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The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want Minority Critiques of the Critical Legal Studies Movement

Richard Delgado
University of Alabama - School of Law, rdelgado@law.ua.edu

THE ETHEREAL SCHOLAR: DOES CRITICAL LEGAL STUDIES HAVE WHAT MINORITIES WANT?

*Richard Delgado**

Introduction

What does Critical Legal Studies (CLS) have to offer racial minorities in their quest for social justice? More generally, what legal theory or program best meets the needs and desires of minorities? Any acceptable theory must be radical, or at any rate progressive, one would think, since minorities want to change the world. Although CLS purports to be a radical theory,[1] minorities have not flocked to it. And CLS has not paid much attention to minorities, not placing racial questions on its agenda until this year, ten years after its formation as a legal movement.[2]

This article suggests that the current schism between CLS and minorities results from a fundamental difference between what CLS proposes and what minorities seek in a legal theory. Part I describes what may be called the negative and positive aspects of the CLS program, and explains why they are troublesome for minorities. Part II reveals how a common theme of the CLS critique—the advocacy of informality—ignores the need for structure in containing and eliminating racism. The last section of the article describes what a radical political program must include to serve the interests of minorities, and outlines the social arrangements that could best provide the safe and decent conditions necessary for minorities to flourish.

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* Professor of Law, University of California, Davis. J.D., University of California, Berkeley (Boalt Hall), 1974.

[1] *See, e.g.*, Hutchinson & Monahan, *Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 Stan. L. Rev. 199, 199–202 (1984); Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 Stan. L. Rev. 509, 509–10 (1984).

[2] Approximately 40 minority lawyers, law students and law professors, out of a total of approximately 150 people, attended the 1987 annual meeting of the Conference on Critical Legal Studies. (The minority attendance at previous meetings has been much smaller.) The topic of the 1987 annual meeting was race. The program was entitled "The Sounds of Silence: Racism and the Law."

I. CLS Themes—From a Minority Perspective

The CLS program has both negative and positive features. The negative themes include a far-ranging attack on American legal and social institutions,[3] while the positive themes describe an alternative, utopian society.[4] What follows is an analysis of those elements of the CLS negative and positive programs that minorities find unappealing and worrisome.

A. The CLS Negative Program

I admit at the outset that the CLS negative program contains much that is useful for minorities. Its attack on the public/private distinction breaks down the artificial barrier between the public sphere, in which conduct is highly regulated, and the private sphere, in which it is not.[5] The CLS critique of the social order demonstrates that current arrangements and distributions of power are neither necessary nor natural,[6] and that hierarchy irrationally places some at the top while it sacrifices those at the bottom.[7] More generally, CLS challenges and decodes "Eu-

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[3] Among the targets of the CLS program 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. *See, e.g.*, Gordon, *Critical Legal Histories*, 36 Stan. L. Rev. 57 (1984); Hutchinson & Monahan, *The "Rights" Stuff: Roberto Unger and Beyond*, 62 Tex. L. Rev. 1477 (1984); Stick, *Can Nihilism Be Pragmatic?*, 100 Harv. L. Rev. 332 (1986). *See generally* Brosnan, *Serious But Not Critical*, 60 S. Cal. L. Rev. 259 (1986). Admittedly, this article contains a number of generalizations about a body of literature which has more than one strand of thought. Although the description herein may not apply equally to all Critical Legal Scholars, common themes do appear, and I feel I have fairly summarized the field.

[4] *See infra* notes 72–83 and accompanying text; Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561 (1983); R. Unger, Knowledge and Politics (1975).

[5] *See, e.g.*, Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1057 (1980); Kairys, *Freedom of Speech*, in The Politics of Law: A Progressive Critique 140, 163–65 (D. Kairys ed. 1982); Kairys, *Introduction*, in *id.* at 1, 3; Sparer, *supra* note 1, at 529–31.

[6] *See, e.g.*, Kennedy, *Legal Education as Training for Hierarchy*, in The Politics of Law: A Progressive Critique, *supra* note 5, at 40, 50; Mensch, *The History of Mainstream Legal Thought*, in The Politics of Law: A Progressive Critique, *supra* note 5, at 18.

[7] *See* Kennedy, *supra* note 6; *see also* 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 judicial support thereof).

romyths" that rule the lives of minorities and consign us to lowly fates.[8]

At the same time, however, the CLS negative program contains elements that repel and in fact threaten minorities. These elements include: (i) disparagement of legal rules and rights,[9] (ii) rejection of piecemeal change,[10] (iii) idealism,[11] and (iv) use of the concept of false consciousness.[12] Much of CLS scholarship in these areas is either risky, since it asks minorities to give up something of value, or unreliable, because it is based on presuppositions that do not correspond to our experience.[13]

1. The CLS Critique of Legal Rules and Rights

The CLS critique of legal rules and reasoning is well known. Rules, since they are indeterminate and manipulable, can generate practically any result in a given situation.[14] Rules invite the savvy to operate near their borders while the uninitiated remain well inside.[15]

Rights, a special kind of rule, receive particularly harsh criticism from Critical Legal Scholars (Crits).[16] Rights legitimize society's unfair power arrangements, acting like pressure valves

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[8] *See* Williams, *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, Inequal. & the L. J. (forthcoming in 1987) (attacking the Euromyths that whites rule by manifest destiny, being culturally and intellectually superior to third world persons, and that minorities must become westernized in order to gain power and control over their lives).

[9] *See infra* notes 14–22 and accompanying text.

[10] *See infra* notes 38–42 and accompanying text.

[11] *See infra* notes 45–49 and accompanying text.

[12] *See infra* notes 52–63 and accompanying text.

[13] Moreover, the CLS movement may be reaching out to women and minorities now, see *supra* note 2 and accompanying text, in part because it is under attack by the right and needs allies. *See infra* note 35 and accompanying text. Coalition-building may thus serve the temporary interest of all of these groups. *See* Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518 (1980).

[14] *See, e.g.*, Frug, *The Ideology of Bureaucracy in American Law*, 97 Harv. L. Rev. 1276, 1292 (1984); Kennedy, *supra* note 6, at 48–49; Kennedy, *Form & Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1766–74 (1976); Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 Wis. L. Rev. 720, 748–49 (1972).

[15] *See* Kennedy, *Form & Substance in Private Law Adjudication*, *supra* note 14.

