THE SCHISM BETWEEN MINORITIES AND THE CRITICAL LEGAL STUDIES MOVEMENT: REQUIEM FOR A HEAVYWEIGHT?

I. INTRODUCTION

Despite the enaction of federal civil rights reforms in the 1960s, the socioeconomic status of people of color, African-Americans[1] in particular, improved only to a small degree over the last two decades.[2] Evidence indicates that the African-American community is economically bifurcated into a large, impoverished urban under-

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[1] "African-American" and "Black" are used interchangeably in this Note to denote a specific cultural group. *See* Wilkerson, *"African-American" Favored by Many of America's Blacks*, N.Y.Times, Jan. 31, 1989, at 1, col. 1. *See also* MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS: J. WOMEN IN CULTURE & SOC'Y 515, 516 (1982)(noting that "Black" should not be perceived "as merely a color of skin pigmentation, but as a heritage, an experience, a cultural and personal identity, the meaning of which becomes specifically sigmatic and/or glorious and/or ordinary under specific social conditions"). For a discussion of the political overtones of the naming of Americans of African descent *see* W.E.B. DUBOIS, 2 THE SEVENTH SON 12–13 (1971). "Minorities" and "people of color" are also used interchangeably.

[2] *See* NATIONAL URBAN LEAGUE, THE STATE OF BLACK AMERICA 1990 (1990). The gap between the socioeconomic status of African-Americans and whites remains wide and grows wider in a variety of categories. For example, in 1988, the poverty rate for African-Americans stood at 31.6%, while that for whites was 10%. *Id.* at 25, 28, 34. The median family income for African-Americans in the 1980s fell below their median income in the 1970s and is only 57% that of white median family income. *See also* Bernstein, *20 Years After the Kerner Report: Three Societies, All Separate*, N.Y. Times, Feb. 29, 1988, at B8, col. 2; G. JAYNES AND R. WILLIAMS, A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 6–31, 269–329 (1989). Some commentators suggest that developments in the status of African-Americans mirror developments in the population at large. In particular, real earnings of Americans improved steadily for the period 1940–1973, but they stagnated and declined after 1973. *Id.*

class and a disproportionately small middle class.[3] Congress enacted the civil rights reforms in the 1960s to provide political and economic empowerment to those citizens, principally African-Americans, who historically had been disadvantaged by discrimination and victimized by racism.[4] After their enactment, these originally vague statutes underwent twenty-five years of judicial refinement defining their scope and content to effectuate their designated purposes.[5]

Recent Supreme Court cases concerning the body of civil rights law produced by that judicial refinement, however, indicate a retreat from the constructive activity of the preceding two decades. Responding to the litigious attacks of the Reagan Administration Justice Department, the Supreme Court systematically altered this body of civil rights law.[6] Precedents that for many years provided plaintiffs who suffered discriminatory harm with relatively effective legal recourse were altered to the benefit of future defendants in civil rights actions.[7] As demonstrated during the 1989 Summer Term, the Court is clearly no longer an ally of the civil rights community.[8]

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[3] *See* W. WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1987); *see also* Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.3 (1988).

[4] The Civil Rights Reforms of the 1960s, popularly known as the Second Reconstruction (the "first" legislative Reconstruction followed the Civil War), are codified as the Civil Rights Act of 1964, 42 U.S.C. §§ 1981–2000h(6)(1982) and the Equal Employment Opportunity Commission regulations, 29 C.F.R. §§ 1600–1691(1990). These enactments provide protection against employment discrimination, secure voting rights, and establish a system for deciding controversies.

[5] *See* Brodin, *Reflections on the Supreme Court's 1988 Term: The Employment Discrimination Decisions and the Abandonment of the Second Reconstruction*, 31 B.C.L. REV. 1, 2 (1990). The vagueness of the statutes reflected the product of political compromises made by the drafting legislators. Most of the federal judiciary's activity focused on Title VII of the Civil Rights Act which prohibits employment discrimination. While deciding cases brought under Title VII, the courts created a system of case law governing standing, allocation of burdens of proof, and availability of different forms of relief. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[6] *See* ACLU, IN CONTEMPT OF CONGRESS AND THE COURTS–THE REAGAN CIVIL RIGHTS RECORD (1984); *see generally* Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong*, 1985 U. ILL. L. REV. 785; *see generally* D. BELL, AND WE ARE NOT SAVED (1987); Bell, *The Supreme Court, 1984 Term–Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985).

[7] *See* Brodin, *supra* note 5, at 5–11, 25–30, 29 (arguing that the Court's 1988 Term decisions eliminated Title VII's "cutting edge," made prevailing in Title VII lawsuits more difficult for plaintiffs, and made defending such allegations of discrimination easier.)

[8] *See, e.g.*, City of Richmond v. J. A. Croson Co., 109 S. Ct. 706 (1989) (increasing the evidentiary requirement needed to justify minority set aside programs); Wards Cove Packing, Inc. v. Atonio, 109 S. Ct. 2115 (1989) (tightening the standard of proof required to establish employment discrimination, requiring specific causal mechanisms under a "but for" standard, rather than a combination of mechanisms under a substantial cause standard); Martin v. Wilks, 109 S. Ct. 2180 (1989) (reopening consent decrees to challenges of reverse discrimination by persons not originally parties to the decree).

Jurisprudential scholars are critical of the Court's hostile treatment of employment discrimination and affirmative action case law.[9] Minority scholars in particular question the Court's commitment to remedying persistent social and economic problems that plague people of color and people of limited means in our society.[10] From a broad perspective, the Court's recent decisions underscore the special role played by the nation's judiciary in a liberal democracy—fulfillment of which requires careful construction and interpretation of the law to achieve social justice. Contrasting the Court's recent decisions, which diminish plaintiffs' prospects for prevailing, with its constructive activity of the preceding two decades illustrates that judicial decisions may operate as a double-edged sword. For people of color and people of limited means, the decisions may affirmatively effect socioeconomic change or they may facilitate preservation of the status quo.

The damaging assault on civil rights orchestrated by the Reagan Administration, along with the restrictive decisions issued by the Supreme Court, support the views of the jurisprudential movement[11] called Critical Legal Studies (CLS).[12] A fundamental tenet of CLS holds that law is composed of indeterminate legal rules used by the politically powerful to further their own ideological objectives.[13] Critical Legal Scholars argue that these indeterminate legal rules are susceptible to skillful and deceptive manipulation by those groups in our society that control the political machinery. Frequently, these rules seem to generate contradictory results.[14]

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[9] *See* Lawyers' Committee for Civil Rights Under Law, *Committee Report*, Vol.3, No. 3, at 1 (Summer 1989) [hereinafter *Committee Report*]. Laurence Tribe, of Harvard Law School, remarked, "I am extremely critical of the Court's overall handling of the civil rights cases this Term . . . . I think there is a clear, convincing, and compelling need for a Civil Rights Restoration Act of 1989 to undo some of the Court's demolition work of this Term." *Id.*

[10] *See, e.g., id.* at 1, 2, 12, 13.

[11] Jurisprudence, or the philosophy of law, is "that science which has as its function to ascertain the principles on which legal rules are based, so as not only to classify those rules in their proper order, and show the relation in which they stand to one another, but also to settle the manner in which new or doubtful cases should be brought under the appropriate rules." BLACK'S LAW DICTIONARY 767 (5th ed. 1987).

[12] *Committee Report, supra* note 9, at 12. Professor Derrick Bell of Harvard Law School, a minority proponent of CLS, recently remarked concerning the Court's rulings, "The decisions are a distressing but a wonderful affirmation of the CLS . . . credo; namely that judicial decisions reflect less any kind of concern about precedent and constitutional interpretation than they do the power, interest, and pressures of the society." *Id.*

[13] *See generally* Tushnet, *Perspectives on Critical Legal Studies–Introduction*, 52 GEO. WASH. L. REV. 239 (1984).

[14] *See* Fischl, *Some Realism About Critical Legal Studies*, 41 U. MIAMI L. REV. 505, 513–15 (1987).

