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Andrew W. Haines

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THE CRITICAL LEGAL STUDIES MOVEMENT AND RACISM: USEFUL ANALYTICS AND GUIDES FOR SOCIAL ACTION OR AN IRRELEVANT MODERN LEGAL SCEPTICISM AND SOLIPSISM?

Andrew W. Haines†

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FIRST PROLOGUE

Once upon a time, there was a society of priests who built a Celestial City whose gates were secured by word-combination locks. The priests were masters of the Word and, within the city, ascending levels of power and treasure became accessible to those who could learn ascendingly intricate levels of Word magic. At the very top level, the priests became gods; and because then they had nothing left to seek, they engaged in games with which to pass the long

† Professor of Law, William Mitchell College of Law, B.A., 1966, University of Minnesota; J.D., 1969, University of Michigan; Reginald Heber Smith Community Lawyer Fellow, 1969-71.

I wish to gratefully acknowledge the assistance of my colleague Russ Pannier. His graciousness in identifying resources and in serving as a sounding board helped me in shaping this article. I would also like to acknowledge the thoughtful assistance of Kevin Staunton, Editor-in-Chief of the Law Review and Michael A. Koziol, Editor.

hours of eternity. In particular, they liked to ride their strong, surefooted steeds, around and around the perimeter of heaven: now jumping word hurdles, now playing polo with the concept of the moon and of the stars, now reaching up to touch that pinnacle, that fragment, that splinter of the Refined Understanding which was called Superstanding, the brass ring of their merry go-round.

In time, some of the priests-turned-gods tired of this sport, and denounced it as meaningless. They donned the garb of pilgrims, seekers once more, and passed beyond the gates of the Celestial City. In this recursive passage, they acquired the knowledge of undoing Words.¹

Anyone exposed to Western culture has little difficulty imagining that the above quote refers to some mythological setting, probably directly out of Greek, Roman, Germanic, or Scandinavian mythology. The "Once upon a time" surely tips us off that we enter a time period "long ago and far away," where mortal men and women did not tread: the exalted imagination of the collective consciousness of the species. We can even add polish, flourish, and lyricism to our mental picture with the fusion of literature, music, theatre, and the other visual arts, to call forth Richard Wagner's epic opera *Der Ring Des Niebelungen* (his most awe-inspiring and captivating, if not his finest musical drama). We can imagine the priests cum gods bemusing themselves to the music of *Das Rheingold*, occasionally broken up by their frantic rides to the music of the "Ride of the Walkuren" in *Die Walkure*, with its overtones of taking dead heroes to their celestial resting place and with its undertone of impending strife and disaster. Even the turning away of the priests cum gods to the "new truth seeking" could cause

1. Bell, *Strangers in Academic Paradise: Law Teachers of Color in Still White Schools*, 20 U.S.F.L. REV. 385, 392 (1986) (quoting P. Williams, *Critical Legal Methodology* [unpublished essay on file at University of San Francisco Law Review]); see also H. HESSE, *MAGISTER LUDI* (1969) (also published as *THE GLASS BEAD GAME*). Any reader of Hermann Hesse may identify a resemblance of the Williams' myth to Hesse's *MAGISTER LUDI* (OR *THE GLASS BEAD GAME*). While Hesse does not place his story among clearly denominated priests or gods, he centers his story around an elaborate Game, the Glass Bead Game, symbolic of human imagination and mental virtuosity, performed according to strict formal rules of logic. Further, the Game serves as the *raison d'être* and focal point of a special province of the spirit called "Castalia," located somewhere in the unspecified future. To Hesse, this community does not represent an utopian society; it represents a "model of reality" that probably existed in Platonic academies, yoga schools, or Buddhist schools. In sum, "Castalia," a Celestial City, signifies a human institution or community exclusively devoted to the "Life of the Mind."

us to imagine the sweet refrains of *Siegfried*, which fades into the solemn and ominous sonorities of *Gotterdammerung* (the twilight of the gods), when the priests cum gods acquire the “knowledge of undoing Words.”

Yet, the above quote does not represent an ancient text suddenly uncovered about times “long ago and far away;” nor does this quoted passage refer to the usual cultural myths of the collective consciousness of the species, which we westerners treat as standard fare in our world literature. This brilliantly alliterative and metaphorical creation weds the elements of the western mythic tradition with the story of the emergence of the Critical Legal Studies Movement (CLSM).² Hence, this powerful allegory refers to the other-worldly existence of legal education. Like its cultural progenitors, this allegory utilizes mythic creations to comment on human existence within a specific sub-culture: that of the American hallowed legal academy. Importantly, like Wagner and the unknown authors of the other myths, our author conjures up the ideas of betrayal, the fickleness of humans, arrogance, ideological struggles³ for world domination, vanishing innocence, greed, self-renewal, destruction, redemption and the like within the academy. In sum, she conjures up all the images of the human condition within legal education, with its perennial human struggle and resultant human tragedy.

Most certainly, her exercise of literary license does not represent an unwarranted exaggeration of the contemporary world of legal education. To many persons both inside and outside of legal education, the legal academic world represents a celestial community removed from the normal work activities of ordinary mortals. The charmed life spending endless hours playing word games according to fairly strict formal rules of logic holds great fascination for many in our culture, especially those of intellectual persuasions or pretensions, partly because

2. A chronicle of the emergence of the Critical Legal Studies Movement (CLSM) appears in Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391 (1984). For another very recent discussion of the genesis of the CLSM by one of the major voices in the movement, see Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505 (1986). See generally *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984) (providing additional background information about the genesis and development of CLSM).

3. Compare Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984) with Martin, *Of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1 (1985).

the culture awards those who demonstrate the virtuosic ascendancy through the supposedly intricate degrees of word combinations. Moreover, the few prestigious positions in this privileged world confer great power on the possessors. These persons develop and manipulate arcane and complex languages (or knowledges, if you will, based on word combinations) of human intercourse that play major roles in creating the obedience crucial for orderliness and fair play within society. Further, these positions convey power because of the ability to train and credential the next generation of lawyers. In addition, these persons benefit from what Derrick Bell calls a "monstrous contradiction."⁴ They espouse free enterprise while they enjoy socialism. Legal academies "worship meritocratic concepts and despise any unearned aid," while the inhabitants receive guaranteed sinecures with handsome fringe benefits, often outstripping those benefits received by teachers at other graduate levels, with the exception of business and medical school facilities.

Moreover, her mythical world, like the previous mythical worlds of Wagner and the others, does truly capture the recurring divisions⁵ within a celestial world. Her myth captures the now celebrated and somewhat rancorous division⁶ in legal education caused by the CLSM. In the last sentence of the quote, the author portends the charges and countercharges of betrayal, the fickleness of humans, arrogance, ideological struggles for social domination, vanishing innocence, greed, self-

4. D. Bell, *supra* note 1, at 387; *see also* Speech by Derrick Bell to the AALS Workshop on Civil Rights (Sept. 26, 1986) (on file at the William Mitchell Law Review office) [hereinafter Bell Speech]. In that speech, Professor Bell refers to "those who espouse free enterprise and merit while living the communist ideal: working by choice and not need, and yet paid based on need rather than worth." *Id.* at 3.

5. An earlier equally celebrated division occurred with the arrival of the Legal Realism Movement. For discussions of the connection between the Legal Realist and the CLSM, *see generally* A. Chase, *What Should a Law Teacher Believe*, 10 *NOVA L.J.* 403 (1986); Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 *HARV. L. REV.* 1669 (1982).

6. *See generally Critical Legal Studies Symposium, supra* note 3. At the risk of mixing similies, one could analyze the division wrought by CLSM as an oedipal revolt played out within the professional arena. Indeed, some of the vehemence from several quarters seems more comprehensible within this analytical framework. On the other hand, some may take issue with this characterization as an over-intellectualization. These persons may simply characterize the vehemence as the reaction to the incivility and dogmatism of the dominant forces in the CLSM. *See* Burton, *Reaffirming Legal Reasoning: The Challenge From The Left*, 36 *J. LEGAL EDUC.* 358 (1986); Kelman, *Trash-ing*, 36 *STAN. L. REV.* 293 (1984).

renewal, destruction, and redemption that the various priests cum gods have hurled at each other inside and outside of the CLSM, within the celestial world of legal education. To the heart of the matter, the phrase “undoing Words” points to the human struggle: it captures the focal point of the anti-CLSM forces who allege that the CLSM promotes nihilism (of course, centered around their introduction of the dreaded Marxist analysis into legal scholarship) within the Celestial City, undoing the harmony and symmetry of legal reasoning, especially attacking the classical liberal tradition, encouraging the novitiates to develop disrespect and deep and abiding cynicism for the legal process. From the perspective of CLSers, the “undoing Words” represent the keys to delegitimizing⁷ the infrastructure of the reigning American social theory, classical liberalism, which has served to mask rather than permit humans to reach their potential.

As we depart from this mythical world for the real world of legal education, we can imagine that the mythical encampments have already determined who represents the forces of dark and who represents the forces of light. The priests cum gods within the Celestial City have moved to secure the existing word-combination locks, and they have moved frantically to create new word-combination locks. Many of them constantly ride around telling the others that the sacrilegious heretics profane the godhead of liberalism (which the Founding Fathers enshrined in a sacred document called the “Constitution”) that the priests protect and interpret for the mortals

7. See, e.g., Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229 (1981). Freeman notes as follows about the goal of the CLSM:

The goal of trashing, however, is not liberation into nihilist resignation. I am no nihilist. If anything, I might be more justly accused of having utopian tendencies. The point of delegitimation 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 notions of justice that generate so much of the contradictory scholarship. One must start by knowing what is going on, by freeing oneself from the mystified delusions embedded on our consciousness by the liberal legal worldview. I am not defending a form of scholarship that simply offers another affirmative presentation; rather, I am advocating negative, critical activity as the only path that might lead to a liberated future.

Id. at 1230-31 (citation omitted). Put another way, some CLSers want to reveal the role of the law in buttressing class domination, to unmask its pretensions to fairness whenever the law perpetuates injustice, and to disabuse legal scholars, and by extension the society as a whole, that “legal solutions” within the classical liberal framework will solely solve social problems of the class structured society.

outside the City. On the other hand, the religious pilgrims work hard, sometimes in a raucous, fun-filled manner, to “trash” all of the old word-combinations and to develop new “undoing Words” to “trash” any new word-combinations. They ride around pronouncing the profanation of the godhead of “true consciousness” (as against the “false consciousness” of those within the City), which, if all will acknowledge and pursue, will lead to the genuine celestial community of commutarian socialism. Some priests cum gods, those not aligned with either camp of priests, continue their daily tasks. Some passing time with the old ritual of word games; and some work to develop new word-combinations that will alleviate the suffering and hardship of many of the common folk outside of the City, quite a few of whom physically resemble a sect within these priests.

Meanwhile, we can further imagine that the common folk outside of the Celestial City hardly notice the heavenly struggle taking place within the walls. They turn all of their attention to the daily struggle for survival. People of color comprise a significant portion of this group, speaking in various tongues within their subgroupings. These persons have had a long history of deprivation and suffering at the hands of the majority, who are white. At some distant point and time, some persons started the rumor among these common folk of color that they would eventually receive their just desserts for suffering and deprivation. Now the persons of color discuss an idea that an elder among them called JUSTICE. No one really knows where she got the idea or what it actually means.⁸

INTRODUCTION

A. Why Should the Legal Community Examine the CLSM?

Two sets of reasons emerge for prompting analysis of the CLSM. First, I can identify objective reasons that urge the consideration of this body of ideas. Second, I can identify a set of subjective reasons that illuminate a justification for others to explore this movement; my own odyssey touches upon general reasons for others within the legal community to likewise

8. The inspiration for this portion of the PROLOGUE comes from the ideas of Derrick Bell, which will appear in their original form later in the article. See Bell, *supra* note 1, at 385-86.

devote their time to examining the outlines of the movement or to devote time exploring one or more thinker within the movement in some depth.

The Prologue should have made abundantly clear that the CLSM has drawn the attention of a significant portion of legal educators, even though the general legal community has little knowledge of this sect of legal educators, and it probably has even less concern⁹ about this group's ideas or activities. Persons in the legal community should want to examine the nature of this furious debate, since future legal positions will shape the outlines of this debate. Further, persons in the legal community should have an interest in a movement that some, including CLSers, view as a descendant of the American Legal Realism Movement (ALRM).¹⁰ Indeed, the CLSM extends the ALRM to "the entire structure of legal thought" and to the analysis of the "ideological role of legal scholarship."¹¹ Even if one accepts the view that CLSM differs in that it pursues a "radical political agenda" while the ALRM pursued "reformist policy programs,"¹² persons in the legal community should examine why this difference results.

