms as valid social goals.[24]According to Tushnet 'the liberal theory of rights forms a major part of the cultural capital that capitalism's culture has given us'.[25]

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22 See Matsuda M, Lawrence C, Delgado R, Williams K, Crenshaw I, *Words That Wound : Critical Race Theory, Assaultative Speech and the First Amendment*, Westview Press, Boulder (1993) p 1.

23 Gaze B and Jones M *Law, Liberty and Australian Democracy*, Law Book Company, Sydney (1990) p 9.

24 Both Hobbes T in *Leviathan* (1641) and Locke J in *Two Treaties on Government* (1689) emphasis the state's integral role in the maintenance of the 'social contract', a means of circumscribing state intervention into the hallowed realm of individual liberty. Mills on the other hand derives his theory of rights, not from an emotional perspective, but on utilitarian grounds. On rights, Mills and his followers assert that, 'in the part which merely concerns himself (sic), his independence is, of right, absolute. Over himself, over his own body and mind the individual is sovereign ...' Mills JS 'On Liberty, Chapter 1' in Gaze B and Jones M, *Law Liberty and Australian Democracy*, Law Book Company, Sydney (1990) p 7. Mills' notions of individual liberty governs the rights to conscience, opinion, speech, freedom to pursue our lives to suit our own character, and freedom of association. He concludes that, 'no society in which these liberties are not, on the whole, respected is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified': p 7. For Mills, liberty is causally linked to the idea of utilitarianism.

25 Tushnet M 'An Essay on Rights' (1984) 62 *Texas Law Review*, 1363.

In refusing to acquiesce to the assumptions that law and rights are based on neutral community consensus and are the most valid assertion of political goals, the CLS critique is aimed at undermining or at least demonstrating the highly contingent nature of the accepted traditional mythology about the nature of law and rights. If existing legal rules and rights are seen as contingent, the presumption that they are written on stone tablets is removed, allowing for replacement with more 'satisfactory' principles and movements. This critique is allegedly not a purely theoretical, disutile undertaking but rather is meant to be an 'act of creative destruction that may help us build societies that transcend the failures of capitalism'.[26]

'The law is not a bounded set of norms ... but part of a distinctive manner of imagining the real.'[27] The law produces social orders and is not merely an element or reflection of it.[28]Once an issue is transformed into a legal issue it is said to become imbued with the 'mantle of objectivity and neutrality, its resolution appears value-free'.[29] However, there are inherent dangers associated with transforming indigenous needs for water, adequate health care and native title into legal entitlements or rights to these aspirations. Once again the spectre of legal rights and obligations clouds the true depth of the moral and political issues involved in resolving systemic inequality.

The false dichotomy of legal and moral issues is superfluous: 'what (legal) proponents describe as an alternative to politics is, in reality, the entrenchment of one particular political vision'.[30] Through centuries of gradual entrenchment, the attributes of rights are perceived to have an independent authority and influence separate from social conditions which produced them, as well as providing certain constraints on the way the law is to function and the way the law responds to particular circumstances:

> What becomes important for CLS scholars is the examination of how the legal imagination constrains the power of the 'material' transformation of society: this involves CLS investigation of how and why particular elements and rules of the legal system are given a privileged status and the effect this has on the structure of society.[31]

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26 *Ibid.*

27 Gabel P, 'The phenomenology of rights consciousness and the pact of the withdrawn selves' (1984) 62 *Texas Law Review* 1563 at 1577.

28 Tushnet M, as above, 1391.

29 Graycar R and Morgan J, *The Hidden Gender of the Law* Federation Press, Sydney (1990) p 56.

30 Petter A, 'Canada's Charter Flight : Soaring backwards into the future' (1995)16 *Journal of Law and Society* 151 at 161.

31 Frug G, 'A Critical Theory of Law' (1989) 43 *Legal Education Review* 292.

As the derivative of the natural law tradition, natural rights have been discredited by many, but none more forcefully than Marx. Marxist theory dismissed civil and political rights as bourgeois concepts that endorse state dominance of economic and social life. Thus:

> Human emancipation will only be complete when the real, individual man has absorbed into himself the abstract citizen; when as an individual man, in his everyday life, in his work, and in his relationships, he has become a species being; and when he has recognized and organized his own powers as social powers so that he no longer separates this social power from himself as political power.[32]

Furthermore, in Marx's most renowned critique of the concept of rights, *On the Jewish Question*,[33] he portrays rights as 'egotistic[al],' only serving to enhance the autonomy of the individual. Thus the collective is wrongly characterised as an impediment to the freedom of the individual. Marx envisaged a world in which the alienated 'man' and the oppressive social conditions making rights necessary would be eradicated.

While the CLS critique draws on the Marxist tradition, it can be distinguished from it to the extent that rights are not solely regarded as the product of capitalism nor would they be obsolete in a form of pure communism.[34] The philosophical basis and the practical application of rights have been challenged from a number of vantage points. Duncan Kennedy and Peter Gabel are at the fore of the CLS critique of rights, both suggesting that rights '... have no existence. They are shared, imaginary attributes that the group attributes to its members ... [they are a] hallucination'.[35] Gabel in particular has been instrumental in establishing a phenomenological critique of rights discourse that seeks to undermine the liberal tradition and the recent post-World War II explosion of rights fervor in which the common person (the oppressed minorities in particular) now claims a right to equal concern and respect for almost every aspect of existence.

The phenomenological critique of rights highlights the means by which the 'party of

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32 Marx K, *On the Jewish Question* (1845) p 44.

33 *Ibid* 46.

34 While the CLS movement sees some value in the acquisition of rights — for example, as a means of energizing social movements — the movement is adamant that the risks associated with their invocation outweigh their benefits. Rights are regarded as a subversive, state sanctioned mechanism aimed at pacifying political movements. See Kennedy D and Gabel P, 'Roll over Beethoven' (1984) 36:1 *Stanford Law Review* 1 at 26-27, 33-34, 37.