Given these assertions, the Movement's views merit close consideration for their plausible analysis of the deliberate disarmament of civil rights law by the Reagan and Bush Administrations and the Supreme Court.

Minority Legal Scholars (Minority Scholars) and Critical Legal Scholars may share skeptical views of politics, law, and society, but, despite their shared perspectives, minorities have not embraced the CLS Movement.[15] The traditional alliance between people of color and left-originating reform movements that marked the 1960s civil rights era has failed to develop. Moreover, no indication exists of substantial contributions by minorities to the Movement's conferences and scholarship prior to the CLS conference of 1987—there was neither an alliance nor even a significant collaborative relationship.[16] In an attempt to examine this schism, which on its face appeared counterintuitive, the 1987 annual CLS conference focused on the issue of race.[17] The conference was aptly titled "The Sounds of Silence: Racism and the Law,"[18] illustrating the kinds of issues that Minority Scholars found absent from the CLS agenda. More specifically, CLS failed to integrate the problem of racism into its theory and failed to offer viable prescriptions for combatting the discriminatory effects of racism in its agenda.[19]

This Note examines substantively the Minority Scholar–CLS dialogue generated by the CLS conference of 1987. As a foundation for presenting and analyzing the dialogue, Part II surveys the composition, history and theory of CLS. Part III analyzes Minority Scholar critiques of CLS and CLS responses, with attention to those elements of CLS that Minority Scholars find problematic. Part IV argues that although CLS presents insightful and critical jurisprudence, in its current form CLS offers limited utility to minorities in developing a social reform agenda. Fundamental contradictions be-

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[15] *See* Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 301 n.1 (1987).

[16] *See* Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 323 (1987).

[17] *See Introduction*, 23 HARV. C.R.-C.L. L. REV. 293, 293 (1988). Volume 23 was devoted in its entirety to Minority Scholar critiques of CLS.

A similar attempt to expand the CLS dialogue was undertaken at the 1985 CLS conference which was devoted to the issue of feminism and the solicitation of feminist scholarship. *See* Matsuda, *supra* note 16, at 343 n.88 and accompanying text.

[18] *See Introduction*, *supra* note 17, at 293.

[19] Subsequent to this conference, these Minority Scholars created an informal group for the purposes of encouraging research and scholarship in the area of race law and critical theory, filling the void left untouched by CLS. *See* excerpts of the report from the first annual Workshop on New Developments in Critical Race Theory published in the 1989 Newsletter of the Conference on Critical Legal Studies.

tween that which CLS advocates and that which minorities seek preclude minorities from embracing the CLS Movement completely.

II. Overview of Critical Legal Studies (CLS)

Throughout most of its existence, the CLS Movement has generated heated debate within the legal community. The initial reception of CLS varied greatly. The most favorable response viewed CLS as welcome intellectual provocation;[20] the least favorable as unwelcome "nihilism."[21] The CLS Movement originated among a group of faculty and young student activists who attended Yale Law School together in the late 1960s.[22] The same radical intellectual energy that fueled much of the social activism against the Vietnam War and for civil rights reform at universities in the 1960s also spawned the development of CLS in the late 1970s.[23] The activist roots of its founding members account for the CLS Movement's wide-ranging radical leftist jurisprudence. As academic paths matured into professional careers, the young activists turned their anti-establishment energies toward the legal system, in which they had become major participants. CLS now consists primarily of law professors and students, in addition to a few practicing lawyers and social scientists.[24] The number of CLS scholars totals at least 150 and the body of CLS scholarship is topically vast.[25]

The CLS Movement is led primarily by a small group of law professors responsible for organizing its activities.[26] Duncan Ken-

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[20] *See* Haines, *The Critical Legal Studies Movement and Racism: Useful Analytics and Guides for Social Action or an Irrelevant Modern Legal Skepticism and Solipsism?* 13 Wm. Mitchell L. Rev. 685, 692 (1987).

[21] Dean Paul Carrington of Duke Law School labeled CLS adherents "nihilists . . . [who] have an ethical duty to depart the law school, perhaps to seek a place elsewhere in the academy." Carrington, *Of Law and the River*, 34 J. Legal Educ. 222, 227 (1984); *see also* Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 Stan. L. Rev. 391, 403 (1984) (quoting Mark Tushnet's anticipation of the ultra-leftist movement's reception, "when they find out what we are doing they will come after us with guns"); *see generally* Johnson, *Do You Sincerely Want to Be Radical?*, 36 Stan. L. Rev. 247 (1984).

[22] *See generally Barrister Interview with Duncan Kennedy*, 14 Barrister 12 (Fall 1987).

[23] *See* Critical Legal Studies 2 (A. Hutchinson ed. 1987) [hereinafter Critical Legal Studies].

[24] The Yale Law Journal, with the aid of Duncan Kennedy and Karl Klare, compiled a bibliography of CLS works that illustrates the expansive nature of the CLS Movement. It contains a great many authors, hundreds of works, and spans various disciplines, including sociology and economics. *See generally Bibliography*, 94 Yale L.J. 461 (1984) [hereinafter *Bibliography*].

[25] *See* Critical Legal Studies, *supra* note 23, at 1.

[26] *See Bibliography*, *supra* note 24, at 461 n.1. The CLS Movement's activities include holding national conventions and "summer camps" to discuss legal theory and to encourage critical research and writing among the network of adherents and interested parties. *Id.*

nedy, Karl Klare, Alan Freeman, Roberto Unger, Robert Gordon, Morton Horowitz, and Mark Tushnet[27] stand out as representative members. It is important to note that the majority of CLS proponents are white, Ivy League-educated, and male. There exists a small number of feminists, such as Clare Dalton,[28] and minorities, such as Derrick Bell,[29] who also have contributed to CLS scholarship, but their numbers are disproportionately small compared to the number of white, male contributors. The CLS Movement's virtually homogenous composition gives rise to one of the primary criticisms leveled at CLS by Minority Scholars: that the lack of diversity in the Movement's contributing membership accounts in large part for the Movement's neglect of issues of race in its agenda. Minorities observe that the CLS Movement's composition bears the same characteristics as most other institutions in legal academia.[30]

Critical dialogues are maintained within the CLS Movement with the use of legal scholarship, primarily in the more prestigious law reviews.[31] CLS purports to condemn the law reviews as institutions of hierarchy and conservativism that serve only to propagate the status quo within the stratified legal academies. But use of the law reviews is necessary to CLS for several reasons. First, presenting critical dialogues in the law reviews ensures that CLS engages rival jurisprudential theories as coequals from academically respected standing, lending legitimacy and drawing attention to their views, often considered too radical to enter the mainstream collection of jurisprudential analyses. Also, law reviews possess special significance in the development of jurisprudence because they are traditionally sources of new developments in legal theory and "creative suggestions" for "law reform activities."[32] From this respected position, the CLS aim is to expose the allegedly flawed logic of these mainstream jurisprudential analyses.

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[27] Professor of Law, Harvard Law School; Professor of Law, Northeastern University; Professor of Law, Buffalo Law School; Professor of Law, Harvard Law School; Professor of Law, Stanford Law School; Professor of American Legal History, Harvard Law School; Professor of Law, Georgetown Law School, respectively.

[28] Visiting Professor of Law, Northeastern Law School.

[29] Professor of Law, Harvard Law School.

[30] *See, e.g.*, Matsuda, *supra* note 16, at 342.

[31] For example, volume 36 of The Stanford Law Review (1984) was devoted in its entirety to the subject of CLS, as were large portions of volumes 22 (1987) and 23 (1988) of The Harvard Civil Rights and Civil Liberties Law Review, *supra* note 14. *See* Schlegel, *supra* note 21, at 406, n. 45 (discussing the academic and professional credentials of CLS proponents).

[32] *See* Closen, *A Proposed Code of Professional Responsibility for Law Reviews*, 63 NOTRE DAME L. REV. 55, 55 (1988).