On the personal side, I first became truly aware of the CLSM after reading two thoroughly stimulating articles by CLSers Peter Gabel¹³ (certainly one of the most penetrating and illumi-

9. *But see* L. Keyes, *On Critical Legal Studies . . . and Law Students*, 43 BENCH AND BAR 3 (March, 1986). The President of the Minnesota State Bar Association used his "President's Page" to alert the practicing bar to the new whirlwind in legal education, the CLSM, if the bar did not know of its existence. He reinforced the knowledgeable about the need for vigilance against this questionable new movement. Interestingly, in telling the practicing bar that Minnesota law schools have not attracted many adherents to the CLSM, the President did not inform the practicing bar that Minneapolis had hosted a national meeting of the CLS Conference and that the University of Minnesota, at one time, served as the seat of a major voice in the CLSM, Professor Alan Freeman, who composed one of the most powerful scholarly tracts to emerge from the CLSM while he served on the faculty of the University of Minnesota Law School, before he moved to the faculty at SUNY/Buffalo School of Law. *See Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978). Because Freeman's article goes to the essence of this article, I will discuss it further at other points.

10. *See generally* Note, *supra* note 5 (comparing the CLSM with the Legal Realism movement).

11. *Id.* at 1676.

12. *Id.* at 1677.

13. Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 MINN. L. REV. 601 (1977). Gabel represents one of the best examples of the profound integration of the European philosophical and critical social theory into American legal scholarship.

nating writers in the CLSM) and Karl Klare¹⁴ (one of the most original and influential thinkers in the CLSM). These two articles whetted my appetite for other CLS publications. At this point, I began to explore other writings of Gabel and another dominant figure in the CLS, Duncan Kennedy. From this immersion, I gravitated into the bedazzling world of the CLSM pretensions about its global, unifying theorizing. Here I found myself trying, like most non-CLSM legal educators, to separate out the "professorial hype"¹⁵ from the genuine, penetrating analyses.

The above recitation points out what probably prompts many legal educators like myself to explore CLSM: intellectual curiosity and the quest for personal growth. A significant portion of the profession periodically scours the legal journals for interesting new publications, both inside and outside areas of expertise. Being insatiable readers of legal ideas, most of us cannot avoid becoming attracted to such alleged movements of ideas. Moreover, since many of us exhibit the desire to intellectually grow and expand our horizons, a movement that has

14. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-41*, 62 MINN. L. REV. 265 (1978). Few in the CLSM can surpass or even equal Klare for his genuine humanity, inventiveness and solid scholarship. This Article, together with the Freeman article, Freeman, *supra* note 10, represent true highpoints for the CLSM theorizing. See Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 510 n.4 (1984). Moreover, Klare remains one of the few CLSers who has remained fairly consistently interested in the "need to conceive and anticipate, however rudimentally, the institutional forms or political expression, collective decision-making, resource allocation, and dispute resolution which will some day constitute a free and democratic society." K. Klare, *Notes and Commentary: Law-Making As Praxis*, 40 Telos 123, 124 (1979). Several others have committed themselves solely to the limited task of developing "negative critiques." See, e.g., Freeman, *supra* note 9. For a discussion of this negative analytical approach and its decided shortcomings see Sparer *supra* note 14, at 552-74.

15. I plainly admit that I ran aground with the following articles: Gabel & Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984) and Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984). While both articles contain stimulating ideas, I felt like I had eavesdropped on the private discussion of two persons from an arcane sect within the legal academy speaking in their insider's language. I wondered if the author of the second, giving Woody Allen a run for his money, really expected his readers to take him seriously. My intellectual curiosity and quest for personal growth did not propel me to give much deep thought to these articles. I concluded that I would not carry away many helpful ideas that would bear on my special concern: racism in American law. In retrospect, I suspect that the manner and the shape of the articles had much to do with my disaffection. Others undoubtedly experienced such reactions.

garnered such public attention within legal academic circles, as has the CLSM, could not help but grab one's attention.

Beyond the above, I have additional reasons why I gravitate toward the CLSM. First, I have long had a burning interest in identifying transformative legal analyses that will usher in a more just American society. Starting with my early days as a "Reggie Fellow" in legal services, I have maintained an interest in "leftist radical theories" that could play a positive role in the human struggle of all persons, but that would especially alleviate the suffering by persons of color. I hope to uncover analyses that will provide further theoretical foundations for carrying on the pioneer civil rights work of W.E.B., DuBois, Charles Hamilton Houston, Thurgood Marshall, Derrick Bell and others.

Second, I came to recognize, unlike some Marxist theorists, that "law-making represents a form of social praxis;" it did not simply signify "epiphenomena" that reflect, serve as instruments, and buttress the class power of the dominant class.¹⁶ Some in the CLSM similarly shared¹⁷ this view, thus holding out the hope of articulating a clear and positive role for law in the transformation of American society.

Third, as one of the intellectuals of color who experiences social, intellectual, and professional marginization, I felt the pressure to gravitate toward intellectual positions of other marginalized persons, which most certainly the CLSM represents with its "leftist fringe" image. Beyond the natural affinity with kindred souls who experience similar alienation, the marginalized harbor the usually unarticulated hope that collectively they can identify theories, methods and approaches that will reduce, if not eliminate, their alienation. Social experience has taught that the marginalized often possess great insight and vision about the depth of their alienation and the liberating paths that can lead them (and the non-marginalized) through the social dialectic into a healthy interaction. Quite possibly, (an existential hope that grows out of the longing of the heart) these marginalized persons may articulate a "totalizing theory" that will liberate or more probably articulate a "localized cri-

16. See Klare, *Notes and Commentary*, *supra* note 14, at 125-28 (for analysis of why this traditional Marxist analysis holds little validity in modern society).

17. See, e.g., *id.*

tique"¹⁸ that will mediate along the common interest of the marginalized and the non-marginalized.

Fourth, I began to appreciate what Harold Cruse meant in his monumental work, *The Crisis of the Negro Intellectual*,¹⁹ when he discussed the option (and inward pressure) that the person of color has to gravitate toward "the social world or worlds of the 'intellectual.'"²⁰ As Cruse notes, "[t]he Negro intellectual must deal intimately with the white power structure and cultural apparatus, and the inner realities of the black world at one and the same time."²¹ Our very survival as persons of color depends on our sensitivity to and comprehension of the intellectual winds that blow around us. Further, these intellectual winds hold seductive appeal for the marginalized; they can deceptively offer a means of identifying with the larger oppressive mechanisms that diminish our existences. Thus they offer us the illusion of escape from our harsh existences that genuinely lock us in the oppression.

Fifth, persons of color must exercise vigilance against the possibility that movements like CLS can offer superficial and misdirective approaches to addressing social problems, leading to intellectual and social sterility, if not leading to the outright death of social transformation movements. As Frantz Fanon points out in his *Black Skin, White Masks*, a person of color has "[o]ne duty alone: That of not renouncing my freedom through my choices."²² In sum, persons of color must give as much attention to scrutinizing critiques that critique modern technological society as those critiques do analyzing modern technological society. Modern capitalist society poses supreme challenges to the marginalized to avoid accomplishing, wittingly or unwittingly, what Fanon advocates.²³

Sixth, the examination of the CLSM provides insight into what the late French intellectual Michael Foucault meant by "subjugated knowledges"²⁴ (a rewording of the sociology of knowledge concept) and the important focal points for analyz-

18. See Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 773-80 (1985).

19. H. CRUSE, *THE CRISIS OF THE NEGRO INTELLECTUAL* (1967).

20. *Id.* at 451.

21. *Id.*

22. F. FANON, *BLACK SKIN, WHITE MASKS* 229 (1967).

23. See generally H. MARCUSE, *ONE DIMENSIONAL MAN* (1964).

24. See M. FOUCAULT, *POWER/KNOWLEDGE* 79-84 (C. Gordon ed. 1980).

ing these knowledges. The CLSM explores the nexus between “accepted categories of rationality” and the reigning political theory, classical liberalism, noting that the dominant forces in society denominate certain forms of knowledge (such as racism) as the essence of rationality, while they exclude certain other forms as irrational.²⁵ By this focus, the CLSM draws attention to the underlying concern with the identification and utilization of these knowledges: the exercise of power. In sum, the CLSM points to Foucault’s view that the knowledges best become understood through their “complex strategical situation” in society. The focus thus becomes the multiplicity of force relations of this knowledge within its sphere of operations, the process of changing or strengthening these relations, the support or contradictions among these force relations, and the strategies through which these relations emerge into institutionalized forms within the society in general and within the law in particular.²⁶ Accordingly, the CLSM/Foucault analysis sensitizes one to the great dynamism within the operations of society and the manifestations of this society, its laws. The study of CLS focuses on the study of groups of ideas (knowledge) and the tracings of the power of these ideas within the larger framework of what a given society has deemed as rationality, with particular concern for the political consequences of these ideas.

B. *The Nature of the Critique of the CLSM*

One must approach a critique of the CLSM with some care. The vastness of the writings (including the sympathetic and hostile critiques) probably present a number in excess of 400.²⁷ Hence, any critique of this vast terrain presents a formidable, Herculean task for any critic, even the most intrepid among us. Further, the critic faces a serious challenge to define what she or he means by the term CLSM (if not the term

25. See Boyle, *supra* note 19, at 730-34.

26. M. FOUCAULT, *THE HISTORY OF SEXUALITY* 92-93 (1980).

27. See Kennedy & Klare, *A Bibliography of Critical Legal Studies*, 94 *YALE L.J.* 461, 461-90 (1984). *Cf.* Chase, *supra* note 5, at 410. Chase indicates that one can pare down the “massive CLS bibliography (as of 1984) into just forty or fifty ‘key works’” that speak to two subjects: the left-wing political orientation of CLS and to intellectual themes that run throughout CLS writings, the “critique of indeterminacy” and the “critique of pervasiveness.” *Id.* at 411. He does not enumerate the “Forty or fifty key works,” however, beyond supplying examples of CLS works that come within the categories.

CLS).²⁸ The variety and rich array of views²⁹ and activities that come under the title CLSM pose a major challenge to any person who seeks to classify and explain them. Moreover, one can already discover several recent critiques³⁰ of the views within

28. See Chase, *supra* note 5, at 409-15 (1986).

29. One can identify, for example, the vein of CLS writings that venture into the discussion of history. See Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984). Further, one can identify a vein of writings that rely on a variety of European philosophical and literary thought. See, e.g., Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127 (1984); Boyle, *supra* note 19. One can likewise identify a view that examines the relationship of CLS and feminism. See, e.g., Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983). Another variation examines racism and the law, the focus of this article. See, e.g., Freeman, *supra* note 9. One can also identify doctrinal analyses. See, e.g., Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979). Attacks on hierarchy and the analysis of a communitarian vision of an idealized society are also available. See, e.g., Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983). Finally, one can identify a vein of writings that examine CLS and empiricism. See, e.g., Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984). This list by no means exhausts the possible categories of the CLS literature; however, it does give the CSLM a sense of the wealth and variety. Within the legal community, even the opponents of the CLSM must admire the rich contributions of the movement to legal literature, if for no other reason than the CLSM has compelled its opponents to reexamine their positions to better defend them. Few movements receive such positive recognition. Moreover, the scholarship and the soundness of some analyses rank with the best that has surfaced within legal literature in several years. However, as with all movements, CLS has its share of modest and questionable writings. For even stronger critiques of the CLS writings, see the analyses *infra* note 31, some of which fiercely attack the style, motives, intellectual maturity, quality, integrity, intellectual honesty, and effectiveness of the CLS thinkers.

30. See, e.g., *Critical Legal Studies Symposium*, *supra* note 3. The variety of the critiques now begin to rival the variety and array of the CLS writings. Two of the most probing critiques arise in Sparer, *supra* note 14, and Bronson, *Serious But Not Critical*, 60 S. CAL. L. REV. 259 (1987), while two of the strongest critiques arise in Burton, *supra* note 6 and Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413 (1984). Further, one can identify a critique that, out of the Marx genre (Groucho, not Karl), gives CLS a stinging satirical retort, which some in the academic community believe the concept of "trashing" so richly deserves. See Shapiro, *The Death of the Updown Distinction*, 36 STAN. L. REV. 465 (1984). Additionally, an example of a critique of the movement itself appears in Carrington, *supra* note 3 and Martin, *supra* note 3. Moreover, one can find some of the CLS and anti-CLS literature in the midst of the debate about the present state of legal scholarship. See, e.g., Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1113 (1981); Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1017 (1981). For fairly brief and accessible treatments of the CLSM, and critiques of the views within the movement, see Chase, *What Should a Law Teacher Believe*, *supra* note 5 and Note, *supra* note 5. Finally, one should note that a fairly sizable "underground" of probing and well-written unpublished CLS criticism exists in and around the legal academic world. These represent "writings in progress" or writings that may never reach the formal publication stage. Based on the above, one can conclude that the CLSM has spurred a dizzying development of legal literature in America, Canada, and the United Kingdom.

the CLSM and the movement itself, which run from modest (and immodest) global analyses of the views in the CLSM to specific in-depth analyses of a given view. Better yet, one can even discover an excellent recent sympathetic critique³¹ that analyzes views in the CLSM closely related to the topic of this article, “fundamental human rights and legal entitlements.”

Based on the above, the article will take a limited approach to CLSM and its response to racism. First, I will analyze the character of the CLSM itself, since I want to analyze the movement’s response (or lack there of) to racism, given its claim of facilitating “liberation politics.” Second, I will feature the articles of two prominent writers whose views represent major, formal CLS statements about racism. Third, I examine major shortcomings of the formal CLSM and CLS views about racism, briefly considering an important contemporary race issue. In sum, I will provide a sympathetic critique of the positive and negative elements of the CLSM’s response to racism in American society, building on a recent sympathetic critique of the CLSM’s response to “fundamental human rights.”

