

LOOKING TO THE BOTTOM: CRITICAL LEGAL STUDIES AND REPARATIONS

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Introduction

When you are on trial for conspiracy to overthrow the government for teaching the deconstruction of law,¹ your lawyer will want black people on your jury.² Why? Because black jurors are more likely to understand what your lawyer will argue: that people in power sometimes abuse law to achieve their own ends, and that the prosecution's claim to neutral application of legal principles is false.³ This article discusses the similar perspectives and goals of people of color and critical legal scholars. It also suggests that the failure of the two groups to develop an alliance is tied to weaknesses of the Critical Legal Studies (CLS) movement.

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¹ Cf. Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 Stan. L. Rev. 391, 403 (1984) (quoting Mark Tushnet, who said, "when they find out what we are doing they will come after us with guns"); E. Schrecker, *No Ivory Tower: McCarthyism and the Universities* (1986) (describing persecution of left academics during the McCarthy era). See, Frug, *McCarthyism and Critical Legal Studies*, 22 Harv. C.R.-C.L. L. Rev. 665 (1986) (reviewing E. Schrecker, *supra*, and comparing McCarthyism to current attacks against critical legal scholars).

² See J. Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels* 32-35, 171-91, 225-51, 375-81 (1977) (discussing the sensibilities of black jurors). The prosecution in the political trial of scholar-activist Angela Davis used its peremptory challenge to remove black jurors. B. Aptheker, *The Morning Breaks: The Trial of Angela Davis* 173-84 (1975).

³ For example, the prosecution in Angela Davis' trial alleged that she had participated in a bizarre prison escape/murder conspiracy. Defending against the felony charges, she and her attorneys educated the jury about the reality of government oppression of blacks, and in particular blacks who are Communists. In her extended two-hour opening statement to the jury, Davis spoke about her political activities in "the struggle for Black liberation and for the right of all working people—Chicano, Puerto Rican, Indian, Asian and white." She also spoke of her anti-war and prison rights activities, and the government spy campaign directed against her, contrasting her highly visible political activities with the lack of evidence of criminal acts. The jury acquitted her. B. Aptheker, *supra* note 2; A. Davis, *Angela Davis, An Autobiography* (1974).

The central problem facing critical legal scholars, and indeed all thoughtful legal scholars, is the search for a normative source. Arthur Leff, in an oft-cited article, asked, "[W]ho among us . . . *ought* to be able to declare 'law' that *ought* to be obeyed?"⁴ Although post-realist legal thinkers—left, right, and center—are often ready to proffer a specific perspective, they also conclude that no external, universally accepted normative source exists to resolve conflicts of value.⁵ Critical legal scholars disparage traditional sources of norms such as the market system, the pluralist tradition, and classical liberalism,⁶ yet they hesitate to proclaim new sources of norms. "Speak, God,"⁷ the cry goes forth, but as yet no voice has answered—at least not in the pages of the law reviews.

This article suggests that those who have experienced discrimination speak with a special voice to which we should listen. Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.

The method of looking to the bottom is analogous to but different from the method of legal philosophers such as Rawls⁸

⁴ Leff, *Unspeakable Ethics, Unnatural Law*, 1979 Duke L.J. 1229, 1233.

⁵ See, e.g., R. Unger, *Knowledge and Politics* 295 (1975); Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. Legal Stud. 103, 110–11 (1979). Arthur Leff, a non-CLS theorist, also referred to God in his quest for determinate law. See *infra*, text accompanying note 7.

⁶ See, e.g., R. Unger, *supra* note 5.

⁷ *Id.* at 295. The allusion in the text is to the well-known conclusion of Leff's article:

Nevertheless:
 Napalming babies is bad.
 Starving the poor is wicked.
 Buying and selling each other is depraved.
 Those who stood up to and died resisting Hitler, Stalin, Amin, and
 Pol Pot—and General Custer too—have earned salvation.
 Those who acquiesced deserve to be damned.
 There is in the world such a thing as evil.
 [All together now:] Sez who?
 God help us.

Leff, *supra* note 4, at 1249.

⁸ See J. Rawls, *A Theory of Justice* (1971). As part of his moral philosophy, Rawls proposes what he calls the "difference principle," which requires redistribution of societal goods to the least advantaged whenever this can be done without violating the first principles of liberty. For an expanded critique of Rawls's method, see Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M.L. Rev. 613 (1986).

and Ackerman,⁹ who have proposed moral theories that call for special attention to the needs of the least advantaged. What is suggested here is not abstract consideration of the position of the least advantaged. The imagination of the academic philosopher cannot recreate the experience of life on the bottom. Instead we must look to what Gramsci called "organic intellectuals,"¹⁰ grass roots philosophers who are uniquely able to relate theory to the concrete experience of oppression.¹¹ The technique of imagining oneself black and poor in some hypothetical world is less effective than studying the actual experience of black poverty and listening to those who have done so.¹² When notions of right and wrong, justice and injustice, are examined not from an abstract position but from the position of groups who have suffered through history, moral relativism recedes and identifiable normative priorities emerge. This article, then, suggests a new epistemological source for critical scholars: the actual experience, history, culture, and intellectual tradition of people of color in America. Looking to the bottom for ideas about law

⁹ See B. Ackerman, *Social Justice in the Liberal State* 238-39 (1980) (dialogue between hypothetical disadvantaged and advantaged persons on the principle of equal sacrifice).