Practical and substantive complications burden an attempted CLS overview. The number of CLS adherents is so large as to make comprehensive coverage impracticable.[33] Also, with substantive differences in theory existing within the CLS Movement, pinpointing the primary tenets carries the risk of excluding important views and failing to present the unbounded essence of the Movement.[34] Thus, an overview of CLS is less a catalogue of theories than it is a presentation of themes common to all of its various works.

A. *Social and Jurisprudential Antecedents of Critical Legal Studies*

CLS in part derives from two leftist movements prominent during the early and middle portions of this century, Critical Social Theory and American Legal Realism (ALR).[35] Critical Social Theory, for which the principal inspirations were the writings of Karl Marx and Friedrich Nietzche, maintains that the normative source for law resides in social, economic and material conditions.[36] Prevailing law changes according to variations in the social, economic, and material needs of the ruling class. The popular name for this theory was Marxist instrumentalism.[37] For the predominantly European followers of Critical Social Theory, hierarchy remained crystallized conceptually in society, while the laws remained in flux as an ideological instrument.[38]

ALR, which "flourished" in the United States at several eastern law schools in the 1920s and 1930s,[39] denounced any value to constructing a theory of judicial decision-making.[40] ALR viewed the economic exigencies pervading life in the 1920s and 1930s, and the social legislation enacted to mitigate those exigencies, as the factors most influencing judicial decision-making. The Realists argued that in this context, the notion of an objective, impartial system of legal

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[33] *See supra* note 24 and accompanying text.

[34] *See* Fischl, *supra* note 14, at 507; Haines, *supra* note 20, at 701. For a description of the factions within the CLS Movement, *see* Hutchinson & Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 219–27 (1984).

[35] *See* Williams, *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5 J. L. & INEQUALITY 103, 115–19 (1987).

[36] *Id.*

[37] *See generally* H. COLLINS, MARXISM AND LAW (1982).

[38] For a discussion of the impact of Critical Social Theory on CLS, *see* Hutchinson and Monahan, *supra* note 34, at 213–30.

[39] *Id.*

[40] For a comparison of CLS and ALR, *see generally* Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669, 1670–86 (1982) [hereinafter Note].

thought is illusory because legal reasoning is indeterminate.[41] Precedents can be manipulated to support any desired outcome, and economic exigencies, not legal rules, determine which outcome appeared more logically desirable.[42] In response to this perceived indeterminacy, the Realists believed that decision-making should be based upon empirical data gathered in scientific research, rather than upon artificial legal concepts.[43] The institutional constructs envisioned by the Realists to perform this function were the expert administrative agencies that later proliferated during the New Deal era.[44]

The substantive difference between ALR and CLS, however, is that ALR was unequivocal in its commitment to liberalism.[45] This commitment to working within the existing legal and political institutional machinery distinguishes the two movements, for CLS harbors no similar commitment.[46] Because of its ultra-leftist convictions, CLS denies that there is any value to preserving the current institutional machinery. This machinery, CLS argues, is premised upon the contradictory norms underpinning capitalistic and democratic society. This substantive difference between ALR and CLS results in the contrasting reformist policy programs of ALR and the radical agenda of CLS.[47]

B. *Critical Legal Studies*

1. CLS Theory

CLS consists primarily of two themes. The first theme is an assault on legal objectivism[48] and formalism.[49] CLS premises this attack on the theory introduced by American Legal Realism that

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[41] *Id.* at 1670.

[42] *Id.* at 1670–86.

[43] *See* Hutchinson & Monahan, *supra* note 34, at 204 n. 20.

[44] *Id.*

[45] *Id.* at 204.

[46] *Id.* at 199–202.

[47] *See* Note, *supra* note 40, at 1677.

[48] *See* CRITICAL LEGAL STUDIES, *supra* note 23, at 323. "Objectivism is the belief that the authoritative legal materials—the system of statutes, cases, and accepted legal ideas—embody and sustain a defensible scheme of human association." *Id.* at 324. Objectivist norms are rooted in a discernable order which emanates from capitalistic and democratic principles. *Id.* at 323.

[49] *Id.* at 323. Formalism is a "commitment [to using] impersonal purposes, policies, and principles . . . [as] indispensible components of legal reasoning." *Id.* Formalism presupposes an inherently apolitical, rational, and moral coherence to the workings of law. *See generally* Weinrib, *Legal Formalism: On the Imminent Rationality of Law,* 97 YALE L.J. 949, 951 (1988). In short, formalism asserts that there is a distinction between law and politics. *Id.*

legal rules are indeterminate.[50] CLS rejects the notion that law is "preexisting, clear, predictable, and discernable through legal reasoning . . . ."[51] CLS scholars argue that the law is neither neutral nor value-free, but at every level involves policy choices.[52] Legal rules merely provide the appearance of certainty.[53] Although supposedly based upon presumably neutral legal rules, any given judicial decision can be argued persuasively to the contrary.[54]

The institutions which bear responsibility for overseeing the proper functioning of our liberal democracy also bear responsibility for perpetuating the indeterminacy which plagues the system. This indeterminacy is in part a byproduct of the function played by the judiciary when deciding cases and developing law. CLS considers fallacious the assumption that judges have the unerring capacity to insulate themselves from individual and group politics, other external pressures, and personal biases.[55] Therefore, statutory interpretation and adjudicatory decision-making reflect the impact of these influences more than they reflect strict adherence to neutral rules. The exercise of textual interpretation, in particular, is ambiguous because "[a] textual interpretation based on a fragmentary passage can always be refuted by invoking the [broader purpose of] the document in its entirety, or its implicit structure . . . ."[56] Also, when textual interpretation is not dispositive, a search for the drafter's intent carries an equal risk of ambiguity. Legislative compromises between politically opposite parties typically yield vague legislation.[57] A judge giving overriding significance to one legislator's intent neglects the intentions of the other compromising legislators.[58] CLS thus argues that indeterminacy pervades those components of the legal system popularly perceived as the most rational and neutral—legal rules and the decisions of the judiciary.[59]

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[50] *See supra* notes 36–42 and accompanying text.

[51] *See* Harrison and Mashburn, *Jean-Luc Goddard and the Critical Legal Studies (Because We Need the Eggs)*, 87 MICH. L. REV. 1924, 1934 (1989).

[52] *Id.*

[53] Robert Gordon writes, "[l]egal discourses are saturated with categories and images that for the most part rationalize and justify in myriad subtle ways the existing social order as natural, necessary and just." 3 TIKKUN 14, 15 (1988).

[54] *See* Fischl, *supra* note 14, at 509.

[55] *See generally* Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

[56] *See* Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 318 (1988).

[57] *See, e.g.*, Brodin, *supra* note 5, at 1–2.

[58] *See* Delgado, *supra* note 15, at 302. *See, e.g.*, Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980); D. KAIRYS, THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 1, 3 (D. Kairys ed. 1982).

[59] *See* D. Kairys, *Law and Politics*, 52 GEO. WASH. L. REV. 243, 243–49 (1984).

Analysis of the fundamental principles of contract law illustrates the indeterminacy perceived by CLS. Traditional theories of liberalism ground the normative touchstones for objectivism in the capitalistic market and the democratic republic.[60] If objectivism and formalism apply to contract law, then the normative sources underpinning the legal rules that order contract law should efficiently and justly operate the capitalistic market and the democratic republic. Optimally, the legal rules would be rational and the decision-making bodies would be neutral. But each rule confronts a counter-rule. For example, the primary rule—that private individuals are free to choose their own terms and parties, with the state's enforcement capacity levied against a defaulting party—is met with an opposing rule—the state will intervene in defense of the collective interest in preventing enforcement of "grossly unfair bargains."[61] Indeterminacy thus arises as a result of the requirement that judges select one of these conflicting rules over another in order to justify a decision. Inherently different values are involved in this choice. Under the CLS perception, the normative sources actually give rise to conflict.