[16] *See generally Symposium: A Critique of Rights*, 62 Tex. L. Rev. 1363 (1984). Among the CLS writers who criticize reliance on rights are: Freeman, *Legitimating Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049 (1978); Hutchinson & Monahan, *supra* note 3, at 1482–83; Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 Indus. Rel. L.J. 450, 468–80 (1981); Tushnet, *An Essay on Rights*, 62 Tex. L. Rev. 1363 (1984).

to allow only so much injustice.[17] With much fanfare, the powerful periodically distribute rights as proof that the system is fair and just, and then quietly deny rights through narrow construction, nonenforcement, or delay.[18]

Rights, Crits argue, are never promulgated in genuinely important areas such as economic justice.[19] They protect only ephemeral things, like the right to speak or worship.[20] When even these rights become threatening, they are limited.[21]

For CLS, rights reinforce a soulless, alienating vision of society made up of atomized individuals whose only concern is to protect their own security and property.[22] Crits argue that rights are alienating since they force one to look at oneself and others as isolated rights-bearers ("I got my rights") rather than as interdependent members of a community, and make it impossible for us even to imagine what a nonhierarchical society founded on cooperation and love would be like.

The CLS critique of rights and rules is the most problematic aspect of the CLS program, and provides few answers for minority scholars and lawyers.[23] We know, from frequent and sad experience, that the mere announcement of a legal right means little. We live in the gap between law on the books and law in action. We have no difficulty imagining a better world; for us, eliminating racism would be a good start.

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[17] *See, e.g.*, Freeman, *Antidiscrimination Law: A Critical Review*, in The Politics of Law: A Progressive Critique, *supra* note 5, at 96, 112–14; Freeman, *supra* note 16; Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*, 61 Or. L. Rev. 157 (1982).

[18] Freeman, *Antidiscrimination Law*, *supra* note 17.

[19] *E.g.*, Kennedy, *supra* note 6, at 49; Kairys, *Freedom of Speech*, *supra* note 5, at 164.

[20] *See* Kennedy, *supra* note 6, at 48–49.

[21] *E.g.*, Kairys, *Freedom of Speech*, *supra* note 5, at 164–65 (freedom of expression is limited when it becomes powerful enough to be threatening, as in the "fighting words" or "clear and present danger" cases).

[22] *See* Gordon, *New Developments in Legal Theory*, in The Politics of Law: A Progressive Critique, *supra* note 5, at 281, 287; Kennedy, *supra* note 6, at 49; Tushnet, *supra* note 16, at 1384. *But see* Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L.J. 1, 65–68 (1984) (describing rights-like features of proposed Crit society); Unger, *The Critical Legal Studies Movement*, *supra* note 4, at 597 (drawing distinction between property rights, which tend to make some individuals dependent on others, and political/civil rights, which do not pose this threat).

[23] *See, e.g.*, Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 Harv. C.R.-C.L. L. Rev. 000 (1987); Williams, *supra* note 8; G. Torres, Address at Conference on Critical Legal Studies Annual Meeting (Jan. 7, 1987) (unpublished manuscript on file with Harvard Civil Rights-Civil Liberties Law Review).

Even if rights and rights-talk paralyze us and induce a false sense of security, as CLS scholars maintain, might they not have a comparable effect on public officials, such as the police? Rights do, at times, give pause to those who would otherwise oppress us; without the law's sanction, these individuals would be more likely to express racist sentiments on the job.[24] It is condescending and misguided to assume that the enervating effect of rights talk is experienced by the victims and not the perpetrators of racial mistreatment.

Second, CLS scholars are often hazy about what would provide minorities comparable protection if rights no longer existed.[25] The CLS positive program, or Utopia, discussed below,[26] is both far from adequate and far off in time.

Third, Crits argue that rights separate and alienate the individual from the rest of the human community.[27] This may be so for the hard-working Crits who spend much of their lives in their studies and law offices.[28] For minorities, however, rights serve as a rallying point and bring us closer together.[29] On the other hand, any distance rights place between us and others may be beneficial; there is at least safety in distance.[30]

One explanation for the CLS position on rights may be that the average Crit, a white male teaching at a major law school,

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[24] *See* G. Allport, The Nature of Prejudice 472 (1954); Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev. 133, 148–49 (1982); P. van den Berghe, Race and Racism 20–21 (2d ed. 1978) (law's sanction has some effect in discouraging expression of racist sentiments).

[25] *See infra* notes 67–73 and accompanying text (describing CLS' positive program); Brosnan, *supra* note 3, at 264–67 (CLS' critiques of rights lack a theory of justice); *id.* at 268 (describing CLS as politically passive).

[26] *See infra* notes 80–83 and accompanying text.

[27] *See supra* note 22; Sparer, *supra* note 1, at 529–30.

[28] *See* Dalton, *The Clouded Prism*, 22 Harv. C.R.-C.L. L. Rev. 000 (1987) (describing critical scholars, typically white males who spend their lives in books, as being out of touch with the minority experience).

[29] *See generally* D. Bell, Race, Racism and American Law 279–361 (2d ed. 1980) (describing black movement and struggle for civil rights).

[30] *Compare* Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buff. L. Rev. 205, 217 (1979) (we need, but fear, community; observing that a single look from a friend can reduce a victim to misery), *with* Abortion, Moral and Legal Perspectives (J. Garfield & P. Hennessy, eds. 1985) (close—especially sexual—relationships with men are risky and ill-advised because of power disparities between men and women and the oppression of women in society). Minorities run comparable risks. *See, e.g.*, Delgado, *supra* note 24 (minorities frequently subject to slights, rebuffs, and slurs); C. Pierce, Unity in Diversity: Thirty-Three Years of Stress, Solomon Carter Fuller Lectures, American Psychiatric Ass'n Meeting, Washington, D.C. (May 12, 1986) (transcript on file with Harvard Civil Rights-Civil Liberties Law Review) (blacks frequent victims of "microaggressions"). *See generally* A. Higginbotham, In the Matter of Color (1978).

has little use for rights.[31] Those with whom he comes in contact in his daily life—landlords, employers, public authorities—generally treat him with respect and deference. Rarely is he the victim of coercion, revilement, or contempt.[32] In the mind of the average Crit, rights offer relatively little security, while they promote a shrunken, atrophied, and unsatisfying social existence.[33] Rights transform those governed by them into lone, deformed stick figures vulnerable to pressures emanating from large corporations or faceless bureaucracies.[34] Yet, when Crits are treated insensitively or unfairly, or are coerced into giving up something of value—such as an academic appointment in a tenure battle tinged by anti-Crit bias—they have been as quick as anyone to resort to the language of rights.[35] Their behavior in such situations exemplifies the universal tendency of beleaguered persons and groups to revert to rights-talk.