I will utilize the following division of ideas in the remainder of the article. Part II of this critique will explore the definition of the CLSM and examine the writings of the two prominent CLS thinkers. Part III will briefly examine racism in America, with an eye toward critiquing whether the CLSM has sufficiently considered the impact of modern notions about racism within the CLS critiques of law’s treatment of racism. Part IV will discuss the critique of the CLSM’s responses (or lack thereof) to racism.

Preliminary, we all must acknowledge the value of the efforts of some within the CLSM to carry on the tradition of Jeremiah, being “truth sayers” about racism in our midst, given that the

31. See Sparer, *supra* note 14. The author commented on what he denominated the “dominant tendency” of the CLSM, with emphasis on the following:

(1) the critique of ‘liberal rights;’ (2) the explicit rationalization of negative critique as *the* appropriate route or left scholarship today and the subsequent failure to develop — or even self-consciously to work towards — a praxis for radical legal theory and social movement; and (3) the role of the radical law teacher vis-a-vis her or his students who are to become practicing lawyers.

Id. at 510-11 (emphasis in the original). This sympathetic analysis of views within CLSM on fundamental rights covers some of the ground that my Article will consider and it draws similar conclusions. My critique of racism in the CLSM is also sympathetic. My criticisms, however, have a slightly different approach and analysis.

“nation prefers its racial lessons served up with large helpings of what might be kindly called, ‘patriotic mythology.’”³² People of color readily admire the courage of those who earnestly and honestly seek immunity from the “attraction of non-threatening rationalizations which so often substitute for honest admissions regarding the nation’s lamentable racial past, reflected to an appalling degree in its contemporary legacy.”³³ Further, we appreciate those among us who acknowledge “that protection of promised Constitutional rights will not necessarily result from the well-wrought legal brief, the persuasive oral argument, or the reliance on some intellectually satisfying neutral principle.”³⁴

In addition, we should acknowledge the valid points about addressing racism that Derrick Bell highlights in analyzing the views of CLS thinkers:

Alan Freeman, and his CLS colleagues, argue that there is something deeply wrong with the legally conceived approach to dealing with the race discrimination problem. He attacks reliance on litigation for civil rights reform and warns that by conceiving the problem of racial discrimination in legalistic terms, destructive belief systems are embraced; belief systems associated with the liberal tradition like individualism, vested rights, privacy, autonomy, in fact, all the glorious supposedly shared American values.

These so-called shared American values assume a national commitment to equality that is difficult to prove by our behavior, which causes Freeman to condemn this commitment as “a mammoth fraud.” He and his cohorts believe these values, internalized by lower class whites, serve to rationalize power relationships as they are, and obscure the true nature of economics in this society.³⁵

Yet, we must not lose sight of the limits of these CLS insights and the larger impact of the CLSM on the movement and direction of both racism and methods for attacking racism. In sum, we must embrace the genuinely lucid, informative, and helpful analyses that meaningfully undermine the structures of racism in America, while taking serious issue with those views

32. See *AALS Civil Rights Workshop Speech*, *supra* note 4, at 3.

33. *Id.*

34. *Id.* at 6.

35. *Id.* at 3-4.

and any conduct that widely misread the fundamental character of racism and that even nurture and reinforce racism.

SECOND PROLOGUE

FROM A DISTANCE, it might be Camelot. The castle is located high on an impressive mountain, so high that it is often invisible in the mists and clouds that abound at such altitudes. But on a sunny day, particularly after rains have cleansed the atmosphere, it is both visible and awe-inspiring. Its high battlements of white stone reflect the sunlight so brilliantly that it is difficult to tell whether the sun or the castle is the source of the light. . . .

It is generally believed that those who built and reside in the castle have achieved their lofty and prestigious positions through their ability to serve those who are the rulers of the land. The residents of the castle are not the rulers, but they translate the orders of the real rulers into language which, though arcane, complex, and beyond the comprehension of even intelligent persons, communicates a sense of power that engenders an awed confusion and a subtle but real coercion toward compliance. Through the manipulation of those with power, the castle's residents gained a facsimile of power. Only the truly powerful dare describe the authority of the castle's residents in that way.

It is said that those who live in the castle do not call it a castle at all, although entry is extremely difficult. . . . Indeed, those who have gained admission to the castle refer to it as *The Academy*.

The academicians, as they like to be called, embrace mystique. They are high priests whose power is based less on God than on their superior intellectual gifts. There is commitment in the Academy, but it is not the usual ambitions, desires, or even basic needs. Rather, those in the academy maintain whenever asked, and sometimes even when no one inquires, that their dedication is to the *Life of the Mind*. Absolutely no one knows what that means.³⁶

I. THE CLSM AND ITS RESPONSES TO RACISM

A. *The CLSM - How Does One Define It?*

If we exit from the myth for the real world, we can discover some members of the legal academy who have developed their

36. See Bell, *supra* note 1, at 385-86 (emphasis in the original).

own special voice for discussing their responsibility to “translate the orders of the real rulers into language which, though arcane and complex, . . . communicates a sense of power. . . .”³⁷ The CLSM represents such a group. In fact, we can state that the propelling concerns of the CLSM reside in its desire to do the following: to decode and delegitimize the existing language and its underlying structures;³⁸ and to analyze the alternative societal power arrangements that will move toward the members’ vision of a just society.

While the above summary illuminates the CLSM to some extent, one cannot rest easily with its validity. At best, this statement represents one person’s limited, and highly oversimplified, effort to capture the essence of a complex gathering of ideas in addressing an even more complicated social phenomenon called racism. Indeed, if one ventures through the legal literature one discovers several (unsuccessful) attempts³⁹ to capture this complex movement. For example, one writer approaches the subject from the perspective of the “four versions of CLS.”⁴⁰ He starts with the “meeting” (“experience” or “happening”) version:

In a sense, the best description of CLS is simply the values and views of all the lawyers, law students, law professors,

37. *Id.* at 386.

38. *See* Freeman, *supra* note 7 and accompanying text.

39. *See* Boyle, *supra* note 18, at 687 n. 1 (“Most articles describing critical legal theory are more or less straight, discursive accounts of a supposedly unified body of work about doctrinal indeterminacy, legitimation, and political action.”) *See also Id.* at 688. (“From the outside, critical legal scholarship appears to be a strange blend of legal realism, the New Left, and literary criticism.”)

40. *See* Chase, *supra* note 5, at 409. Actually, one can identify other versions of CLS. Beyond the formal meetings, one discovers a “loose federation” of law students, law professors, practicing lawyers, and other academicians, both in America and in other countries, who comprise the “mailing list” and network of sympathetic minds. These persons may maintain active monitoring (meant in a non-Orwellian Big Brother-watches-you sense) of the movement of ideas and the holding of events within CLS. I probably come within this group, having never attended a national conference or other CLS meeting, either in America or Europe, though I receive CLS mailings and I frequently venture into the CLS literature. Moreover, this “loose federation” will develop its own modifications, expansions, and refinements of the CLS theories at the local sites, without such activity ever appearing in formal print, and some of this “loose federation” have probably incorporated and will presently incorporate into their formal writings and social movement activities. One may possibly denominate this aspect a “sixth version” of CLS. No one can accurately estimate the size of this “subterranean element” of the CLSM. Even more important, this aspect of CLSM demonstrates that the movement involves far more than a silly fringe of besotted “lotus-eaters” at a few law schools.

social scientists, and other interested parties, who have come together for these national meetings and everything which has come out of the mutual association and activity. Virtually no one ever tries to talk about CLS in these terms and that is a pity.⁴¹

He denominates this version of "CLS as a form of social praxis."⁴² Next he identifies the version of CLS that relates to a reading⁴³ of the materials in the massive 1984 CLS bibliography. Further, he reduces the bibliography into two categories he calls "CLS3" and "CLS4," with the breakdown turning on the symbolic representation of the movement as the legal version of the "American left academia,"⁴⁴ and the analytical treatment of two important legal themes in the CLS literature: the "critique of indeterminacy" and the "critique of pervasiveness."⁴⁵

41. *Id.* (citation omitted).

42. *Id.* at 409-10. I am not positive what Chase means by the term *reading*. I can, however, venture the thought that he refers to the external or non-CLS scholarly activity of research and reflection on the "corpus" or "oeuvre" of CLS scholarship, so that one gains a sense of "what CLS stands for" through this examination. If one cares to move in this direction, one can interpret *read* to mean what I describe in note 40 above: reflecting and reworking the CLS ideas; and integrating the fundamental ideas and refinements into works in progress or social activities. Indeed, one should appreciate that the *reading* and federating, together with the meetings, give the CLSM its breadth and broad influence. Based on this fact, one can appreciate why persons who comprise this penumbra of the CLSM maintain involvement with the "total experience," even though they reject (or ignore) the antics of those CLSers in the limelight.

43. See Kennedy & Klare, *supra* note 27.

44. See Chase, *supra* note 5, at 410. He notes the following about this version of CLS:

The "work" of CLS3 stands in direct relation to the scholarship produced by other American left-wing professors, particularly those in such fields as sociology, history, and political science. Premier examples of CLS3 scholars include Richard Abel at UCLA, Morton Horwitz at Harvard, and David Trubeck at Wisconsin. CLS3 writing also has an important and interesting relation to the work of legal historians and sociologists *not* involved with CLS, such as Lawrence Friedman at Stanford, Willard Hurst at Wisconsin, and Stanley Katz at Princeton. Stated in the simplest possible way, CLS3 is engaged in the analysis of historical, political, and socio-economic causes and consequences of the operation of the American legal system, broadly understood.

Id. at 410-11 (citation omitted, emphasis in original).

45. *Id.* at 411. Chase notes that this version of CLS generates the most controversy and is the version of CLS that most persons refer to when they speak of CLS. In his view, the core of the controversy caused by CLS4 resides in the following: that law represents a "form of ideology," which legitimizes the existing power relationships of society. The first aspect, the "critique of indeterminacy," focuses on the "open-textured and infinitely 'manipulable' system" that can justify any given political result. The second aspect, the "critique of pervasiveness," focuses on the inter-

If one ventures beyond this global effort to explain the CLSM, one identifies several other approaches. A fairly recent global effort to define the CLSM approaches the task with these three objectives: 1) analyzing CLS's evolution from the critical methodologies associated with the ALRM, 2) analyzing the effectiveness of these methodologies compared to the attainment of the radical political agenda, and 3) recommending ideas for CLS scholars to adopt.⁴⁶ In undertaking this task the analysis makes several claims about the CLSM. First, this analysis claims that the CLSM represents the maturation of the critical methodologies of the ALRM with two twists: the CLS scholars "explore incoherences at the level of social or political theory and critical scholarship is linked, not to reformist policy programs, but to a radical political agenda."⁴⁷ Second, this analysis notes that the CLSM differs from the ALRM in that the former views "tensions endemic to particular doctrinal fields pervad[ing] whole systems of legal discourse,"⁴⁸ and the former utilizes the "methodologies of other disciplines."⁴⁹

Another fairly recent global effort (probably the most comprehensive and, I might venture to append, richly helpful global analysis) by James Boyle exhibits even greater ambitions. He undertakes the following heroic task: "to give a sense of the types of theory that are commonly lumped together under the label 'critical legal scholarship'"⁵⁰ through analyzing the "constitutive tensions" that flow through critical legal thought; and to mediate the "subjectivist, personal, phenomenological strand and the structuralist, patterned, impersonal strand . . . to develop a toolkit for an ongoing project rather than to chronicle the rise of an academic movement."⁵¹ The sheer sweep of his analysis, as he interweaves the traces of

action between the ideology of classical liberalism and the American legal system. The "critique of pervasiveness" holds the view that classical liberalism has so permeated American life and its instrument, the legal system, that it blinds us to its inherent contradictory dualities, which actually further destructive and oppressive hierarchical domination and social relations. *Id.* at 411-15. For extended, illuminating analysis of the CLS attack on classical liberalism, see Sparer, *supra* note 15, at 516-52.

46. See Note, *supra* note 5.

47. *Id.* at 1677.

48. *Id.* at 1680.

49. *Id.* at 1681.

50. See Boyle, *supra* note 18, at 687. In essence, Boyle, from the "eye of the controversy" rather than from outside of the CLSM, undertakes what he calls a "fragmentary set of accounts about critical legal theories."

51. *Id.* at 688 (citation omitted).

legal realism, European linguistic theories, and varieties of Marxist theories to reach the crossroads of his mediating cohesion of CLS thought, prohibits brief summary. Moreover, one cannot easily describe the social action “toolkit” ultimately formulated. Boyle’s linking of these strands of thought together with the prism of Foucault to arrive at the junction of his “localized critiques”⁵² (his “social toolkit”) defies a brief summary, even if one believes that one has grasped the nuances of his analysis.