The attack on objectivism and formalism generates the second major CLS theme, the attack on liberal rights theory.[62] Liberal rights theory is the prevailing mainstream political idea that individuals possess fundamental rights that are protected and vindicated by the legal system.[63] If, for CLS, the idea of objectivist and formalistic rules is a fallacy, then liberal rights theory must also be fallacious. CLS scholars argue that this notion is erroneously premised upon objective and formalistic legal reasoning revealed in the first theme. For CLS, liberal rights theory represents neither a defensible nor an adequate means of ordering society.[64]

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[60] *See* CRITICAL LEGAL STUDIES, *supra* note 23, at 325.

[61] *Id.* at 325–26. *See generally* Dalton, *An Essay on the Deconstruction of Contract Doctrine*, 94 YALE L.J. 16 (1985).

[62] *Id.* at 5. *See also* Tushnet, *supra* note 13, at 240.

[63] *See* CRITICAL LEGAL STUDIES, *supra* note 23, at 15–35; Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the CLS Movement*, 36 STAN. L. REV. 509, 516–22 (1984).

[64] *See* CRITICAL LEGAL STUDIES, *supra* note 23, at 5. Robert Gordon writes:

> [C]onsider all the habitual daily invocations of law in official and unofficial life—from the rhetoric of judicial opinions through advice lawyers give clients, down to all the assertions and arguments about legal rights and wrongs in ordinary interactions between police and suspects, employers and workers, creditors and debtors, husbands, wives, and neighbors, or television characters portraying such people. Sometimes these ways of speaking about law appear as fancy technical arguments, sometimes as simple common sense. ("An employer has the right to control what

CLS argues that liberal rights theory in its current form is normatively bankrupt.[65] The scholars metaphorically describe liberal rights rhetoric as being akin to a "patchwork quilt" underneath which there is a great deal of chaos.[66] Liberal rights rhetoric conceals the presence of societal choices.[67] This rhetoric masks the unresolved and contradictory values that motivate human action.[68] Examples of these contradictory values are "reason and desire; freedom and necessity; individualism and altruism; autonomy and community; and subjectivity and objectivity."[69] CLS argues that "things could be otherwise, and that choice is always essential."[70] Taking into account the consequences of choosing one value over another gives rise to collective responsibilities. Collective attention to responsibilities provides the appropriate normative order and structure to govern our relations and eliminates the need for protection in the form of rights from injurious acts of others.

Additionally, CLS argues that liberal rights theory exerts a paralyzing, hegemonic force upon society.[71] The popular perception that liberal rights theory is rooted in objectivist reasoning creates a false consciousness of necessity for objectivism and formalism.[72] Liberal rights theory is simply a political fiction reifying the illusion that courts do not have to make value choices with societal implications. The grounding of liberal rights discourse in the received doctrine of objectivism circumscribes reformist dialogue, requiring any change to the system to come from within the system. For CLS, an appeal for vindication of one's rights represents participation in

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happens on his own property, doesn't he?") In whatever form, they are among the discourses that help us to make sense of the world, that fabricate what we interpret as its reality. They construct roles for us like "Owner" and "Employee," and tell us how to behave in the roles. (The person cast as "Employee" is subordinate. Why? It just is that way, part of the role.) They wall us off from one another by constituting us as separate individuals given rights to protect our isolation, but then prescribe formal channels (such as contracts, partnerships, corporations) through which we can reconnect. They split up the world into categories that filter our experience—sorting out the harms we must accept as the hand of fate, or as our own fault, from the outrageous injustices we may resist as wrongfully forced upon us.

TIKKUN, *supra* note 53, at 15.

[65] *Id.* at 4–5. *See also* Hutchinson and Monahan, *supra* note 34, at 208.

[66] *See* CRITICAL LEGAL STUDIES, *supra* note 23, at 3.

[67] Hutchinson and Monahan, *supra* note 34, at 208–10.

[68] *See id.*

[69] *See* Sparer, *supra* note 63, at 516.

[70] *See* Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PENN. L. REV. 685, 689–90 (1985).

[71] *See, e.g.*, Crenshaw, *supra* note 3, at 1335.

[72] *See* Delgado, *supra* note 15, at 309–10.

a dialogue with hollow rhetoric. "[The rhetoric]. . . reflects, legitimizes, and reinforces the pattern of existing social and legal arrangements."[73] Society becomes locked into the status quo because the rhetoric precludes development of innovative approaches to solving social problems. Rights discourse is thus an ideological mechanism for achieving and maintaining domination.[74]

Moreover, duplicative use of the rules and blind resort to the current legal system adds to the appearance of legitimacy and objectivity. Liberal rights rhetoric enables courts to manipulate and decide among the options presented by the current liberal rights discourse without effecting actual change in the present societal conditions.[75] The notion that liberal rights discourse can transform or remedy the "oppressive character of our social relations" and institutions is undermined by the presence of unresolved contradictions and motivational values.[76]

CLS describes the limited transformative potential of the current liberal rights dialogue as the "contingent nature of the legal, political, and social order."[77] "[W]ith power, money, and class as rank determinants . . . illegitimate hierarchies are frozen into paralyzing structures: law/judge; judge/lawyer; law teacher/law student; private property/police power; management/labor; etc."[78] In the context of adjudication, pitting two relatively unequal entities against each other, and assuming that indeterminate rules will dictate a just outcome, is irrational. The system renders marginalized citizens debilitatingly dependent upon the will of the judiciary. CLS argues that there are inherent functional limits to attaining distributive and corrective justice through the current system. In response, the Movement searches for a true normative theory that can mediate the interplay of conflicting values without perpetuating the status quo.[79]

2. CLS Agenda

Casting aside liberal rights theory because of its limited transformative potential, CLS pursues its own ultra-radical agenda using

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[73] *See* Harrison and Mashburn, *supra* note 51, at 1935.
[74] *See* Delgado, *supra* note 15, at 310.
[75] *See* Sparer, *supra* note 63, at 517.
[76] *Id.*
[77] Williams, *supra* note 35, at 119.
[78] *See* Harrison and Mashburn, *supra* note 51, at 1935.
[79] *See* Matsuda, *supra* note 16, at 324.

deconstruction, which is the methodological alternative to formalism.[80] Sometimes called delegitimization or "trashing," deconstruction is the mechanism CLS scholars use to expose the conflicting choices underlying accepted legal norms.[81] Much of CLS's deconstruction is premised on the belief that confrontation generates resolution and synthesis.[82] "The [CLS] objective in deconstructing . . . an area of law is to make its conceptual structures visible and bare to scrutiny."[83] A frequently quoted definition of trashing suggests, "[t]ake specific arguments very seriously in their own terms; discover they are actually foolish . . . ; and then look for some . . . order . . . in the internally contradictory, incoherent chaos . . . exposed."[84]

Trashing represents the primary focus and driving energy of the CLS agenda.[85] The agenda's goal is to "complete the modern rebellion against the view that social arrangements are natural or inevitable."[86] CLS scholars "seek in practice to identify and overturn all contingent, hierarchizing forms of legal consciousness in order to free up 'the infinite possibilities of human connection.'"[87] Spurred by their attacks on formalism and liberal rights theory, Critical Legal Scholars utilize trashing to undertake a wide-ranging assault on all the social, political, and legal institutions and their supporting doc-

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[80] The term "deconstruction" has its origins in critical literary theory, particularly in the writings of Jacques Derrida. *See generally* J. DERRIDA, MARGINS OF PHILOSOPHY (A. Bass trans. 1982).

One Critical Legal Scholar, Alan Freeman, writes: "The point of [deconstruction] is to expose possibilities more truly expressing reality, possibilities of fashioning a future that might at least partially realize a substantive notion of justice instead of the abstract, rightsy, traditional, bourgeois notion of justice . . . ." Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229, 1230 (1981).

[81] *See* Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984).

[82] This idea of confrontation is derived from the Marxist dialectical approach of thesis/antithesis/synthesis. *See generally* Brosnan, *Serious But Not Critical*, 60 S. CAL. L. REV. 259, 270–80 (1987).

