Fugitive Thought

Prison Movements, Race, and the Meaning of Justice

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Introduction

I can never be what I ought to be until you are what you ought to be, and you can never be what you ought to be until I am what I ought to be.

—Martin Luther King Jr., *Strength to Love*

To will oneself free is also to will others free.

—Simone de Beauvoir, *The Ethics of Ambiguity*

The one-hundred-year-old walls are cold and all around me sounds the archaic and brutal crash of heavy metal gates. This is the Maximum Security Correctional Facility in Elmira, New York, where human bondage does not wear the clinical mask of efficiency that one finds at more modern prisons and jails, with their hospital-like air, all clear (bullet-proof) glass, and white walls. After giving a lecture on the Zapatista movement in Chiapas, Mexico, to a class of prisoners, I am approached by a prisoner/student who asks me how old I am. When I tell him, he says that we are the same age and comments that I should be proud of myself for accomplishing so much. I reply to the effect that our different positions reflect little on our individual merits, that the U.S. mythology of determination, family values, and hard work actually bears less on the fate of young men of color than do circumstance and fortune, especially in a country where six Latino males are imprisoned for every one with a doctoral degree.[1] Yet, even as I say it, I feel the impotence of my words for making any difference in the fact that I will soon be going home while he returns to his cell to finish his sentence. My words fall flat against the prevailing conception of justice in a society that believes his imprisonment is just; they seem inconsequential

against society's belief that his incarceration ensures my well-being and that my freedom means not only freedom from prison but also freedom from him. Nearly everything in U.S. society attempts to assure me that my fate is unconnected to the lives of those who inhabit the prisons of our nation—a fact that reminds me that how we understand our lives has consequences for how we live them. For many of us who are concerned with questions of oppression and domination, freedom and justice continue to be critical frameworks to which we respond and that we redefine and recreate in resistance to oppressive practices and conceptions. Indeed, much contemporary leftist theory has of late been re-asking old questions about the meaning of ethics.

Addressing law, incarceration, and critical moral theory, this book responds to some of the most urgent concerns among leftist activists and scholars over the status of ethics and social change in the contemporary political and intellectual landscape. Social theorists have made repeated and as yet unanswered calls for "some way" to evaluate messy normative issues that are central to political practice. They have sought a way to adjudicate norms that is attentive to context without imposing an artificial neatness on them. It therefore appears that the time for a critical ethics to complement the analyses of critical social theory is long past due. By fleshing out the implicit epistemological criteria upon which claims to justice and freedom have been made and challenged within the contexts of legal theory and prison activism, this project contributes not only to the growing study of prison writings and the interdisciplinary field of critical legal studies, but also to intellectual debates about social transformation and moral theory. My investigation seeks to reinvigorate political discussions on the left that have reached an impasse due to a suspicion of key moral terms like justice, solidarity, and freedom in a postmodern, post–Civil Rights era. It neither ignores the changing political climate of contemporary U.S. society nor retreats to modernist master narratives or a naive universalism. Instead, it critically reconstructs concepts such as justice with an eye to how they are used by participants, such as lawyers and prisoners, in radical political projects.

I am reminded of the persistent role of radical conceptions of justice and freedom when I read, for example, the words of Mumia Abu-Jamal, the journalist and activist who is currently sitting on Pennsylvania's death row.[2] Reflecting on the efforts by prison administrators and politicians to prevent publication of his first book, *Live from Death Row*, Abu-Jamal writes:

> In *Live from Death Row*, you hear the voices of the many, the oppressed, the damned, and the bombed. I paid a high price to bring it to you, and I will pay more; but, I tell you, I would do it a thousand times, no matter what the cost, because it is right! . . . It was right to write *Live from Death Row*, and it's right for you to read it, no matter what cop, guard, prisoncrat, politician, or media mouthpiece tells you otherwise.
>
> Every day of your life, no doubt, you've heard of "freedom of speech" and "freedom of the press." But what can such "freedom" mean without the freedom to read, or to hear, what you want? (2–3)

How are those in the academy, particularly in the theoretical humanities, to learn from and speak with writers and activists like Abu-Jamal without a vocabulary of right, freedom, and justice? In writing *Fugitive Thought*, I felt many motivating forces. Among these was the sense that ethical and moral theorizing are an essential part of the resistant practices of the oppressed. In addition, it seemed to me that the growing centrality of the prison-industrial complex to U.S. society and to the experiences of people of color directly brings freedom and justice to bear on those practices of resistance that are necessary both to survive in the present world and to attempt to transform it into a more humane one. Constantly, I am reminded that, despite the great differences between the academy and the prison system, they are inextricably bound together: from the file cabinet in my office (made by prison labor) to the campus cafeteria (run by Sodexo-Marriott, one of the largest investors in the private prison industry) to the students in a class I taught on prison literature (nearly one third of whom had friends or relatives in prison). When I read the words of prison theorists like Abu-Jamal,

I am encouraged to take morality and ethics seriously. I have learned much from their writings about what justice, freedom, solidarity, and responsibility can and should be. This book is my effort to engage in dialogue with these thinkers from my own location as an academic trained in the U.S. university system, teaching both in that system and in this country's prison system, and to think through what I have learned about freedom and justice.

But just what are freedom and justice? Upon reflection, their meanings are not obvious. In the two epigraphs to this book, for example, Henry David Thoreau and W. E. B. Du Bois demonstrate that there are multiple ways of using these terms. This multiplicity produces the rhetorical irony in their words. *Freedom* may not always mean *freedom*, while *justice* is often anything but *justice*. When one is speaking of abhorrently disproportionate rates of arrest, conviction, sentencing, and parole among black, Latina/o, and poor white prisoners, for example, one might quite validly describe U.S. justice as for "just us" (wealthy whites), as the popular joke goes.[3] Here, *justice* is reduced to something like "what those in power decide." At the same time, leftist activists and poor folks often speak of the U.S. "injustice system." Here, the implication might be that a standard exists beyond the courts and legal system and that according to this standard the speakers find these institutions unjust. Thoreau makes this kind of implication in his statement that truly just men will only be found in the prisons of an unjust society.

Consider the issue of the death penalty. For many people in the United States, the question of the implementation of the death penalty is clear. Whether they see it as a deterrent to murder or an appropriate punishment, they consider it to be just in an abstract way. A large number of these same people, however, might oppose it if one could show the death penalty to be implemented in an obviously discriminatory way, enforced primarily against poor people and members of racial and ethnic minority groups. Unless, of course, they take the position of the U.S. Supreme Court. Statistics presented in 1987 to the Court in *McCleskey v. Kemp* showed that the death penalty is indeed implemented

in a racially discriminatory way. A massive 1983 study on the death penalty in Georgia, after accounting for more than 200 other variables, found race to be the most important factor in death-penalty sentencing.[4] Defendants in Georgia convicted of killing whites were more than four times more likely to receive a death sentence than defendants convicted of killing blacks, while a black defendant convicted of killing a white victim was almost 22 times more likely to receive a death sentence than a black defendant convicted of killing a black victim (Baldus, and others 707–10; *McCleskey* 300–301). Rather than dispute the statistical evidence, Justice Powell, writing the majority opinion in *McCleskey*, held that *even if* the death penalty is administered disproportionately according to race, ethnicity, and class, it is still just. He added, "McCleskey's claim [that racially disparate outcomes make the death penalty unjust], taken to its logical conclusion, throws into serious question the principles that underlie the entire criminal justice system" (*McCleskey* 272). We have here a case of what psychologists call "cognitive dissonance." The Court was unable to accept not the facts presented to it but the "logical conclusion" to which they led, namely that racial and class-based injustice in the death penalty's implementation points to the likelihood that similar injustices nourish the very roots of the U.S. legal system. As a consequence, racially disparate outcomes in death penalty implementation were declared insufficient for finding the death penalty unjust (Gross and Mauro 134–227; Russell 28–30; Tushnet 79–85).[5]

What sense of justice could support such logic? Justice Brennan wrote in his dissenting opinion that Powell's concern about the entire justice system being thrown into question "seems to suggest a fear of too much justice" (*McCleskey* 308). Continuing, he added that we would be mistaken to believe that "minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die" because ultimately "the reverberations of injustice are not so easily confined" (*McCleskey* 312). If Powell's decision offended Brennan's sense of justice, as it apparently did, how might one distinguish between Powell's and Brennan's senses

of justice? Are they simply using *justice* in two different ways? Or is something more fundamental indicated by this difference?

In the remainder of this introduction, I map out the historical contexts of debates about justice and freedom, moving from abolitionist views of natural law and Supreme Court doctrine to African American intellectual thought about the nature of freedom. Given the landscape of contemporary cultural theory in the humanities, however, there is a preliminary question to which I must respond: Why moral and ethical theory at all?

The Goals of Theory

Claims about justice, freedom, solidarity, and the like are by their nature "normative," that is, they make claims about what things should be like and how people ought to act. For a number of reasons, claims of this sort have fallen into disfavor among many cultural critics in the humanities. This is not a strictly recent phenomenon, and many before me have responded to crises in normative thinking. In 1935, African American philosopher Alain Locke, in trying to chart a course between absolutism and radical relativism, urged his contemporaries not to give up the project of normative theory. According to Locke, "[i]n dethroning our absolutes, we must take care not to exile our imperatives, for after all, we live by them. . . . Without some account of normative principles, some fundamental consideration of value norms and 'ultimates' (using the term in a non-committal sense), no philosophical system can hope to differentiate itself from descriptive science or present a functional, interpretive version of human experience" (21). In 1969, European critical social theorist Herbert Marcuse responded to marxist charges that morality was simply bourgeois ideology by arguing that a radical morality was necessary for liberatory struggle. According to Marcuse, "[t]he effort to free words (and thereby concepts) from the all but total distortion of their meanings by the Establishment . . . demands the transfer of moral standards (and of their validation) from the Establishment to the revolt against it." Thus, "[i]n the face of an amoral society, [morality] becomes a political weapon" (*Essay* 8). What is the context for the

contemporary dismissal of normative thinking, and why in the face of the current state of cultural theory do I insist on using the language of morality, ethics, and normative values?