35 *Ibid* 35.

humanity' creates the illusion that our false selves are compelled to be alienated from each other. We tell ourselves that alienation is inevitable. Avoidance and fear of real connection between people has led us to create the illusion that rights can provide real connection, and that it is the state which must provide these rights. We look to the state to provide our unity and to determine how we exist in relation to each other as 'rights bearing citizens.' Thus the real world of humanity conceives the world of rights bearing citizens to be identical. To play this game, we must accept alienation.[36]

## Rights are indeterminate and incoherent

Under this model, law and politics are intended to be quite separate, because human rights/civil liberties law is based on objective application of 'universal truths', while politics depends on subjective decisions of policy.[37] CLS challenges these 'articles of faith' by suggesting that law is negotiable, that rights apply to different people in various ways, that rights wins are based on subjective values and that the language of rights pretends to display an internal logic that is not reducible to other value spheres. In fact, rights are as policy dependant as politics. The claim by the liberal state that rights discourse is a means of creating changes in social conditions is abhorrent to the CLS theorists who characterise the law as ideology. In asserting an abstract neutrality and rationality in the process of recognising rights, the law and its officers offer the guise of some comfort for the underprivileged. All the while, the effect of the invocation of rights is to undermine any purposive benefit that they may hope to achieve. Thus the ultimate effect of rights is a charade that legitimises the social order, affirming current legal structures as 'normal'.[38]

### *Technical indeterminacy/abstraction*

Rights are said to be technically and fundamentally indeterminate. Technical indeterminacy is evident in the use of the technical language of rights, that is, the specification of abstract legal rights in particular legal contexts. Fundamental indeterminacy consists of the tendency to describe rights only in particular social contexts.

Technical indeterminacy is basically the use of 'broad, universal and vague language' as a means of transforming everyday needs into a form of rights

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36 Gabel P 'The phenomenology of rights consciousness and the pact of the withdrawn selves' (1984) 62 *Texas Law Review* 1567.

37 Tushnet M 'An Essay on Rights' (1984) 62 *Texas Law Review* 1583.

38 Altman A *Critical Legal Studies: A Liberal Critique* Princeton University Press, Princeton (1990) 1, 22.

discourse that is supposedly more likely to precipitate social change because the terminology is 'acceptable' to the legal system. Thus the needs of indigenous peoples for land and economic and political self-empowerment become the rights to land and self-determination. According to Smart, more than meaning is lost in the process of translation.[39] CLS theorists argue that the resultant technical indeterminacy means that the reduction of all rights and other social factors to some measure of value is impossible and positively harmful.[40] Their major concern is the trivialisation and universalisation of facts and interests and real experiences that we ought to value for their own sake. Existential experiences become desiccated, alienated and reified as an instance of exercising one's rights, rather than embodied claims by those in need. The 'party of humanity' is co-opted into believing that the false consciousness generated by rights language is achieving material gains. In fact the reverse is true. This is aggravated by the gradual internalization of rights which fosters a sense that rights are ends in themselves. Tushnet asserts that while rights may be appropriate in the courtroom, they have the effect of nullifying solidarity in movements that are

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39 Smart C *The Problem of Right: Feminism and the Power of Law* Routledge, London (1989) p 140. Smart suggests that power differences cannot be resolved by the use of rights. While rights may empower the weak to some extent, abstract language cannot comprehend power relations, let alone change them. Rights language may draw attention to a particular situation or may have the opposite effect of having a disastrous effect on individuals. Rights simply exchange real problems of lack of water, housing and equal concern and respect for legal problems.

40 This does not mean that political organization disappears completely, but legislation on particular questions can have unintended effects. The legalisation of politics means that numerous issues of concern to indigenous peoples, such as the protection and preservation of traditional lands, are increasingly seen as legal questions to be settled through litigation. Litigation is fraught with dangers. While, 'the parties will get their legal rights, whatever they may be, which flow from the view of the facts and of the law which the courts find to be correct ... the difficulty in foretelling outcomes flows from uncertainty as to how the evidence will fall out and be viewed by the judge in a full scale confrontation, sometimes uncertainty as to the law or how it will be applied, and often uncertainty as to how long, expensive and stressful litigation will be.' See Wooten H, 'Mediating between Aboriginal Communities and Industry' Speech delivered to the *AIC Conference on Doing Business with Aboriginal Communities*, Darwin, 27 February 1996 p 4. Litigation also potentially has a 'chilling effect' by removing the opportunity for creative solutions to be canvassed, through negotiation and compromise with political figures. Indigenous peoples may regard resorting to litigation as the only source of justice.

committed to overcoming inequality in all of their insidious, pervasive forms.[41]

CLS theorists suggest that the aim of the reification and abstraction of social issues into rights discourse is aimed at making the real into a quantifiable, detached factor which can be easily balanced on the utilitarian scale. The inherent problem with this is that rather than being some neutral and self-evident process, the person who wants to 'recognise' a right can choose the necessary measure of value, the necessary consequences, and the necessary level of generality.[42]

In simple terms, the claim to a right to self-determination does not impart an immediately realisable gain for the 'party of humanity.' The abstract rights discourse may contribute to an overall environment of empowerment, but (according to Gabel and Kennedy[43] and Trubek [44]) it is not as effective as needs-based claims, which when fulfilled bring quantifiable, explicit change to the material conditions of life for the oppressed. Further, abstract and vague language has the dual possibility of promoting an expansive reading of particular rights or the alternative, a formal and narrow interpretation. Again the structure of rights is left to the determination of legal and state officials. It is allegedly impossible to connect a highly abstract right with a particular outcome without specifying a wide range of social arrangements that the proponents take for granted but that another person who believes in 'autonomy' might reject.[45]

Kairys' study of the US Supreme Court First Amendment cases attempts to demonstrate that freedom of speech cases, rather than supporting the interests of the underprivileged, in fact evidence a pattern of manipulation that seems to reinforce access to rights for the privileged.[46] He suggests that even if rights produce any determinate consequences at all, they are not fixed entities as they lack a determinate

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41 Tushnet M 'An Essay on Rights', (1984) 62 *Texas Law Review*, 1386 at 1377.

42 *Ibid.*

43 Kennedy D and Gabel P, 'Roll over Beethoven', (1984) 36:1 *Stanford Law Review* 1 at 34.

44 Trubek D 'Where the action is: critical legal studies and Empiricism' (1981)36 *Stanford Law Review*.

45 Fiskin J 'Justice, Equal Opportunity and the Family' in Tushnet M, 'Rights — An Essay in Informal Political Theory' (1989) 17 *Politics and Society* 390-405. Fiskin suggests that 'the effort to move from grand abstractions of "a theory of human rights" to a specification of determinate, particularized rights cannot succeed.'