[83] *See* Harrison and Mashburn, *supra* note 51, at 1937 (citing Boyle, *supra* note 69, at 936).

[84] Kelman, *supra* note 81, at 293. With regard to trashing, Professor Boyle observed, "If the language seems bizarre, it is purposeful strangeness. Language itself, according to the Crits, is a conceptual structure of false necessities. Crits have attempted to invent a new language to expand our vocabulary and to facilitate their critique." Harrison and Mashburn, *supra* note 51, at 1937 (citing Boyle, *supra* note 69, at 936); *see also* Husson, *Expanding the Legal Vocabulary: The Challenge Posed by the Deconstruction and Defense of the Law*, 95 YALE L.J. 969 (1989).

[85] *See* CRITICAL LEGAL STUDIES, *supra* note 23, at 8.

[86] Williams, *supra* note 35, at 120 (*quoting* Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 579 (1983).

[87] *Id.*

trines which comprise society.[88] Targeted for assault by CLS "are legal education, the bar, legal reasoning, rights (including civil rights), precedent, doctrine, hierarchy, meritocracy, the prevailing liberal political vision, and conventional views of labor and the free market."[89]

After this deconstruction is complete, the Critical Legal Scholars' aim is to create an egalitarian community whose vital and sustaining force is the realization of true community.[90] As an alternative to our current system of ordered liberal rights, the egalitarian society to which CLS aspires would feature decentralized decision-making; "rules . . . set by small groups such as factory workers, farm workers, and students[;]"[91] continual renegotiation of the rules; and equality as the paramount goal.[92] Hierarchy would be unnecessary since "everyone would share work, goods, and responsibilities."[93] The de-emphasis on individualism resulting from the energetic pursuit of community would foster non-competitiveness. This in turn would allow the individual human personality to "flourish" in a "non-hierarchical, non-repressive society."[94]

III. THE MINORITY SCHOLAR—CRITICAL LEGAL SCHOLAR DIALOGUE

A. *Minority Scholar Critiques*

The principal Minority Scholars participating in the dialogue are Mari Matsuda, Richard Delgado, Harlon Dalton, Robert Wil-

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[88] *See* Delgado, *supra* note 15, at 302.

[89] *Id.* at 302 n. 3. *See, e.g.*, Kennedy, *Legal Education as Training for Hierarchy*, in THE POLITICS OF LAW, *supra* note 58; D. KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (1983); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 MINN. L. REV. 265 (1978) (attacking workplace hierarchies and their judicial legitimization); Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PENN. L. REV. 1296 (1982); Freeman and Mensch, *The Public Private Distinction in American Law and Life*, 36 BUFFALO L. REV. 237 (1987) (public/private distinction); Kelman, *supra* note 81, at 306–28 (law and economics); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (individualism and altruism); Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (equal protection).

[90] *See* Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1109 (1981).

[91] *See* Delgado, *supra* note 15, at 313; *see also* Hutchinson & Monahan, *supra* note 34, at 230.

[92] *See* Delgado, *supra* note 15, at 313.

[93] *Id.*

[94] *Id.*

liams, Andrew Haines, and Kimberle Crenshaw,[95] all of whom teach law at various schools across the country. Similar to the CLS proponents, these scholars do not embody exclusively all minority scholars critiquing CLS. Rather they stand out as representative spokespersons, some of whom vividly illustrate their critiques of the Movement with intensely personal experiences concerning race and society.[96] The Minority Scholars are virtually uniform in their assessment of CLS: they find all three major CLS themes—the indeterminacy argument, the rights discourse critique, and the CLS egalitarian agenda—problematic. They note first, however, several positive aspects to CLS: specifically, the Movement's "descriptive"[97] and "prescriptive power."[98] Professor Matsuda writes that "[the] central descriptive message [of CLS]—that legal ideals are manipulable and that law serves to legitimate existing maldistributions of wealth and power—rings true for anyone who has experienced life in non-white America."[99] The mechanism of trashing in particular, one Minority Scholar writes, is irreverent and incisive enough to penetrate "the apocryphal legal texts . . . and myths," and various other reifications (ideology operating in statutory or common law form) that restrict choices and dialogue.[100] As Professor Matsuda further observes, "[k]nowing when doctrine sticks, when it doesn't, and why . . . are major intellectual contributions of the CLS movement."[101] Thus, both the Minority Scholars and CLS recognize that political motives guide the use of legal rules that are premised upon normatively incorrect doctrine to justify predetermined outcomes.

The Minority Scholars find equally noteworthy the "prescriptive power" of CLS.[102] The quest for an egalitarian society without oppression, hierarchy, and maldistribution of wealth in a broad sense presents an inspiring and attractive endeavor.[103] This egali-

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[95] Assistant Professor of Law, University of Hawaii; Professor of Law, University of Wisconsin; Associate Professor of Law, Yale University; Professor of Law, University of Arizona; Professor of Law, William Mitchell University; Assistant Professor of Law, University of California at Los Angeles, respectively.

[96] *See, e.g.*, Dalton, *The Clouded Prism* 72 HARV. C.R.-C.L. L. REV. 435, 440–47 (1987); *see also* Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

[97] *See* Matsuda, *supra* note 16, at 327–29.

[98] *Id.* at 329–40.

[99] *Id.* at 327.

[100] *See* Williams, *supra* note 35, at 127.

[101] *See* Matsuda, *supra* note 16, at 329.

[102] *Id.*

[103] *Id.*

tarian ideal is quintessentially the vision of the future held by many people of color and people of limited means.

The origination of these descriptive and prescriptive contributions within the prestigious and exclusionary walls of mainstream legal academia, where most CLS scholars reside, lends legitimacy to ultra-leftist jurisprudence in general. Although reluctant to agree substantively with CLS, the legal community must at least acknowledge the cogent critical theories put forth by their academic peers. Arguably, this legitimacy would not exist if the CLS Movement originated from elsewhere in the legal community, such as from practicing minority lawyers. In reference to the general legitimation of critical scholarship, the Minority Scholars acknowledge that CLS has indeed even stimulated minority scholarship: "[s]ignificantly, this [commitment to ultra-leftist jurisprudence] . . . underscores the liberating impact that the CLS analysis has had on the victims of racism, propelling them to explore its barriers."[104]

For the Minority Scholars, however, the realization that the composition of CLS is predominately white and male tempers the value of these descriptive and prescriptive contributions.[105] The absence of a significant minority voice integrated in the Movement's theory signals the unattractiveness of the CLS agenda. Vividly capturing this bittersweet realization, and introducing a major criticism of CLS, one Minority Scholar writes,

> "[l]ike a pack of super-termites, these scholars eat away at the trees of legal doctrine and liberal ideals, leaving sawdust in their paths. That they do it so well, and so single-mindedly, is compelling; it suggests that this is what the smartest are doing. Never mind that no one knows what to do with all the sawdust."[106]

Despite CLS's presentation of insightful and critical social commentary and jurisprudence, substantively its three major themes remain troubling to Minority Scholars.

First, regarding the indeterminacy of law argument, the Supreme Court's recent rulings do illustrate the validity of the CLS idea that legal rules are manipulable and legal outcomes are subject to the ideology and motivations of the politically powerful.[107] But CLS fails to address the possibility that racism is the motivation

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[104] *Id.*

[105] *See generally id.* (arguing that adopting the normative intuitions of persons who have actually suffered discrimination might help align CLS theory with the interests of minorities).

[106] *Id.* at 330.