For minorities, however, that rights minimize many forms of coercion is of enormous importance. At the same time, the psychic rewards that Crits believe will result from a rightless interracial "community" are far from our experience. Even if such rewards were achievable, they would necessarily rank lower than simple security on our scale of need. Of course, a utopian community of the sort Crits advocate might provide minorities with both security and psychic satisfaction. As will be shown later, however, that hope is probably vain.[36]

In short, the two groups see rights differently. White CLS members see rights as oppressive, alienating and mystifying. For minorities, they are invigorating cloaks of safety that unite

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[31] *See generally* Williams, *supra* note 23 (describing differing attitudes of the author and a white male colleague regarding an apartment lease in New York City); Dalton, *supra* note 28; Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 Tex. L. Rev. 1563 (1984).

[32] I use "rarely" in a relative sense. *See* Delgado, *supra* note 24, at 135–49 (frequency and severity of race-based harms greatest in minority populations).

[33] *See supra* note 22.

[34] These are the forms of mistreatment most white communitarians seem principally concerned about. *See, e.g.*, Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury*, 34 UCLA L. Rev. (forthcoming in 1987). *See generally* M. Sandel, Liberalism and the Limits of Justice (1982).

[35] For example, when 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.

[36] *See infra* notes 75–79 and accompanying text (critique of the CLS positive program).

us in a common bond. Instead of coming to grips with the different function of rights for the two groups, Crits insist that minorities adopt their viewpoint, labeling disagreement on our part false consciousness[37] or a lack of political sophistication.

2. *The CLS Critique of Piecemeal Reform*

Critical scholars reject the idea of piecemeal reform. Incremental change, they argue, merely postpones the wholesale reformation that must occur to create a decent society.[38] Even worse, an unfair social system survives by using piecemeal reform to disguise and legitimize oppression.[39] Those who control the system weaken resistance by pointing to the occasional concession to, or periodic court victory of, a black plaintiff or worker as evidence that the system is fair and just.[40] In fact, Crits believe that teaching the common law or using the case method in law school is a disguised means of preaching incrementalism and thereby maintaining the current power structure.[41] To avoid this, CLS scholars urge law professors to abandon the case method, give up the effort to find rationality and order in the case law, and teach in an unabashedly political fashion.[42]

The CLS critique of piecemeal reform is familiar, imperialistic and wrong. Minorities know from bitter experience that occasional court victories do not mean the Promised Land is at hand.[43] The critique is imperialistic in that it tells minorities and other oppressed peoples how they should interpret events affecting them.[44] A court order directing a housing authority to

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[37] For an explanation of the term "false consciousness," see *infra* notes 52–63 and accompanying text. *See also* Gabel, *Reification in Legal Reasoning*, 3 Res. in L. & Soc. 25, 25–27 (1980) (defining false consciousness as reification).

[38] *See* Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 Stan. L. Rev. 413, 421–23 (1984). *See generally* Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 Yale L.J. 1063 (1981).

[39] *See* Gordon, *supra* note 22, at 286. *See also* Freeman, *supra* note 16; Klare, *supra* note 7.

[40] *See* Freeman, *supra* note 16.

[41] *See* Kennedy, *supra* note 6.

[42] *See* D. Kennedy, *supra* note 7; Kennedy, *supra* note 6.

[43] *See, e.g.*, D. Bell, *supra* note 29, at 2–51; *see also* M. Jorrin, Governments of Latin America 120 (1953) (citing slogan, "Hecha la ley, hecha la trampa"—every law generates its own loophole).

[44] *See generally* Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. Pa. L. Rev. 561 (1984).

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. It smacks of paternalism to assert that the possibility of revolution later outweighs the certainty of heat now, unless there is evidence for that possibility. The Crits do not offer such evidence.

Indeed, some incremental changes may bring revolutionary changes closer, not push them further away. Not all small reforms induce complacency; some may whet the appetite for further combat. The welfare family may hold a tenants' union meeting in their heated living room. CLS scholars' critique of piecemeal reform often misses these possibilities, and neglects the question of whether total change, when it comes, will be what we want.

3. CLS' Idealism

The CLS program is also idealistic.[45] CLS scholars' idealism transforms social reality into a mental construct.[46] Facts become intelligible only through the categories of thought that we bring to experience. Crits argue that the principal impediments to achieving an ideal society are intellectual. People are imprisoned by a destructive system of mental categories that blocks any vision of a better world.[47] Liberal-capitalist ideology so shackles individuals that they willingly accept a truncated existence and believe it to be the best available. Changing the world requires primarily that we begin to think about it differently.[48] To help break the mental chains and clear the way for the creation of a new and better world, Crits practice "trashing"—a process by which law and social structures are shown

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[45] I use the word "idealism" in its philosophic sense, whereby explanations of social reality are in the realm of thought or consciousness, rather than in material forces or concrete actions. *See* The Random House Dictionary of the English Language 707 (J. Stein ed. 1971) (definition 5a of "idealism").

[46] *See* Schwartz, *supra* note 38, at 422, 426–28; Gordon, *supra* note 22, at 291.

[47] *See* Gordon, *supra* note 22, at 288–89; Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 Stan. L. Rev. 591, 671–72 (1981); Kennedy, *Antonio Gramsci and the Legal System*, 6 A.L.S.A. Forum 32 (1982); Kennedy, *Critical Labor Law: A Comment*, 4 Indus. Rel. L.J. 503, 506 (1981).

[48] *See* Gordon, *supra* note 22, at 291 (individuals' principal limitations are their own imagination and thought, but article concedes that, for example, "propensities for evil" and "finite resources" might also play some part in limiting life possibilities of the poor).

to be contingent, inconsistent and irrationally supportive of the status quo without good reason.[49]

CLS scholars' idealism has a familiar ring to minority ears. We cannot help but be reminded of those fundamentalist preachers who have assured us that our lot will only improve once we "see the light" and are "saved."