46 Kairys D 'Freedom of Speech' in Kairys D (ed), *The Politics of Law: A Progressive Critique*, Pantheon Books, New York (1982) pp 140-141. See *Buckley v Valeo* 424 U.S. 1 (1976) 180; *Central Hudson Gas and Electric Corp. v Public Services Commission* 447 U.S. (1980) 557, in which the court held that commercial freedom of speech can outweigh concerns for public awareness of the problems associated with a particular use of energy.

content and thus may be manipulated to produce a required result. Opposing parties can use the same language to reach their particular ends. Aboriginal writer Alexis Wright highlights the ways in which rights discourse may be used by opposing sides in a practical context.[47] Her book provides a unique snapshot of an Aboriginal community in Tennant Creek with a strong identity, though plagued by alcohol abuse and its ancillary problems. In the course of her descriptions of community life, Wright details a debate over the possibility of banning alcohol in the community. Amongst the typical exchanges between the contesting parties, the indigenous residents asserted that the ban would 'be a violation of human rights'.[48] A number of community members argued that the 1967 referendum had given them 'the right to drink.'[49] All the while the publicans also claimed that any attempt to resist the sale of alcohol would be 'a violation of [their] human rights'.[50]Rights advocates and abusers have prostituted rights, each seeking to advance their particular interest while attempting to lend some authority to their arguments by invoking meta-norms.

### *Fundamental indeterminacy/decontextualisation*

Fundamental indeterminacy is related to technical indeterminacy and functions to define and constantly reshape the concept of rights. Thus rights are said to have no uniform, coherent meaning.[51] That is:

> The conditions of the society define exactly what kinds of rights talk makes sense, and the sort of rights talk that makes sense in turn defines what the society is.[52]

Individual freedoms depend on the state and social context within which they exist, and thus are constantly potentially threatened by it. They cannot be understood in the abstract because they are shored up by determinate socio-cultural boundaries. The international community is only beginning to respond to criticisms about its universalising assumptions. This argument is a significant element of the view of some Asian leaders that human rights are merely a Western, imperialist construct which does not correlate with Asian logic and social systems. What may be a right in a particular setting may not be in another.

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47 Wright A *Grog War* Magabala Books, Broome (1997) p 101.

48 *Ibid* p 93.

49 *Ibid* pp 62-63.

50 *Ibid* p 93.

51 Tushnet M 'Rights — An Essay in Informal Political Theory' (1989) 17 *Politics and Society* 390-405.

52 Olsen F 'Liberal rights and Critical legal theory' in Joeges C and Trubek D (eds), *Critical Legal Thought; An American – German Debate* Nomos, Baden-Baden (1989) p 253.

## Rights are alienating

Rights are viewed by the CLS movement not as constant, organically derived themes but rather the imposition of state condoned false consciousness which only makes sense in particular social settings. As Tushnet asserts, 'relatively small changes in the social setting accompanied by technological advance can mean that specific rights can easily become superfluous'.[53] The result is that while human rights norms may come and go and the description of indigenous peoples, rights to native title or self government may disappear and be replaced by alternative language, the core forms of oppression remain; that is, the structural forms of non- indigenous domination remain, making it difficult to sustain the claim that a right remains implicated.

The emphasis on individualism promoted by the liberal tradition is seen by CLS scholars as alienating and ignores the relational nature of social life. It has been suggested that the 'rhetoric' of rights is constantly problematised by the paradoxical situation in which the only reason for collective coercion is to ultimately protect individual freedoms.[54] This 'fundamental contradiction' in liberal legal theory causes inherent tension as 'relations with others are both necessary to and incompatible with our freedom'.[55] While it may be superfluous to discuss rights from the Marxist 'reductionist capitalistic' perspective alone, the language of rights is often framed in terms of individual rights — to act, to life, personal integrity, free speech and so on. Both international and domestic law adopts a similar frame of reference.[56] CLS scholars recognize that collective rights do exist, but that in the US in particular, 'the tug towards individualist construal of rights claims is quite strong'.[57] The rights movement ignores epiphenomenal

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53 Trubek D 'Where the action is: critical legal studies and Empiricism', (1981) 36 Stanford Law Review 1363.

54 Pritchard S 'The jurisprudence of human rights: Some critical thought and development in practice' (1995) 2:1 *Australian Journal of Human Rights* 1.

55 Kennedy D 'Critical Labor Law Theory : A comment' (1981) 4 *Industrial Law Journal* 503, 506.

56 See the *International Covenant on Civil and Political Rights* (1966), the *International Covenant on Economic, Social and Cultural Rights* (1988 and the *Universal Declaration of Human Rights* (1948). The French and Japanese governments have also maintained that at international law, there is no such thing as collective rights and that the protection and promotion of individual rights and freedoms should be the ultimate concern of the UN human rights system. See 'Government Statements' at the *Commission on Human Rights Working Group on the Draft Declaration on the Rights of the World's Indigenous Peoples, Session 2*, 1996.

57 Tushnet M 'Rights — An Essay in Informal Political Theory' (1989) 17 *Politics and Society* 409.

relations in favor of atomized, fragmented identities developed and exploited by post-Fordism.[58]

## Rights are reified and inhibit social transformation

*It is not just that rights talk does not do much good. In the contemporary United States, it is positively harmful. Rights are an impediment to progressive social forces, the party of humanity.*[59]

Perhaps the most forceful argument put forward by CLS theory is that rights discourse is little more than a rhetorical diversion, providing only an ephemeral advantage and masking the need for a more consistent claim for political and social change to material conditions of life. Rights discourse is an illusion because the party of humanity is fooled into believing that what should be, already is. What ultimately matters is not whether an individual exercises a particular right, but rather whether 'they engaged in politically effective action'.[60] 'If their action was politically effective, we ought to establish the conditions for its effectiveness, not because those conditions are 'rights' but because politically effective action is important.'[61]

The law has a tendency to transform feelings and needs of the 'party of humanity' into good legal arguments, the result of which is the transference of feelings into an ideological framework 'that co-opts them into adopting the very consciousness they want to transform'.[62] The law has the potential to reorder legal subjects out of groups traditionally marginalised, though at a cost, including heightened legal surveillance.[63] The result is that the false consciousness of rights suggests that true gains can be made by appealing to the state, further reinforcing 'the presumptive political legitimacy of the status quo'.[64] For those who seek to radically transform the social order or the institutionalization of a particular social phenomena such as patriarchy or racial prejudice, CLS argues that rights only serve to constrain movements and ultimately contribute to subduing a movement's transformative potential.[65]

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58 Pritchard S, as above, 45.

59 Tushnet M 'An Essay on Rights' (1984) 62 *Texas Law Review* 1364.

60 *Ibid* 1371.

