

Cornel West, “The Role of Law in Progressive Politics,”
Vanderbilt Law Review 43 (6) (1990), 1797-1806.

What is the role and function of the law in contemporary progressive politics? Do legal institutions represent crucial terrain on which significant social change can take place? If so, how? In what ways? How can progressive lawyers remain relatively true to their moral convictions and political goals?

In this article I shall attempt to respond to these urgent questions. I will try to carve out a vital democratic space left between the Scylla of upbeat liberalism that harbors excessive hopes for the law and the Charybdis of downbeat leftism that promotes exorbitant doubts about the law. My argument rests upon three basic claims. First, the fundamental forms of social misery in American society neither can be adequately addressed nor substantially transformed within the context of existing legal apparatus structures. Serious and committed work within this circumscribed context, however, remains indispensable if progressive politics is to have any future at all. Second, this crucial work will be primarily defensive unless significant extraparliamentary social motion brings power and pressure to bear on the prevailing status quo. Social motion and movements presuppose either grass roots citizen participation in credible progressive projects or rebellious acts of desperation that threaten the social order. Third, progressive legal practitioners confront the difficult task of linking their defensive work within the legal system to possible social motion and movements that attempt fundamentally to transform American society.

Any argument regarding the role of law in progressive politics must begin with two sobering facts about past and present American history. First, American society is disproportionately shaped by the outlooks, interests, and aims of the business community, especially corporate America. The

extraordinary influence of corporate capital on our government and its legal institutions makes it difficult even to imagine a free and democratic society with publicly accountable mechanisms that alleviate the vast disparities in resources, wealth, and income. Those who focus on forms of social misery—like hunger, poverty, and homelessness—must think in epochal, not apocalyptic, terms.

The second brute fact about the American past and present is its chronically racist, sexist, homophobic, and jingoistic nature. The complex and tortuous quest for American identity from 1776 to the present has produced a culture in which people primarily define themselves in terms of race, gender, sexual orientation, and political activities. America's uniqueness among other modern nations—with the exceptions of South Africa and Hitler's Germany—is that race has served as the linchpin in regulating its quest for identity. A detailed genealogy of American legal discourse on citizenship and rights—as initiated by the late Robert Cover of Yale—bears out this inescapable reality. The historical articulation and impact of African slavery and Jim Crowism on forms of American patriarchy, homophobia, and anti-American (usually communist and socialist) repression and surveillance yield a profoundly conservative culture.

The irony of this cultural conservatism is that it tries to preserve a highly dynamic, corporate-driven economy; a stable, election-centered democracy; and a precious liberties-guarding rule of law. This irony constitutes the distinctive hybridization of American liberalism (in its classical and revisionist versions) and the debilitating dilemma of American radicalism (in its movements for racial, class, and sexual equality). In other words, American liberalism diffuses the claims of American radicals by pointing to long-standing American democratic and libertarian practices, despite historic racist, sexist, class, and homophobic constraints. Hence, any feasible American

radicalism seems to be but an extension of American liberalism. The sacred cow of American liberalism—economic growth achieved by corporate priorities—neither is examined nor interrogated. Moreover, those groups that raise questions are relegated to the margins of the political culture.

My first point is that the extension of American liberalism in response to racial, class, and sexual equality is desirable but insufficient. It is insufficient because the extension of American liberalism leaves relatively untouched the fundamental cause of social misery—the maldistribution of resources, wealth, and power in American society. Yet the extension of American liberalism with regard to race, labor, gender, and homosexuality appears to be radical on the American ideological spectrum principally because it challenges America's deeply entrenched cultural conservatism. In fact, this extension, as seen for example in the 1930s and 1960s, occurs through insurgent social motion and movements that convince political and legal elites to enact legislation or judicial decrees against the will of the majority of the population.