Are our chains really mental? They may be so for members of privileged groups. They are much less so for minorities. Imagine that the Crits' trashing program succeeded and that all laws were repealed. Would our lot improve? That proposition is open to serious doubt. The forces that hold us back are not largely mental, legal, nor even political. What holds us back is, simply, racism—the myriad of insults, threats, indifference, and other "microaggressions" to which we are continually exposed.[50]

Because the Crits are intellectuals, they assign a large role to reason and ideology. Yet reason and ideology do not explain all evil. Telling an individual that he or she harbors racism will not make it go away; telling a black person that a rebuff was racially motivated will not ease its sting. Racism will not go away simply because Crits show that legalisms are indeterminate, that rights are alienating and legitimizing, and that law is a reflection of the interests of the ruling class. Whatever utility these concepts may have in other settings and in attempting to explain the angst of CLS members,[51] they have limited application in helping to understand, much less cure, racism.

4. The CLS Concept of False Consciousness

The concept of false consciousness is the final aspect of Crit scholarship that minorities find problematic.[52] Workers and

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[49] *See* Gordon, *supra* note 22, at 289 (thinking one's way through the veil of ideological mystification spun by the dominant culture); Kairys, *Legal Reasoning*, in The Politics of Law: A Progressive Critique, *supra* note 5, at 11–17. *See generally* Kelman, *Trashing*, 36 Stan. L. Rev. 293 (1984).

[50] *See* C. Pierce, *supra* note 30 (describing microaggressions as those "subtle, minor, stunning, automatic assaults . . . by which whites stress blacks unremittingly and keep them on the defensive, as well as in a psychologically reduced condition"); Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 Rutgers L. Rev. 673, 687, 690 (1985).

[51] Rights-based talk may distress white professionals who hunger for a more communitarian, fulfilling lifestyle than is currently attainable within their professional lives and social class.

[52] *See generally* Lukacs, History and Class Consciousness (1968); Freeman, *supra* note 16; Kairys, *Introduction*, *supra* note 5; Kennedy, *Antonio Gramsci and the Legal System*, *supra* note 47.

minorities buy into a system that degrades and oppresses them, and vehemently defend that system with a kind of "false honor."[53] These groups accept their own subordination because they believe that the constitutional system protects their property against takings by the state, and that it elevates their status above that of the lowest class.[54] Thus, oppressed people not only accept the liberal ideology and the mental shackles described in the preceding section, but also embrace it loyally and reject the proffered assistance of revolutionaries.

Some CLS writers even argue that the Framers intended false consciousness to exist. While extolling the virtues of freedom, the Framers set out to achieve ideological hegemony for themselves and their class by providing for separate classes and by protecting the property and prerogatives of employers and slave owners.[55]

False consciousness rationalizes the lowly status of workers, women, minorities and other oppressed groups.[56] According to capitalist-liberal ideology, society consists of individuals who express political preferences through voting and achieve economic results through the marketplace.[57] The system is formally fair; therefore, if one is poor, reviled, hungry, or out of work, it is one's own fault.[58] At the same time, the person who occupies a position of power deserves it. In a meritocratic society, the cream rises to the top. The duty of everyone else is to obey.

Ideologically achieved domination becomes a self-generating spiral. The masses are persuaded that they are of little merit. Demoralized, they take little interest in elections or in the way political and economic life is run.[59] Thus, false consciousness

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[53] *See* Gabel & Kennedy, *Roll Over Beethoven*, 36 Stan. L. Rev. 1, 26–27, 33–34 (critique of illusory rights) (1984); Johnson, *Do You Sincerely Want to Be Radical?*, 36 Stan. L. Rev. 247, 255–56 (1984). *See generally* Kennedy, *supra* note 6 (hierarchy sets up artificial and false sense of self); Kennedy, *supra* note 30 (structure of society made possible by consciousness of society); Kennedy, *Form and Substance in Private Law Adjudication*, *supra* note 14.

[54] *See supra* note 52.

[55] Sparer, *supra* note 1, at 537. *See* D. Bell, *supra* note 29, at 16–29. Bell does not subscribe to the Crits' theory of black subordination via false consciousness.

[56] *See* Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 Wis. L. Rev. 379 (1983); *see also supra* note 52.

[57] *See* Kairys, *Freedom of Speech*, *supra* note 5, at 164; *cf.* Johnson, *supra* note 53, at 255–56.

[58] *See* Freeman, *supra* note 16, at 1075; Klare, *Law-Making as Praxis*, 40 Telos 123, 134 (Summer, 1979).

[59] *See* Pettigrew, *supra* note 50, at 674–75.

blinds them to the alienation, lack of justice, conflict and unfairness inherent in political life.

Civil rights law is subject to particularly scathing criticism. Crits argue that the purpose of civil rights is to reconcile minorities to subordination by convincing us that the system is fair; our lowly status is simply the result of our inferiority.[60] The legal system protects society's investment in the subordination of minorities by assuring everyone that the status quo is inevitable.[61] It accomplishes this by doling out the occasional victory, such as *Brown v. Board of Education*,[62] and by ensuring that most civil rights are formal, rather than substantive.[63]

As with the other elements of the negative program, one should begin by asking whether the concept of false consciousness holds true for minorities. Much of what Crits criticize as false consciousness evinces their distrust of liberal legalisms and the elusive promises of court victories. Most of us have already acquired this distrust; society has provided us with more than adequate tutelage.[64] We know from Derrick Bell[65] and from personal experience not to place too much reliance on liberal attorneys who say they know exactly what we want. We know, indeed we live, the bogus public-private distinction.[66]

Moreover, it is worth questioning the extent to which our current subordination is caused by uncritical absorption of self-defeating ideologies, as opposed to other forces. Much more of our current plight is due to other factors: coercion by the dominant group; exclusion from clubs, networks, information, and needed help at crucial times; microaggressions; and the paralysis and hopelessness caused by the majority culture's denial of our pain and reality. (Who among us has not been asked by a white

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[60] *See* Kennedy, *Antonio Gramsci and the Legal System*, *supra* note 47, at 8.

[61] *See supra* note 47 and accompanying text.

[62] 347 U.S. 483 (1954).

[63] *See generally* Freeman, *supra* note 16 (antidiscrimination laws actually perpetuate discrimination through formality).

[64] *See supra* notes 23, 43 and accompanying text; *see generally* Pettigrew, *supra* note 50 (formal condemnation of racism by courts and legislators since 1964 has reduced blatant, violent acts of racism, but other forms persist).