I believe the recent demise of "Truth" (and its capitalized attendants) to be, on the whole, a good thing, a just thing. However, it is precisely because I believe it to be a *good* thing, a *just* thing, that I hold on to the possibility of reconstructing better, more just versions of at least some of the concepts of critical moral inquiry. There was a time when intellectual debate on the left was full of moral outrage and conviction. Radical rhetoric utilized (in many cases, invented) a robust vocabulary of "natural right," "human nature," "justice," "virtue," "morality," "sin," "community," "unity," "universality," "truth," "liberation," "equality," "humanity," and even "totality." Although things have changed more slowly in some quarters than in others, in many contexts on the left, such words are today virtually profane. At least enough to earn their users rolling eyes and sneers—sometimes outright intellectual and political dismissal—these concepts have become nearly exclusively identified by many contemporary theorists as reactionary. Some have shown how demands for unity, universality, absolute truths, equality, and singular concepts of human nature have been complicit in the denial of multiplicity and difference, shutting out the voices of the oppressed as too particular and biased, while passing off the perspectives of oppressors as universal and impartial. Thus, for example, feminists and anticolonial critics have shown that the supposedly abstract and disinterested "reason" of traditional philosophy hides ample Eurocentric and male bias.[6] Meanwhile, other critics have argued that moral theory merely serves to obfuscate material questions and to divert energy from practical change to mere moral disapproval. Notable in this regard have been marxists, following Marx himself and his rejection of bourgeois sentiment and reform in favor of radical critique and revolution.[7] Some have shown the limitations of grand, unified political strategies that rely on obedience to a central party or a revolutionary state as opposed to more dispersed political action that remains open to coalition and dissention. These have included anarchists who reject hierarchy of any kind as a legitimate

means to egalitarian ends, as well as "postmarxist" radical democratic theorists who are suspicious of the apparent tendency for totalizing analyses to lead to totalitarian regimes.[8] Finally, many have discovered patterns of complicity between, on the one hand, supposedly liberatory normative theories and a faith in rationality and, on the other hand, the increasing normalization and subordination of subjects in the service of increasingly totalitarian bureaucratic states. According to these theorists, we risk further ensnaring ourselves in dominating structures to the extent that we uncritically invoke strategies that have their points of origin in the very regimes that have brought about our domination in the first place.[9]

Critics differ as to whether the key concepts of the modern era have been taken over exclusively by defenders of the political and economic status quo, whether they have always been complicit with the expansion of domination and exploitation, or whether they have simply outlived their usefulness given the present configuration of the world stage. In any case, intellectuals and activists have offered many good reasons to be skeptical of how such concepts are invoked and, at the very least, to demand what exactly one means by "justice," why one feels the need for "unity," or how one intends to employ the category of "human nature."

Beyond a justified suspicion of moral theory, however, many have been led to abandon normative claims altogether, even to reject the very impulse to articulate norms as itself oppressive and totalitarian. These critics forgo, even denounce, such theorizing, claiming instead that something else should guide political practice, whether that something else be desire, power, or exigency.[10] I sympathize with such claims to an extent, for I see much validity in their criticisms and suspicions of older positions that laid claim to an impartial and perfectible reason or to total knowledge of society's "fundamental contradiction." I also share their disdain for positions that relied on faith in the inevitable march of history to justify political action. Indeed, many of these older positions are still with us today, and although they are not dominant within the field of contemporary cultural studies, they retain significant influence elsewhere. However, this book sets out from a commitment to the

following two premises: that careful feminist and anticolonial critiques of traditional normative theory need not lead us to abandon normative theorizing altogether and that moral theory can still benefit progressive political struggle and intellectual inquiry. One goal of this book is to show how recent political struggles against prisons have continued to generate normative theory that is critical of traditional theorizing while retaining a commitment to key concepts like justice and freedom.

Some scholars have acknowledged both the usefulness of normative claims for political work and the criticisms of Eurocentrism, false universals, and "foundationalism" (that is, the traditional view that one can find principles or rules that will provide a bedrock foundation for knowledge and guarantee its absolute certainty). Yet, these scholars have called for normative claims only reluctantly, as a concession to the imprecise, "untheoretical" world of everyday politics that seems to reward the certainty of absolute moral foundations.[11] We can never form political commitments with absolute certitude, and we should therefore always be open to discussion regarding their validity. Furthermore, we should always be aware of the risks implied in the fact that what we assert we assert as limited, imperfect human subjects situated in time and space. However, if to say this is also to say that in order to be politically effective we must commit ourselves to making political claims as if they were absolutes even though we know they are not, then where does that leave us? In other words, if our acknowledgment of contingency and error gives us no choice in the political arena but to go on strategically or tactically arguing as if we were still absolutists or foundationalists, then of what use is such acknowledgment in the first place? Why not just pack up our theory books and go home to the world of "real" politics where people are allegedly theoretically unsophisticated and inconsistent?

In order for the critique of traditional normative theorizing to have any claim on us other than to simply give up ethics altogether, it should be at once more modest and more demanding than many have formulated it. More modest, because it should lead us not to reject all moral claims out of hand as "totalitarian" or "normalizing" gestures.

More demanding, because it should lead us to painstaking evaluation and debate about the nuances, background assumptions, biases, partiality, and empirical grounding of these claims, deciding which ones probably are, which ones might be, and which ones probably are not "totalitarian" or "normalizing." This is the work that an out-of-hand rejection forsakes. For this reason, I have chosen to characterize the kind of ethical theory I attempt in this book as *postpositivist* and *antifoundationalist*, terms I believe to be both more limited and more rigorous than the catch-all term *postmodern*, which I associate with the kind of sweeping baby-and-bath-water move that those of us who are concerned with the relations between theory and social practice should seek to avoid.

While joining in the critique of the European Enlightenment's and Western modernity's complicity with oppression and domination, other critics lament what they see as a too hasty dismissal of the enterprise of moral inquiry. While acknowledging the rightness of the emergent intellectual backlash against Eurocentric, masculinist, foundationalist, and absolutist invocations of *truth*, *history*, and *reason*, such scholars have sought to bring nuance and specificity to certain key concepts, reclaiming them for antifoundationalist, liberatory projects. My own recent endeavor, *Reclaiming Identity: Realist Theory and the Predicament of Postmodernism*, which I co-edited with Paula M. L. Moya, seeks to reinvigorate debates about identity, knowledge, and values in the fields of literary and cultural studies, American studies, ethnic studies, and lesbian and gay studies. That volume grew out of a belief among the editors and contributors that poststructuralist and postmodern critiques of individual and group identities and their epistemological relationship to objectivity, moral values, and experience had left too little room for theorizing the continuing relevance and reality of identity. Such an intervention seemed timely and necessary to maintain the critical force of identity-based political struggles and intellectual projects. That effort, in turn, drew strength from previous critical reconstruction, such as Linda Martín Alcoff's work on truth and coherence, Samir Amin's on universality, Richard Boyd's on truth and reference, Sandra Harding's

and Renato Rosaldo's on objectivity, María C. Lugones's on group identity and the self, Satya P. Mohanty's on knowledge and experience, and Naomi Scheman's on emotions.[12]

Key to *Reclaiming Identity* was an approach we described as *postpositivist realism*. This is a particularly cumbersome term for the present project on justice, freedom, and prison writings, since legal positivism and the philosophical tradition of logical positivism are distinct—as are postpositivist realism, legal realism, and literary realism! I say more about most of these theoretical positions as they come up throughout this book, but I should say something about *postpositivist realism* here. What distinguishes postpositivist realism from foundationalist and (logical) positivist (also called logical empiricist) movements in Western philosophy is its rejection of the quest for bedrock foundations for knowledge and of claims that knowledge can exist unmediated by background theories, assumptions, interpretation, and biases. Positivism, as a philosophical system, rejects speculation about unobservable entities and seeks to base all knowledge on directly observable (rather than speculative or inferential) facts and sensory data. In order to provide such a basis or foundation, these facts must be arrived at independently of interpretive bias, theoretical framework, or the perspective of the observer. By contrast, postpositivist realism claims that, through interpretation, we create theories that have the possibility of being judged more or less accurate according to how well they account for the causal features of the world that condition our theory-making practices (that is, those features that influence how we act, think, or exist). It therefore makes room for the role of subjectivity in knowledge-generating practices and for unobservable (yet causal) aspects of reality. Postpositivist realism is, therefore, neither an absolutist project that demands unquestionable foundations or total certainty, nor a relativist one that gives up on the importance of "reality" in conditioning our experience and knowledge of the world. Instead, it contends that accounts of causal features of the social world can yield accurate, reliable, and *revisable* understandings of reality. This also entails a conception of error as

an instructive presence that enables revision and criticism, rather than obstructing the path to knowledge.