The law has played a crucial role in those periods in which liberalism has been extended. It has done so precisely because of the power of judicial review and an elected body of officials responding to social movements—not because cultural conservatism has diminished significantly. The effects of these laws and policies over time have attenuated some of the more crude and overt expressions of cultural conservatism; the more subtle expressions, however, still permeate our society. The existing legal apparatus neither can address adequately nor transform substantially the plight of the racially and sexually-skewed, ill-fed, ill-clad, or ill-housed. This is true not only because of the marginalizing of perspectives highlighting the need for redistribution of resources, wealth, and

power, but also because of the perception that the extension of American liberalism is the most radical option feasible within American political culture.

Is this perception true? Do all workable radical alternatives presuppose economic growth achieved by corporate priorities? These questions are acute especially given the collapse of social Keynesianism in the mid-1970s—that magic Fordist formula of mass production undergirded by mass consumption alongside government provisions to those with no access to resources that sustained economic growth in the post-war period. The conservative project of supply-side economics and military Keynesianism of the 1980s yielded not simply a larger gap between the haves and have-nots, but also a debt-financed public sphere and a more corporate-dominated economy—all in the name of "free enterprise."

If the extension of American liberalism is the only feasible radical option within American political culture, then the defensive role of progressive lawyers becomes even more important. Their work constitutes one of the few buffers against cultural conservatism that recasts the law in its own racist, sexist, anti-labor, and homophobic image. Furthermore, defensive work within the existing legal system helps keep alive memory traces left by past progressive movements of resistance—memory traces requisite for future movements. This defensive work, though possibly radical in intent, is liberal in practice in that it proceeds from within the legal system in order to preserve the effects of former victories threatened by the conservative offensive. This same defensive work has tremendous radical potential, especially within the context of vital oppositional activity against the status quo. Thus, the distinction between liberal and radical legal practice is not sharp and rigid; rather, it is fluid and contingent on the ever-changing, larger social situation. Clearly, the crucial role

of this kind of legal practice, be it to defend the rights of activists, secure permits to march, or dramatize an injustice with a class action suit, is indispensable for progressive politics. In "cold" moments of American history, however, when cultural conservatism and big business fuse with power and potency, radical lawyers have little option other than defensive work. This work, although often demoralizing, serves as an important link to past victories and as a basis for the next wave of radical action.

In our present period, radical legal practice takes two forms: Theoretical critiques of liberal paradigms in the Academy or participation in radical organizations that engage in extraparliamentary social motion. It is no accident that the first form consists of a pedagogical reform movement within elite institutions of the legal Academy. This Critical Legal Studies (CLS) movement is symptomatic of a pessimism regarding feasible radical options in American political culture and a distance between radical legal critiques and radical legal action. The pessimistic conclusions of the CLS movement cannot be dismissed as the results of insular bourgeois theorists with little grasp of political reality. In fact, their understanding of this reality often is acute. Some of the CLS "trashing" of liberalism at the level of theory, however, spills over to liberal legal practice. This spillover is myopic: it assails the only feasible progressive practice for radical lawyers in the courts. This myopia becomes dangerous and irresponsible when aimed at civil rights lawyers whose very effort to extend American liberalism may lead to injury or death in conservative America.

Is there any way around this impasse? Can progressive legal practice be anything more than defensive? My second point holds that there are but two ways out of this labyrinth. In situations of sparse resources, degraded self-images, and depoliticized sensibilities, one avenue for poor people is

rebellion and anarchic expression. The capacity to produce social chaos is the last resort of desperate people. It results from a tragic quest for recognition and survival. The civil terrorism and criminality that haunt our city streets partly are poor people's response to political neglect and social invisibility. Like most behavior in American society, this anarchic expression is linked directly to market activity—the sale and purchase of commodities. The commodities tend to be drugs, alcohol, and the human body itself. These tragic forms of expression have yet to take on an explicitly political character, yet they may in the near future. If and when the situation becomes political, the prevailing powers will be forced to make political responses—not simply legal ones that lead to prison overcrowding.