[65] Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegration Litigation*, 85 Yale L.J. 470 (1976) (conflicts of interest between minority clients and their lawyers).

[66] *See* Kairys, *Freedom of Speech*, *supra* note 5, at 163–164.

person, naively or almost incredulously, "Do you really, in this day and age, suffer on account of your race?"[67])

Ultimately, the CLS false-consciousness analysis raises more questions than it answers. If false consciousness exists and is so powerful, why are only minorities and workers afflicted by it, and not white radicals? Is there not something patronizing in diagnosing an intellectual disease that exclusively afflicts persons of color?[68] Is not "false consciousness" an expression, like "incompetent" or "insane," that gives others the authority to treat the victim as if he lacks humanity, autonomy, or will?[69] Is not false consciousness an excuse for white radicals to assert and retain power they would otherwise have to explain and justify? Does not the CLS program create its own false consciousness within the law schools which employ CLS radicals, and ultimately within society at large? Unless coupled with practical action to storm trenches and organize workers, something CLS members have been remarkably slow to do,[70] the CLS reform program allows society to validate myths about free speech and the right to dissent.[71]

B. The CLS Positive Program

Critical Legal Studies, to date, has devoted much less effort to developing a positive program than to criticizing rules and social structures.[72] In general, the Crits' positive aim is to establish a Utopia in which true community would prevail.[73] De-

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[67] *See* Pettigrew, *supra* note 50, at 690–97 (many whites believe racial problem has been solved, but continue to engage in subtle forms of racism).

[68] *Cf.* Schwartz, *supra* note 38, at 438 (describing elements of paternalism in CLS scholarship).

[69] *Cf.* M. Shapiro & R. Spece, Bioethics and Law: Cases, Materials and Problems 168–73 (1980) (terms like "ill" taken as justifying nonconsensual treatment of those so inflicted, when such treatment would otherwise be intolerable).

[70] *See* Brosnan, *supra* note 3, at 264–68 (CLS politically passive, concentrates on doctrinal and conceptual manipulation at the expense of developing a theory of justice). *See also* Johnson, *supra* note 53, at 281–83 (program for action hazy and platitudinous); *but see* D. Kennedy, *supra* note 7 (proposing concrete reforms to law school structure and operation); Gabel & Harris, *Building Power & Breaking Images*, 11 N.Y.U. Rev. L. & Soc. Change 369 (1982) (urging revolutionary legal activism); Sparer, *supra* note 1, at 565–73 (urging progressive social action).

[71] *See supra* notes 19–21 and accompanying text (CLS criticizes free speech as an ephemeral right).

[72] *See* Sparer, *supra* note 1, at 565–71; Schwartz, *supra* note 38, at 426–28 (theoretical utopianism); *id.* at 448–52 (grotesque and irresponsible proposals).

[73] *See* Brest, *supra* note 38, at 1109; Gabel, *supra* note 37, at 45–46; Kennedy, *Form and Substance in Private Law Adjudication*, *supra* note 14, at 1771.

cisionmaking would be decentralized; rules would be set by small groups such as factory workers, farm workers, and students,[74] and would remain subject to constant renegotiation.[75] Hierarchy would not exist; everyone would be equal.[76] There would be no need for rights—at least not so many as we recognize today. Instead, everyone would share work, goods and responsibilities.[77]

Individuals would benefit from the de-emphasis on individualism in Utopia. In contemporary society, the individual lacks depth and character because of his isolation and lack of commitment to others.[78] He may be free in a formal sense, but he is also stunted and barely human. In a non-hierarchical, non-repressive society, on the other hand, the human personality would flourish.[79]

The Crits' positive program would poorly serve the needs of minorities. Some radical theoreticians may indeed be lonely. Most minority lawyers and law professors are not: we have each other. We meet, share experiences, recount horror stories, laugh and cry together. Victimization brings us together, building in us a community. It is much more problematic to accept the invitation, if it is that, to join Crits and other whites in mixed-race communities lacking in structure or rules.

Two immediate difficulties confront any serious discussion of incorporating minorities into the utopian communities envisioned by the Crits. First, one must be a self who is fully recognized as a member of a community of selves before one can merge into such a community, and certainly before the lines between self and others can safely begin to blur. How can this

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[74] *See* Hutchinson & Monahan, *supra* note 1, at 230.

[75] *Id.*; *see also* Kennedy, *supra* note 53, at 1771.

[76] *See, e.g.*, Klare, *supra* note 7 (equality in the workplace); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 Wis. L. Rev. 29, 133 (1978) (equality of lawyer and client).

[77] *See* Abel, *A Socialist Approach to Risk*, 41 Md. L. Rev. 695 (1982) (shared risks among workers and managers); Gabel, Book Review, 91 Harv. L. Rev. 302, 315 (1977) (shared selves—merging of sense of self with sense of others so as to blur lines among persons); Kennedy, *Form and Substance in Private Law Adjudication*, *supra* note 14, at 1771.

[78] *See* Gabel and Kennedy, *supra* note 53, at 46; *cf.* C. Gilligan, In a Different Voice 173 (1983) (identifying in women a morality of connectedness). *See generally* Bush, *supra* note 34.

[79] *See* Unger, *The Critical Legal Studies Movement*, *supra* note 4, at 579–85. *See generally* Bush, *supra* note 34.

happen unless society first recognizes us as coequal members, something it has yet to do?[80]

Second, there are no guarantees that racism would not resurface in the CLS communities. To date, Crits have not articulated a psychological or political theory of the origin of racism or of how it could be eradicated. If racism were to surface in a CLS-style Utopia, there would be no rules, rights, federal statutes, or even courts to counteract it. Even if there were tribunals or people's commissions of some kind, would they be guided by strict scrutiny[81] in examining cases of prejudice? Probably not, since the once-oppressed and politically powerless groups would presumably have been empowered by the egalitarian Utopia. Perhaps these difficulties could be overcome. In the meantime, however, the costs of moving to a utopian society would be borne by minorities, since the dismantling of formal structures would initially lead to an increase in racist behavior.[82]

Ostensibly, the CLS choice of structure for the post-revolutionary community is neutral and based on those arrangements with the greatest potential for humanity. However, that choice is not value-free. Utopian society would empower whites, giving them satisfaction currently denied,[83] and disempower minorities, making life even less secure than it is today. As a black leader is supposed to have said, "Community don't look like me."