Perhaps the most ambitious definition of the ultimate goal⁵³ of CLS thought arises in the totalizing, programmatic effort of the celebrated CLSer, Roberto Unger. Assuming that one can read or comprehend his thick writing,⁵⁴ which few of us can honestly do, one notes that he, more than most of the CLSers, concerns himself with mapping out his socialist vision that comes at the termination of the critique of classical liberalism. Perhaps one can best approach Unger through and after comprehending Boyle or some of the more accessible analyses.⁵⁵

Two of the other global efforts commend themselves because their authors define CLS from the perspective of what CLS *does not cover*, or cover properly. First, a CLSer has written an amusing and insightful examination⁵⁶ of how the CLS critics mistake the work of the CLS, for example seeing the work as more destructive, vague, and utopian than it really unfolds. Second, a non-CLSer, in deadly earnestness, critiques⁵⁷ how the CLSM, focusing on selected writers, misuses the European intellectual tradition (critical theories, deconstruction theory, and the like), relies too heavily on oversimplification, creates excessive skepticism, and lacks sufficient analyses of justice.

Beyond these global⁵⁸ analyses of the CLSM, one discovers

52. *Id.* at 773-80.

53. Unger, *supra* note 30.

54. See Pannier, *Roberto Unger and The Critical Legal Studies Movement: An Examination and Evaluation*, 13 WM. MITCHELL L. REV. 647 (1987). See also *Law, Politics, and CLS*, *infra* note 59, at 231-36.

55. See, e.g., Sparer, *supra* note 14; Bronson, *supra* note 30. Many wish that Unger could write as elegantly as the late Sparer and Boyle. *But see*, *Law, Politics and CLS*, *infra* note 59 (“In powerful and elegant prose, reminiscent of the grand theorists of the seventeenth and eighteenth centuries, Unger describes and defends a grand vision of how things in society might be”). *Id.* at 231.

56. See Kelman, *supra* note 15.

57. See Bronson, *supra* note 30.

58. The text does not exhaust the listing of global efforts to define CLSM. See, e.g., Hutchinson & Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding*

specific analyses of discrete aspects of the published body of CLS writings that define the CLSM. One of the best of this variety appears in a work⁵⁹ that has special significance for this article, since it focuses on the topic of the CLS analysis of fundamental rights. This work identifies a "dominant tendency" of CLS, the "critique of 'liberal rights.'" Importantly, this work demonstrates how this critique leads to the very conclusion that CLS wants to avoid, because any vision of reconstructed community must acknowledge the existence and preeminence of fundamental rights.

Based on the above discussion, one must conclude that the definition of CLSM does not easily emerge, especially in the form of a brief cohesive statement of the movement. In point of fact, no one person can pretend to define so complex a movement of personalities, activities, and ideas, which has a mammoth oeuvre with a dizzying array of intellectual strands, some of which contradict each other, and has a formal, surface component and an informal underground component. At best the article can hope to provide a fragmentary glimpse of the personalities, activities, and ideas that comprise this movement. Accordingly, the article must leave this area having unsatisfactorily answered the question of how does one define the CLSM.

B. *The CLSM Responses to Racism*

With the above discussion as a backdrop, the article can now turn to an analysis of the CLSM responses to racism. Notwithstanding the fact that the article cannot tersely and clearly articulate the definition of the CLSM, this backdrop should still illuminate the nature of responses to racism. If this fact holds true, how should one outline these responses? Consistent with the previous analysis of the definition of CLSM, the article will

Drama of American Legal Thought, 36 STAN. L. REV. 199 (1984) (These two Canadian law professors represent a non-American effort at a global analysis, with special emphasis on what they deem CLS's focus on the "legal consciousness," the disagreement within the CLSM about the interpretation of the "prevalence of liberal ideology," what they deem the "fledgling attempts at social reconstruction," and the constitutive tension caused by the possibility that others will turn the CLS analytic back on the CLSM. In actuality, their critique of the political shortcomings of the CLSM and of what needs to be the focus of the CLS vision for the future places their analysis in the first ranks.)

59. See Sparer, *supra* note 14; see also Sparer, *supra* note 31, wherein I provide some insight into his analysis of the fundamental rights critique of CLS.

examine the personalities, activities, and ideas to identify the responses.

If one starts with the personalities and activities, one must rely largely on limited anecdotal information and observations. Some of the primary participants in the CLSM have made earnest, concerted efforts to interact and involve persons of color within the CLSM. In fact, some of these primary participants had worked to include persons of color in the various national conferences and meetings. The most recent conference, the *Tenth National Critical Legal Studies Conference, The Sounds of Silence: Racism and the Law*,⁶⁰ held in conjunction with the 1987 Minority Law Teachers Section of the American Association of Law Schools Convention in Los Angeles on January 6-8, represents an example of this interaction. This multi-day conference examined a host of race-related topics, such as race in America, CLS reflections on race, and minority law faculty critique of CLS scholarship.

If one examines the CLS scholarship, which probably above all represents the primary focal point of any analysis of the CLSM's responses, one focuses on the small grouping⁶¹ of

60. Program Announcement of the *Tenth National Critical Legal Studies Conference, The Sounds of Silence: Racism and the Law* (Nov. 29, 1986)(unpublished announcement, on file at the William Mitchell Law Review office). The cover sheet of the announcement indicates that "[f]ew people of color have participated in CLS conferences in the past We [the minority subsection of the organizing committee of the conference] are very much aware that the relevance of Critical Legal Studies to racial minorities, and especially minority faculty, has been seriously questioned. As participants in many past activities of the Conference on Critical Legal Studies, we are acutely sensitive to this problem." *Id.* Besides the discussions and workshops on race-related issues, the conference planners indicated a program to guide persons of color through CLS, its history, and the planning process of that conference. I will not presently comment on the paucity of participants of color in past CLS activities. Obviously the participants in the CLSM recognized that fact.

61. One could put Mark Tushnet and Paul Brest within this small group of CLS scholars who have devoted some attention to race-related analysis. See M. TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST* (1981); P. BREST, *The Supreme Court 1975 Term, Foreward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976). The former book stands in the tradition of Freeman and Klare, explaining the law as an ideological reflection of the underlying economic conditions. The Brest article, however, stands apart from the Freeman and Klare articles cited in the text; it favors traditional non-CLS analysis. See also Soifer, *Interlude, Confronting Deep Strictures: Robinson, Rickey, and Racism*, 6 CARDOZO L. REV. 865 (1985)(one can only view this bit of witticism as a spoof of CLS analyses, using the examination of Jackie Robinson's integration, with Branch Rickey's guiding hand, of the Major Leagues in 1947).

writers who have devoted some of their attention⁶² to this subject. Alan Freeman represents the writer that virtually all persons identify as the leading spokesman for the CLS response to racism. In fact, his article *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*,⁶³ stands out as one of the finest examples of the CLS scholarship, and probably has had the greatest influence in winning what attention the CLSM has gained from persons of color. One should add Freeman's fairly recent book review⁶⁴ of Derrick Bell's second edition of his major work, *Race, Racism and American Law*, and his article *Antidiscrimination Law: A Critical Review*⁶⁵ to those works that illuminate the CLS analysis of racism. Further, Karl Klare represents the second writer whose analyses give some attention to racism. His article *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor and Civil Rights Law*⁶⁶ represents another of the strong CLS efforts to analyze racism in American society through analysis of the law.

An examination of Freeman's analysis in *Legitimizing Racial Discrimination* discloses approaches noted previously in defining the CLSM. *Legitimizing Racial Discrimination* centers on the point that the law legitimizes the existing social structure, reflecting the hierarchy of oppression that racism has established through the class stratified society. He argues that while constraints outside of law have a major influence, the law maintains autonomy.⁶⁷ Moreover, he argues that within this limited autonomy, the actors cannot resolve the deep value conflicts,

62. Preliminarily, the dearth of analysis of racism by the CLS scholars, given the mammoth size of the oeuvre of the CLS scholarship, immediately strikes anyone examining CLS scholarship. While the scholarship of Freeman, Klare and Tushnet represent considerable efforts, the paucity of treatment remains just that — limited consideration of a *major* social structure, in not simply America but in the entire Western world.

63. See Freeman, *supra* note 9.

64. See Freeman, *Race and Class: The Dilemma of Liberal Reform*, 90 YALE L.J. 1880 (1981) (reviewing Derrick Bell's second edition of his *RACE, RACISM, AND AMERICAN LAW* (2nd ed. 1980)).

65. A. FREEMAN, *ANTIDISCRIMINATORY LAW: A CRITICAL REVIEW IN THE POLITICS OF LAW* (1982). This article seems to be a combination of Freeman's other writings, lacking a smooth integration of those ideas. In some part the ideas even appear to retreat from the position of not solidly depending on the class ideology analysis. See also H. BURNS, *RACE DISCRIMINATION LAW AND RACE IN AMERICA IN THE POLITICS OF LAW* (describing the historical development of racism in the fabric of the law).

66. See Klare, 61 OR. L. REV. 157 (1982).

67. See Freeman, *supra* note 9, at 1052.

even through the use of “shared values,” which makes the mystifying effort little more than “rationalized self-interest” disguised as “universal criteria.”⁶⁸ From there he moves to his major emphasis, that of demonstrating how the “process of legitimation works through that manipulation of doctrine.”⁶⁹ The doctrine in antidiscrimination law must “hold out the promise of liberation,” if it legitimizes, while at the same time failing to deliver such a promise.⁷⁰ The law in this area accomplishes the legitimizing by adopting a “perpetrator perspective” (rather than the “victim perspective”),⁷¹ with its focus on fault and causation that lead to concern over intentional discrimination, which intention becomes very difficult to identify and prosecute.⁷²

Importantly, he tries to demonstrate how the perpetrator perspective can explain the doctrinal evolution in antidiscrimination law. He organizes the United States Supreme Court race-related cases into various eras: the eras of uncertainty, 1954-1965, contradiction, 1965-1974, and rationalization, 1974 through the present. Each one of the eras gets demarcated by pivotal Supreme Court analyses that cyclically evolve the perpetrator doctrine through flirtation with and adoption of some aspects of the victim perspective, with the doctrinal analysis always returning to the perpetrator perspective. Equally important he tries to demonstrate that legal ideologies such as freedom of association, color-blindness, an integrated society, and equality of educational opportunity grew out of and helped further develop antidiscrimination law. The ideologies rationalized the perpetrator perspective where necessary, cutting back on the broad reach of the victim perspective, and sometimes setting up the expectation of relief possible under the victim perspective.

His book review goes beyond the above article. In analyzing Bell’s book, Freeman notes that Bell crossed an important line in writing his second edition: Bell migrated from teaching students “to do civil rights law” to “teaching them about the unhappy history of modern civil rights law.”⁷³ According to

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 1052-55.

72. *Id.* at 1057-1119.

73. See Freeman, *supra* note 66, at 1886 (emphasis in the original).

Freeman, this repositioning dictates that the teacher rethink his or her strategy in teaching. The teacher can continue to employ the strategy of "self-conscious doctrinal manipulation;" the teacher can resort to the strategy with the variation of pushing for "mass movement protest," which involves maximizing the effort to obtain concessions from controlling powers; the teacher can avoid reinforcing the mystification of classical liberalism by unmasking (delegitimizing) its presuppositions and contradictions.⁷⁴ Freeman argues that Bell does not travel sufficiently far enough in presenting a "concrete historical account to replace" the delegitimized structures of the law.⁷⁵

This critique of Bell offers Freeman the opportunity to reexamine the meaning of racism in American society through radical analysis. He begins with a consideration of a series of questions that attempt to determine if racism represents a "unique form of oppression," or whether it represents another form of the traditional class relationships. He explores some recent Marxist historical scholarship that demonstrates that racism has a complicated historical character, not easily encapsulated in the traditional Marxist analysis.⁷⁶ Racism confronts Marxist analysis with the challenge to integrate its "unique history with a complex present."⁷⁷ The traditional Marxist analyses — the perpetual underclass of low wage laborers who willingly work below non-racial victims ("the reserve army of labor"); the division of class consciousness to create class conflicts that impede formation of genuine class consciousness ("divide-the-working-class"); the "opportunistic approach of selecting members of racial minorities" as persons sufficiently enlightened by their oppressors to warmly receive radical ideas; and the synergism of legal actions and political actions in the civil rights to advance the class struggle⁷⁸ — fall short of addressing racism. He argues that we need some "contemporary theory of racism" that explains the stubbornness of the remaining conditions of racism.⁷⁹ Until that time, the reigning legal ideology will continue to pretend that America has cured

74. *Id.* at 1887-88.

75. *Id.* at 1888-89.

76. *Id.* at 1889-90.

77. *Id.* at 1891.

78. *Id.* at 1891-94.

79. *Id.* at 1894.

racism, causing those within the legal system to preserve the myths of liberalism. In effect, this state of affairs makes civil rights law appear to offer a credible measure of tangible progress without in any way disturbing class structure generally.⁸⁰

Freeman's *Antidiscrimination Law* goes even farther than his book review does in his analysis of racism. He begins by stating his now familiar theme: "antidiscrimination law as it has evolved from 1954 to the present has served more to rationalize the continued presence of racial discrimination in our society than it has to solve the problem."⁸¹ He continues his analysis with the familiar victim/perpetrator dichotomy, again arguing that the perpetrator model, with its fault axis, remains as the foundation of contemporary antidiscrimination law in America. Again he tries to demonstrate that the evolution of the perpetrator perspective serves as an illuminating analytic for examining the United States Supreme Court race-related cases during his denominated eras. He explores the role of the legitimizing legal ideologies noted above plus others such as ethnic fungibility and voluntarism. The latter, he notes, sharpens the "dissonance between the experience of burden imposed on those whites who are called upon to participate in such programs and the felt innocence of such persons created by the perpetrator perspective."⁸² What sets this article apart from the previous writings comes in the further focus on the class structure analysis. He argues that the underlying legal ideologies assume a society that does not exist: one premised on consensus, community of interest, cooperation, and mutual benefit. Social realities point out that society really operates by conflict, class divisions, domination, and exploitation. Accordingly, he explains the rejection of the victim perspective by the ruling class' utilization of the law to legitimize the class structure, with persons of color as the perpetual underclass. But not stopping here, Freeman argues that three ideologies rationalize the class structure: the doctrines of formal equality, vested rights, and equality of opportunity. These doctrines, he argues, misdirect analyses away from a genuine distribution of the societal burdens, they entrench legal positions by not threatening to take legal privileges and gains from innocent

80. *Id.*

81. *See* Freeman, *supra* note 66, at 97.