One major challenge for progressive politics is to find a way of channeling the poor's talent and energy into forms of social motion that can have impact on the ruling powers. This second way out of the impasse is the promotion of citizens' organized participation in credible progressive projects. Yet, the American political culture militates against this. The status quo lives and thrives on the perennial radical dilemma of disbelief: ordinary citizens find it hard to believe that their actions can make a difference when resources, wealth, and power disproportionately are held by the corporate community.

The best project progressive politics offered in the 1980s was the courageous and exciting presidential campaign of one charismatic spokesperson seeking acceptance and respect within the Democratic party: the prophetic witness of the Reverend Jesse Jackson. His two campaigns, however, reveal the weaknesses of American progressive politics: the obsession with media visibility and the inability to generate social motion outside electoral politics. Jackson's campaigns also disclose the

refusal to promote democratic practices within one's own organization. Jackson's campaigns have had a significant and, for the most part, salutary effect on American progressive politics. His major contribution is that his efforts represent the first serious attempt since Martin Luther King, Jr.'s Poor Peoples' Campaign to amass a multiracial coalition addressing the issue of the maldistribution of resources, wealth, and power. Unlike King, Jackson's attempt to highlight this crucial issue often is downplayed or overshadowed by his quest for entry into the centrist Democratic party elite. Social motion and movements in America neither tend to be rooted in nor sustained by campaigns for electoral office—no matter how charismatic the leader.

There can be no substantive progressive politics beyond the extension of American liberalism without social motion or movements. Moreover, despite the symbolic and cathartic electoral victories of liberal women and people of color, all remain thoroughly shackled by corporate economic priorities and debt-ridden administrations. Under such conditions, the plight of the ill-fed, ill-clad, and ill-housed only can worsen.

Given the lethargic electoral system—nearly exhausted of progressive potential, though never to be ignored as possible conservative politicians lust for more power—we must look toward civil society, especially to the mass media, universities, religious and political groupings, and trade unions, for social motion. Despite the decline of popular mobilization, political participation, and unionization, there still exists a vital and vibrant culture industry, religious life, student community, and labor movement. In the midst of a market-driven culture of consumption—with its spectators passivity, evasive banality, and modes of therapeutic release—there is an increasing sense of social concern and political engagement. These inchoate progressive sentiments search for an effective

mode of organized expression. Until channels are created for these inchoate sentiments legal progressive practice will remain primarily defensive.

How do we create these channels of resistance and contestation to corporate power? What positive messages can we offer? What programs can we put forward? These questions lead to my third point regarding the lawyer's role in progressive politics. In a society that suffers increasingly from historical amnesia—principally because of the dynamic past-effacing activities of market forces—lawyers have close contact with the concrete traces and residues of past progressive struggles. This close contact is, in part, what Alexis de Tocqueville had in mind when he called the legal elites America's only aristocracy. Clearly, he understood continuity in terms of social stability. I revise his formulation to connect America's continuity with the memory of the effects of progressive victories of the past. These effects are inscribed in the law of a society whose link with the past is tenuous and whose present is saturated with flashing images, consumer and hedonistic sensibilities, quick information, and even disinformation.

The role of progressive lawyers not only is to engage in crucial defensive practices—a liberal practice within the court system—but also to preserve, recast, and build on the traces and residues of past conflicts. This latter activity is guided by a deep historical sensibility. This sensibility not only deconstructs the contradictory character of past and present legal decisions (or demystifies the power relations operative in such decisions), but also concocts powerful and enabling narratives that demonstrate how these decisions constitute the kind of society in which we live and how people resist and try to transform it. Progressive lawyers can become politically engaged narrativists who tell analytically illuminating stories of how the law has impeded or impelled struggles for justice and

freedom. Like the best rap artists, progressive lawyers can energize a demoralized citizenry with insights on the historical origins and present causes of social misery. Lawyers can perform this role more easily than others because of their prestige and authority in American society. Progressive lawyers can seize this opportunity to highlight the legal system's internal contradictions and blatant hypocrisy, using the very ideals—fairness, protection, formal equality—it heralds. This kind of progressive legal practice, narrative in character and radical in content, can give visibility and legitimacy to issues neglected by and embarrassing to conservative administrations and can educate citizens on the operations of economic and political powers in the courts. In this regard, historical consciousness and incisive narration yield imminent critiques, disclose the moral lapses, and illuminate the structural constraints of the law. At the same time, it must empower society's victims to transform society.