[107] *See* Brodin *supra* note 5; *supra* notes 4 and 6 and accompanying text.

underlying legal decisions which perpetuate oppressive social and institutional conditions.[108] Through recognition of the non-objective, non-formalistic forces influencing legal outcomes (which CLS generally terms "ideology"), CLS incidentally raises the possibility—a very real and intellectually compelling possibility for people of color—that racism is one of the non-objective, non-formalistic forces. As the Minority Scholars assert, the failure of CLS scholarship to pinpoint and to integrate discussion of the problem of racism as a principle reason for inconsistent and discriminatory decisions ignores the issue over which most of the exploratory energies of minorities are spent.[109]

In its very few works discussing the issue of racism, CLS, because of its Marxist roots, attributes the occurrence of discriminatory and status quo-perpetuating legal outcomes primarily to class-based and economic-based discrimination.[110] Racism receives merely tangential treatment as an incidental product of class and economic strife. In contrast to the CLS view, the Minority Scholars assert that class-based and economic-based discrimination as suffered by many minorities results from race-based discrimination, not vice versa.[111] The phenomenon of racism manifests itself in a variety of contexts, including public housing, employment, and education and in many ways fuels the process whereby some unfortunate citizens change in the eyes of society from people of color to people of limited means.[112]

The Minority Scholars posit cogent theoretical support for their belief that regardless of changes made to the institutional structure of our society, racism will persist as a social-psychological phenomenon.[113] It occurs in both overt and covert forms and in both micro—and macro—legal contexts.[114] Accordingly, for these scholars, any analysis of the role of law in society necessarily must consider the law not only as a means for protecting against racism, but also as a means for perpetuating racism. CLS runs afoul of minority interests by giving merely tangential treatment to a problem that

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[108] *See, e.g.*, Crenshaw, *supra* note 3, at 1335, 1357–81.

[109] *Id.*; *see, e.g.*, Freeman, *supra* note 89; Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives From Labor and Civil Rights Law*, 61 OR. L. REV. 157 (1982); *see also* Crenshaw, *supra* note 3, at 1356; Haines, *supra* note 20, at 706–27 (analyzing Freeman's and Klare's writings).

[110] *See* Crenshaw, *supra* note 3, at 1335, 1357–81.

[111] *Id.*

[112] *See* Haines, *supra* note 20, at 715.

[113] *See* Delgado, *supra* note 15, at 315–21.

[114] *Id.*

historically has threatened the stability of an entire population of African-Americans.

Second, the Minority Scholars find the CLS critique of liberal rights discourse problematic.[115] In short, CLS asserts that rights and rights discourse legitimate unfair distributions of wealth and power by focusing on the individual rather than the community, providing piecemeal reform, and limiting the overall possibility of reform by circumscribing the boundaries of dialogue.[116] False consciousness, the belief in the legitimacy of the existing system of liberal rights discourse, deludes minorities into accepting and reconciling their deprived status.[117]

The Minority Scholars acknowledge the plausibility of this theory, but assert that false consciousness is not the primary mechanism with which the majority culture stymies and diffuses minority reformist activity.[118] The Minority Scholars find troubling the idea that "[through] absorption of self-defeating ideologies (rights discourse) . . . " minorities participate in their own oppression.[119] They argue that it "smacks" of the very paternalism that CLS purports to disdain by suggesting that minorities are unable to comprehend fully their own plight and discern who (the majority culture) and what (frequently racism) propagates that plight.[120] Other forces, they argue, combine to paralyze minority reformist efforts and to inject a sense of hopelessness into an already daunting endeavor—forces such as political and economic "coercion by the dominant group; exclusion from clubs, networks, information, and needed help at crucial times; [and] microaggressions . . . ."[121] CLS focuses inappropriately on minority rather than majority culture.

The Minority Scholars also take issue with the rights discourse critique corollary which holds that faithfully staying within the system and engaging in rights discourse results in inadequate piecemeal reform (the patchwork quilt metaphor).[122] CLS argues that "[t]hose who control the system weaken [infrasystem] resistance by pointing to the occasional concession to, or periodic court victory

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[115] *See, e.g., id.* at 303–12; Crenshaw, *supra* note 3, at 1357, 1366–69; Williams, *supra* note 35, at 125.

[116] *See* Delgado, *supra* note 15, at 303. For a discussion of the rights critique, *see infra* notes 62–79 and accompanying text.

[117] *See* Delgado, *supra* note 15, at 309–12.

[118] *Id.*

[119] *Id.* at 311.

[120] *Id.* at 308.

[121] *Id.* at 311.

[122] *Id.* at 307–08.

of, a Black plaintiff or worker as evidence that the system is fair and just."[123] This corollary contradicts the reality that incremental, within-the-system reforms have proven to be the most successful reforms.

> Even the American Civil War, the passage of the Thirteenth, Fourteenth and Fifteenth Amendments of the United States Constitution, the passage of the Civil Rights Acts of the 19th Century, . . . the civil rights demonstrations, the urban revolutions of the 1960's, the passage of the Civil Rights Acts of the 20th Century . . . demonstrate that [minorities] benefit from glacial not seismic changes in the operation of American law.[124]

According to CLS, achieving reform in the area of civil rights requires endlessly litigating narrow technical issues at great cost to the plaintiff—endeavoring against the considerable inertia of the status quo. For Minority Scholars, however, the reality of these victories awarding substantive rights squarely refutes the CLS arguments that conventional liberal rights concepts and discourse are disutile for minorities.[125]

Finally, the Minority Scholars attribute the problematic aspects of CLS theory to the perceived elitist,[126] negative,[127] and informal[128] character of the Movement. With respect to elitism and informality, the Minority Scholars argue that the trashing of rights discourse is plausible for CLS scholars because they reside in privileged positions in our society. These are positions from which theoretically disposing of rights and creating an informal community premised upon good will and sharing carries no threat of harm.[129] Implicit in this criticism is the suspicion that CLS simply does not take itself or its proposed agenda seriously. What is missing, Minority Scholars argue, is a measure of reality.[130]

Turning to the issue of negativism, the Minority Scholars find that cynicism pervades the CLS Movement's writings and its agenda.[131] The process of deconstructing virtually all of society's

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[123] *Id.* at 307.

[124] Haines, *supra* note 20, at 722.

[125] *See* Williams, *supra* note 35, at 123–27; *see also* Williams, *supra* note 96, at 414–33.

[126] *See, e.g.*, Matsuda, *supra* note 16, at 342–45.

[127] *See, e.g.*, Delgado, *supra* note 15, at 302–12; Williams, *supra* note 35, at 123–27.

[128] *See* Delgado, *supra* note 15, at 314–20.

[129] *See* Delgado, *Critical Legal Studies and the Realities of Race—Does the Fundamental Contradiction Have a Corollary?* 23 HARV. C.R.-C.L. L. REV. 407 (1988) (asserting that whites lack the necessary degree of empathy).

[130] *Id.*

[131] *See* Crenshaw, *supra* note 3, at 1366–69.

accepted institutional and jurisprudential norms involves considerable negative energy and razes the foundations of a capitalistic and democratic society. Minority Scholars believe this process inhibits the CLS Movement's ability to generate positive enthusiasm for legal and social change.[132]

B. *Critical Legal Scholars' Responses to the Minority Scholar Critiques*

The CLS responses come principally from Alan Freeman[133] and Morton Horowitz.[134] Significantly, only two of over one hundred Critical Legal Scholars responded, despite considerable energies expended by the Minority Scholars in engaging the Critical Legal Scholars in dialogue. This small number of respondents begs the question: "How seriously does CLS, as a movement, take the concerns of minorities?" Perhaps many of the Critical Legal Scholars considered the two responses adequately representative of the CLS position. More likely, given that CLS members typically do not retreat from an opportunity to express their views on a controversial subject, most Critical Legal Scholars were simply not sufficiently aroused by the subject of minority concerns to respond meaningfully. Moreover, the responses fail to engage the Minority Scholars' critiques of CLS directly. Rather than give the critiques systematic and comprehensive treatment (the manner in which they were presented), the CLS responses evaded much of the substance presented by the Minority Scholars, amounting to a general defense of CLS theory. The Critical Legal Scholars defend the indeterminacy argument and the trashing of liberal rights theory, while only subtextually incorporating the problem of racism in these defenses. The CLS scholars also argue that they are experientially qualified to critique rights and rights discourse. Professor Freeman in particular argues that their extensive involvement in the civil rights movement in the 1960s establishes an intimate familiarity with the territory and texture of liberal rights discourse. He further argues that this intimate familiarity creates a genuinely serious, and not just intellectually curious, interest in the minority agenda.[135]

The CLS responses undertake a pragmatic defense of the Movement's rights discourse critique. This defense holds that premising liberal rights theory on the belief in the existence of funda-

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[132] *See* Haines, *supra* note 20, at 732.