82. *Id.* at 105.

persons, and they set up the ideal of just dessert and merit (and the converse of failure and lack of ability). In addition, the class divisions beneath the ideologies help explain the fear that the destruction of these ideologies would cause. For example, attacks on the doctrine of equality of opportunity threaten to expose the lower-class whites to the impositions of burdens for remediation for discrimination injuries. For this reason, the law maintains the appearance of remediation while forestalling any genuine remediation that the victim perspective might mandate.

If one focuses on Klare's analysis, one discovers some of the same ideas of Freeman, but with a different emphasis. He too calls attention to the "interlocked ideological underpinnings of class and race domination."⁸³ He too utilizes the "legitimation" argument.⁸⁴ Klare diverges from Freeman with his focus on the "public/private" and the "substance/process" dichotomies,⁸⁵ introduced by decades, long United States Supreme Court constitutional analyses, and with his focus on the confluence of the labor and civil rights movements. According to his analysis, the Court historically wedded these notions with the "liberty of contract" views to remove racism from scrutiny and to push it into the private law realm, which the Constitution, according to the legal analyses, could not reach. Further, he gives particular emphasis to the view that both of the movements must come to grips with the "class domination" and the "prevailing conceptions of formal equality."⁸⁶

In concluding the CLS responses to racism, one can note that the analytical responses operate primarily at the descriptive level, with limited reliance on the prescriptive approach. Both authors acknowledge that their focuses primarily center on delegitimizing the reigning legal ideologies; they do not fundamentally seek to offer a prescription for curing the problems. Nonetheless, they do recognize the necessity to move beyond their delegitimation approach to formulate new theories (Freeman) or to do so and to forge alliances for progressive changes (Klare). Indeed, Klare places a heavy responsibility on organized labor when he admonishes it that it can

83. See Klare, *supra* note 67, at 158.

84. *Id.* at 162.

85. *Id.* at 161.

86. *Id.* at 164.

only extricate itself from its dilemma if it offers a vision of a just world that includes racial equality and full participation.⁸⁷

THIRD PROLOGUE

Speculation on such matters is a luxury that those born to the lowlands cannot afford. They have little time and even less inclination to wonder about either the sun or the castle. Both represent different and foreign worlds. Each seems light years removed from the fields or the factories where work is hard, hours are long, and the pay is hardly sufficient to cover costs of the shelter and sustenance that enable workers to continue in the jobs that monopolize their lives. They know only that the power of the sun and of the castle are great and that appeals for restraint and understanding are as unlikely to be answered when made to the castle as when made to the unknowing sun.

Even so, those who had ventured close to the castle reported that there are huge banners flying above the turrets that proclaim: *Law is Justice — Justice is Law*. Few remember when this motto was first displayed, and no one knows what the expression means.

The common folk include a large minority who are not white, but people of color. Out of their history, this minority gained, the hard way, a great appreciation for what they call 'freedom.' They do not really know what freedom means either; but the word has a good ring to it, and they hope if they ever get it, their work will be less hard, the pay more equitable, and the other emoluments of citizenship might, at last, be made available on the same basis as those granted as of right to those who are white.⁸⁸

II. RACISM IN AMERICA

Appreciation of the CLS responses to racism dictates some further treatment of the structure of racism in America. While at least one of the CLS analytical responses discusses the structure at some length, one should not automatically assume that this discussion exhausts the field. Other resources have different approaches and further insights that sharpen appreciation of the phenomenon of racism. Moreover, these resources fa-

87. *Id.* at 163 and 199.

88. See Bell, *supra* note 1, at 385-86 (emphasis in original).

cilitate the criticism of the CLS analysis of racism and the role of law in extirpating or reinforcing racism.

In a fairly recent historical analysis of racism,⁸⁹ Winthrop D. Jordan addresses racism in terms of its underlying psychologies. His historical analysis of the origins of racism in America focuses on the "thoughts" and "feelings" directed toward a specific object, which suggest attitudes in operation within American society. Moreover, he argues that these attitudes connote a "wide range in consciousness, intensity, and saliency" in the response patterns to the object, the race of the other human being, and he argues that the attitudes exist at "various levels of . . . consciousness and unconsciousness," implying the lack of clear division between the "conscious and unconscious mental processes."⁹⁰ Accordingly, he constitutes these attitudes with "highly articulated ideas, off-hand notions and traditional beliefs . . . myths . . . expressions of the most profound [urgings, and] coded languages of our strivings for death and life and self-identification."⁹¹

Jordan's analysis of the State of Virginia's efforts to restrict the right of masters to manumit their slaves in the year of 1806 illustrates his approach to describing racism. The Virginia Legislature hotly debated the necessity of halting the tide of emancipations. Jordan notes that the legislators and many of the white population feared the increase in the free Negro population. At the propaganda level, the former announced that the free Negro population represented a circle of "lazy nuisances, harborers of runaways, and notorious thieves,"⁹² despite the fact that these assertions had no basis in reality. Jordan concludes that the reaction to the free Negroes operated at a "symbolic level." The free Negro signified hard won freedom that the slaves had actually struggled to obtain, and the free Negro "embodied all too effectively the failure of

89. W.D. JORDAN, *THE WHITE MAN'S BURDEN* (1974).

90. *Id.* at ix.

91. *Id.* Comparing his historical approach to that of "economic reductionism," Jordan says the following:

To deal with the roots of American racism in this way is not to ignore the crucial matters of economic exploitation and social degradation. Without those factors we would have no racism as we know it. But to say, as many have done, that racism is merely rationalizing ideology of the oppressor, is to advance a grievous error. To rest the analysis there is to close one's eyes to the complexity of human oppression.

Id.

92. *Id.* at 220.

white Americans to remain true to Nature and the corollary principles of liberty.”⁹³ Jordan argues that the free Negro symbolized the insurrectionary because of the fear of whites that the slave could attain equality with them through emancipation. Or restated, Jordan argues that the free Negro and the fear of the slave revolt signify the fear of the “loss of white dominion.”

Furthermore, Jordan argues the free Negro had deeper meaning for whites during the 1806 period. Not only did the freedom symbolize that whites had lost control over blacks, but the freedom symbolized that whites had lost control of themselves. They could no longer rely on slavery to maintain the personal and social checks on behavior, the important restraints on civilized conduct. Most certainly, this fear of being out of control surfaced in the concern about the intermixing of the races—in essence, the concern about their “unrestrained exercise of their most basic impulses.”⁹⁴ Based on the above, Jordan argues that the debate of 1806 symbolized the “perpetual duel between” white America’s higher and lower natures: the “cultural consciousness”—Christianity, humanitarianism, the ideologies of liberty and equality—and the primal urges—to maintain the identity of the white group, the passion for domination, sheer avarice, sexual desire.⁹⁵ The higher nature, the “communal conscience,” impelled recognition of the equality of the Negro, as the florescence of brotherhood, the American Declaration of Independence, enshrined; the lower nature, the deeper and darker urges, impelled the harsh treatment of the Negro.

Others have particularly explored this psychological interpretation of racism within the context of its application to the law. In a very recent article entitled *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*,⁹⁶ Charles R. Law-

93. *Id.* at 221.

94. *Id.* at 222. Jordan provides his analysis in the following forceful fashion:

In this sense, white men were attempting to destroy the living image of primitive aggressions which they said was the Negro but was really their own. Their very lives as social beings were at stake. Intermixture and insurrection, violent sex and sexual violence, creation and destruction, life and death—the stuff of animal existence was rumbling at the gates of rational and moral judgment.

Id.

95. *Id.* at 225.

96. See 39 STAN. L. REV. 317 (1987).

rence gives us an excellent primer on the unconscious structure of racism, as it relates to an enrichment of the Fourteenth Amendment Equal Protection Clause legal analyses. He explores both the "psychoanalytical theory" and the "cognitive theory" of racism as a prelude to outlining how lawyers and courts could incorporate such ideas into equal protection arguments. I do not need to repeat his extensive analysis for present purposes; I simply want to continue to broaden the previous CLS analysis of racism to include the focus on the human psyche and the unconscious. Any legal analysis, as Lawrence demonstrates, must come to grips with the irrational overt or irrational hidden structures, the irrational phenomena, taking lessons from both the psychoanalytic⁹⁷ and cognitive approaches.⁹⁸ In effect, what we gain from viewing the consequences of behavior rooted in repression or from understanding the process of human categorization and the development of personality theories should find their ways into any critical analyses of the law.

To be sure, racism confronts American society with a complex, baffling social structure. We probably encounter various means of describing racism because its complexity causes us to view it in a fragmentary form,⁹⁹ now observing one angle, later observing still other angles. Perhaps this complex irrational phenomenon eludes the totalizing explanation, especially the "economic reductionism" of the Marxist and neo-Marxist schools. Yet, regardless of how we view it, racism has the same impact. Whether we analyze racism from the interior as Jordan and Lawrence do, or whether we analyze it as exterior ideologies, a "social consciousness in its effort to legitimate the prevailing social order,"¹⁰⁰ racism creates economic, social, and political domination of a group of persons to the benefit of another group of persons. In fact, modern racism has developed sophisticated manifestations: its subtle institutional variants and the "concept of meritocracy."¹⁰¹ Moreover, the various "structural changes in the American economy"¹⁰²

97. *Id.* at 331-36.

98. *Id.* at 336-39.

99. Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201, 206 (1982).

100. *Id.*

101. *Id.* at 207.

102. *Id.* at 210. Calmore refers to the Wilson thesis, which centers on the struc-

transform racism into extremely difficult to address race equivalents such as poverty, health condition, and lack of formal education. In the end, racism confronts any transformative efforts through the law with a complex task.

Given the broad view of racism, although this article only provides a sketch of this complex phenomenon, how do CLS analyses lead us toward some illuminating treatment of the subject through an analysis of the role of the law? Do we observe rich insights as the CLSM claims it provides, both inside and outside of the specific racism analyses, or do we observe, as the Third Prologue intimates, hollow words that leave persons of color exactly where they stood before the hoopla (if they do not retrogress through the utilization of words): with backbreaking toil that extracts much value but that provides little true benefit? In sum, do the CLSM responses to racism and the law, analyzing the personalities, activities, and ideas, supply an effective analysis and praxis,¹⁰³ or do they merely symbolize an example of a misdirective modern legal skepticism¹⁰⁴ and solipsism¹⁰⁵ that deflects persons of color from ex-

tural changes of "labor saving innovations, industrial relocation, and the shift from goods-production to service-production jobs, and . . . to the recent prohibitions of racial discrimination . . ." *Id.*

103. See J. SARTRE, *SEARCH FOR A METHOD* (1968). Sartre uses the term as follows: "Thus a philosophy remains effecacious so long as the *praxis* which has engendered it, which supports it and which is clarified by it, is still alive." *Id.* at 5-6 (citation omitted) (emphasis in the original). The author took the word from the Greek, which some translators interpret to mean "deed" or "action." Sartre uses the term to mean any *purposeful human activity*. I adopt the Sartrean meaning within the article, which the addendum that *praxis* herein refers to *purposeful human activity* of a socially ameliorating nature.

104. See A. FLEW, *A DICTIONARY OF PHILOSOPHY* (1979). Technically the term *scepticism* (more frequently spelled *skepticism*) refers to both a philosophy and a philosophic movement. Roughly defined, the non-capitalized term refers to the "philosophical attitude that maintains that sure knowledge of how things really are may be sought, but cannot be found." *Id.* The classical arguments for scepticisms focused on the unreliability of the senses and the fact that experts contradict each other. *Id.* The early sceptics responded to their dogmatic opponents, although in time others viewed the sceptics as no less dogmatic because they claimed that certain impressions compelled the mind more than others due to their serviceability, which the sceptics found necessary to use when their critics claimed that the sceptical position inhibited individual action. Based on the above, one can appreciate that the term now denotes an attitude of systematic doubt about views on various aspects of human existence.

105. See *A DICTIONARY OF PHILOSOPHY*, *supra* note 104, at 306. Technically, this term refers to the "theory that I am the sole existent," *Id.* The solipsist holds that "I alone exist independently, and what I ordinarily call the outside world exists only as an object or content of my consciousness." *Id.* Philosophers doubt whether any per-

pending their energies toward exploiting the fault lines in the structure of racism, and that deflects persons of color from identifying effective cures for racism through the law? The next Part will more fully answer these questions.