Without this kind of historical consciousness and analytical story-telling, it is difficult to create channels for resistance and challenge to corporate power. In addition, those who challenge that power must emphasize the moral character of past and present leaders and followers who cared, sacrificed, and risked their lives and reputations for the struggle of justice and freedom. Progressive lawyers must reveal the ethical motivations of those who initiated and promoted the legal victories that furthered the struggles for racial, sexual, and class equality within the limiting parameters of American law.

The Critical Legal Studies movement is significant primarily because it introduces for the first time in legal discourse a profoundly historical approach and theoretical orientation that outlines simultaneously the brutal realities of class exploitation, racial subordination, patriarchal domination,

homophobic marginalization, and ecological abuse in American history. By historical approach, I mean a candid recognition that the law is deeply reflective of, though not thoroughly determined by, the political and ideological conflicts in American society. By theoretical orientation, I mean a serious encounter with social theories that emphasize the structural dynamics of the economy, state, and culture that shape and are shaped by the law.

Legal formalism, legal positivism, and even legal realism have remained relatively silent about the brutal realities of the American past and present. This silence has forced American liberalism for the most part to remain captive to cultural conservatism. It also has limited radical alternatives in legal studies to extensions of American liberalism. The grand breakthrough of the CLS movement is to expose the intellectual blinders of American liberal legal scholarship and to link these blinders to the actual blood that has flowed because of the hidden realities. CLS calls attention to the human costs paid by those who suffer under the institutional arrangements sanctioned by liberal law in the name of formal equality and liberty.

Yet CLS cannot be more than a progressive movement within a slice of the professional managerial stratum without connections to other social motions. Academic leftist subcultures have a crucial role to play, yet they do not get us beyond the impasse.

American culture may not possess the democratic and libertarian resources to bring about racial, sexual, and class equality. Its cultural conservatism and corporate influences may impose insurmountable constraints for such a radical project. Lest we forget, in my estimation there are roughly three reactionaries (Ku Klux Klan, the John Birch Society, and so on) for every leftist in America. Moreover, it is precisely this kind of cynical, or perhaps realistic, outlook that often

confines radicalism to extensions of American liberalism. How does one combat or cope with such an outlook?

There is no definitive answer to this question. To avoid illusions one must sustain hope for social change by keeping alive the memory of past and present efforts and victories and remaining engaged in such efforts. As Nietzsche noted, subversive memory and other-regarding morality are the principal weapons for the wretched of the earth and those who fight to enhance their plight. In America, this memory and morality consists of recurring cycles of collective insurgency and violent repression, social upsurge and establishmentarian containment. Because of the powers of big business and cultural conservatism, the American left is weak and feeble during periods of social stability. Usually led by charismatic spokespersons, American radicalism surfaces in the form of social movements contesting this stability with a moral message that borrows from the Nation's collective self-definition (as democratic and free). These social movements change the prevailing status quo, but rarely rearrange fundamentally the corporate priorities of American society. In this regard, American radicalism is more than an extension of American liberalism when it constitutes a serious and concrete threat to corporate power (when it calls for substantial redistribution of resources, wealth, and power). This threat is short-lived, however, because of repression and incorporation. After such social movements, American radicalism is relegated to a defensive posture, trying to preserve its victories by defending extensions of American liberalism.