Combining critical race and legal theory with a materialist literary criticism, I argue in the following chapters that one can understand moral concepts and values like justice, freedom, or solidarity "objectively" insofar as one can distinguish among different causes of distortion and bias in the articulation of such ideals. This is a different conception of objectivity than is often associated with Western philosophy these days, but it emerges from a tradition of thinkers who have sought to understand how theory-laden inquiry (that is, inquiry informed by, rather than abstracted from, context and presupposition) can yield reliable and accurate knowledge. It is an ideal that African American literary critic Johnnella Butler has recently described as "contextualized objectivity."[13] It assumes that, rather than seeking to eradicate all bias in pursuit of a "view from nowhere" (an impossible task), we should ask how different forms of perspective, subjectivity, and partiality bring about different ideas about what freedom or solidarity can be. I argue that one can judge conceptions of justice, for example, as "better" or "worse"—more or less expansive and liberatory—than others based on their capacity to enable reciprocal recognition and free development of individuals within a given society. Running the length of *Fugitive Thought* and unifying its discussions of legal theory, moral philosophy, and literature from U.S. prison movements is this kind of postpositivist moral realism. As noted previously, postpositivist realism rejects notions of absolute certainty or theory-independent meaning. However, unlike many relativist positions, it argues that our theories of the world can help us to understand the social reality on which our beliefs and actions are dependent. This is so precisely because our theories are conditioned by a social reality that is at least partly independent of our theories. In addition, privileging the contributions of social location and identity to knowledge acquisition, postpositivist realism acknowledges the possibility of our own error and that of cultural "others," encouraging a careful, respectful, and thorough analysis of different perspectives and local articulations of moral possibilities.[14]

What Is Justice?

Writing in rather different contexts, Frankfurt School critical social theorist Ernst Bloch and U.S. prison activist George Jackson indicate why the oppressed might find legal structures to be less than comforting. As Bloch wittily observes, "One who is poorly clothed is well advised to avoid the policeman, for the eye of the law sits in the face of the ruling class" (181). Similarly, Jackson writes, "Every time I hear the word 'law' I visualize gangs of militiamen or Pinkertons busting strikes, pigs wearing sheets and caps that fit over their pointed heads. I see a white oak and a barefooted black hanging, or snake eyes peeping down the lenses of telescopic rifles, or conspiracy trials" (*Blood* 168). Given the many reasons for being suspicious of state legal systems, a question that arises is how (or whether) one can pursue justice in opposition to such structures. This gives rise to two more related questions: Is justice something more than or different from law? And is justice only relative to the existing legal order? As an initial way of considering these questions, I would like to place them in the context of one of the principal debates in legal theory and the philosophy of law, the debate between the traditions of legal positivism and legal naturalism. *Legal positivism* might be defined as the view that all things having to do with justice in a given society can be reduced to "positive law" (that is, those laws and legal decisions actually existing within a society and codified in statutes, published court rulings, and officially binding documents, such as the U.S. Constitution and international treaties). Also sometimes called *formalism*, it is a skeptical position, usually dismissing such notions as natural law or human rights as metaphysical abstractions, instances of ideological mystification, or unverifiable, utopian postulates that do not bear on how societies actually function. Legal naturalists, on the other hand, hold that standards of justice, such as natural law or human rights, can be identified through sources other than positive law, for example, through divine revelation, rational speculation, or empirical inquiry into the possibilities for human nature. According to standards of natural law (or natural right), positive laws can be found just or unjust, whereas according to legal positivism, positive laws can only be unjust if they

conflict with more fundamental statements of positive law, as when a congressional act violates a constitutional provision.

I sketch the contours of the schism between legal positivism and natural law theories by attending to discussions about slavery and abolition in the nineteenth century. First, I consider the case of an enslaved black man, Dred Scott, who sued for his freedom and the freedom of his family in the U.S. courts. In ruling on the case of *Scott v. Sandford*, Supreme Court Chief Justice Roger B. Taney goes out of his way to rule on two different points. The first is the question of the citizenship of free blacks; the second is the ability of Congress to legislate in the territories. A ruling on the second point was the original goal of the litigants, since it was Scott's claim that, having been born a slave and then taken first to the "free soil" state of Illinois and then to the "free soil" territory of Upper Louisiana, he was no longer a slave and could not be held in bondage by the defendant, John Sanford.[15] The issue, then, was federal legislation commonly known as the Missouri Compromise, which prohibited slavery in parts of the Louisiana Purchase north of the 36th parallel, excluding the state of Missouri.

It would have been easy enough for Justice Taney to have followed existing precedents in order to declare that free soil laws deprived slave holders of their property without "due process of law." Such a ruling would have invalidated the Missouri Compromise (which had technically already been gutted by the time the ruling was handed down). However, Taney felt the need to go further and to rule that, even were Scott a free black, he could still not become a U.S. citizen and could not, therefore, file a suit in Federal Circuit Court as a citizen of the state of Missouri. According to this argument, the lower court never had the jurisdiction to hear the case in the first place. Justice Taney ruled on this issue even though both parties to the suit had admitted the jurisdiction of the Circuit Court, and Scott's eligibility to sue was therefore not being contested in the Supreme Court appeal (699). Taney casts the question quite broadly in his opinion, stating it thus: "Can a negro, whose ancestors were imported into this country and sold as slaves, become a member of the political community formed and brought into

existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied [*sic*] by that instrument to the citizen[?]" (700).

In interpreting the Constitution, Taney repudiates any possibility for altering its meaning, noting that "No one . . . supposes that any change in public opinion or feeling in relation to this unfortunate race . . . should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted . . . it must be construed now as it was understood at the time of its adoption" (709). Taney also completely separates his responsibility as a Supreme Court Justice from the task of determining what is or is not "just," writing, "It is not the province of the court to decide upon the justice or injustice, the policy or impolicy of these laws" (700). Following the logic that characterizes a positivist approach to the law, Taney completely collapses the meaning of *justice* with the political authority of those who wrote the Constitution and continue to write legal statutes: "The decision of that question [of justice] belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted" (700). Of course, one could point out that such a restricted view of justice as reducible to actual law and to political power is not consistent with the view of justice and law held by Thomas Jefferson and other constitutional framers, many of whom subscribed to a view of natural law as an ideal standard toward which human institutions were gradually progressing. For Taney, however, armed with his own nineteenth-century, positivist sense of justice and legal interpretation, the task became to discover what the framers' original opinions of blacks were and how those opinions differed from their definition of *citizen*.

An interesting rearticulation of Taney's view of justice and legal meaning can be found in U.S. Supreme Court Chief Justice William Rehnquist's 1976 article on the notion of a "living Constitution."

Rehnquist, writing while still an associate justice and shortly after the Court's decision in *Roe v. Wade* guaranteed a woman's constitutional right to an abortion, provides two possible meanings for the phrase "living Constitution": first, that the Constitution was worded generally so that it could be applied to situations that did not yet exist at the time of its framing and, second, that courts should be able to substitute "some other set of values for those which may be derived from the language and intent of the framers" (695). It is the second sense to which he objects, using as an example of its expression a legal brief filed on behalf of state prisoners. He quotes the brief, in part, as follows: "The Court, as the voice and conscience of contemporary society, as the measure of the modern conception of human dignity, must declare that the [named prison] and all it represents offend the Constitution of the United States and will not be tolerated" (695). Rehnquist disagrees with this position because he sees the Court's role as "merely interpreting an instrument framed by the people." He adds, as if paraphrasing Taney, that a "mere change in public opinion since the adoption of the Constitution, unaccompanied by a constitutional amendment, should not change the meaning of the Constitution" (696–97).[16]

Throughout his article, Rehnquist rhetorically collapses the "language" and "meaning" of the Constitution with the "intent" of the framers. Although he tries to distance himself from Taney's decision, using the abrogation of the congressional free soil laws in *Scott* as an example of the constitutional doctrine to which he objects, it should be evident that his view of the law is fundamentally the same as Taney's. It is at least difficult to imagine that Rehnquist's approach would not have led to a similar ruling on the question of Scott's freedom (Rehnquist 700–702). For Rehnquist, laws cannot be unjust or morally wrong, because "laws that emerge after a typical political struggle in which various individual value judgments are debated . . . take on a form of moral goodness because they have been enacted into positive law. It is the fact of their enactment that gives them whatever moral claim they have upon us as a society . . . not any independent virtue they may have in any particular citizen's own scale of values." Furthermore, "there simply is

no basis," Rehnquist tells us, "other than the individual conscience of the citizen that may serve as a platform for the launching of moral judgments" except for positive law (704).

Given his identification of the language of the Constitution with the intent of the framers, it follows from Rehnquist's argument that we must always be governed by eighteenth-century conceptions of social values. Most of "the people" who adopted the Constitution certainly believed slavery to be just, freedom to be male, and morality to be Christian and Protestant. Must we abrogate the Constitution to make it commensurate with any other sense of justice, freedom, or morality? While Rehnquist claims that this is the only view of judicial review compatible with democratic philosophy, it could as easily prove incompatible, enslaving people to antiquated conceptions of right and stifling the voice of, to quote Rehnquist's brief writer, "the modern conception of human dignity." Our chief justice allows no room for a view of justice as something other than positive law (as, for example, empowering social arrangements conducive to the flourishing of human dignity). According to Taney's and Rehnquist's perspectives, we must honor injustice if it is codified in law—or, rather, nothing can be an injustice if it is codified in law. Such positions make evident that the question at issue in the prisoners' brief and in *Scott* is precisely what are justice, freedom, and human dignity. One need not be a linguist to see that the meanings of these words might exceed the constitutional framers' sense of them.[17] My point is not that a legal positivist view always leads to conservatism, but that it does not provide many options for justifying change or for explaining the expanding reference of moral terms.