FOURTH PROLOGUE

Strangely, even those who support and defend the role of the law in the existing economic system are not truly happy. Lacking any real motivation for continued achievement in their too safe, too secure enclaves, some become petty, turn on one another, form cliques, and generally make one another miserable. Matters are enlived when, every generation or so, a new jurisprudential movement comes to the Academy.

At present, one such movement is causing consternation at some of the most prestigious schools. Adherents of this new movement urge people of color that their cause will be furthered if we help overturn the old guard. The rhetoric favors destruction over reform, contradiction over clarity, confrontation over discussion, and the word 'indeterminate' as the ultimate condemnation. There is much seriousness here and some good sense, but hearing the debate and trying to determine its possible relevance to our plight, one is reminded of the old Harlemite who in the 1930's found himself harangued by an earnest young Marxist. The old gentleman was patient and listened quietly about how the millenium would come in under a red flag. When the leftist proselytizer had finished, the black man said he had a question.

"Ask me anything, pops," the young radical urged. "We have all the answers to this society's problems."

"Well," said the old man, "when the revolution is over and the communists are in power, will they still be white?"¹⁰⁶

son has ever held such a view, and I do not mean that CLSers subscribe to this view. I do mean, however, that CLSM views in general and those with respect to racism in particular raise the question whether these attitudes do not propel the subscribers to the brink of solipsism. The delegitimation process, inelegantly symbolized by the term "trashing" poses a danger that subscribers doubt that any other world exists beyond their own immediate philosophical constructs, namely their "true consciousnesses."

106. See Bell, *supra* note 1, at 391.

III. THE CRITIQUE OF THE CLSM'S RESPONSES TO RACISM IN AMERICA

In the last Part, I posed several questions that direct our attention to a critique of the CLSM's responses to racism in America. Now I want to explore those questions at some length. In doing so, I want to reiterate that this critique will sympathetically analyze the effectiveness of the CLSM responses. Yet, I do not want to communicate that the critique will supply a paean to CLS accomplishments, ignoring any shortcomings and honest differences of opinion. In essence, the critique will examine the positives and negatives of the CLS responses.

If I began with the positive dimensions, I can note the commendable efforts to interact and involve persons of color within the CLSM, including the efforts to include us within the various national conferences and meetings. Indeed, the focus of the Tenth Conference demonstrates some sincerity in challenging racism inside and outside of the CLSM. The willingness to undertake a genuine introspection of the role of the CLSM in extirpating racism within the movement and within the law school classroom demonstrates the commitment to reaching far to work on the roots of racism. Moreover, the solicitude makes a major, strong statement about efforts to address a serious social problem that the legal educators of color constantly encounter: the fierce professional efforts to marginize¹⁰⁷ us within the legal education world. We have difficulties getting into this world and playing significant, humanizing roles while in this world, especially as credible intellectuals of substance. Any efforts to challenge the customary marginization (the unannounced and often unconscious *de rigueur* treatment) of the law school world deserves *high* praise. In essence, the treatment means that persons of color have one less slight to surmount in their travails, like Sisyphus, to climb the "arduous mountain of legal education."

Likewise, I can note the commendable efforts to focus on the

107. I will analyze in detail these fierce professional efforts to marginize law professors of color in a forthcoming article entitled *Minority Law Professors and the Myth of Sisyphus: Consciousness and Praxis Within the Special Teaching Challenge in American Law Schools*. If I modernize the metaphor for persons of color in legal education, all of these persons signify Jackie Robinson at some level breaking into and seeking centralization in legal education.

structures of racism, as evidenced by the analyses of Freeman and Klare. Without a doubt those analyses represent several helpful efforts to probe the depths of the legal consciousness to interpret how and why American law has developed its responses to racism. Whether one categorizes these persons as the "new abolitionists" (perhaps more accurately the modern "Radical Republicans," using the small "r" meaning while playing off of the capital "R" 19th century heritage) or the "new Platonians,"¹⁰⁸ they have moved us out of intellectual complacency into a reexamination of old, venerated ideas and accepted practices about classical liberalism and "civil rights" approaches to racism.

Furthermore, I can commend them for efforts to overcome the "scholarly imperialism"¹⁰⁹ of mainstream white law professors who exclude persons of color from an effective voice in civil rights scholarship. Both Freeman and Klare make active, sincere efforts to identify and recognize scholars of color, both inside and outside of the legal world. Indeed, both of these persons give great regard for the views and opinions of scholars of color. Freeman's analysis of Bell's book represents a warm treatment wedded to a sincere difference of opinion about the direction of future responses to racism. Similarly, Klare gives great recognition of the power and penetration of early civil rights analyses, in particular the consideration of the work of the brilliant, but often unrecognized and unacknowledged, Charles Hamilton Houston, one time dean of Howard Law School.¹¹⁰

Moreover, I note the influence of Freeman, Klare, and others in the CLSM on the analyses and writings of persons of color. One discovers traces of the CLS analyses in the state-

108. See A DICTIONARY OF PHILOSOPHY, *supra* note 104, at 251. In his middle period, Plato characterized "Socrates as employing an essentially negative method." He had Socrates "exposing the inadequacies of a proposed definition of, or thesis about, the excellencies of character, but not producing the sought for definition." *Id.* One might note the approach of the middle period "opens Plato to the charge that dialectic, however seriously pursued, will only serve to undermine people's faith that there are standards of conduct to be sought." *Id.*

109. See Delgado, *The Imperial Scholar: Reflections On a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

110. See Klare, *supra* note 66, at 185 and 190-92. He examines the advocacy of Charles Hamilton Houston in the celebrated *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944).

ments¹¹¹ and writings¹¹² of persons of color. No one really knows how many other such influences have appeared and will appear. Significantly, this discussion underscores the liberating impact that the CLS analyses have had on the victims of racism, propelling them to explore its barriers.

Focusing on the limitations and negative dimensions, I note the lingering exclusionary character of the CLSM. Despite the obvious efforts of some within the CLSM to encourage wider participation by persons of color, the movement remains a largely ethnocentric, radical intellectual movement. Perhaps the genesis¹¹³ and the constant reference¹¹⁴ to this exclusionary beginning has some bearing on the reluctance¹¹⁵ of persons of color to participate fully. Outsiders may interpret this emphasis as the unspoken message about the exclusivity of this intellectual movement; they may see it as an ethnocentric radical intellectual reification of the European radical intellectual tradition. Unwittingly, the emphasis may result in a polarity between two important groups who need each other, radical intellectuals and persons of color, with a fair number of the latter wondering whether this movement merely signifies the self-absorption in the other group's virtuosic intellectual displays to the exclusion of truly grappling with the pressing social problems of persons of color. Perhaps other reasons can explain the exclusionary character. Persons of color may find the ideas, the methodology, and the conduct of the participants disincentives for participation. Whatever the root causes, the CLSM maintains its exclusionary character; it continues to *talk to* and not *dialogue with* (or *talk about* and not *talk with*) persons of color.

111. See, e.g., Speech, *supra* note 4.

112. See, e.g., Lawrence, *supra* note 95; Lawrence, "Justice" or "Just Us: Racism and the Role of Ideology" (book review), 35 STAN. L. REV. 831 (1983); Delgado, *supra* note 109; Haines forthcoming article, *supra* note 107 (utilizes phenomenological analysis to develop an account of the role of minority law professors within legal education, to decode the meaning of environments as they experience them, rather than accept the reified form compelled by the environmentally harsh, frozen role of the marginalized person).

113. See Schlegel, *supra* note 2.

114. See, e.g., Hutchinson & Monahan, *supra* note 59, at 200.

115. On the other hand, the reluctance of persons of color to fully participate could result from a lack of awareness and knowledge about the CLSM. It could also flow from a historically derived, centuries old suspicion that all persons of color experience at appearance of another set of promises of liberation. Possibly persons of color have other reasons for caution. See text for further explanations.

Furthermore, I note the paucity of the CLS analyses that address racism in America. Given the extensive writings under the umbrella of the CLSM, one cannot avoid the conclusion that some factor operates to propel the CLSers past the important subject of racism. If Derrick Bell and others have correctly assessed the role of race in the development of American law, both outside and inside constitutional law, the limited coverage of the CLSM seems incongruous. Moreover, one cannot safely rely on the explanation that the CLSM fears its participants will become known as "civil rights jockeys." Persons who brave the opprobrium of the teaching profession by creating the concept of "trashing" would hardly wince (or would they?) at the thought of being further marginalized by association with analyses of racism. Perhaps the structures of racism have deep unconscious levels that help determine the priority of the external scholarship. Regardless of the explanation, this may cause persons of color to wonder whether, in its totality, not in its discrete analyses such as that of Freeman and Klare, the CLSM remains at the margins of truly addressing racism.

Moreover, I observe that a significant number of very helpful recent analyses¹¹⁶ of racism have come outside of the formal CLSM. For example, Derrick Bell has long functioned as a virtual fountain of inventive, incisive, and stimulating analyses of racism, through a host of formats: books, traditional law review articles, non-traditional law reviews,¹¹⁷ allegorical commentaries,¹¹⁸ speeches,¹¹⁹ his conduct at national conferences and in national organizations, and his conduct as dean of a law school. Richard Delgado has similarly functioned as a fountain of analyses about racism in like formats.¹²⁰ Charles Lawrence,¹²¹ Ralph Smith,¹²² and Roy Brooks¹²³ have also made

116. The listing in the text does not pretend to exhaustively enumerate the helpful analyses. I chose them because of the prominence of the persons and because of my personal knowledge of the analyses.

117. See, e.g., Bell, *The Supreme Court 1984 Term, Foreward: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985); Bell, *An American Fairy Tale: The Income-Related Neutralization of Race Law Precedent*, XVIII SUFFOLK U.L. REV. 331(1984).

118. See, e.g., Speech, *supra* note 2.

119. See, e.g., Bell, AALS CIVIL RIGHTS WORKSHOP SPEECH, *supra* note 2.

120. See, e.g., Delgado, *supra* note 109; Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

121. See, e.g., Lawrence, *supra* note 97.

122. Smith, *Alternatives to Paralysis: A Working Paper Precipitated by the Affirmative Action Cases*, 61 OR. L. REV. 317 (1982).

123. See, e.g., Brooks, *Affirmative Action in Law Teaching*, 14 COLUM. HUM. RTS. L.

significant contributions with scholarship and through their conduct at various levels within legal education. Moreover, one can identify significant recent historical analyses¹²⁴ that extend our knowledge of the foundations of racism in American law, sharpening our understandings about the phenomenon of American racism.

The above point about the very helpful analyses arising outside the formal CLSM holds special weight when I focus on the subject of affirmative action. While one can take the approach of Freeman (assuming for the moment it represents a valid analysis) that strategies for fighting racism, such as affirmative action, reinforce the oppression of racism,¹²⁵ one still has to confront the reality that persons of color must wage a multi-front battle against the complex social phenomenon called racism, including wrenching the niggardly gains of affirmative action from the complex forces in American society. For this reason, any inventive analysis¹²⁶ outside of the CLSM that confronts the strains or fault lines in the myth of a color blind equal protection clause or that exploits any fault lines in the Title VII ambivalence to affirmative action should receive encouragement. We must praise efforts that result in pushing race-conscious relief to new frontiers, as recently happened in *U.S. v. Paradise*,¹²⁷ and *Johnson v. Transportation Agency, Santa Clara County*,¹²⁸ even as we stop to ponder the possible truth of Freeman's thesis. People of color must not lose sight of the unceasing struggle that America has written into the script of racism and hence into the very fiber of their social beings — which includes exploiting the ambiguity in racism as well as analyzing whether a particular exploitation furthers or impedes progress toward eliminating racism.

Freeman and others in the CLSM make an unsettling point about feeding into the structure of racism. Indeed, their analy-

REV. 15 (1982); Brooks, *Civil Rights Scholarship: A Proposed Agenda for the Twenty-First Century*, 20 U.S.F. L. REV. 397 (1986) [hereinafter *Civil Rights Agenda*].

124. See *Symposium — Historical Race Relations*, 17 RUTGERS L. J. 407 (1986). For an analysis of the limitation of Tushnet's CLS approach to history, which may help indirectly explain why the historical approaches in the symposium will undoubtedly receive a warmer reception and greater exposure, see Watson, *Slave Law: History & Ideology* (book review), 91 YALE L. J. 1034 (1982).

125. See Freeman, *supra* note 65, at 1894.

126. See Smith, *supra* note 123, at 118.

127. 107 S. Ct. 1053 (1987).

128. — U.S. —, 107 S. Ct. 1442 (1987).

ses call to mind the earlier quote from Fanon that persons of color should not renounce their freedom through their choices. Yet, American history has taught persons of color a hard, cold lesson: we have only prevailed through the process of accretion, not through cataclysmic actions. 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 numerous cyclical outbreaks of lynchings, the civil rights demonstrations, the urban revolutions of the 1960's, the passage of the Civil Rights Acts of the 20th Century, and the Vietnam War demonstrate that persons of color benefit from glacial not seismic changes in the operation of American law. Accordingly, persons of color must develop a variety of strategies¹²⁹ to combat racism, including utilization of interim measures like affirmative action, and including building transient and interim coalitions that help unmask the edifice of rationalizations that might support racism within the reigning orthodoxy of liberalism.