61 *Ibid* 1371.

62 Kennedy D and Gabel P, 'Roll Over Beethoven' (1984) 36:1 *Standford Law Review* 1 at 33.

63 Smart C *Feminism and the Power of Law* Routledge, London (1989) p 143.

64 Kennedy D and Gabel P, as above.

65 Gabel P 'The phenomenology of rights consciousness and the pact of the withdrawn selves' (1984) 62 *Texas Law Review* 1563 at 1590.

Claims for rights supposedly evidence an inability of rights claimants to implement a practical politics of rights. In order to claim rights, social movements must be compliant and seek state recognition so that rights may be granted. This reaffirms the idea that the movement must be compatible with the political foundations of the status quo. It is suggested that to assert a legal right is to mischaracterise social experience and to assume the inevitability of social antagonism by affirming that social power rests in the state and not in the people who compose it.[66] The state is summoned to intervene, while any sense of social activism is relegated to the 'radicals.' The struggle is shifted away from the structural conditions at the root of inequality, to become individualistic, abstract and disempowering. 'Rights struggles are either examples of depoliticised culture or invocations of dangerous discourse.'[67]

Because we fear the reality of alienation, we subconsciously create a false consciousness in the form of the state, which we have reified and internalised, such that we believe it serves our interest and can overcome society's ills. This attribution of democratic consent forms the basis of our appeals to the state, and thus we become more reliant upon its benevolence and 'legitimate' authority from above. In fact, we are inadvertently reinforcing our own alienation from the true relations we desire amongst our fellow humanity. The effect is the dialectic of desire for true connection but fear of it, thus we constantly recreate the vicious circle from which we subconsciously seek to escape.

Gabel and Kennedy do not completely dismiss the value of rights. They suggest that in some instances the process of calling on the state to recognise a particular right may energise social movements. Both theorists concede that rights do focus attention on issues and are a means of attracting communal action. However, the trap is that the allure of rights may cause the 'party of humanity' to perceive their attainment as an end in itself. This false consciousness deceives oppressed groups such as indigenous peoples into accepting a minimal grant or Pyrrhic victory. Because rights discourse trivializes complex social issues and transforms them into juridical problems, the CLS theorists prefer informality — a restyling of arguments used by the oppressed. Instead of claims for the right to housing, the CLS movement would argue for the state to meet the needs of the homeless.[68] Gabel and Kennedy conclude

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66 Gabel P and Harris P 'Building power and breaking images: critical legal theory and the practice of law' (1982-83) *New York Review of Law and Social Change* 369, 375-6.

67 Pritchard S 'The Jurisprudence of Human Rights: Some critical thought and development in practice' (1995) 2(1) *Australian Journal of Human Rights* 1 at 10.

68 Williams P 'Alchemical notes: reconstructing ideals from deconstructed rights' (1987) 22.

that reliance on rights discourse can only promise (and never wholly deliver) an equitable and just society. They suggest that actual social progress can only be achieved by active people's movements. If the advice of Gabel and Kennedy is implemented by indigenous peoples, the desire for grand, abstracted rights must be replaced by a plan for the achievement of firm political goals and the creation of a long term social movement aimed at overcoming systemic barriers to indigenous advancement. Gabel and Kennedy conclude with the suggestion that the 'party of humanity' should 'keep [its] eye on power and not rights'.[69]

Rights claims upon legal processes leave unchallenged the factors integral and complicit in the politics of law and litigation, ensuring that the elements of legal discourse neutralize the effect of any limited benefits that can be claimed.[70] Another issue is the ability to exercise rights. This requires fundamental social change: '[we] have never presumed to ... guarantee the citizenry the most effective speech or the most informed electoral choice'.[71]

Unmasking rights also unmasks the source of power. Rights masquerade as strength, but reveal universal need. For example, indigenous peoples in Australia often blame the legal system as the source of problems in incarceration and deaths in custody, but while the legal system is implicated, it is not the underlying source of the problem. More significant are the sources of institutional racism — the social construction of 'Aboriginal deviance' — the forces which are not readily distinguishable, though they are ever present. In Canada, a number of critical legal scholars have suggested that the entrenchment of a Bill of Rights has resulted in 'the over-legislation of political debate ... which has led to a view of the state as *instrumental*, with the courts separate from this state and as pronouncing *self executing* rights decisions'.[72]

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*Harvard Civil Rights* – Civil Liberties Law Review 304, 401, 431. See also Williams P, 'The pain of word bondage' in Williams P (ed) *The Alchemy of Race and Rights* Harvard University Press, Cambridge (1993) pp 47-159.

69 Gabel P and Kennedy D 'Roll Over Beethoven' (1984) 36:1 *Stanford Law Review* 1 at 15.

70 Fudge J and Glasbeek H 'The politics of rights: a politics with little class' (1992) 1 *Social and Legal Studies* 45, 50.

71 *San Antonio Independent School District v Rodriguez* 411 US 1 (1973) in Tushnet M, 'An Essay on Rights' (1984) 62 *Texas Law Review* 1363 at1380.

72 Fudge J 'The effect of entrenching a Bill of Rights upon political discourse: Feminist demands and sexual violence in Canada' (1989) 17 *International Journal of the Sociology of Law* 445.

## Rights can be set off against each other

It is never absolutely clear whose interests or rights will win in a contest between competing claims to 'rights'. Rights are manipulatable and can be set off against one another.[73] When rights are stacked against each other the problems are intensified — it is difficult to gauge whether the rights to freedom of speech should always trump the right to not be racially vilified, for example. The recent *Wik* decision highlights the intrinsic problems that arise when the rights and interests of two diametrically opposed groups are set against each other.

Carol Smart raises the point that any claim for a particular right of a minority group will always be followed by subsequent claims by opposing parties. This is evident in the current backlash in Australia against rights for refugees and other subjugated groups who are seen to have benefited by the 'political correctness movement'.[74] Smart also identifies the related problem of rights being associated with self-interest. She evidences this claim by discussing radical women's groups in the United Kingdom who have been ostracized for claiming rights. Their claims lost some legitimacy because they were seen as yet another attempt by self-interested radicals to promote their cause. The resulting antagonism makes the development of rights more difficult and can in fact harm the long-term political goals of social movements. She suggests that rights may be replaced with assertions of 'needs' in order to avoid the trap of competing rights.