In contrast to Taney's positivism, most radicals in the nineteenth century, including abolitionists, advocated a naturalist position with regard to law and justice. Even so, such a position did not necessarily yield a different approach to constitutional interpretation. Abolitionist William Lloyd Garrison, for example, in arguing that the U.S. Constitution was a pro-slavery document, discounted the idea that interpreters in the nineteenth century could redefine the meaning of words used by the constitutional framers or suggest that they "misunderstood and

misinterpreted their own Constitution" (302). For Garrison, the fact that many of the framers of the Constitution intended to defend slavery meant that "it is not an error in legal interpretation that they are to correct, but they are to be arraigned as criminals of the deepest dye" (302–03).[18] However, Garrison believed that interpretation of the Constitution strictly limited to its words and the intentions of its authors was compatible with a commitment to an external standard of justice and right. In fact, Garrison's criticism of the Constitution is based in part on the fact that it permits of no higher standard of justice; for that reason, he felt that it had to be abrogated and the Union dissolved before slavery could be abolished.

A contrasting example of abolitionist commitment to natural right can be found in Frederick Douglass's 1847 response to Henry Wright. The context for Douglass's letter is Wright's and other abolitionists' criticisms of the act of purchasing a slave's freedom. Douglass summarizes this position as follows: All people have a natural right to freedom, and no one has a right to own another or to purchase another; therefore, to purchase the freedom of a slave is to acknowledge the right of the seller to own another human being. (In chapter 3, I will return to this argument in considering the narrative of Harriet Jacobs.) Following the purchase of Douglass's own freedom, he responds to a statement by Wright, seeking to assuage his concerns: "The error of those, who condemn this transaction, consists in their confounding the crime of buying men *into slavery*, with the meritorious act of buying men out of slavery, and the purchase of legal freedom with abstract right and natural freedom" (I.202). For Douglass, the separation between natural and legal freedom means that one can acknowledge the necessity of dealing with the force of the courts and the state without endorsing or sanctioning their injustices. Consequently, while one must acknowledge the reality and force of positive law in negotiating everyday relations, such an acknowledgment can be compatible with holding positive law unjust according to an external standard of natural right.

Later, rejecting Garrison's intentionalist interpretation of the Constitution, Douglass even holds that slavery is illegal. His contention

here is noteworthy: "We found, in our former position, that, when debating the question, we were compelled to go behind the letter of the Constitution, and to seek its meaning in the history and practice of the nation under it . . . we [now] hold [slavery] to be a system of lawless violence; that it *never was lawful, and never can be made so*" (II.156). Douglass holds that the intentions and actions of the framers and the nation at the time of the writing of the Constitution do not settle the question of what the document means. If concepts such as justice and freedom are invoked, their meaning can well extend beyond the limited sense of the person invoking them. To the extent that conditions of human existence are possible that are freer and more just than those under which the Constitution was adopted, freedom and justice are not limited to the state of that society. Douglass's moral inquiry takes normative terms to have objective possibilities that can exceed the terms' use in any one context. The fact that Jefferson proclaimed slavery to be just does not mean that slavery is or was just, only that he thought it to be so. Douglass's claim is that he has a more accurate sense of justice than did Jefferson, one that was more accurate even in Jefferson's time and for Jefferson himself, although he may not have known it.[19]

In a response to the kind of argument that Douglass presents, Garrison replies that to interpret the Constitution in any light other than the intentions of the authors would be "to advocate fraud and violence toward one of the contracting parties, whose cooperation was secured only by an express agreement and understanding between them both" (310). This is an interesting retort on the question of constitutional interpretation, but it agrees with Douglass on one crucial issue: that the key terms invoked in the Constitution (especially *freedom* and *justice*) have reference beyond the limited comprehension of the constitutional framers. The difference between the two abolitionist positions is that Garrison also holds that there is a second, positivist sense of justice that is validly employed when discussing the arena of existing institutions; according to this sense, slave owners denied of their right to own slaves could "*justly* claim to have been betrayed, and robbed of their constitutional rights" (310; emphasis added). When Garrison also

calls slaveholders "criminals," however, he is not equivocating but rather distinguishing between legal and natural right and the appropriate usage of each. As in Douglass's defense of the purchase of his freedom, Garrison employs a legal right sense of justice from within the terms of positive law while holding on to a natural right sense of justice according to which positive law can in turn be evaluated.

Thus, while legal positivist positions reject any conception of justice beyond existing laws and judicial precedents, legal naturalists assert the possibility of evaluating legal systems as just or unjust according to an external standard. Beyond this difference, natural law positions have usually been conceived of in such a way that natural right (however it is defined) provides an infallible and absolute foundation for social regulation and action. I believe that it is for this reason, along with its traditional association with religious argumentation, that many contemporary leftist theorists have abandoned legal naturalism. At the forefront of the leftist rejection of natural law and any nonpositivist approach to justice have been marxist philosophers and critical legal scholars. As I demonstrate in chapter 1, many marxists and critical legal theorists have turned to rearticulations of legal positivist approaches, reducing notions of justice to the body of actually existing laws and/or the body of legal decisions made by judges. In performing this reduction, marxists and critical legal scholars frequently deny the possibility of a standard, external to positive law, by which contemporary societies and legal systems might be viewed as unjust. Therefore, any reconceptualization of natural law that would oppose absolute foundations and divine infallibility would also have to work against strong currents in contemporary legal theory and leftist philosophy. Despite the daunting nature of the task, chapter 1 of this book takes steps toward such a reconfiguration of natural law in the course of elaborating a postpositivist approach to justice. Important to this task is my interpretation of the thought of Martin Luther King Jr. I argue that, in addition to his theological arguments, King's ideas about justice rely on a notion of natural law as a realizable ethical ideal whose possible achievement is latent in the formation of society. His standard of natural law is, therefore, neither

ahistorical nor realized in the positive laws of his day; however, it is materially possible and can therefore be seen as a more fundamental ethical standard than the notion of justice embodied in positive law.

King's work asks us to inquire not only into the nature of justice, but also freedom and the relationship between the two. I argue that a discussion of justice must be accompanied by a discussion of freedom. Garrison's and Douglass's views on legal and natural right make clear why this should be the case. Even once one acknowledges a standard of justice external to positive law, justice remains a concept to be enacted through social regulation and administration. It remains "juridical" insofar as it pertains to law-making bodies and courts even if it is not reducible to them. The implementation of an ideal of justice that would be incompatible with a present-day unjust and unfree society would therefore depend on the transformation of that society such that conditions of freedom might enable the establishment of new, just legal standards. It is for this reason that Garrison suggested true justice could not be instantiated in the society of his day. In a hypothetical passage in which he supposes that the U.S. Constitution were an antislavery document, he points out that such a liberatory document would be lifeless without the power of force behind it. In other words, if the Constitution promotes freedom and justice but slavery still exists, then the Constitution clearly has no impact on the actual functioning of society: "[I]f we are living under a frightful despotism, which scoffs at all constitutional restraints, and wields the resources of the nation to promote its own bloody purposes—tell us not that the forms of freedom are still left to us!" (312–13). Because of the interdependence of justice and freedom, I suggest that an appeal to justice understood as an appeal to transform legal and judicial institutions requires an additional call for a radical notion of freedom that would allow people to implement the social transformation for which justice calls.

What Is Freedom?

As with *justice*, there are many senses in which one might use the word *freedom*. I contend that many of these are also interestingly connected

to justice. Justice is something one usually attributes to real or desired institutions, procedures, or processes. Even when one speaks of a person being just, one usually is speaking of that person's behavior in making decisions. Since only people free of coercion from unjust institutions would be able to act justly, the establishment of justice in a society must entail the freedom of people from such institutions. Furthermore, if justice aims at the promotion of human dignity and flourishing, and if freedom is understood as essential to that flourishing, then justice might also entail a complex understanding of what it means to be free beyond simply a lack of physical constraint by external forces. One might speak, therefore, in the first instance of legal freedom as lack of restraint, such as not being a slave or not being in jail or not being bound by an unjust contract. This is the minimal freedom that Du Bois ironically criticizes in the epigraph to this book. He suggests the necessity of a second, more meaningful sense of freedom that includes the material ability to act and make decisions about one's life. This sense implies not merely the absence of restraint but the presence of ability: empowerment. Thoreau registers a third sense of freedom (moral or existential freedom) when he describes prison as "that separate, but more free and honorable ground, where the State places those who are not *with* her but *against* her,—the only house in a slave-state in which a free man can abide with honor" (720). Here Thoreau suggests that even though one is in prison, physically unfree, one is freer than are those who have remained slaves to social injustice rather than opposing the moral wrongdoings of the state. Going further than Thoreau, I argue in the course of *Fugitive Thought* that the experience of unfreedom by prisoners (and slaves) can give rise to concrete notions of freedom's possibilities that are more enabling and expansive than those that have preoccupied, indeed dominated, the Western philosophical tradition. These alternative possibilities are closer to those suggested in Nobel laureate Toni Morrison's novel *Beloved*, where she writes that "[f]reeing yourself [i]s one thing; claiming ownership of that freed self [i]s another" (95).

Throughout this book, I discuss expanded notions of freedom in writings by prisoners and ex-convicts such as Assata Shakur, Miguel

Piñero, Pancho Aguila, and others. Here, I review some other considerations of freedom. In the Western philosophical tradition, freedom has mostly been discussed in the field of metaphysics. There it has been considered in opposition to determinism. A long tradition of distinguished philosophers have devoted themselves to the question of whether and to what degree human choice and action are previously determined by outside forces (determinism) and whether and to what degree humans may choose to act as they wish (freedom). Frequently such discussions have carried implications about political and legal freedom, although more often implicitly than explicitly. In Aristotle's discussion of voluntary choice, for example, the nature of freedom is not described so much as it is assumed. It is an implied concept, implied in his characterization of volition as the state of having something under one's control. Thus freedom, for Aristotle, means not being subject to the control of external forces so that one might make a deliberative choice in relation to something under one's own control. It is thus a concept bound up with individual autonomy, mastery over objects/others, and lack of external restraint. If I am not mastered by something external to myself, this is so insofar as I am myself the master of something else.[20]

The identification of freedom with mastery and autonomy continues in later considerations of freedom. For example, the Roman slave Epictetus defines freedom narrowly as being able to act without constraint. He asks, "What is it then which makes man his own master and free from hindrance?" (120). What he finds is that, insofar as bodies can be controlled or destroyed by others and material objects can likewise be lost, taken away, or destroyed, one can never exercise freedom so long as one remains bound to concern over the body or material world. Expanding on this, he writes,

> When you wish your body to be whole, is it in your power or not?
> "It is not."
> And when you wish it to be healthy?
> "That is not in my power."