If I leave my above analysis and proceed to the substance of the Freeman analyses, I find some troubling points. By now we know his syllogism, as outlined above. We know of his concentration on the role of class divisions to explain the legitimation process of law, helping us comprehend why the law has adopted and largely reinforced the perpetrator perspective in resolving racism. But one should not too quickly adopt his view about the role of class divisions to explain legitimation in the law. What does he mean about the class structure of American society, given its present complex character? Does America have monolithic classes, the rich versus the poor for example, or does it have various classes: rich versus poor, professional versus non-professional, educated versus uneducated, service worker versus heavy industry worker, government worker versus non-government worker, industrious person versus the indolent person, rural person versus the city person, and the like? I believe the answer is evident.

129. Cf. M. TIGAR & M. LEVY, *LAW AND THE RISE OF CAPITALISM* 286 (1977). The authors point out that while reigning legal ideology of the dominant group in society forces the populace's attention to "interpreting the system of rules," a dissident group can exploit the natural openness of the rules and the dominant legal ideology in order to "explore the limits of the dominant legal ideology in order to see how much can be accomplished within those limits."

Hence, anyone will have difficulty using the term “ruling class” in today’s complex American society, even if one can make sense of the traditional class analysis. In point of fact, we observe Foucault’s ideas about the various knowledges and their “moving substrate of force relations that engenders states of power” in operation. We have multifarious groupings that create various forms of knowledge, which, in turn, engender power relations. We can no longer discuss the society in the monolithic terms that Freeman uses; we can no longer simply and loosely use class structure and ruling class terminology. Indeed, Freeman seems on the verge of making this admission in his book review when he admits that the traditional Marxist class analyses do not adequately explain contemporary racism. He admits that no contemporary theory, historical or otherwise, adequately explains the phenomenon of racism. In effect, we all must return to square one with our analyses putting the “economic reductionism” of the class structure analysis in the museum of analytical artifacts to represent a bygone era.

Given the dubiousness of his class analysis (even in his own eyes), can he truly argue that civil rights law only offers a credible measure of tangible progress without disturbing the class structure of society? Must he not adopt another position? Perhaps he means that until someone truly explains racism in more penetrating non-traditional Marxist class analysis and until that person (or others) finds the path to liberating strategy at all levels — the legislative, judicial, administrative, executive, social custom, and psychological — civil rights law will simply make minor inroads into the changing complex phenomenon of racism. Perhaps he means, in effect, that we should keep the perpetrator analysis but jettison the class analysis underpinnings, leaving racism as an irreducible phenomenon, or we should retain the perpetrator perspective and reduce racism to some other foundation, such as a psychological foundation.

I find another troubling aspect in the substance of Freeman’s analysis. He does not give due credit to the positive, overriding value of some of the doctrines (vested rights, equality of opportunity, and the like) for the well-being of persons of color. Even with the possibility of legitimizing racism because of the devious conduct of some in America, persons of color *cannot* dispense with these concepts for survival. We need cer-

tain fundamental protections (not the same as “neutral concepts”) that we can manipulate and deploy analytically to stimulate the moral consciences of America’s decision-makers, which help us navigate the channels and major waters of America’s constitutional scheme of government. These fundamental rights concepts serve as breaks and checks on the diminution of the personhood of persons of color, when not abused by the devious, and when persons of color can successfully appeal to emotions of the political decision-makers, or when persons of color can compel particular results with the concepts that deploy the various checks and balances in the political system.

Moreover, does the concern for the fear over the imposition of burdens on some whites if victim-type relief gets granted to persons of color mean that voluntarism or equality of opportunity, developments from the liberal jurisprudential analysis, take us in the wrong direction analytically? Could not part of the problem be with the narrowness of the individuals, many of whom succumb to “zero sum” type thinking? Should not some of any analysis focus on the necessity of convincing whites that the honest sharing of the now limited bounty of American life will redound to their benefit — in terms of a happier and healthier American society and in terms of how white Americans feel about themselves as giving and sharing human beings? Hence, I must question whether, as Freeman says, an unacceptable contradiction lies only at the level of values, with the law hiding and further assisting the manipulation of the value contradiction for some class bias. For persons of color, the concepts serve to offset the further tyranny of the racist and to help remedy society from the tyranny and evil deeds of racists (for example, the Founders of the United States).

Moreover, with what doctrinal analysis should persons of color advocate for their well-beings if they advocate replacement of the vested rights and equality of opportunity doctrines? Does Freeman inform us beyond elucidating the contradictions? If he intimates that some communitarian, non-private rights oriented approach must come forth to save us from reinforcing the oppression, he has an obligation to us to draw out the outlines of such a view. Perhaps he means to point toward the CLS analyses that Unger and other CLSers now attempt to make with their alternative visions of American

society. For the present, persons of color must ride these vehicles to liberation until better ones come along.

If I examine the Freeman analyses in light of the Jordan and Lawrence approaches, I gain further appreciation for the limitation of Freeman's approach. Jordan and Lawrence draw one's attention to the full panoply of filaments that comprise society's law: legislative creations, judicial creations, customs, and other social creations that form the web of social relations. Social attitudes thus radiate out into both formal and informal reflections of social interactions, not simply judge-made law. Accordingly, one cannot focus the majority of one's attentions on the narrow scope of the United States Supreme Court cases, devoting one's attentions primarily to exploring ideas developed around a limited "perpetrator/victim" axis. If one does so, one misses the significance of the Jordan analysis and the rich lessons that Judge Higginbotham supplies in his monumental *In the Matter of Color*.¹³⁰ Both of these persons provide numerous examples of the tortuous reasoning of white Americans at all levels — legislative, executive, administrative bodies, private law-making, custom, sacred law development, human science and the like — who made (and make) themselves "victims" as they acted (and act) like "perpetrators" of racial oppression. For example, the whites who perpetrated the restriction of the manumission of slaves in Virginia during 1806 victimized themselves in numerous ways. Thus, one has *extreme* difficulty singling out persons of color for special designation as "victims" on the continuum of "victim/perpetrator," using a small aspect of American law.

In addition, Jordan and Lawrence approach underscores the tortured reasoning that must result in adopting a "victim/perpetrator" axis to demonstrate the view of American law as a "rationalizing ideology of the oppressor." In actuality, the Jordan and Lawrence approach makes us cognizant that American law dissolves into a "complicated coded reflection" of the complex, tortured, conscious and unconscious mental processes of white America. Law represents the surface of the plate tectonics of the deeper and not too clearly understood geological forces of racism, in the same fashion that the earth's crust, the resultant mountains, and the seas represent the earth's larger and little understood geological forces.

130. A. L. HIGGINBOTHAM, *IN THE MATTER OF COLOR* 3 (1978).

If I explore the logic of the above critique of Freeman's approach, I can argue that one can adopt a more compelling explanation for the complicated connection of racism to the development of American law than the "victim/perpetrator" axis harnessed to the "economic reductionism" analysis. For example, one can follow the suggestion of Lawrence by using the "psychoanalytical theory" — one can utilize the id, ego, and superego analysis, seeing the cyclical movement of the law along the lines that Jordan describes in his book. Indeed, this approach helps us understand such perplexing juxtapositions as the post-civil rights protections for the freedmen and the infamous Black Codes, the harsh race-baiting of the early 20th century and anti-lynching laws, and the harsh segregation of the mid-20th century and the civil rights activities of the 1960s. In sum, one can argue that American law, *in its broadest sense*, not simply the United States Supreme Court analyses, reflects the "perpetual duel between the higher and lower natures:" individual and communal consciences struggling with primitive urges, the rational followed by the irrational, followed by a clearing away of the irrational, followed by outcroppings of irrationality, followed by the consciences urging rationality.

Furthermore, if one stays with the psychological analysis, one may bring a different light to the contradictions that Freeman notes in classical liberalism. For example, one can explain the contradiction between individual freedom and the community as a conflict generated by the complex psychological development of one out of the other. One can argue that the concept of individual freedom developed out of and eventually became the antipode of the notion of the community and the individual belonging to the community.¹³¹ Through slavery and the attitudes that preceded and developed subsequent to slavery, both the slave and the master recognized the concept of freedom from oppression: one because he or she lacked such freedom; and the other because he or she denied this freedom. Thus, the oppressor evolved a negative sense of community, and from the denial of belonging to the community (slavery and its social death) a concept of acting separate and apart from the community to obtain the benefits of membership within the community, which became refined by the oppressor within the notion of individual liberty. Since the op-

131. See O. PATTERSON, *SLAVERY AND SOCIAL DEATH* 334-42 (1982).

pressor controlled many societal manifestations of the law, the oppressor both enshrined its freedom from the oppression of others (tearing it from the bosom of the community) and its right to deny this freedom from oppression to others. Accordingly, the notion of community and the Anglo-American notion of individual freedom must always live in a state of complex tension and conflict: the former shifts in its outlines and meanings over time but mainly centers on belonging to a unity, while the latter, also shifting over time, symbolizes trying to avoid the dismissal from and acting outside to return to membership or acting in opposition to membership in the community.

If I leave the substance of Freeman's analysis to examine Klare's ideas, I carry forward a large mass of the Freeman criticism to Klare. First, Klare makes his ideas vulnerable to the criticism that he falls prey to the malady of "economic reductionism." His focus on the class and race domination ideological underpinnings likewise makes him miss the complexity of racism in his interpretations of the interlocking character of racism and the law. Second, he too focuses on only one aspect of the web of the law, United States Supreme Court analyses. Third, he, like Freeman, adopts an interesting but unconvincing set of dichotomies to explain the evolution of antidiscriminatory law. Those dichotomies — the "public/private" distinction and the "substance/process" distinction — seem plausible to sharply explain the cycles of irrationality and rationality in the confluence of the labor and civil rights case law; however, they do not appear to easily explain the genesis or development of such 19th century law as the Freedmen's Bureau Legislation and the spate of civil rights legislation during the 1960s.

If I undertake a historical examination of the substance of the Freeman and Klare analyses, the reader can gain an even sharper sense of the criticisms that I make of these views: the ideas do not necessarily represent previously unarticulated sharp criticisms of the role of the law in crystallizing racism in America; nor do the ideas equal the fullness and cogency of some earlier analyses. For example, I can assay several points that Dr. Martin Luther King, Jr. raised in (and outside) of his

“Letter from Birmingham City Jail”¹³² nearly three decades ago to illustrate my criticisms.

First, Dr. King brought sharp emphasis to the moral detour of the Founders of the United States. He illuminated the conduct of humans who use base economic and political motives to deceptively call “law and order” justice, moving the country away from establishing nobler notions of justice and equality. Moreover, he made Americans acutely aware of what Jordan calls the “perpetual duel between America’s higher and lower natures.”¹³³ With this emphasis, he made Americans reexamine the necessity of the indefatigable struggle to overcome this tendency, making us value the role of critical social agents who play positive parts in the unceasing vigilance. Further, he recognized the immorality of groups and, for that reason, advocated the necessity of revitalizing the civic conscience to awaken the responsible agents to identify and extirpate unjust laws. Finally, with his focus on the unfinished work of the *national dream of brotherhood*, he underscored the intricate and inextricable thread that ties race, politics, and social reform together in America.

Second, Dr. King brought emphasis to the primal nature of human existence, its communal orientation. With his emphasis on the “Beloved Community,”¹³⁴ or brotherhood, he stressed the solidarity of human existence, in the sense of humans belonging and relating to each other. He appreciated

132. See M.L. King, *Letter from Birmingham City Jail*, in CIVIL DISOBEDIENCE 72 (1979).

133. Cf. J. HIGGINBOTHAM, *supra* note 129, at 384, citing C. MILLER, *Constitutional Law and the Rhetoric of Race*, in PERSPECTIVES IN AMERICAN HISTORY 148 (1971). Judge Higginbotham calls the tendency that of “moral overstrain,” a “. . . tension caused between high ideals and low achievement, between the American creed including equalitarian individualism and the historical American reality of unjust, unequal and class treatment for blacks.”

134. For a discussion of Dr. King’s utilization of the phrase, see generally K. L. SMITH & I. G. ZEPP, JR., SEARCH FOR THE BELOVED COMMUNITY: THE THINKING OF MARTIN LUTHER KING, JR. 119 (1974) (“The vision of a ‘Beloved Community’ was the organizing principal of all King’s thought and activity.”). See also Strum, *Crisis in the American Republic: The Legal and Political Significance of Martin Luther King’s Letter from a Birmingham Jail*, 2 J. L. & RELIG. 309, 321 (1984) (“Where equality is a principle of distribution, stipulating how the benefits and burdens of society are to be allocated, brotherhood or the beloved community is a principle of solidarity, indicating how the members of a society belong to and with each other.”); Dr. King’s famous “March on Washington” speech (“With this faith we will be able to transform the jangling discords of our nation into a beautiful symphony of brotherhood.”); M. L. KING, WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? (1967).

that implicit within this community lay, as Martin Buber points out, a dialogic center,¹³⁵ a sense of interacting and communicating among individuals, the turning of one individual to another with a "mutuality of inner action," the sense of reciprocity manifest even in moments of unpleasantness, the sense of love that individuals must have one for another, and the sense of responsibility, in its non-specialized ethical dimension of responding to moments of life and its moral sense of responding to the cosmic spirit immanent in the self responding. Importantly, Dr. King centered the vision of the human community within and outside of man-made positive laws, judging the basic political structures and policies of the society as they affect the fundamental human personality.¹³⁶ Indeed, his emphasis brought attention to the fact that all forms of "alienation, psychological, economic, and political," signify excruciating separation that distorts the meaning of human existence. Moreover, his emphasis on the communal existence underscored the ancillary point that America struggles with the tension between its received traditions of Enlightenment Liberalism, with its economic focus in its individual orientation, and Religious Communalism, with its extra-legal critique of human existence.