II. Informality—The Source of the Trouble

Much of the misfit between the CLS program and the aspirations of minorities is due to the informality of the CLS program.[84] CLS themes and approaches criticize formal struc-

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[80] On the difficulty of achieving selfhood in a racist society, see, e.g., G. Allport, *supra* note 24, at 142–62; W. Grier & P. Cobbs, Black Rage (1968).

[81] Inability of a group to fend for itself in the political marketplace is a principal justification for applying strict scrutiny under the equal protection clause to state action. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1972); *cf.* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

[82] *Cf.* D. Bell, *supra* note 29, at 29–30, 40–46 (costs of racial remedies always placed on blacks or poor whites); Bell, *Minority Admissions and the Usual Price of Racial Remedies*, 67 Calif. L. Rev. 3 (1979).

[83] *See* G. Torres, *supra* note 23.

[84] For a discussion of formalism and nonformalism in the context of adjudicatory processes, see Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 Wis. L. Rev. 1359 (1985).

tures such as rights, rules and bureaucracies, while opting for consciously informal processes that rely on good will, intersubjective understanding and community. The CLS positive and negative programs exemplify this informality; they illustrate the Crits' preference for holistic approaches that sweep everything at once into their scope.[85]

Whatever sense informal, small-scale politics may make for the CLS membership, it is bad news for minorities. Discretionary judgments colored by racism or other forms of prejudice are made possible by replacing rules, guidelines and rights with fluid, informal decisionmaking. In fact, structureless processes affirmatively increase the likelihood of prejudice. CLS theorists have avoided confronting these risks, since CLS lacks a political and psychological theory of racism. CLS theory simply assumes that racism is just another form of class-based oppression, a product of a hierarchal social structure.[86]

The Crits' focus on informality also ignores the influence that rules have on an individual's character and action. A society that enacts rules and provides structures to curb racism announces that racism is unacceptable behavior. By committing ourselves to norms of fairness we become fairer people. By changing the structure, we change the setting in which we act and ultimately change ourselves. If we jettison rules and structures, we risk losing the gains we have made in combatting racism.

The psychological-political analysis that follows explains and illustrates the interaction among rules, conduct and character. I outline the principal social scientific theories of racism and then develop a consensus position which explains the circumstances in which most people are likely to behave in a discriminatory fashion. I apply this view to the highly informal Crit program to demonstrate that the CLS program exposes minorities to an increased risk of prejudicial treatment.

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[85] *See, e.g., supra* notes 14–22 and accompanying text (rejection of rights in favor of principles, shared love and cooperation); *supra* notes 33–42 and accompanying text (rejection of incremental reform; insistence on global change).

[86] I was unable to locate any CLS articles or books on the psychology of racism. The relatively few treatments of race discuss it in political or class terms. *See, e.g.*, Freeman, *supra* note 16; Hutchinson & Monahan, *supra* note 1, at 227–36 (utopian proposals center almost exclusively on reforming social arrangements to eliminate hierarchy, lessen alienation, and increase community and sharing); *cf.* Pettigrew, *supra* note 50, at 685–86 (current theorists tend to confuse race problems with class struggle).

A. Theories of Race and Racism

Most Americans harbor some degree of racial prejudice.[87] Indeed, individuals rarely come to grips with their racist impulses and bring them completely under control.[88] Most deal with them through a variety of mechanisms: displacement, denial, rationalization, overcompensation and compromise.[89]

Social scientists have developed a number of overlapping theories to explain the origin of prejudice based on race, ethnicity, sex, or other immutable characteristics.[90] The principal approaches are: psychoanalytic theories, which explain prejudice in terms of unconscious forces and deep-seated syndromes, such as the authoritarian personality;[91] socioeconomic theories, which explain prejudice through historical trends, social group clashes and scapegoating;[92] and social-psychological theories, which explain racism by means of social conditioning and in-group/out-group categories.[93] It is likely that each of these theories partly explains the multifaceted aspects of racist behavior.

[87] *See Is the Dream Over?*, Newsweek on Campus, Feb. 1987, at 10, 12 (black students "treated like aliens"; "[t]ales of insults abound"); Friedrich, *Racism on the Rise*, Time, Feb. 2, 1987, at 18, 21 (survey of attitudes); *Racism Flares on Campus*, Time, Dec. 8, 1980, at 28 (changes in national mood; prejudice now considered "acceptable" in some quarters); *Less Tolerance for Cults, Broad Pattern of Prejudice Revealed*, San Francisco Chronicle, Mar. 9, 1987, at 4, col. 3 (reporting results of Gallup poll).

For classic studies of the nature and extent of ethnic prejudice among Americans, see G. Allport, *supra* note 24, at 79–80, 197–202. For a recent study of the more subtle forms of prejudice, see generally Pettigrew, *supra* note 50.

[88] *See* G. Allport, *supra* note 24, at 338; I. Katz, Stigma—A Social Psychological Analysis 97 (1981); Pettigrew, *supra* note 50, at 688–89 (many avoid outward expressions of racism, but without internalizing norms against it).

[89] *See* Delgado, *supra* note 84, at 1384 (discussing the principal psychological methods by which individuals deal with tension between racist impulses and public norms condemning racism); Pettigrew, *supra* note 50, at 690 (discussing avoidance and displacement mechanisms).

[90] Some of these theories are summarized in Delgado, *supra* note 84, at 1375–83. *See generally* P. van den Berghe, *supra* note 24.

[91] For an excellent summary of psychoanalytic theories of racism, see Lawrence, *The Id, The Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 331–36 (1987); *see also* G. Allport, *supra* note 24, at 199; T. Adorno, E. Frenkel-Brunswik, D. Levinson & R. Sanford, The Authoritarian Personality (1950); Simpson & Yinger, *The Personality Functions of Prejudice and Discrimination*, in Racial and Cultural Minorities: An Analysis of Prejudice and Discrimination (G. Simpson & J. Yinger 4th ed. 1972).

[92] *See* G. Allport, *supra* note 24, at 224–25 (historical scapegoating); *id.* at 234–38 (unconscious use of racism and scapegoating to maintain group loyalty); J. Kovel, White Racism—A Psychohistory 44 (1984) (psychology of a people a product of historical forces); Delgado, *supra* note 84, at 1378–79; *see also* Handlin, *Prejudice and Capitalist Exploitation*, 6 Commentary 79 (1948) (psychological explanation of racism incomplete; explanation must reach out to include social forces).