> [. . . . .]
> And to live or die?
> "That is not mine either."
> The body then is something not our own and must give an account to any one who is stronger than ourselves. (120–21)

A stoic philosopher in the tradition of Seneca and Marcus Aurelius, Epictetus urges his readers to see that freedom lies in the ability to deny the body and passions, to master and renounce emotion and materiality so that one's physical state becomes unimportant for the exercise of the mind. One is truly free for Epictetus not by being physically unfettered but by being unconcerned about one's physical state. Later, the rationalist philosopher René Descartes, in his *Fourth Meditation*, presents deliberation as the opposite of freedom, contra Aristotle. One is freest, for Descartes, when one acts knowingly and correctly, that is, when one's choice is clear and easy. Misuse of freedom consists in acting without knowing. Thus, (self-)restraint, according to Descartes, is the most important use of one's freedom, so that one should not abuse one's freedom by deciding too rashly (and wrongly) (83–90). Meanwhile, putting a new spin on Epictetus's view, Descartes's Spanish contemporary Benedictus de Spinoza held that the mind has freedom in direct proportion to how much control it exercises over the body and emotions. The mind is therefore free insofar as it acts from its own power and is not determined by "external" passions (616).[21] Thus, Aristotle, Epictetus, Descartes, and Spinoza, despite other differences, all inscribe freedom as mastery over something: others and objects, materiality and the body, oneself, emotions.

Seventeenth-century English philosopher Thomas Hobbes, unlike many earlier philosophers, was primarily concerned with political liberty, rather than the abstract freedom of the will. Hobbes defines freedom as lack of external impediment to motion. Because his overarching goal is to legitimate the rule of the sovereign, he seeks to demonstrate what the limits of freedom should properly be for the ruler's subjects. Liberty for Hobbes only exists insofar as it is consistent with the rule

and intentions of the sovereign. Within that sphere, it lies "only in those things, which in regulating their actions, the sovereign hath prætermitted: such as is the liberty to buy, and sell, and otherwise contract with one another; to chose their own abode, their own diet, their own trade of life, and institute their children as they themselves think fit" (161). Interestingly, Hobbes's view of freedom is not necessarily freedom from the sovereign, but rather freedom to act without impediment in accord with the wishes of the sovereign. One has freedom, for example, to refuse certain orders from the sovereign, but the sovereign may then have one executed. This does not deny one's liberty, since one acted without impediment in refusing the command. However, for Hobbes, one does not have freedom to act in any way that would limit the sovereign's own freedom; this is the final limit to freedom: "When therefore our refusal to obey, frustrates the end for which the sovereignty was ordained; then there is no liberty to refuse: otherwise there is" (165).

Despite its conservatism, Hobbes's sense of freedom anticipates the classical liberal position as characterized by nineteenth-century Englishman John Stuart Mill. Mill, a utilitarian and staunch advocate of democracy, argues for a wide scope for individual political freedom. He believes that society can progress only if significant personal freedom is afforded to all individuals under a representative government. In order to justify his argument, he turns to the notion of rights. For Mill, one has a right to do something if it concerns only oneself and does not impinge upon the rights of others or work against one's duties to others. Thus, he moves away from the skeletal definitions of freedom as "lack of impediment" and places it within a juridical model: the balancing of individual rights and duties. Individualism therefore becomes central to Mill's project. The first task in determining the scope of freedom must be to determine which acts affect no one other than the individual. To be sure, Mill has persuasive arguments for the importance of individuality and diversity, but this emphasis comes at a price. One advance of Mill's position is that, whereas for Epictetus, Descartes, and Spinoza freedom consists in freedom *from* the body and emotions, for Mill (and for Hobbes as well) freedom is precisely freedom *of* the body

and emotions. One of the most important realms of personal freedom after freedom of speech and thought, according to Mill, is the freedom to experiment in forms of living one's life in accord with one's desires. Despite this important contrast with earlier philosophers, however, there is an antagonism between the individual and others in Mill that is his inheritance from them and the price of his individualism. Freedom is nothing, in this tradition, if not freedom from others. As a result, Mill believes that individual freedom necessitates government and restraint: "All that makes existence valuable to anyone depends on the enforcement of restraints upon the actions of other people" (5). In other words, if I am free from slavery, it is only because others are restrained from holding me as a slave. The primary function of government, therefore, is to guarantee individual rights, thereby limiting freedoms. This line of thought has inaugurated a long tradition of philosophizing about the relative weight and ranking of rights and duties (for example, in *Scott v. Sandford* the right to freedom versus the right to property).[22]

In existentialist accounts of freedom in the twentieth century, one also sees an emphasis on freedom as freedom from others. In fact, the very separation between self and other is defined for French existentialist Jean-Paul Sartre as the essence of freedom, the freedom to negate, or to choose, within a given set of circumstances (within one's "facticity"). Sartre, despite his defense of a radical freedom limited only by the circumstances in which one finds oneself making a choice, brings the discussion of freedom nearly full circle to Aristotle. One enacts one's freedom in relation to, indeed, *against* a resisting world of otherness: "Thus the very project of a freedom in general is a choice which implies the anticipation and acceptance of some kind of resistance somewhere. Not only does freedom constitute the compass within which in-itselfs otherwise indifferent will be revealed as resistances, but freedom's very project is in general to do in a resisting world by means of a victory over the world's resistances" (507).[23] This position within existentialism is significantly altered by writers such as Simone de Beauvoir and Maurice Merleau-Ponty. In addition, democratic theorists such as Hannah Arendt, in critiquing earlier positions in the liberal tradition, have advocated

more complex notions of freedom. For de Beauvoir, one only exists in the world through one's relation to others; one "exists only by transcending [one]self, and [one's] freedom can be achieved only through the freedom of others." "Man is free," she writes, but "he must assume his freedom and not flee it; he assumes it by a constructive movement . . . and also by a negative movement which rejects oppression for oneself and others" (156).[24] Similarly, Arendt rejects the traditional European association of freedom with sovereignty: "If it were true that sovereignty and freedom are the same, then indeed no man could be free, because sovereignty, the ideal of uncompromising self-sufficiency and mastership, is contradictory to the very condition of plurality" (*Human Condition* 234). Instead, Arendt argues that it is in relation to others, in one's sociality and interdependence, that freedom exists, rather than in one's (imagined) separation from others (*Human Condition* 28–37, 38–39, 234–36).[25]

While the notion of freedom as connection to others, rather than freedom from others has recently begun to be explored by European philosophers, there exists a substantial intellectual tradition that has envisioned freedom in this way for at least two centuries.[26] Black thinkers from Frederick Douglass and David Walker to Assata Shakur and Angela Davis have given substantial effort toward elaborating a critical conception of freedom.[27] Historian Elsa Barkley Brown, in an important essay, argues that both before emancipation and during the Reconstruction Era (1867–77) African Americans understood freedom in decidedly different terms than the reigning tenets of nineteenth-century liberalism. Brown explores in rich historical detail how blacks during Reconstruction embraced a notion of freedom as collective autonomy, rather than individual autonomy. She attributes this partly to the historical circumstances of slavery and postslavery poverty for blacks in the United States: "Whether one eats or starves in this setting depends on the available resources within the community as a whole" (126).

In the writings and thought of most slaves and former slaves, one encounters account after account of the violence done to interpersonal

relationships by the system of slavery: the tearing apart of families, the denial of the right to marry, and the subsequent difficulties in tracking down relatives after emancipation, for example. In his speech "What to the Slave Is the Fourth of July?" Frederick Douglass describes "the tenderest ties ruthlessly broken, to gratify the lust, caprice and rapacity of the buyers and sellers of men" (121). Similarly, Brown notes that the "efforts to reunite family and to establish ways of providing for all community members occupied much of freed people's time and attention" (124). After describing the effects of slavery and oppression on black families, Martin Luther King Jr. writes that African Americans "are a people torn apart from era to era. It is logical, moral and psychologically constructive for us to resist oppression united as families" (*Where Do We Go* 108). Given that separation from others was a central experience for blacks under slavery, the struggle for freedom has been in large part a struggle for the freedom to have connections to others. While, on the one hand, freedom from bondage does mean autonomy and freedom from the power of slaveholders, on the other hand, emancipation came to mean the possibility of entering into and maintaining binding and meaningful interpersonal relations. Brown demonstrates, in turn, how the sense of familial bonding among former slaves evolved into a strong and powerful sense of communal bonds. This is just one example of how an intimate understanding of the substance of states of unfreedom can give rise to a fuller and less abstract notion of what freedom might consist of than what is offered to us by the classical liberal tradition of Mill. For Douglass, unfreedom consists, not merely in impediment to autonomous movement, but in dehumanization, being kept ignorant, separated from one's family, and beaten (118, 120). Brown notes that, for blacks during Reconstruction, freedom meant not having to work under someone else's control and being able to participate directly in political decision making (127, 130).