## International human rights deters domestic action

A frequent complaint in the indigenous community is that the UN is too far detached from the everyday struggles of indigenous peoples. Making claims on an international forum such as the Working Group on Indigenous Peoples creates a number of unique problems. Indigenous rights can only be elucidated in the most basic language which some suggest is vague and ineffective. Quite often, the debate can move to the international community at the expense of grassroots domestic action. Furthermore, the UN forum is principally concerned with the elaboration of international standards and is ineffective for the review of domestic

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73 Pritchard S 'The Jurisprudence of Human Rights: some critical thought and development in practice' (1995) 2:1 *Australian Journal of Human Rights* 1 at 12-15.

74 Tushnet M 'Rights: An essay in informal political theory' (1989) 17 *Politics and Society* 413-15. Tushnet refers to a 1967 study undertaken by Luker K which highlights the tendency for increased support for 'pro-life' organisations after the celebrated legal victories of pro-choice advocates.

developments, considering its low status in the UN hierarchy. Such a limited authority reinforces the view that indigenous rights are peripheral.

## Critics of the CLS critique

*... [I]n discarding rights altogether, one discards a symbol too deeply enmeshed in the psyche of the oppressed to lose without trauma and much resistance.*[75] *... Our objectives have not changed, but our strategies and methods will have to.*[76]

The modern movement for the creation of human rights norms is built on the basis of growing international consensus. Emerging from the movement is the notion that rights claims can be a valuable form of politics and a meaningful mechanism for the realisation of progressive social movements. Whilst there is acknowledgement of some of the structural and conceptual flaws implicit in discussion of rights, there is a tendency to highlight the positive effects of rights struggles upon individual consciousness and the mobilization of social movements. A wide range of groups is willing to challenge the hegemony of 'rights trashing'. There is nonetheless a body of thinkers who suggest that while rights discourse can be 'obfuscatory, individualistic and sometimes disempowering, they can also provide significant foci for resistance'.[77] Alan Hunt has criticised the 'pervading ambivalence to rights' exhibited by the left:

> the left can and must abandon its ambivalence towards rights, they are a field of engagement between alternative social and political objectives, and are at the same time important sources of mobilization and for securing political advances.[78]

## Symbolism

According to critical feminist and critical race theorists, the CLS theorists' staunch adherence to a dogmatic world view is evidence of their failure to truly understand the cultural and social implications of rights for marginalised members of the community. They suggest that rights have a symbolic (often underestimated) impact on social

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75 Williams P 'Alchemical Notes: reconstructing ideals from deconstructed rights' (1987) 22 *Harvard Civil Rights — Civil Liberties Law Review* 1.

76 *Ibid* 93.

77 *Ibid.*

78 Hunt A *Explorations in Law and Society: Towards a Constitutive Theory of Law* Routledge, New York (1993) 228. See Trubek D, 'Where the action is: critical legal studies and Empiricism' (1981) 36 *Stanford Law Review* 576.

movements. Indigenous peoples are a clear example of a group who, in the past 10 years, have embraced the human rights discourse as a tool for highlighting the failures of governments to recognize their needs. Mick Dodson, until recently the Social Justice Commissioner of HREOC, has commented that international human rights norms are valuable because:

> with little economic, industrial or political power, indigenous peoples [can call upon human rights standards] which encode the basic principles of universal justice ... to be a principal buffer between us and systematic discrimination by the state. Unfortunately the principle of democracy does not protect the rights of all peoples ... as a small minority.[79]

Dodson suggests that rights ensure that a state cannot exist in isolation, but rather is forced to take action on the basis of international pressures to conform. International human rights law is a mechanism for conflating the needs of indigenous peoples into arguments that strike a chord with deeply held beliefs of the 'party of humanity', and as a result are not so easily transgressed. CLS analysis would suggest that buying into this discourse serves only to further aggravate our alienation and false consciousness.[80] Nevertheless, Patricia Williams asserts that the rights discourse continues to be a source of hope. After fighting for access to rights, minorities are reluctant to relinquish them for the sake of radical theory:

> Rights feel so new in the mouths of most black people. It is still so deliciously empowering to say. It is a sign for and gift of selfhood that is very hard to contemplate restructuring ... at this point in history. It is the magic wand of visibility and invisibility, of inclusion and exclusion, of power and no power ... [81]

Margaret Minnow, a critical feminist theorist, also identifies the problem of denying the oppressed access to rights discourse:

> I worry about criticising rights and legal language just when they have become available

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79 Aboriginal and Torres Strait Islander Commissioner, *Third Report 1995* , AGPS, Canberra (1995) p 1, 43.

80 International human rights law advances the rights of indigenous peoples, principally by establishing standards against which governments actions may be gauged. For example, the United Nations Working Group Convention on Biological Diversity sets minimum standards with respect to the protection of indigenous peoples' intellectual property rights, see Articles 8(j) and 10(c).

81 Williams P 'The Pain of Word Bondage' in Williams P (ed) *The Alchemy of Race and Rights*, Harvard University Press, Cambridge (1991) p 153.

> to people who had previously lacked access to them. I worry about those who have, telling those who do not, 'you do not need it, you should not want it'.[82]

The value of rights is that rights can allow debate on legal and political choices without assuming a settled social agenda. Another important feature is the growing recognition that rights need not be framed in individualist, alienating language but can be in the form of communal action:

> a brave and fragile assertion that a weak community has rights against the strong ... affirms a community dedicated to invigorating words with a power to restrain, so that even the powerless can appeal to those words.[83]

## Pragmatism

CLS scholars contest that rights can only provide momentary gains in political struggles; that claims for integrated social justice are too often sacrificed for the short term goals of formal equality. Critical race theorists and critical feminist theorists retort that at least rights go some way to establishing the conditions by which oppressed groups can secure a seat at the negotiating table. To argue from the rights paradigm is to seek recognition from the state, as the ultimate arbiter of power relations and the grantor of rights, that a claim is worth official recognition. Legal rights are tradable commodities; their recognition can be traded in for particular benefits as well as being a bargaining chip for gaining further advances, a process which does not necessarily undermine the legitimacy of the claimant. While to some extent there is an inherent recognition of power imbalances in the assertion of rights it is an inescapable fact of the legal positivist world order. To suggest that all oppressed groups are co-opted by the hallucinatory pull of rights is to deny them their agency and their ability to pursue a range of actions, with rights as but one tool in an overall strategy for the advancement of a social movement.[84]

Elizabeth Schneider, a women's rights litigator, has suggested that rights are in fact very useful to the extent that they support rather than impede political actions:

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82 Minow M 'Interpreting rights: an essay for Robert Cover' (1987) 96 *Yale Law Journal* 1860, 1910.