Third, Dr. King underscored the importance of the interconnectedness of sacred and secular laws¹³⁷ in the American political design. As one observer notes, Dr. King "understood as few of his contemporaries that the religious sensibility and political thought at the time interpenetrate and together constitute a resource for understanding and evaluating given religious and political practices."¹³⁸ Dr. King underscored that this synergism brings forth, through the combination of Hebraic-Christian and European natural law traditions, the "concept of human personality."¹³⁹ In turn, this concept serves as an integral part of the American political philosophy within the notion of the community and underneath the positive law, and, by extension, serves as a criterion of the morality of the society. Because of this criterion of the human personality, Dr. King could argue that "any and all social systems that distort

135. M. BUBER, *BETWEEN MAN AND MAN*, 1-39 (1947).

136. See Strum, *supra* note 135, at 316-21.

137. See King, *supra* note 133, at 77.

138. See Strum, *supra* note 135, at 317.

139. *Id.* at 316-20.

the soul and damage the personality are morally culpable.”¹⁴⁰ Hence, Dr. King argued that this concept impels the reified political institutions and the positive laws to reflect that the community consists of healthy human relationships founded on this primal human personality.

Moreover, Dr. King’s emphasis on the interconnectedness of the sacred and secular laws brought a sharper examination of the “structural crisis” of the American Republic: racism. His utilization of the combined religious and political traditions causes Americans to appreciate that the country cannot simply cast the crisis as the tension between racism and the idealism of equality. The crisis signifies a tension between the “*reality of human personality*, a principle of religious deprivation and political implication, and the *reality of racism*, a principle that . . . distorts the essential character of religion and politics.”¹⁴¹ Dr. King understood that this criterion of human personality, with its religious-based natural law, clearly manifests itself in the United States Constitution. For this reason, Dr. King made us aware that America’s organic laws, from which other laws radiate, reflect the religious and the constitutional traditions that converge in a meaning of human life antithetical to racism.

Indeed, by transcending the limited concern of equality, Dr. King made us aware that we must address larger social and economic questions when analyzing the fabric of American laws. This approach permitted Dr. King to argue that poverty in America, for example, signifies a glaring failure of communal responsibility and institutional denial of human dignity and social participation. Furthermore, Dr. King’s utilization of this rich religiously and constitutionally based concept of human personality highlighted the fact that brotherhood does *not* mean equality. For him, equality brought attention to the distribution of benefits and burdens of society, while the notion of the community brought attention to the solidarity and dialogic character of American life. Hence, American racism in the fabric of the law both contradicts the notion of equality, unfairly preferring one individual over another or group of individuals over others, and contradicts the notion of the com-

140. See King, *supra* note 133, at 77. Dr. King notes that “[a]ny law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality.”

141. See Strum, *supra* note 135, at 316.

munity, since it pits individuals against each other and groups against each other.

Beyond the above points about the limitations of the CLSM's responses to racism, I note several other plainly negative points. First, the undue CLS emphasis on the negative criticisms has important unwanted side effects. Yes, the CLS criticisms have their positive side:

Criticism can be very creative therapy; criticism can liberate and enlighten. By "unfreezing" the world as it now appears, the Critical scholars hope to enable individuals to imagine and attain new possibilities for self-development and meaningful social interaction. For the CLSers, criticism is an antidote to the social paralysis induced and sustained by the existing hierarchial nature of society. By reassuring people that things need not always be as they are now, the CLS movement can inspire the confidence necessary to reject prevailing agreements.¹⁴²

But other persons¹⁴³ have noted the debilitating ineffectiveness of the negative critiques of CLS. In their excessiveness, the negative criticisms lead to pessimism, and, in turn, they lead to skepticism and extreme fear that they push society too close to the brink of nihilism and chaos. Moreover, these negative critiques can undermine notions like fundamental rights,¹⁴⁴ which serve as important anchors of our societal notions of human rights in the antidiscrimination context. The analyses can unwittingly confuse and misdirect analyses about racism *away from* directions that will extend the legal analyses for amelioration, especially through the utilization of the indeterminacy and pervasiveness components. In particular, they mire persons down with efforts to address the contradictions in the concept of indeterminacy and they alarm persons because the pervasiveness analysis seems to lead to totalitarian political solutions,¹⁴⁵ if not to nihilism. In addition, the negative critiques can lead to the denigration of past civil rights activities (much accomplished before CLS arrived in legal academia), casting doubt on several generations of serious and sincere struggles to combat racism by an army of stout men and women. Klare recognizes this fact and attempts to inject

142. See Hutchinson & Monahan, *supra* note 59, at 228.

143. See, e.g., Bronson, *supra* note 31, at 264; Sparer, *supra* note 15, at 516-52.

144. See Sparer, *supra* note 15, at 516-52.

145. See, e.g., Sparer, *supra* note 14, at 525.

balance in his analysis of the confluence of the labor and civil rights movements. Also, this undue emphasis sends negative signals about the appropriate role models¹⁴⁶ for law students both inside and outside of the civil rights courses. This point raises *particular* concern because of the impact on various students of color, many of whom already arrive in law school vulnerable to the discouragements that law school can bring. Without proper attention to establishing a balance, the undue emphasis on the negative critiques will communicate to students of color a sense of the *utter* futility in undertaking traditional civil rights activities. Finally, these negative critiques cast doubt on contemporary civil rights activities, which, in turn, casts doubt on the soldiers in this army of workers. This shadow on the effectiveness of civil rights activities creates confusion and resentment in persons of color from the CLSM, casting doubt on the efficacy of CLS as it presently stands.

Second, the CLSM analyses of racism can lead to the serious, active discouragement of social change. The CLS analyses can lead to the dethroning of one dogmatism, a variety of formalism, only to enthrone another dogmatism, a form of skepticism, which stalls social change. The CLS analyses can make persons skeptical of any ameliorative action, for fear that it will lead into the structure of racism. Persons of color must avoid the over-intellectualizing about the process of delegitimation; they must bring some balance¹⁴⁷ into the analysis of racism. Further, the participants in the CLSM and their analyses of racism have insufficient involvement in establishing agendas¹⁴⁸ and strategies for combating racism. Klare did demonstrate some sensitivity to this point in his analysis of the confluence of the labor and civil rights movements. Yet, one senses that the CLS analyses place small stock on developing strategy. Moreover, the analyses (again Klare being the exception) give little consideration to a broad definition of law beyond judge-made law. One sees little indication in the analyses of racism

146. *See id.*, at 567-74.

147. *See, e.g.*, Speech, *supra* note 4. Bell makes the point in the following manner: "It seems to me possible to acknowledge that legal principles and doctrine are indeterminate, lacking in rationality, inherently subjective and therefore, illegitimate and in need of deconstruction, and yet at the same time we should be able to devise civil rights strategies in which the conformance of minority strategies with the interests of the majority is not always left to fortuitous occurrences." *Id.*

148. *See, e.g.*, Civil Rights Agenda, *supra* note 124.

that America's laws embrace not only judge-made laws, but they embrace legislative enactments, societal customs, institutional forms of social activity, various social systems, various economic structures, and all patterns of life. Law as such, like the complex human existence it mirrors, envelopes and permeates every feature of human life. Accordingly, analyses that attempt to address an important social structure like racism must reach the far corners of the legal realm.

Third, the CLS analyses of racism do not demonstrate sufficient sensitivity to modern historical and scientific theories of racism. As both Jordan and Lawrence illustrate, modern historical analyses and modern science have much to tell us about the subterranean world of the mind. In turn, this information should enlighten us about the nature of racism and the consequent analyses to combat racism. Quite possibly, some CLS efforts to formulate a theory of the personality¹⁴⁹ may point to the direction for correction here, especially if these efforts wed the modern historical analyses and modern scientific ideas. For the present, the CLS analyses of racism seem (contrary to the hype and some public belief) *behind* the movement of important bodies of ideas.

EPILOGUE

Beyond the walls of the City lay a Deep Blue Sea. The priests built small boats and set sail, determined to explore the uncharted courses, the open vistas of this new and undefined terrain. They wandered for many years in this manner, until at last they reached a place that was a half-a-circumference away from the Celestial City. From this point, the City appeared as a mere shimmering illusion; and the priests knew that at last they had reached a place which was Beyond the Power of Words. They let down their anchors, the plumb lines of their reality, and experienced godhead once more.

Under the Celestial City, dying mortals called out their rage and suffering, battered by a steady rain of sharp hooves whose thundering, sound-drowning path described the wheel of misfortune.

At the bottom of the Deep Blue Sea, drowning mortals reached silently and desperately for drifting anchors dan-

149. See Hutchinson & Monahan, *supra* note 59, at 240-42.

gling from short chains far, far, overhead, which they thought were life-lines meant for them.¹⁵⁰

CONCLUSION

The myth once again graphically highlights the human reality. The helpful, illuminated aspect of the CLSM responses to racism seem *paled* by what otherwise shines through as unduly skeptical and solipsistic approaches to racism in particular and to analyses of American law in general. Perceptions cause me to draw this conclusion: the self-absorbed, essentially negative character of the movement as a whole *diminishes* the effectiveness of its worthwhile responses to racism. In point of fact, the movement projects itself, in some moments, as the antithesis of Martin Buber's point about the fundamental dialogic character of existence. I observe a movement that projects itself as an elitist, ethnocentric federation of individuals that plays and enjoys playing word games in its own world, while not truly developing analyses and strategies to address America's *major* social problem: a complex, harsh racism. I observe that this federation presents incomplete analyses for racism and a modest social transformation movement. Yet, we can learn (and have learned) from its incomplete analyses, while not perceiving that they represent a *major* path to social praxis.

Importantly, persons of color must generously recognize and acknowledge other indirect contributions of the CLSM, given the above limitations. First, the CLSM sensitizes us to the necessity of building coalitions, especially with other marginalized individuals. While we critique the shortcomings of the CLSM, we must acknowledge a social solidarity premised on a common goal: the liberation of America's law and, by implication, American society. Accordingly, we respond to the common "rhythm beyond the law"¹⁵¹ and through it seek to harness and direct that "rhythm within the law" to identify the paths out of racism.

Second, the CLSM, like Plato's Socrates before it, challenges us to rethink and reaffirm our vision of the American society. It challenges us to develop a vision that responds both to the dimensions of the social reality of all persons of color and to

150. See Williams, *supra* note 1.

151. See H. WOFFORD, JR., NON-VIOLENCE AND THE LAW: THE LAW NEEDS HELP IN CIVIL DISOBEDIENCE 71 (1979).

human values that we should attain through our legal consciousness. It makes us appreciate, whether it intends to do so or not, that contradictions inherent in human existence, and that the contradictions of life impose serious limitations on making choices between differing and sometimes competing human values.

Third, the CLSM reminds us that persons of color within the law must play major roles in the valuing process, since we do not make the experiences and lessons of racism part-time concerns or a low social priority. The CLSM provides another example of the necessity of accountability for persons of color within the law. These persons continually participate in an ongoing dialogue among minority communities, the majority community, and the legally trained mediators of color. The courses of action of the latter become responsible insofar as these courses symbolize responses that anticipate (and prepare for)¹⁵² the actions and reactions of the others in this triadic relationship.

Finally, the CLSM makes persons of color recognize, by the contrariety of some of the participants' conduct and ideas, that they must interact inside of, to, and through the law within the frame work of a continuing society, of which they comprise central actors and have a vested interest. These persons must do more than "trash" the law of this continuing society, if for no other reason than to recognize that persons of color constructed American law through the significant sacrifice of untold millions of persons who invested hard work, some of whom even gave their lives in the effort. They must reconstruct the law where possible to remove the dead and rotten parts, to remain faithful to the idea that persons of color made the society their creation despite the odds. Despite the conduct of others, persons of color must not forget that the triadic dialogue signifies omnipresent American realities: the centrality of race and racism in American law; and the centrality of American law to the continuing health and vitality of American society.

In closing, one should have clearly gathered by now how I resolved the question in the title. Most certainly, I can acknowledge that the CLSM represents a stimulating, useful contemporary jurisprudential movement without needing to blow

152. See Speech, *supra* note 4.

its contributions out of proportion to their importance, especially in addressing the major social structure of racism. All persons associated with the law can certainly profit from a study of the CLSM's responses to racism, provided they can look past the rancorous intramural conflict among the high priests of the law. Even with the limitations noted, I see possibilities, directions, and glimmers of approaches and thoughts not yet fully formed. Perhaps the chains of thought from the priest-turned-gods, the new seekers of truth, and their conduct will genuinely signify the fragments of important "life-lines" meant for mortals of color beneath the Celestial City. **ONLY TIME WILL TELL.**