In King's work, the distinctively African American conception of freedom, including its attendant claims about solidarity and responsibility, is grounded in an understanding of subjectivity as relational. Since individual subjectivity is impossible without recognition from others,

freedom cannot usefully be defined by the absence of restraint from other people. While many conceptions of freedom in classical liberalism assume a tension between one person's freedom and that of others (since my freedom entails a limitation on the ability of others to act with regard to me), the freedom of others, according to King, is a precondition for one's own free action, rather than a limitation on it. To act otherwise and to assume that one's freedom lies in unrestricted action and the limitation of others is to deny the intersubjective nature of the self and action and to refuse to acknowledge one's dependence on others.[28] Therefore, while one should not lose sight of the importance of physical and legal freedom from external restraint, there does remain a sense in which someone could be freer while physically in bondage than one who is free from captivity but enslaved by a refusal to acknowledge one's relation and duty to others.

Identity, Knowledge, and Praxis: An Overview of the Project

My interest in the writings of prisoners has served to deepen my concerns about the interconnection of justice and freedom and the complexity of invocations of each. I therefore turn in the second half of this book to prison literature partly to provide a corrective to the views of lawyers, legal scholars, and professional philosophers regarding the concept of justice. I demonstrate that prisoners' intimate involvement with the injustices of positive law makes them valuable and concrete theorists of justice and that their participation in struggles for freedom makes them among the most important theorists of the material nature and possibilities for expanded notions of freedom. What I discovered as I looked into the work of radical prison writers and theorists was a general suspicion of the impulse to theorize justice abstractly and independently from other concepts such as freedom. In this, I agree with political theorist Iris Marion Young, who objects to traditional theorizing about justice and its dependence on counterfactuals—nonexistent states of nature or fictional stories about a perfect society that supposedly show us what an ideal method or procedure for justice would look like (3–7). My claim, furthermore, is not merely that the input of prisoners and

dissidents is *useful* in developing a critical theory of justice and freedom, but rather that it is *necessary*. I contend that social theory is flawed at its core to the degree that it is unable to ground itself in the lives of those whom it is supposed to affect. The result of such a repositioning of critical social theory on a large scale would be a significant transformation of the leftist political and theoretical landscape. Among other things, this kind of "praxical" view of theory (that is, of theory as arrived at through experiencing and acting in the world) could force theorists to acknowledge that some contradictions cannot be resolved neatly in the abstract, but rather should be worked out in concrete situations, "on the ground," as social scientists say. The prisoners whose writings I examine argue that, as a consequence of the relationship between one's own freedom and that of others, freedom is something not to be possessed but rather to be enacted and practiced through struggle for the freedom of others. This is a position much indebted to a tradition of theorizing freedom-in-struggle on the part of black slaves, former slaves, and their descendents in the United States.

In turning to prisoners as social theorists, one thing that I find significant is their use of a theoretically constructed identity as *prisoner* or *political prisoner*.[29] The writers I address have a particular sense of themselves as prisoners, political prisoners, or even prison activists that is resistant; they understand themselves and the society in which they live in ways that challenge the dominant portrayal of the relations among the state, prisons, laws, and prisoners. Prisoners do not gain critical knowledge of society through the simple fact of being imprisoned. Instead, through active struggle against injustice and struggle for freedom and humanity, they are thrust into a location that affords them the opportunity to assess and evaluate the meanings and possibilities of ethical concepts like justice and freedom. How they understand that location and take it up as a place from which to act—that is, how they identify themselves—is integral to what they know and how they make sense of the world. In other words, their identities as prison activists and political prisoners have crucial interpretive and political consequences. In the nineteenth century, it was slaves, former slaves, and abolitionists

who were the most actively involved in thinking and acting in relation to the stakes of rival conceptions of freedom. Today, it is prisoners and those struggling on the "outside"—prison abolitionists and reformers—who are most likely to find themselves rethinking and expanding such conceptions.

In *Prison Literature in America*, H. Bruce Franklin argues that there exists a struggle between two different self-representations by prison writers in the period of the 1970s. On the one hand, there is the "collective revolutionary consciousness based on Black historical experience" of the self-identified political prisoner; on the other hand, there is the "isolated convict ego, branded and cast out, seeking either to reintegrate with the social order or to defy it in [isolated] rebellion" (262). The first of these subject positions understands the prisoner's freedom or imprisonment as collective freedom or imprisonment and often portrays it as a particularly extreme illustration of the general condition of society (243–44). This identity as political prisoner proves valuable in interpreting the social world and elaborating alternative ethical conceptions. In an essay in *If They Come in the Morning*, prison activist Bettina Aptheker argues for four different senses of the term *political prisoner*: First, there are political leaders who are framed in order to reduce their effectiveness; second, there are prisoners arrested for civil disobedience; third, there are "many thousands of originally non-political people who are the victims of class, racial and national oppression"; and fourth, there are those regular convicts who "due to the social conditions they experience" in prison "begin to develop a political consciousness" and are subsequently persecuted by parole boards and prison administrators because of their political beliefs (51). Those who identify as political prisoners in one of these four senses, and who act from such an identity, act in a resistant mode toward dominant oppressive systems. This social identity, its interpretive consequences, and the resistant action that follows from it can give rise to alternative moral conceptions.

In a recent paper on George Jackson and standpoint epistemology, Robert Wasilewski has argued that Jackson elaborates just this kind

of resistant political prisoner identity in order to launch his critique of U.S. society. Drawing from Marx and from Mohanty's exploration of social identities as theoretical constructs that enable us to interpret our experiences, Wasilewski makes the following claim: "The very endeavor of attempting to change the world brings one into focus with its central power structures. Jackson in particular encounters and confronts the prison system and institutional racism, and in these encounters gains a necessary insight into their oppressive machinery" (7). One can see that the role of "praxis," or concrete action directed at transforming the world, is central to both the theoretical elaboration of an identity and the generation of new moral knowledge (Moya and Hames-García 62–64).

On the basis of these kinds of arguments about the inseparability of praxis, knowledge, and identity, I believe that one of the best places to look for insights about what justice and freedom are not and what they can be is in the words of those struggling within and against the contemporary prison-industrial complex. Amazingly, this decision is counterintuitive for many people. If, however, we commit ourselves to the premise that knowledge is praxical and that it therefore cannot be arrived at simply through philosophical reflection, then we should acknowledge that it is at least as reasonable to turn to prisoners for a theory of justice and freedom as it is to turn to lawyers, judges, and professional philosophers. While I do not attend exclusively to the writings of prisoners in this book, I do base my reconstruction of these ethical concepts in large part on the struggles of black and Latina/o prisoners in the United States. Insofar as this book insists on the necessity for normative theory to be informed by subordinate perspectives, such as those provided by prisoners and social dissidents, it presents prisoners as among the most informed and eloquent voices commenting on and articulating alternatives to the existing inhumanities of injustice and unfreedom. I contend that their perspectives are crucial for understanding existing models of justice from a critical perspective and for envisioning the possibilities for better, freer social arrangements in the future. Two discoveries that emerge in my study of the poetry and essays

of these prisoners are the power of their experiences of social protest within the prison and the effects of those experiences in shaping their political and intellectual views.

Black feminist critic Margo V. Perkins, in her book *Autobiography as Activism: Three Black Women of the Sixties*, distinguishes the project of literary criticism from history, by noting that her goal is not so much to provide a history of women's involvement in the Black Power Movement, but rather to explore how activists "use life-writing to recreate themselves as well as the era they recount" (xiii). Similarly, *Fugitive Thought* is not fundamentally a history of legal thought, prison movements, or leftist activism in the late twentieth century. It does not use prisoner's writings to recreate a historical narrative, as does Kate Millett's *The Politics of Cruelty: An Essay on the Literature of Political Imprisonment*. However, while it employs the tools of literary analysis to examine writings by legal theorists and prison intellectuals, it is also not only a literary study. In this sense, it departs significantly from Gregg D. Crane's *Race, Citizenship, and Law in American Literature*, H. Bruce Franklin's *Prison Literature in America: The Victim as Criminal and Artist*, or Barbara Harlow's *Barred: Women, Writing, and Political Detention*. Like Wai Chee Dimock's *Residues of Justice: Literature, Law, Philosophy*, *Fugitive Thought* seeks to interrelate legal theory, literature, and philosophical debate about justice and freedom. However, unlike Dimock's text, mine locates its subject material in noncanonical literary and philosophical traditions resistant to Western thought in order to foreground coloniality, gender, race, and sexuality. *Fugitive Thought* focuses on a relatively select group of texts that exemplify crucial elements of radical theorizing around social justice and radical prison movements in the United States.

The first section of this book, "Justice, Race, and Law," consists of two chapters and traces important issues in U.S. legal theory, such as the productive tensions between legal naturalism and positivism and the interplay between race and epistemological standpoint. This introduction has given a brief look at the nineteenth-century debates between natural law theories and legal positivist views of justice. While positivist

positions reject any concept of justice beyond existing laws and judicial precedents, legal naturalism asserts the possibility of evaluating existing legal systems as just or unjust according to an external standard. Chapter 1, "Toward a Critical Theory of Justice," picks up debates about justice in contemporary legal theory and the philosophy of law. Using a critical moral realism that advocates a revisable and realizable ideal of justice, I argue against standard marxist repudiations of justice, such as that put forward by the philosopher Allen Wood. I demonstrate how these critiques of justice, as well as many positions taken within the late-twentieth-century critical legal studies movement, equate justice with actually existing laws. In making this kind of positivist move, such critiques limit, rather than expand, the range of moral options available to us. This primarily theoretical chapter then moves to a defense of the version of moral realism that informs my entire project. This postpositivist moral realism entails the rejection of impoverished notions of objectivity as detachment and freedom from presupposition and theoretical bias. I then examine the critical theory of natural law employed in Martin Luther King Jr.'s "Letter from Birmingham Jail." Important for King, as for moral realism, is the belief that the possibilities for normative concepts are not limited to those corresponding to existing institutions. Finally, I return to the questions of epistemic privilege and social identity that will be central to the book, invoking legal scholar Mari Matsuda's notion of "looking to the bottom" of society for the most radical and emancipatory moral insights.