83 *Ibid.*

84 In terms of the indigenous struggle for land rights, reliance on legal gains is but one element of an overall strategy for securing social justice. Indigenous groups frequently speak of the need to establish a social movement committed to advancing the issues of reconciliation and social justice.

> admittedly, rights discourse can reinforce alienation and individualism, and can constrict political vision and debate. But, at the same time, it can help to affirm human values, enhance political growth, and assist in the development of collective identity.[85]

Although it is accepted that rights language supplements a particular doctrinal formulation to a social problem, the effect is also to raise the awareness of issues, which for the majority of oppressed groups has a more substantial and ongoing effect.

Despite the foreboding thesis of the CLS movement that rights discourse can only result in minimal changes to the dominant paradigm, the *Toonen* case is an example of an action which enabled an individual (with the support of the international community) to secure the repeal of an anomalous discriminatory law. The views of the United Nations Human Rights Committee ultimately resulted in the repeal of a law that was deemed by the committee to have 'created the conditions for discrimination in employment, constant stigmatization, vilification, threats of physical violence and the violation of basic rights'.[86] Further, the action drew attention to homophobia in Tasmania, energised the gay rights lobby and established the conditions for further advancement of the movement. The then Attorney General Michael Lavarch commented that such UN induced action had long term effects in mobilizing the community as well as 'promot[ing] benefits for all Australians and a firm basis of principle which Australia would apply in considering ... human rights questions'.[87]

## Benefits of instability

Williams, while acknowledging that rights may be unstable and indeterminate, notes that they also provide protective distance. For those who are seen as the 'other', rights promote the idea that at least formally all persons are entitled to expect a certain level of equal concern and respect in their day-to-day relations. She suggests that rights are a powerful shield and protector of minimum standards which are constantly denied the oppressed. The assertion of a right can also be a positive act whereby the 'party of humanity' utilises abstract principles to establish claims for

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85 Schneider E M, 'The dialectics of rights and politics: perspectives from the women's movement' (1986) 61 *New York University Law Review* 589.

86 Views of the Human Rights Committee under Article 5, paragraph 4 of *the Optional Protocol to the ICCPR* – Fiftieth Session, Concerning Communication No. 488/1992. In CCPR/C/50/D/488/1992 on 31 March 1994, at para 2.4.

87 Lavarch M 'Why Canberra listens to UN wisdom on human rights' *The Australian*, 12 April 1994.

particular standards of treatment, from which no derogation is permitted:

> The vocabulary of rights speaks to an establishment that values the guise of stability, and from whom social change for the better must come (whether it is given, taken or smuggled).[88]

Even though rights provide the guise of stability critical race theorists recognize that their instability can still destabilise other establishment values such as racism.[89]

## Arguments for universalizing tendencies

While the minority groups are often the strongest critics of the critics, this is often to rebuke the essentialist views of the Eurocentic values implicit in the CLS movement.[90] In response to the argument of fundamental indeterminacy — that human rights are purely Western and are an intrusion into non-Western societies — Asian human rights non-governments organisations (NGOs) have consistently contradicted their governments' stances and reaffirmed the view of the international community that no meta-norms can trump universally applicable human rights standards. At the Bangkok NGO human rights meeting in 1993, the Asian NGOs reaffirmed their 'commitment to the indivisibility and interdependence of human rights, be they economic, social and cultural or civil and political'.[91] Even the Deputy Prime Minister of Malaysia, Anwar Ibrahim, acknowledges that 'to say that freedom is Western or un-Asian is to offend our own traditions as well as our forefathers who gave their lives in the struggle against tyranny and injustice'.[92]

## Disutility and social transformation

In challenging the rights 'disutility' argument the critical race theorists suggest that describing 'needs' for minorities is futile as a political activity:

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88 Williams P 'The pain of word bondage' in Williams P (ed) *The Alchemy of Race and Rights*, Harvard University Press, Cambridge (1991) p 148.

89 Matsuda M, 'Voices of America: accent, anti-discrimination law and a jurisprudence for the last reconstruction' (1990) 100 *Yale Law Journal* 1329.

90 Delagado R, 'The ethereal scholar: Does CLS have what minorities want? (1987) 722 *Harvard Civil Rights – Civil Liberties Law Review* 301, 304.

91 See the Bangkok *NGO Declaration on Human Rights*, 29 March 1993 which records the views of some 110 human rights organisations representing some 26 Asian Pacific countries.

92 Pritchard S 'The jurisprudence of human rights: Some critical thought and development in practice' (1995) 2(1) *AJHR* 1, 21.

> ... It has never been treated by white institutions as the statement of a political priority.[93]... The goal is to find a political mechanism that can confront the denial of need. At this level, the insistence of certain scholars that the 'needs' of the oppressed should be emphasized rather than their 'rights' amounts to no more than a word game.[94]

Smart suggests that rights are to be preferred over the 'plight' mentality. She insists that rights infer a level of autonomy and assertive strength, of while needs- based claims resonate with the idea of the helpless victim reliant on the grace of those in power.[95] The argument that rights are disutile, even harmful, trivializes this aspect of black experience, specifically, as well as that of any person or group whose vulnerability has been truly protected by rights.[96] She suggests that rights discourse for blacks imbues a sense of collective solidarity and a symbolic resonance that 'elevates one's status from human body to social being. [Rights signify] the collective responsibility, properly owed by a society to one of its own'.[97]

Groups that represent the victims of human rights often use juridical or at least rights discourse to forward their claims as a result of disenchantment with political processes. In the United States there is a long history of the Supreme Court being the only advocate willing to promote the rights of Native Americans, often against the wishes of Congress. As far back as the 1830s Chief Justice Marshall in *Worcester v Georgia*[98] forcefully supported Indian rights to be self-determining, independent political communities, against the directives of Congress. CLS scholars would suggest that, despite claims by the court to exercising neutral judgment, they were in fact executing coded political decisions. Furthermore, the desires for Indians to seek legal recognition served only to render their rights susceptible to being legally eroded by latent legislative actions.

Law helps overcome the sense of being illegitimate:

> It is this experience of having, for survival, to argue for our own invisibility in the passive, unthreatening rhetoric of 'no rights' which, juxtaposed with the CLS abandonment of rights theory, is both paradoxical and difficult for minorities to accept.[99]

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93 Wright A *Grog War*, Magabala Books, Broome (1997) p 151.