[93] *See* G. Allport, *supra* note 24, at 22, 29–47, 139; K. Clark, Prejudice and Your Child 17 (2d ed. 1963); J. Kovel, *supra* note 92, at 132. *See generally* Snyder, *On the*

On the other hand, racism runs counter to the body of public principles that form our national ethos, including fairness, egalitarianism and humanitarianism.[94] The conflict between racist impulses and the American creed causes many people to act inconsistently—fairly and humanely on one occasion, thoughtlessly or with prejudice on another.[95] Racism and racial egalitarianism are thus maintained in equipoise. Americans are influenced by both public and private norms with respect to race.[96] The highly principled public norm exhorts us to treat others in an unprejudiced, evenhanded fashion.[97] The private norms, the standards that guide us during moments of intimacy or familiarity, are much less noble.[98] In private settings, prejudicial behavior and speech are much more likely to appear. The same individual may thus act quite differently on different occasions, depending on whether he sees himself as governed by public or private values.

The "situational specificity"[99] of the racist impulse supplies the best means for its control. Most people suppress their prejudices when environmental features remind them that racism will not be tolerated and that the American creed demands a high standard of conduct. Although there are other theories and approaches to racism,[100] the "confrontation" approach—where prejudice is publicly confronted and discouraged through formal

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Self Perpetuating Nature of Social Stereotypes, in Cognitive Processes in Stereotyping and Intergroup Behavior 183 (D. Hamilton ed. 1981); Delgado, *supra* note 84, at 1380 (summarizing social-psychological theories of prejudices).

[94] For the classic statement of this view, see G. Myrdal, An American Dilemma: The Negro Problem and Modern Democracy (1962).

[95] *See* I. Katz, *supra* note 88, at 23; P. van den Berghe, *supra* note 24, at 20–21; Delgado, *supra* note 84, at 1384–85; Fairchild & Gurin, *Traditions in the Social-Psychological Analysis of Race Relations*, 21 Am. Behav. 757, 764 (1978).

[96] *See* G. Myrdal, *supra* note 94, at LXXI, 80.

[97] *Id.*

[98] *See supra* notes 87–89 and accompanying text.

[99] *See* I. Katz, *supra* note 88, at 23; J. Kovel, *supra* note 92, at 54–55; Fairchild & Gurin, *supra* note 95, at 764.

[100] The leading contender is the "social contact" theory, which supports much of the push for social integration through, for example, school desegregation. This theory argues that prejudice arises from the individual's mistaken belief that minority group members hold beliefs and values different from one's own. Consequently, the belief may be dispelled through demonstration, via close contact, that it is erroneous. According to the social contact theorists, however, not all kinds of contact reduce discrimination. The contact must be among individuals of equal status and sanctioned by social supports, such as law and custom. *See* G. Allport, *supra* note 24, at 261–81; Delgado, *supra* note 84, at 1382, 1385–86; Simpson & Yinger, *The Reeducation of Prejudice and Discrimination: Changing the Prejudiced Person*, in Racial and Cultural Minorities: An Analysis of Prejudice and Discrimination, *supra* note 91, at 673.

structures—is the most widely accepted means of controlling prejudice in the legal and political literature.[101] The theory is supported by empirical studies of legal decisionmaking, including reviews of alternative dispute resolution and comparisons between the adversarial and inquisitorial modes of presenting evidence.[102]

Little of this will surprise minority readers. We know by a kind of instinct that there are times when our white friends can be trusted and times when they cannot. We know that there are occasions—when the flag is flying, the bands are playing, and public values are foremost in everyone's minds—when we are comparatively safe, and that there are other occasions when we must be careful.

The bottom line is that formal public settings are relatively safe for minorities, while informal private settings present risks. To minimize racism, one should structure settings so that public norms are enforced, and prejudice openly confronted and discouraged. Society should avoid creating intimate, unguided settings where highly charged interracial encounters can take place. It remains to be considered what the confrontation theory, and the formality/informality axis generated by that theory, implies for the CLS program.

B. Applying the Theory of Race to the CLS Program

The confrontation theory helps to explain why the open-ended features of the CLS program worry minority scholars. For example, the CLS positive program, which calls for small communities that function without written agendas, statutes, rules or rights,[103] would allow for discretionary judgments based on racial prejudice, and contain few of the structural features that confront and check racism. The lack of confrontation mech-

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[101] *See, e.g.*, I. Katz, *supra* note 88, at 16, 109. *See generally* Delgado, *supra* note 84, at 1385–87.

[102] *See generally* Lind, Thibaut and Walker, *A Cross-Cultural Comparison of the Effect of Adversary and Inquisitorial Process on Bias in Legal Decisionmaking*, 62 Va. L. Rev. 271 (1976); Mnookin and Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950 (1979); Nader, *Disputing Without the Force of Law*, 88 Yale L.J. 998 (1979); Thibaut and Walker, *Discovery and Presentation of Evidence in Adversary and Non-Adversary Proceedings*, 71 Mich. L. Rev. 1129 (1973); Thibaut, Walker, LaTour and Houlden, *Procedural Justice as Fairness*, 26 Stan. L. Rev. 1271 (1974); Thibaut, Walker and Lind, *Adversary Presentation & Bias in Legal Decisionmaking*, 86 Harv. L. Rev. 386 (1972).

[103] *See supra* notes 73–77 and accompanying text.

anisms would likely ensure the invasion of racism into the community.

CLS scholars' rejection of incrementalism also illustrates the dangers of informality. By insisting that everything must change at once, CLS rejects the slow, painstaking process of establishing and refining precedent, replacing that relatively formal process with a mercurial vision of social change with no clear direction and undefined ends.

Similar considerations hold true, although not quite so strongly, for CLS scholars' idealism and their use of the concept of false consciousness. The Crits' emphasis on mental constructs reveals their preference for free-form change over the concrete reform accomplished by litigation, labor activism and community organizing. CLS prefers the broad reach of thought to the measured progression that occurs through new jobs, better housing, court victories and school desegregation.