[133] *See generally* Freeman, *supra* note 56.

[134] *See generally* Horowitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393 (1988).

[135] *See generally* Freeman, *supra* note 56, at 299–315.

mental, natural, formalistic rights ignores the reality that liberal rights discourse developed first as a politically recognized social construction and then became legitimate law through positive enactment.[136] The long line of well-recognized social, political, and scientific movements contributing to the current version of liberal rights discourse illustrates this developmental reality. From the philosophical writings of Descartes, through Marxism, the issues of the existence and utility of rights have commanded considerable intellectual energy.[137]

Critical Legal Scholars acknowledge the value of victories in litigation brought by rights discourse to minorities and other societally marginalized groups of people.[138] The popular perception of liberal rights discourse incorrectly envisions it as a form of protection for numerically large groups of people, such as social or class groupings (based upon class or race). But the historical roots of the development of liberal rights discourse in this country, CLS argues, indicates otherwise. These historical roots indicate that liberal rights discourse originated as a form of protection for individual private property.[139] The original framers of the liberal rights legal system established the system as protection from the pitfalls of popular revolt.[140] To date, the law affords the benefits of collective rights only to corporations based upon their special position in relation to the state in a capitalistic economy.[141] Arguably, minorities might obtain more direct benefit from the implementation of a form of group rights or entitlements.

As illustrated by CLS's deconstruction of the normative touchstones for contract law, legal rules derived from principles of capitalism and liberalism provide little stability and predictive value to individual citizens.[142] For example, the judiciary's freedom to choose between private individual rights and the state's public interest creates instability and indeterminacy. Also, in family law, courts decide between a parent's private right to family autonomy and the state's interest in the protection of abused or neglected children.[143] In

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[136] *See* Horowitz, *supra* note 134, at 403–04.

[137] *See* Freeman, *supra* note 56, at 318–19.

[138] *See generally* Horowitz, *supra* note 134.

[139] *Id.* at 395–400; *see also* Freeman, *supra* note 56, at 355–62.

[140] *See generally* Tushnet, *The Constitution as an Economic Document: Beard Revisited*, 56 GEO. WASH. L. REV. 106 (1987).

[141] *See* Horowitz, *supra* note 134 at 400–01.

[142] *See* Note, *supra* note 40, and accompanying text.

[143] *See* Horowitz, *supra* note 134, at 403.

labor law, courts decide between "the private rights of association of labor unions" and the state interest in restraining the union's unreasonable exercise of power over its members.[144] CLS "condemns" judicial balancing tests because they reinforce the existence of conflicting values and require a judge to choose between them without a normative theory of social justice.[145]

Additionally, CLS argues that rooting rights discourse in an ideal more egalitarian and communitarian than the competitively individualist liberal ideal better serves the interests of minorities and marginalized groups.[146] The courts' role as unanchored arbiter of those interests necessarily would be minimized. Thus, a measure of stability and determinacy would be restored to decisions involving groups less powerful than the groups controlling the machinery of the legal system.

Subtextually, the Critical Legal Scholars respond to the CLS Movement's failure to address racism by providing exhaustive historical references and sociological statistics documenting the pervasive existence of racism in society.[147] The role of racism in the perpetuation of maldistributions of wealth and power is also explored. True to form, the CLS scholars embark on this exploration using deconstruction. In particular, CLS trashes the theory of equality of opportunity which, mainstream jurisprudence alleges, supports our economic system and democratic form of government.[148] CLS exposes this notion as essentially an illusion. Popular perceptions hold that equal access is available to public offices and employment positions—performance meritoriously determines which positions are attained, but each citizen has the opportunity to compete. But in reality racial dichotomies in wealth and power determine access to positions in public office and private business. Instead of ability, talent, and performance determining access, economic status typically bears the greatest determinative value.[149] Moreover, the current economic status of many minorities stems in part from historical, economic and political discrimination fueled by racism. Thus, CLS argues, deconstruction of the ideological assumptions

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[144] *Id.*

[145] *See* Tushnet, *Antiformalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502, 1516–18 (1985); *cf.* Lewis, *The Unbalanced Crits and their Overbalanced Critics*, 40 MERCER L. REV. 913, 916–20 (1989) (arguing that judicial balancing tests are both legitimate and useful).

[146] *See* Horowitz, *supra* note 134, at 405–06.

[147] *See* Freeman, *supra* note 56, at 355–62.

[148] *Id.* at 354–85.

[149] *Id.* at 382–83.

underpinning the notion of equality of opportunity reveals inherent indeterminacy.

The CLS scholars perform further deconstruction on the notion of equality of opportunity by revealing the contradictions underlying the concepts of ability and talent. They argue that "there is no such thing as a natural and objective 'talent' . . . . [S]uch skills are socially and historically contingent, the ones a particular culture needs and wants in its time."[150] The more distorted the power relations within a culture, the more likely that the powerful will bear the valued talents.[151] This critique applies to heavy reliance by the academic community upon standardized test scores in evaluating student performance.[152] The premise underlying the argument holds that the tests reward culturally and economically biased knowledge.[153] This bias segregates the testing population into the already crystallized cultural and economic hierarchies.[154] The declining emphasis upon standardized test scores by academic institutions supports the flaws exposed by the CLS deconstruction.[155]

IV. Irreconcilable Differences

The dialogue exploring the schism between minorities and CLS, while crediting CLS for some important contributions to the general sphere of jurisprudence, also highlights important differences between the social-legal interests of minorities and the social-legal interests and activities of CLS. These differences appear substantively irreconcilable. The incisive and critical deconstruction of law which exposes the underlying conflicts that breed social injustice is the most useful contribution from CLS. But trashing as a process of theoretical analysis differs from trashing as a real-world renunciation of the current legal machinery. Significantly, CLS espouses both forms of trashing, while the Minority Scholars espouse only

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[150] *Id.* at 380–81.

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.* One CLS Scholar writes: "A Black applicant to professional school, whose test scores are lower than those of a competing white applicant, asks for admission on grounds of 'affirmative action.' Everybody in that interaction (including the applicant) momentarily submits to the spell of the worldview promoted in that discourse, that the scores measure an 'objective' merit (though nobody really has the foggiest idea *what* they measure besides standardized test-taking ability) that would have to be set aside to let him in." Tikkun, *supra* note 53, at 16.

[155] *Id.*

the former. The latter concept of trashing has little utility to lawyers who seek to achieve empowering civil rights gains through litigation. Trashing our current rights discourse en route to creating an ideal egalitarian community fails to further certain interests of minorities—short term interests in achieving situationally specific distributive and corrective justice, and long term interests in effectuating changes to the current arrangement of legal apparatus so as to provide a measure of institutional protection for the future.

Regarding both short term and long term interests, the only litigative strategy posited by CLS entails politicizing the entire litigation process. This strategy suggests that lawyers use inflammatory techniques to counteract the false consciousness-inducing effect of the current liberal ideology which is exerted upon the masses.[156] These techniques involve publicizing trials to capture the attention of the general public, then using the public forum thus created to deconstruct the legal system and lay bare the inherent irrationality of the system before all of society.[157] CLS argues that "[the] first principle of a 'counter-hegemonic' legal practice must be to subordinate the goal of getting people their rights to the goal of building an authentic or unalienated political consciousness."[158]

This strategy is prohibitively unattractive for many marginalized citizens seeking vindication of their rights through adjudication.[159] Sacrificing the vindication of one's rights to effectuate this strategy is antithetical to the motivation for entering into litigation.[160] It ignores the economic hardships that force one to resort to litigation in the first place. Also, the strategy wrongly assumes that elevating the collective goal of deconstructing the legal system benefits the plaintiff more than persuasively arguing the law to attain an individual goal in one's own trial. How many individual plaintiffs must sacrifice the opportunity to vindicate their rights in order to incite a mass political consciousness that prompts the overturn of the current system?