94 *Ibid* p 149.

95 Smart C, *The Problem of Right: Feminism and the Power of Law* Routledge, London (1989) p 1.

96 Wright A, as above p 152.

97 *Ibid* p 153.

98 *Worcester v Georgia* 31 US 530 (1832).

99 Williams P 'The pain of word bondage' in Williams P (ed) *The Alchemy of Race and Rights*, Harvard University Press, Cambridge (1991) p 158.

But the so-called failure of rights does not mean that informal mechanisms will ensure better outcomes. They too will eventually be plagued by the same unconscious and irrational forces that seek to undermine rights/formal discourse. According to Williams, the problem with rights 'is not that the discourse is itself constricting but that it exists in a constricted referential universe'.[100] While rights may not undermine power structures, they are useful in ascertaining or supplementing the obligations owed by those in power to those below. Overall, rights while not truly believed in by minorities, are still cherished, not just reified, but

> if it took this long to breathe life into a form whose shape had already been forged by society, and which is therefore idealistically if not ideologically accessible, imagine how long the struggle would be without even that sense of definition, without the power of that familiar vision.[101]

## Neo-liberal critique of the CLS critique

Dworkin asserts that fundamental notions of rights should not be 'trashed' merely because of a flawed methodology: 'the powerful ideas of human dignity ... that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community ... and the more familiar idea of political equality ... that all men (sic) have the same freedom'[102] are concepts which should transcend their current inadequacies. Dworkin submits that once rights are given a content so that they can be used analytically to establish a priority of claims, the problems associated with their assertion (and the CLS critique) will be superfluous. Dworkin acknowledges that humanity can lay claim to having

> certain fundamental rights against their government, certain moral rights made into legal rights ... which should only be limited if there is a 'sufficient justification' ... calculated to increase what the philosophers call general utility.[103]

Thus Dworkin reinforces the idea that rights are imbued with a meta norm quality, that it is worth the social cost in social policy or efficiency to respect human rights because 'principles always have priority over mere policies'.[104]

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100 *Ibid* p 162.

101 *Ibid* p 163.

102 Dworkin R *Laws Empire* Harvard University Press, Cambridge (1986) p 440-4.

103 Dworkin R 'Taking rights seriously' in Gaze B and Jones M, Law, *Liberty and Australian Democracy*, Law Book Company, Sydney (1990) p 11.

104 *Ibid* p 15.

## Indigenous rights

*[I]nternational human rights law is a powerful ally for indigenous peoples. For indigenous Australians international human rights laws are not just 'another set of laws'. International law has been and continues to be a principal buffer between us and systematic discrimination by the state.*[105]

A major problem with the 'needs'-based claims of indigenous peoples is that while governments may address certain social and economic issues, which in themselves are vitally important, such as the need for running water, adequate housing and so on, governments may regard the civil and political needs of indigenous peoples, such as the protection of traditional forms of governance, as of only peripheral importance. Rights discourse however, incorporates a notion of the indivisibility, interdependency and interrelationship of all human rights, that is the civil, political, social, cultural and economic.[106] Furthermore, rights discourse recognises indigenous peoples as a unique category of peoples, whose special status deserves recognition with specific political rights. These First peoples' rights:

> are not special or better rights, but are the rights to choose the direction and form of [indigenous] development. The right to preserve and develop [indigenous] cultures. The right to replace 'yes' with 'yes or no,' or 'yes under conditions which [indigenous peoples] have a say in determining'.[107]

There is some debate as to whether these unique rights can be included in the 'equality' paradigm. UN practice favours an approach to equality that respects the right to equal enjoyment of human rights whilst also having regard to the special cultural characteristics of indigenous peoples.[108] There is a mood amongst commentators that the assertion of indigenous rights must be recognised for their intrinsic value, and not because they happen to fall under the rubric of the 'equality frame.' Equality rights may be seen to imply that recognition of distinct rights are special grants and are only peripheral.

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105 Aboriginal and Torres Strait Islander Social Justice Commissioner: *Third Report 1995 AGPS Canberra* (1995) p 44.

106 See the Vienna Declaration adopted by the Second World Conference on Human Rights, Sec 1, para 5. Set forth in (1993) 14 *Human Rights Law Journal* 370.

107 Dodson M 'Indigenous rights and economic rationalism: dispelling some myths' Address to Australian Council of Social Services (1993)1, 4-5.

108 See for example Article 1(4) of the *United Nations Convention on the Elimination of All Forms of Racial Discrimination.*

The scope of the equality rights paradigm for protecting indigenous rights has been the subject of much debate both domestically and internationally. The *Racial Discrimination Act 1975* (Cth) provides for the recognition of rights that apply only to indigenous peoples under s 8 (1), the 'special measures' provision. The benefit of an expansive reading of s 8(1) is limited by the High Court's decision in *Gerhardy v Brown* where it was held that 'the sole purpose of securing adequate advancement of the beneficiaries is in order that they may enjoy and exercise equally with others' human rights and fundamental freedoms'.[109] While s 8 (1) will protect certain uniquely indigenous cultural rights, the *Racial Discrimination Act 1975* (Cth) can only be used as a defensive mechanism. Internationally there are many precedents for 'equality rights' encompassing *distinct* rights. For example, the Human Rights Committee in a *General Comment* in 1984 affirmed that:

> ... positive measures by states may also be necessary to protect the identity of the minority and the rights of its members to enjoy and to develop their culture and language and to practice their religion in community with other members of the group.[110]

With growing recognition of the distinct rights, it may be possible, over time, to avoid the problems associated with regarding all indigenous rights as 'special measures'. This trend is best demonstrated by the efforts of the Commission on Human Rights Working Group on the *Draft Declaration on the Rights of Indigenous Peoples* (the *Draft Declaration*) which is the leading international standard setting document that recognises the distinct status of indigenous rights.[111] The *Draft Declaration* was promulgated by the Working Group on Indigenous Populations in 1982[112] and is slowly making its way up the UN structural ladder, towards its final proclamation by the General Assembly as a Declaration. The *Draft Declaration* will be the most comprehensive and progressive statement on the rights of indigenous peoples. It will be symbolically important for indigenous peoples across the globe, reaffirming our unique status in the world order, and setting minimum standards for governments to observe. The *Draft Declaration* will not become 'hard law' in the sense that its contravention will not give rise to any

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109 *Gerhardy v Brown* (1985) 159 CLR 70 133 per Brennan J.