The second chapter, "In Contempt: Lawyering out of Bounds," turns to the semi-autobiographical narratives and legal writings and practice of Chicano lawyer Oscar Acosta. The question at the heart of this chapter is whether the postpositivist realist conception of justice discussed in chapter 1 is compatible with the confines of a liberal capitalist legal system. I first consider Acosta's theorization of social identity in order to think about the relationship between his involvement in identity-based political struggle and his legal theorizing. While Acosta uses satire to challenge essentialist conceptions of identity within the Chicano movement, his textual strategies fail to adequately challenge

the sexism and homophobia of masculine identity construction in his texts. In other words, Acosta fails to come up with possibilities for connecting oppressions and identities without assuming false or superficial commonality or reinscribing preexisting lines of inequality. If his theorization of social identity in the context of multiple modes of oppression falls short of the kind of liberatory project he envisions, however, his accounts of the law and of the justice system prove to be much keener. I therefore turn to his critique of existing legal structures. This discussion serves to concretize the theoretical discussion of justice from the previous chapter in the context of Acosta's actual courtroom practice. Acosta's work aims at the reconstitution of the legal system in keeping with a standard of justice external to that system. His analysis of society leads him to believe that, since the existing judicial system cannot admit the legal relevance of historical injustices against Chicanas/os, extralegal pressure is necessary to transform that system, to eliminate the repressive legal features of society, and to project a radical vision of justice that can serve the interests of Chicanas/os. Drawing also from critical race theorist Patricia Williams, I demonstrate how contemporary U.S. juridical systems define systemic aspects of discrimination (for example, historical patterns and material inequalities) as existing outside their purview. This necessitates action outside of the legal system (for example, activism for social change) in order to bring into being a radical conception of justice or freedom. Acosta, then, presents a critique of the system based on an external standard of justice, while Williams suggests how one can begin to move beyond hegemonic definitions of normative juridical concepts like justice and rights.

The second part of the book, "The Practice of Freedom and U.S. Prison Movements," turns from this framework of justice, race, and law to readings of ethical and social critiques in writings by male and female black and Latina/o prisoners in the United States during the last third of the twentieth century. Common to the writers I examine is the inseparable relationship between the exercise of one's freedom and the acknowledgement of one's relationship to others. In addition, interconnection between individuals is seen not as a burden on freedom,

but as a condition of its possibility. Chapter 3, "The Practice of Freedom: Assata's Struggle," looks at Assata Shakur's 1987 autobiography, *Assata*. I examine Shakur's elaboration of a theory of freedom that negates and transcends the given circumstances of U.S. society. Because of the nature of this conception, it remains an open-ended ideal to be realized through ongoing struggle. It thus bears a resemblance to King's notion of justice as deriving from struggle and an acknowledgment of mutuality. The very fact of freedom's incompleteness (no one is free so long as others remain unfree) necessitates action directed at changing society. Freedom, therefore, must be understood ultimately as a practice, rather than as a possession or a state of being. I argue that Shakur's text, drawing from a tradition of black women's autobiography, articulates this conception of freedom as a motivating force for political action. Shakur, a formerly incarcerated member of the Black Panther Party who gave birth to her daughter while in jail, recasts the process of social transformation using motherhood as a metaphor. Drawing from Joanne Braxton's archetype of "the outraged mother," I argue that Shakur's conception of freedom calls for a "politics of outrage." I then expand my discussion of Shakur's theoretical argument, analyzing the role of "hope" in the elaboration of a transcendent and critical politics for freedom (legal and moral) and further considering Shakur's use of the metaphor of motherhood for revolutionary practice. She argues, in effect, that rather than motherhood being the most appropriate revolutionary act for a woman, revolution is the most appropriate act for a mother. In accord within a long tradition of African American slave narratives, this reconceptualization paves the way toward a critical theory of freedom that expands outward to additional claims regarding solidarity and responsibility for the freedom of others. The chapter concludes by examining Shakur's textual strategies for criticizing the U.S. court system and weaving alternative conceptions of freedom and justice.

The fourth chapter, "Resistant Freedom: Piri Thomas and Miguel Piñero," examines writings by convicts and former convicts about the insights they have gained from the experience of incarceration relating to the enactment of moral and physical freedom. Piri Thomas advocates

reforms in order to end the prison system's propensity to existentially and morally deform rather than reform its inmates. His work also presents a critical version of masculinity that informs definitions of "criminality" and rehabilitation. Thomas is perhaps one of the best examples of the "classic" reformed prisoner's critique of the prison system. In two memoirs, *Down These Mean Streets* and *Seven Long Times*, he shows in detail how prisons' emphasis on punishment rather than rehabilitation and their consistent dehumanization of prisoners are responsible for sending most convicts back to the streets worse off than they were when they entered. Convicts who reform do so in spite of, rather than because of, the system. Miguel Piñero offers a far more radical critique of the pernicious operations of power that are intrinsic to the prison's operation. For Piñero, the function of the prison is merely a concentrated instance of the functioning of society at large. He sees at the center of the prison system profound forces of separation and racial, sexual, and economic dehumanization of others. In response, he advocates a conception of freedom as resistance and as a striving toward connection and solidarity with others. This moral vision of freedom develops and further concretizes the ideas found in Shakur's writings. Piñero, like Shakur, sees freedom as a relationship to be enacted rather than a thing to be possessed. The elaboration of alternative conceptions of freedom in this chapter and the preceding one complement the ideals of justice explored in chapters 1 and 2. They develop an ethical ideal that is *realizable*, given the existing state of society, but which diverges from traditional conceptions of the "just society" or the "free individual."

The book's third and final section, "Rebellion, Poetry, and Praxis," looks at the mutual imbrication of theory and praxis through the words of two prison poets, Pancho Aguila and raúlrsalinas (Raúl Salinas), as well as writings by participants in two prison rebellions from the 1970s and anthologies by political prisoners in the United States. It finishes a thread running throughout the project: the view of writings by prisoners and what critical race theorist Gerald López calls "rebellious lawyers" as both social theory and profoundly praxical works that engage in the process of transforming the social world. Chapter 5, "Toward

a Praxical Moral Theory: Prison Poets and Intellectuals," therefore brings the question of social location to center stage. I argue that some of the best insights about ethics and social theory exist in the writings and praxis of participants in prison movements. I begin by examining the poetry of raúlrsalinas and Aguila and explicating their positions on understanding, standpoint, and solidarity. Of particular interest to me is these male writers' attention to gender and sexuality, topics in regard to which one might expect them to have significant blind spots. Yet, in contrast to Acosta, each of these authors in one way or another demonstrates a profound ability to interrogate their own subject positions as men and to articulate sophisticated critiques of gender and sexual oppression. After a detailed consideration of the epistemological frameworks set up by these two poets, I then look at the role of prison intellectuals in two rebellions: the Attica uprising in 1971 and the takeover at the North Carolina Correctional Center for Women in 1975. I also examine writings by various political prisoners. Through a number of published poems and essays, these prisoners put forward normative claims developed out of their concrete experiences of oppression and struggle. Following them, I argue that moral and ethical theory needs to be thought of as arising praxically rather than out of abstract speculation. Rather than applying theory to activism, their example reflects the development of theory out of practical engagement with one of the most destructive and dehumanizing institutional mechanisms in contemporary society. Putting these writings within the context of the critical moral theory elaborated in preceding chapters, I aim to demonstrate how the critiques and moral visions of participants in prison movements can contribute to the production of better and more adequate ethical conceptions and to their eventual realization.

PART I
JUSTICE, RACE, AND LAW

complex is untenable. Of course, publishing and shifts in academic consensus do not necessarily translate into substantive social change. One can also observe significant shifts in public perceptions of prisons, however. The June–July 2002 "Prison" issue of the popular magazine *Colors*, for example, focused on the experiences of prisoners in countries across the globe: South Africa, the United States, Denmark, Colombia, Bulgaria, New Zealand, Uganda, Spain, Italy, Brazil, Mexico, and the Gaza Strip. As James notes, however, reading "will not necessarily compel the reader to moral acts" (*Imprisoned Intellectuals* 3). Herein lies the importance of the praxical perspective for which I have argued in *Fugitive Thought*. Moral claims only derive significance through their enactment in the world. Specifically regarding freedom, those of us on the outside forfeit ownership of our freed selves insofar as we remain inactive on behalf of the freedom of others.

Still, given the continued development of radical theory and organizing, the increased difficulties of publicizing demonstrations and protests, and the heightened governmental repression of radicalism in the past three decades, writings by prisoners take on enormous significance. The publication of these writings becomes one of the few ways of preserving and disseminating the moral praxis that takes place in prisons. It is also one of the only ways to disseminate information about political prisoners and prison conditions. Like Latin American testimonios, these works are able to record the coming to consciousness of their authors and to comment on the strengths and weaknesses of prison movements. In the best instances, they will inspire readers to act as well, helping to birth from the shadows of despair a vision of liberation.

Notes

Introduction

1. Although there were 61,000 "Hispanics" with doctoral degrees in the United States in 2000, there were more than 350,000 "Hispanics" incarcerated in the United States (Newberger and Curry 25; Harlow, *Profile* 3; U.S. Dept. of Justice, *Sourcebook* 519, 524).