If this crude historical analysis has merit, the major role of the law in progressive politics is threefold. First, past victories encoded in the law must be preserved in order to keep alive the memory of the

past, the struggle in the present, and the hope for the future. Second, this preservation, though liberal in practice, is radical in purpose. It yearns for new social motion and movements that can enact and enforce more progressive laws before repression and incorporation solidify. In this regard, radical American legal practice is a kind of Burkean project turned on its head: it fosters a tradition not for social stability, but to facilitate threats to the social order; it acknowledges inescapable change not to ensure organic reform, but to prepare for probable setbacks and defeats. Third, the new memories and victories inscribed in new laws are kept alive by the defensive work of progressive lawyers to help lay the groundwork for the next upsurge of social motion and movements.

The interplay between the work of progressive lawyers and social change is crucial. In some cases, it is a matter of life or death for charismatic leaders and courageous followers. In other instances, it is a question of serving as the major buffer between the unprincipled deployment of naked state power and the "principled" use of the courts against the movement. Such a buffer may prolong the movement and increase its progressive impact on society and culture. The moral character of the movement is important precisely because it may make repressive attackers less popular and may help sustain the memory of the movement more easily. One of the reasons the civil rights movement led by Martin Luther King, Jr., is remembered is that its moral vision was central to its identity and was emphasized more than say, other equally worthy ones like the Congress of Industrial Organizations unionization movement or the feminist movement. King's vision appealed to the very ideals that define the national identity of many who opposed the movement.

How do progressive lawyers articulate ideals that may subvert and transform the prevailing practices legitimated by limited liberal versions of these ideals? Progressive legal practice must put

forward interpretations of the precious ideal of democracy that call into question the unregulated and unaccountable power of corporate America. It also must set forth notions of the precious ideal of liberty that expose the authoritarian attitudes of cultural conservatism. This two-pronged ideological strategy should consist of an unrelenting defense of substantive democracy (in a decentralized, nonstatist fashion) and all-inclusive liberty (as best articulated in the Bill of Rights). This defense is utopian in that it strives to further the possibility of social movements. It is realistic in that it acknowledges the necessity of liberal legal practices for radical lawyers to preserve the gains after social movements have been crushed or absorbed.

The possibility of social movements in the 1990s looms large. The awakening of democracy throughout Eastern Europe has put the spirit of revolution—the quest for substantive democracy and all-inclusive liberty—back on the political agenda. Courageous Chinese students erected a goddess of democracy not to imitate but to complement the Statue of Liberty. The end of colonial rule in Namibia, the re-emergence of some semblance of democracy in Chile, and free elections in Nicaragua (a country wrecked primarily by an illegal United States-sponsored war waged on military and economic fronts), all partake of this spirit of revolution.

Even during the current period of economic decline in the United States, a progressive concern for the ill-fed, ill-clad, and ill-housed has surfaced in popular music. With solid but insular academic leftist subcultures, eager but sober ethnic groups, a battered but determined labor movement, beleaguered but bold feminist progressives, scarred but proud gay and lesbian lefts, and the growing number of green and gray activists, united social motion and movements are in the making in America. What is needed is neither a vanguard party nor purist ideology, but rather the

common pursuit of the overlapping goals of radical democratic and libertarian projects. Jesse Jackson's rainbow politics has enlivened the idea of this coming-together. Now it must be enacted locally and regionally—not simply within electoral politics. Democratic leadership of and by ordinary citizens in extraparliamentary modes must bloom and flourish. The social stability of the conservative administrations must be bombarded and shaken by democratic demands and libertarian protections. The profits and investments of corporate America should be scrutinized and questioned for public accountability and civil responsibility. The xenophobia and jingoism of cultural conservatives has to be morally rejected and has to be judicially checked. A new world is in the making. Let us not allow the lethargy of American politics, the predominance of corporate power, and the pervasiveness of cultural conservatism to blunt the contributions we can make—especially if some of us choose the law as the vocational terrain for progressive politics.