110 General Comments 23 (1994) para 6.2. Compilation of General Comments and General Records adopted by Human Rights Treaty Bodies, UN Doc HRI /Gen/1/Rev 1 (1994) 1, 40.

111 Resolutions and decisions adopted by the Commission at its 51st session, resolution 1995/32, E/CN.4/1995/L.11/Add.2, 3 March 1995. The 'draft declaration' referred for consideration is the draft as prepared by the Working Group on Indigenous Populations in 1993. See UN Doc E/CN/4/Sub2/1992/2B. Aboriginal and Torres Strait Islander Social Justice Commissioner: *Third Report 1995*, AGPS, Canberra (1995) 92.

112 The Working Group on Indigenous Populations seeks to recognise 'the distinct international

domestic remedies for indigenous peoples. Nevertheless, the *Draft Declaration*:

> is the concrete assertion of indigenous peoples' inherent rights and an important product of their struggle for international and domestic recognition that began in many countries centuries ago.[113]

## Practically orientated indigenous rights strategies

Mr Mick Dodson, the former Aboriginal Torres Strait Islander Commissioner, has vociferously advocated for human rights discourse to be infused with grass roots community claims for justice:

> Social justice is not about policy and not about commissions. It is about the lived experience of children, women and men ... the ultimate task must be to enhance the actual quality of the lives of Aboriginal peoples living today. This is pre-eminently a practical matter.[114]

A number of strategies such as 'Tracking Your Rights' and the 'Knowing Your Rights' campaigns have been launched for the purpose of bringing abstract and broad rights into an accessible form.

### *Human Rights and Equal Opportunity Commission 's Community Rights Project*[115]

In November 1997, the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner launched 'Tracking your Rights: a social justice community information resource.' The package is designed to give indigenous peoples a practical guide to accessing their rights. The publication equates the realisation of social justice with the realisation of a number of rights, including *inter alia*:

- citizenship rights (equality rights),
- Indigenous rights (distinct rights based on the unique status of indigenous peoples),

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legal personality which indigenous peoples continue to possess and their equality under international law with other peoples, even where they have agreed to be incorporated into existing states'. Daes E 'The United Nations Draft Declaration on the Rights of the Worlds Indigenous Peoples: current developments' Address to ATSIC seminar April 1995 in HREOC, *Racial Discrimination Act 1975 A Review*, AGPS, Canberra (1995) p 206-207.

113 Aboriginal and Torres Strait Islander Social Justice Commissioner, as above p 87.

114 *Ibid* p 93.

115 Human Rights and Equal Opportunity Commission, *Tracking Your Rights Package*.

- rights of complaint (which recognises that the existence of human rights is useless if they cannot be practically exercised) and
- rights empowerment (asserting rights).

Human rights and anti discrimination laws provide a means of protecting these rights.[116]

### *Queensland Government's 'Know your Rights' Campaign*[117]

Since 1996 the Queensland Anti-Discrimination Commission has visited more than 20 indigenous communities throughout the state for the purpose of raising awareness about complaint mechanisms amongst Murris (the Queensland indigenous peoples) about complaint mechanisms. All communities are provided with a number of pocket-size cards detailing a series of rights and appropriate avenues for redress if transgressed. The document is written in assertive rights discourse. It states that 'you have the *right* to be treated fairly when you ... if you feel discriminated against you have the *right* to ...'

Both of these practical guides are aimed at giving indigenous communities the tools to:

- identify 'rights' issues, and
- assess the most appropriate remedies(from the local police, to administrative bodies, Courts or even as far as the UN Human Rights Committee.)

It is hoped that such mechanisms will allow individual complainants or whole communities to know what they can do to encourage governments to implement their human rights commitments.

## Conclusion

Proponents of the CLS critique believe that the movement's significance lies in 'its presentation of an identifiable alternative, an alternative which is not only within legal scholarship but which at the same time has much to say about the politics of law and, more broadly, about the shape and character of a future alternative society'.[118] If

116 *Ibid.*

117 Queensland Anti-Discrimination Commission, 'Balancing the Act: The newsletter of the ADCQ' (1997) 1: September 1, 2.

118 Hunt A, *Explorations in Law and Society: Towards a Constitutive Theory of Law*, Routledge, New York (1993) p 630.

anything, the CLS movement has forced indigenous rights activists to retreat from their evangelical rights fervor to pursue a more calculated and evaluative response to their aim of achieving substantive justice. A large number of CLS theorists warn that constant petitioning to rights discourse ultimately leads to a loss of foresight in the achievement of long term political movements. Moreover, they suggest caution in framing struggles in a legally acceptable manner, with the ever-present danger that social movements may be demonized as unjustifiable and selfish. Furthermore, Gabel reaffirms that as the right to an 'experience' does not create the experience itself, the only way to erode the authoritarian quality of legal positivist settings is to undermine legal rights discourse in its current form.

Critics of the critique suggest that CLS thought adheres to a particular view of rights which relies too heavily on a theoretical and 'legal' response. Many argue that CLS scholarship, while useful in overcoming a number of long held assumptions about the role of law in society, fails to adequately respond to the particular nexus of race and rights. Rights do have a number of advantages; they express issues succinctly and narrow the focus of inequality to a particular context, and attempt to address injustices on an incremental, case-by-case basis. Rights also change social consciousness, they make popular issues more accessible, they are empowering and they encourage self-determination. The practical rights guides that have been produced for the benefit of indigenous communities are an effective means by which indigenous peoples can respond to violations of their rights as informed, assertive peoples, rather than the pitied 'victims' reliant on the charitable acts of those with power.

With strategic forethought, it would seem that the promotion of rights and the fostering of social movements are not necessarily mutually exclusive. On the contrary, it is possible to use distinct rights discourse and UN mechanisms in situations where they can be most effective, and at the same time, to foster grass roots social movements aimed at promoting reconciliation and the amelioration of indigenous disadvantage. In the context of such creative and strategic solutions, the CLS agenda could be regarded as full of self importance and grandiose theoretical technicalities, though ultimately ineffectual and of limited practical worth. According to Williams, rights must not be discarded — if anything they need to be enlarged to reflect a larger sense of civil rights, such that all humanity has the right to expect civility from others.[119] ●

119 Williams P 'Alchemical notes: reconstructing ideals from deconstructed rights' (1987) *Harvard Civil Rights — Civil Liberties Law Review* 435.