2. On Mumia Abu-Jamal, see note 5 to chapter 3.

3. Consider, for example, President Bill Clinton's list of pardons and commutations upon leaving office. From the controversial financier Marc Rich to heiress/hostage/revolutionary/informant/actress Patricia Hearst, the list was made up almost entirely of wealthy and politically influential white criminals. Compare this fact with the following statistics: According to the U.S. Department of Justice, the lifetime likelihood for going to state or federal prison is one in twenty for the "average" U.S. citizen; blacks have an almost one in six chance; for "Hispanics" the likelihood is nearly one in ten, while for whites, the odds are one in forty. In 2000, "based on current rates of first incarceration, an estimated 28% of black males will enter State or Federal prison during their lifetime, compared to 16% of Hispanic males and 4.4% of white males." Moreover, 65 percent of state prisoners in 1991 belonged to racial or ethnic minorities. Prisoners in federal prisons are far more likely to be "Hispanic" than those in state prisons (28 percent vs. 17 percent). By contrast, the U.S. Census Bureau estimates that blacks comprise 12.8 percent of the total population and "Hispanics" 11.8 percent.

4. The study's results held for the middle range of aggravated-death penalty cases; that is, once the most extreme and heinous murders were excluded, race

proved to be the most salient variable in determining the fate of a defendant. Other variables considered by the study included the age of the victim, whether the defendant was a prisoner or escapee, whether rape was involved, the number of victims, whether the victim was a police officer, the gender of the victim, the prior conviction record of the defendant, whether the victim was a hostage, whether there were multiple shots or stabs, whether armed robbery was involved, whether racial hatred was a motive, and whether there was mutilation of the victim (Baldus, and others, 689–95).

5. In fact, the Court ruled that statistical data of *any* degree are categorically insufficient for proving discrimination (278–83).

6. See, for example, Amin 89–117; Bernal, esp. 189–280; Frye, *Politics*; Hubbard, esp. 7–66; Lloyd, esp. viii–x, 1–2, 103–10; Mignolo, *Darker Side*; Mills, esp. 1–40; Rosaldo 25–87; Said 1–110; Wolf 7–19.

7. See Marx and Engels 154–55, 725–27. See also Tucker 33–53; Wood, "Marxian Critique." For interesting discussions of marxism, ethics, and morality, see Aronson 234–36; Geras, *Discourses* 3–55; Kamenka 106–09.

8. See, for example, Aronson 87–123; Foucault, "Preface"; Horkheimer and Adorno; Laclau and Mouffe 1–5, 47–65; Lyotard 27–41; Marcos and the EZLN 84–86, 92–93, 114; Vaneigem 216.

9. Such critiques include Althusser; Butler, *Gender Trouble*, esp. 1–6, 16–34, and *Bodies That Matter*; Foucault, *Discipline and Punish* 301–06, and *History of Sexuality*; Gilroy 11–14; Sandoval 98–110, 127.

10. See, for example, F. R. Ankersmit's recent work advocating that ethics should give way to aesthetics in political theory and practice (3–20) and Stanley Fish's arguments against the relevance of ethical philosophy to political action (285–92).

11. See, for example, Butler (in Benhabib, and others, 127–32); Fish 285–308; Fuss; Spivak, *In Other Worlds* 103, 202–11, and "Can the Subaltern Speak?" 281.

12. Another recent turn toward moral thinking in contemporary literary theory is Tobin Siebers's excellent book *Morals and Stories*.

13. See also Boyd; Olguin, "Towards an Epistemology"; Rosaldo 25–67. For a thorough and extended discussion of more traditional conceptions of objectivity, see Nagel, *View*.

14. See Mohanty, esp. 229–47.

15. The reason for the discrepancy between Sanford's name and the name of the case (*Scott v. Sandford*) is a court clerk's error that has become conventional.

16. Many Supreme Court justices do not adhere to such a rigid notion of constitutional interpretation. For example, in *Trop v. Dulles*, Chief Justice Earl Warren writes that the Constitution must draw its meaning "from the evolving standards of decency that mark the progress of a maturing society" (642); similarly, in a dissenting opinion in *McGautha v. California*, Justice Douglas recognizes the "evolving gloss of civilized standards" that the Supreme Court has read into the meaning of "due process" (745). As early as 1884, Justice Matthews noted in *Hurtado v. California* that "flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law" (237).

17. Of course, my objections raise the difficult question, with which I deal in chapter 1, of how to determine which laws are unjust.

18. There were, of course, multiple attitudes toward slavery among the constitutional framers, including the staunch abolitionist sentiments of men like James Madison and Alexander Hamilton. The final document is, like most such documents, the result of negotiation and compromise.

19. Those unfamiliar with the contemporary terrain of literary theory may not realize how controversial my last claim is. I will further address the evaluation of claims about accuracy and inaccuracy of moral terms throughout this book; here I only want to point out that Douglass considered such evaluation to be both possible and necessary.

20. The relevant passages are to be found in Aristotle's discussion of moral responsibility in *The Nichomachean Ethics* (1109b30–1115b5). Aristotle's discussions of political freedom in *The Politics* occur in relation to his thoughts on democracy and are very brief (1316b31–1319b1).

21. Spinoza's separation between mind and body/emotions is a bit puzzling, given his earlier collapsing of the body and mind (494–97). On this issue, see Curley 60–86.

22. For an oft-cited contemporary example of the weights-and-measures approach to rights, see Dworkin, esp. 150–83.

23. More generally on the separation between self and other in Sartre, see Alcoff's discussion ("Who's Afraid" 330–33).

24. See also de Beauvoir 78–96; Merleau-Ponty 434–56; Wilkerson, "Ethics" and "Inhabiting."

25. See also Arendt's "Personal Responsibility under Dictatorship" and "What Is Freedom?"

26. John McCumber has recently argued, rather persuasively, that part of

what distinguishes European and North American philosophy of the past century is a not-always-acknowledged desire to put philosophy in the service of freedom. In particular, he provides compelling and thought-provoking readings of the work of Jacques Derrida, Richard Rorty, Jürgen Habermas, and Michel Foucault to show how "they advance their various discourses not merely as 'true,' but as emancipatory" (7).

27. In addition to the works cited in the text, see, among others, Braxton; Davis 53–60; Du Bois; Marable and Mullings; Shakur; Thurston.

28. This view resonates with the dialogic tradition in Jewish theology (see Buber 11–23, 58–69), as well as with certain currents in existentialism (see note 24 to this chapter).

29. On the definitions of *prisoner* and *political prisoner*, see also note 43 to chapter 1.

1. Toward a Critical Theory of Justice

1. In case support is needed for the claim that racial and ethnic minorities in the United States face an unjust social system, consider a Florida study that found that, for 47,000 persons prosecuted under that state's Habitual Criminal Law, "the decision to prosecute was based on race alone." Additionally, "of those targeted for death under a Congressional enacted law for murders committed by drug dealers, between 1988 and 1993, 73 percent were African American and 13 percent Latino," and, "as of September 1993, all of the death penalty prosecutions reportedly approved by the Clinton Administration ha[d] been African American" (NOBO 154, 120). See also notes 1, 3, and 4 to the introduction.

2. For example, in *Capital*: "The use-value of labour-power, or in other words, labour, belongs just as little to its seller [the worker], as the use-value of oil after it has been sold belongs to the dealer who has sold it. The [capitalist] has paid the value of a day's labour-power . . . The circumstance, that . . . the value which its use during one day creates, is double what he pays for that use . . . is, without doubt, a piece of good luck for the buyer, but by no means an injury [injustice (Unrecht)] to the seller" (1: 193–94).

3. For example, in the "Critique of the Gotha Program": "Do not the bourgeois assert that the present-day distribution is 'fair'? And is it not, in fact, the only 'fair' distribution on the basis of the present-day mode of production? Are economic relations regulated by legal conceptions or do not, on the contrary, legal relations arise from economic ones?" (Marx and Engels 528).

4. Compare Tucker's similar position: "[T]he only applicable norm of what is right and just is the one inherent in the existing economic system. Each mode of production has its own mode of distribution and its own form of equity, and it is meaningless to pass judgment on it from some other point of view" (46).

5. On MOVE, see note 32 to chapter 3 and note 35 to chapter 5.

6. A useful point of reference here is the Methodologies of Resistant Negotiation Working Group's definition of politics as a concerted, not necessarily unified, collective social intervention that seeks to endure. This definition, like my understanding of revolutionizing practice, tries to move us away from thinking solely in terms of state power and centralized parties.

7. One should not confuse legal realism with legal positivism or philosophical realism. Philosophically much closer to pragmatism, it was an influential, although never dominant, school of American jurisprudence during the late nineteenth century and early twentieth century. Legal realists defined themselves primarily in opposition to "formalists" (legal positivists). One common legal realist tenet was that law is repeatedly created anew through judicial decisions and consequently lacks the bedrock foundations sought by positivists. On the question of judicial law-making, see Cohen, "Transcendental" 842–47; Frank. On legal realism and indeterminacy in law generally, see Llewellyn 1233–42.

8. Critical Legal Studies, most broadly defined, is a movement among some legal scholars since the 1970s to introduce insights from critical theory to the study of the law. Several key positions are attributed to CLS scholars in general. The most important of these for my purposes are the general incoherence of legal ideology and the limited autonomy of the law. On CLS generally, see Gordon 195–201. On CLS's relation to legal realism, see Altman 205–07, 212–22.

9. On stare decisis, see Post; Sprecher 501–06. See also Frank for a legal realist view of the doctrine.

10. Compare this to Ernest Mandel's analysis: "Ultimately the contradiction between the partial rationality and the overall irrationality of capitalism reflects the contradiction between the maximum valorization of capital and the optimum self-realization of men and women" (509).

11. Critical criminology emerged in the 1960s and 1970s, primarily in Europe, although under a variety of names and schools: radical criminology, feminist criminology, penal abolitionism, and marxist and socialist criminology. It largely conceived of itself as a reaction to a positivistic criminology that