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[156] *See* Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, in CRITICAL LEGAL STUDIES, *supra* note 23, at 303.

[157] *Id.* at 306–21. As seen by CLS, examples of successful utilization of this approach are the Chicago Eight Trial and the Inez Garcia Trial, both of which took place in the 1960s and early 1970s during the heyday of the radical left.

[158] *Id.* at 303–04.

[159] *See* Delgado, *supra* note 15 at 307–08.

[160] *Id.* Professor Delgado aptly points out that "[a] court order directing a housing authority to disburse funds for heating in subsidized housing may postpone the revolution, or it may not. In the meantime, the order keeps a number of poor families warm. This may mean more to them than it does to a comfortable academic working in a warm office." *Id.*

Aside from these impractical suggestions for practicing attorneys, the primary irreconcilable difference between CLS and minorities remains the CLS egalitarian ideal. In brief summary, CLS espouses trashing liberal rights discourse because it maintains the status quo by restricting the development of new approaches to the protection of individual and collective interests.[161] The system of ordering human affairs that supplants liberalism in the ideal egalitarian community would be informal, associational, and non-hierarchical. Individual and collective interests would be protected by the associational interactions of the members of this community. Conflicts in this community would be cognizable (as opposed to the latent, underlying conflicts in liberalism), the collective awareness of one's actions and their consequences would give rise to the obedient recognition of collective responsibilities.

Several irreconcilable problems plague this egalitarian ideal. First, the accepted definitions of racism on which minorities, sociologists, and psychologist agree are ignored.[162] Racism is a social-psychological phenomenon, one that causes minorities to be skeptical of human nature.[163] For the Minority Scholars, racism does not have its origins in disparate economic and social conditions; rather, disparate economic and social conditions frequently are the result of racist beliefs and actions.[164] The recent rise in racially motivated incidents on college campuses, traditionally believed to be bastions of liberalism, illustrates the prudence of minority skepticism.[165]

Given the psychological origins of racism, and given minorities' perception that racism is a primary threat to their economic, political, and social stability, the egalitarian ideal put forth by CLS appears inadequate for serving minority interests. CLS fails to provide an alternative to the concept of rights in its egalitarian ideal that would protect minorities from the manifestations of racism. This omission is alienating for the Minority Scholars who remark that, at a minimum, "[r]ights do, at times, give pause to those who would otherwise oppress us . . . ."[166] Entrusting the protection of personal freedoms to the "good will" of the majority group in CLS's informal society is tantamount to surrendering all of what little security is

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[161] *See supra* notes 62–87 and accompanying text.

[162] *See* Delgado, *supra* note 15, at 316–18.

[163] *Id.*

[164] *See supra* notes 111–12 and accompanying text.

[165] *See, e.g.*, Wilkerson, *Campus Blacks Feel Racism's Nuances*, N.Y. Times, April 17, 1988, § I, at 1, col. 3.

[166] Delgado, *supra* note 15, at 305.

provided by the current legal and political institutions.[167] Even assuming, *arguendo*, that trashing and deconstruction are so popularly effective that a sufficient societal consciousness is generated to reform the current system, what protection is there in the interim between the trashing and the attainment of the ideal? The egalitarian agenda lacks even the slightest realistic plausibility. It remains merely an ideal and not a viable alternative system of arranging human affairs.

CLS stops short of instituting a new system of rights, unable to elude its own trashing: "Until and unless we have successfully jettisoned [trashed] our dominant belief systems, any attempt to formulate a positive program will likely reintroduce the very patterns of domination and alienation that we seek to escape."[168] Thus, the relentless deconstruction of normative sources creates a Catch-22 in which an analogue to rights never may be created because it would simply be another reified instrument of oppression.

The Minority Scholars suggest an alternative to the CLS ideal, providing the conceptual foundations of a social-legal agenda that would adequately serve minority interests.[169] Analysis of this social-legal agenda indicates that the differences between CLS and minority aims are indeed irreconcilable. The agenda suggested by the Minority Scholars would have as its guiding principle "the express need for understanding and coping with racism."[170] In contrast, the CLS agenda has as its guiding principle the deconstruction of normative sources rooted in institutional as opposed to associational touchstones. These two pursuits are not necessarily incompatible, but the Minority Scholars' agenda bears more immediate relevancy to the concerns of minorities. That agenda's goal is to eliminate the very real threat of racism and its manifestations.

In the Minority Scholars' ideal, a critical light would necessarily be cast on the activity of society, scrutinizing distributions and maldistributions of wealth not only for class-based discrimination but especially for race-based discrimination.[171] Minority Scholars suggest correcting maldistributions of wealth by appeals to the individual self-interest in equitable power and resource alignments which benefit all citizens. In order to cope with racism, the society would

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[167] *Id.* at 303.

[168] Dalton, *supra* note 96, at 436 n.4.

[169] Delgado, *supra* note 15, at 320.

[170] *Id.*

[171] *Id.* at 321.

need a strong central authority capable of diligent enforcement and punishment efforts, as a result of an unwavering skepticism of human nature. The society necessarily would be formal.[172]

The informal and decentralized society constituting the CLS ideal contrasts sharply with this Minority Scholar ideal. The two ideals, perhaps at an abstract level, share a vision of a society in which citizens live their lives unfettered by oppression. However, the Minority Scholar ideal, by proposing institutional protections which CLS does not, moves from an abstract ideal to a realistic one. Most notably, the Minority Scholar ideal represents an ideal that minorities perceive to be attainable within the current system of liberal rights. It is an ideal in pursuit of which many minority members of the legal community spend their energies.

The Minority Scholars argue persuasively that the irreconcilable differences in large part stem from the composition of the CLS Movement. CLS, they argue, lacks the empathetic perspective—the actual experience of victimization—to appreciate minorities' compelling need for a stable and functional system of liberal rights. "Those with whom [the average Critical Legal Scholar] comes in contact in his daily life—landlords, employers, public authorities—generally treat him with respect and deference."[173] Ironically, a few CLS scholars have actually experienced such victimization:

> [W]hen two Crits at an eastern law school were experiencing tenure difficulty, allegedly because of their politics and innovative teaching, CLS members around the country wrote to the university's president, urging him to investigate charges that the law school's personnel procedures were biased and infringed the Crits' *rights* of academic freedom.[174]

Rendered a disadvantaged minority in the context of a more powerful majority academic culture, CLS grasped for a principle, that of rights, in order to achieve their vision of corrective justice. Ironically, in doing so, the actions of CLS resemble the actions of racial minorities in the larger context of American society.

The CLS–Minority Scholar dialogue was instigated to explore the schism between traditional allies. Although the dialogue highlighted the powerfully incisive character of the Movement's critical jurisprudence, the Movement's deconstructive (as opposed to reconstructive) agenda conflicts with the determination of people of

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[172] *Id.*

[173] *Id.* at 306.

[174] *Id.* at 306 n. 35. (emphasis added).

color to secure protection via reforms within the existing system of liberal rights. This conflict accounts for the minority perception that the CLS egalitarian ideal inadequately protects their interests by failing to counteract the possibility that racism will manifest itself politically, socially, and economically, during the transition to a more ideal society and in the ideal society.

V. Conclusion

Unfortunately, the same group of liberal reformist students who allied with minorities in the 1960s and achieved substantive civil rights reform are no longer so allied. The development and maturation of CLS for nearly twelve years without the presence of an influential minority perspective produced an ultra-radical jurisprudence which inadequately serves the social-legal reform needs of minorities. Consequently, CLS in its current form remains simply an incisive and insightful critical jurisprudential tool, not a plausible social-legal reform theory for minorities.

John Hardwick