C. The Laboratory of Daily Life: Applying the Theory of Race to the CLS Organization and Its Mode of Operation

Theories, according to pragmatic philosophy, must be tested by their consequences, and by the ways in which they modify the behavior of their adherents.[104] Thus, one should examine the organizational and personal behavior of the members of the Critical Legal Studies Conference on matters of race in order to determine the possible impact of their theories on minorities, particularly since many members of the Conference believe in the inseparability of politics and daily life.[105] If the Conference's reform program holds promise for minorities, one should find a heightened racial sensitivity among the organization and its members.

An examination of the Conference on racial matters does not yield a clear-cut answer to the question. The organization, as is predictable from its theories and program, is highly informal. There are no bylaws, elections, procedures, officers, membership cards or committees.[106] Annual meetings and summer

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[104] *See* W. James, Pragmatism, and Four Essays From the Meaning of Truth 133 (1975); *see generally* C. Peirce, *How to Make Our Ideas Clear*, in The Philosophy of Peirce: Selected Writings 23 (J. Buchler ed. 1940).

[105] *See, e.g.*, Boyle, Critical Legal Studies: A Young Person's Guide 18 (1983) (unpublished manuscript on file with Harvard Civil Rights-Civil Liberties Law Review).

[106] *Id.* at 20.

workshops are organized by ad hoc groups who decide that they have something to say. The informality of the structure allows the "white male heavies," most of whom are at Harvard, to wield a disproportionate amount of power.[107] Few women or minorities wield signficant influence.[108]

The record of individual members of the Conference is better than that of the organization itself. At least three of its well-known members wrote powerful and influential articles supporting minority causes.[109] Many Crits welcome minority colleagues on their faculties, and support affirmative action in law school admissions and appointments.[110] Yet few Crits took an active role in the aftermath of an incident in which the competence of a leading black scholar was challenged by students and colleagues.[111] In addition, there have been sporadic reports of racist language and stereotyping in Crits' scholarship,[112] and of rude treatment of minority panelists by Crits.[113] One would conclude that the Conference's record on racial justice matters is good, but not outstanding—perhaps 3.4 on a 4.0 point scale. If racism manifests itself among CLS members, it is frightening to imagine what would occur in a similarly unstructured group with a less progressively-minded membership.

III. Beyond CLS—Toward a Radical Minority Social-Legal Agenda

It is axiomatic that any social reform program that minorities would find appealing would be based on the express need for understanding and coping with racism. It is not enough to

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[107] *Id.* at 18–28.

[108] *Id.* at 28.

[109] Brest, *The Federal Government's Power to Protect Negroes and Civil Rights Workers Against Privately Inflicted Harm, Part I*, 1 Harv. C.R.-C.L. L. Rev. 2 (1966); Brest, *The Federal Government's Power to Protect Negroes and Civil Rights Workers Against Privately Inflicted Harm, Part II*, 2 Harv. C.R.-C.L. L. Rev. 1 (1966); Freeman, *supra* note 16; Klare, *supra* note 17; *see also* Sparer, *supra* note 1.

[110] Boyle, *supra* note 105, at 18.

[111] *See* Bell, *The Price and Pain of Racial Perspective*, Stan. L. Sch. J., Apr., 1986, at 1, col. 1.

[112] *See* J. Bracamonte, R. Delgado & G. Torres, Statement at the Minority Critique Panel, Critical Legal Studies Annual Meeting (Jan. 1987) (unpublished manuscript on file with Harvard Civil Rights-Civil Liberties Law Review).

[113] *See* N. Gotanda, Statement at the Critical Legal Studies Annual Meeting (Jan. 1987) (on file with Harvard Civil Rights-Civil Liberties Law Review) (describing treatment of minority panelists at an earlier meeting).

subsume racism under some other category, such as class struggle, that fails to understand racism's subtlety and complexity. The program should incorporate some variant of the confrontation approach to containing racism.[114] The new society, and its transitional predecessor, would create structures for detecting and punishing racism and for reminding community members that such conduct will not be tolerated. Because of these structures, such a society would be relatively formal.

Any society consciously designed to promote minority well-being must initially include a strong central authority founded on a healthy skepticism both of human nature and of the possibilities of change through appeals to idealism. Tempering romanticism with watchfulness, it would instead effect change through appeals to citizens' self-interest by arguing that power and resource realignments benefit everyone.[115]

The need for centralized authority stems from the necessity for counter-coercive measures on behalf of minorities. One cannot rely on local authority to redistribute power and physical resources because it is too close to the community and unlikely to upset the status quo. The further authority is from the community, the better.

Our principal worry is not the abuse of corporate or bureaucratic power (CLS' foe), but rather the simple next-door, one-on-one microaggressions by whites.[116] It is a sad truth that, even today, many minorities find success and relative relief from racism only in highly structured, rule-bound environments such as the Army.[117] Group membership may force Crits and other majority-group members to reflect on politics and the nature of the common good, but unless such reflection is accompanied by formal barriers against racism, it is meaningless.

Conclusion

This article asked what minorities would like to see in a legal and political theory, and whether the CLS program

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[114] *See supra* notes 100–02 and accompanying text.

[115] *Cf.* Bell, *supra* note 82, at 17 (whites permit social remedies only when these coincide with their self-interest).

[116] *See supra* note 50 and accompanying text.

[117] Blacks and other minorities have often found professional advancement in the relatively formal environment of the armed forces. *See* Moskos, *Success Story: Blacks in the Army*, Atlantic Monthly, May 1986, at 64.

matches that vision. The answer is that CLS does not provide what minorities seek.

Although some of the features of the CLS program are attractive to minorities, others increase our vulnerability to oppressive or degrading treatment by the majority. A number of these difficulties arise from CLS scholars' ironic failure to articulate a satisfactory theory of either the genesis or the treatment of racism.

The views of various scholars on racism coalesce to form a "confrontation theory," which describes the best means of confining and combatting racism. Many of the intuitive reservations and fears minorities have about the Crits' program arise from the Crits' desire to eliminate those formal societal structures which, according to the confrontation theory, are needed to curb racist impulses in society. In contrast, the radical social reform program outlined here can provide minorities the protection and security they need to function in a world dominated by persons of a race and heritage different from their own.

This reform program may be a tall order, but it is no taller than the CLS vision of an informal Utopia. Indeed, compared to the Crits' proposed society, it is a great deal more humane, safe and protective for those of us who have been denied humanity, safety and protection for so long.