¹⁰ A. Gramsci, *The Intellectuals*, in *Selections from the Prison Notebooks* 5 (1971); see also, C. West, *Prophesy of Deliverance* 121-22 (1982) (discussion of the application of the organic intellectual model to black American culture).

¹¹ The jurisprudential value of informing abstract reason with concrete experience has been recognized by feminists. See, e.g., MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory* (Parts 1 & 2), 7 *Signs: J. of Women in Culture & Soc'y* 515 (1982), 8 *Signs: J. of Women in Culture & Soc'y* 635 (1983).

¹² For examples of scholars engaging in this type of study, see, e.g., C. Stack, *All Our Kin* (1975) (a sociologist recording daily life, kinship and exchange systems of a poor black community, and attempting to see through the eyes of her informants); D. Glasgow, *The Black Underclass: Poverty, Unemployment, and Entrapment of Ghetto Youth* (1980) (study of young men living in Watts, California).

Audre Lorde, whose writing addresses the concrete facts of black poverty, concludes that bread, rather than abstract fairness or liberty, is a primary moral concern. Speaking of her trip to the Soviet Union, she stated:

Russia does not even appear to be a strictly egalitarian society. But bread does cost a few kopecks a loaf and everybody I saw seemed to have enough of it. Of course, I did not see Siberia, nor a prison camp, nor a mental hospital. But that fact, in a world where most people—certainly most Black people—are on a breadconcern level, seems to me to be quite a lot. If you conquer the bread problem, that gives you at least a chance to look around at the others.

A. Lorde, *Sister Outsider* 34 (1984).

In contrast to such experiential theory, Rawls' moral theory uses as its unifying concept the "original position"—the philosopher's imagined universe of pre-being, in which people decide upon principles of justice without knowing whether they will be rich or poor. Imagining the possibility of poverty, the deliberators, Rawls argues, will derive rules that protect liberty and are fair to the poor.

will tap a valuable source previously overlooked by legal philosophers.¹³

In developing the idea that the victims of racial oppression have distinct normative insights,¹⁴ this article will first discuss the attractions of the Critical Legal Studies movement to people of color. Part II sets forth the standard critiques of CLS, and suggests that a consciousness-raising dialogue between critical legal scholars and people of color provides an important methodological response to those critiques. The method of looking to the bottom can lead to concepts of law radically different from those generated at the top. Reparations is suggested in Part III as a "critical legalism," a legal norm suggested by the experience of people of color that may be attractive to those who accept the CLS utopian vision.

I. Critical Legal Studies and the Minority Scholar

*It is evident that all reforms have their beginning with ideas and that for a time they have to rely solely on the tongue and pen for progress. . . .*¹⁵

—Frederick Douglass

The movement known as Critical Legal Studies¹⁶ is characterized by skepticism toward the liberal vision of the rule of

¹³ For example, the non-white interpretation of constitutional values supports the doctrine of reparations. See text accompanying notes 281-90. The label "non-white" is used here simply to indicate that non-white people are historically more receptive as a group to this interpretation than white people. The label is not intended to suggest that no white people subscribe to this interpretation. Indeed, Boris Bittker was the first scholar to delineate a constitutional interpretation supporting reparations claims in his classic book on reparations for black Americans. B. Bittker, *The Case For Black Reparations* (1973).

¹⁴ The corollary that victims of non-racial forms of oppression have distinct claims to normative authority is not discussed here because I believe that racism is a separate social phenomenon justifying separate consideration. Persecution on the basis of religion, sex or class are significant, and some of the analysis in this article would no doubt apply to victims of such persecution. The differences in the perceptions of members of different classes of victims, and among different races, is also worth consideration. The phenomenon of working class racism, for example, shows that economic disadvantage does not necessarily engender social enlightenment. These divergences and intersections call for further consideration by critical scholars.

¹⁵ *Our Position in the Present Presidential Canvass*, Frederick Douglass' Paper, Sept. 10, 1852, reprinted in 2 P. Foner, *The Life and Writings of Frederick Douglass* 213 (1950).

¹⁶ For purposes of this discussion, "Critical Legal Studies" refers to the scholarship listed in the CLS bibliography and to the related social movement comprised of individuals identifying themselves as part of it. See Kennedy & Klare, *A Bibliography of Critical Legal Studies*, 94 Yale L.J. 461 (1984).

law,¹⁷ by a focus on the role of legal ideas in capturing human consciousness,¹⁸ by agreement that fundamental change is required to attain a just society,¹⁹ and by a utopian conception of a world more communal and less hierarchical than the one we know now.²⁰

This movement is attractive to minority scholars, because its central descriptive message—that legal ideals are manipulable and that law serves to legitimate existing maldistributions of wealth and power—rings true for anyone who has experienced life in non-white America.²¹ Frederick Douglass realized this

¹⁷ See, e.g., Tushnet, *Legal Scholarship: Its Causes and Cures*, 90 Yale L.J. 1205, 1222–23 (1981).

¹⁸ See, e.g., Kennedy, *Toward An Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, in 3 *Research in Law and Sociology* 3 (S. Spitzer ed. 1980).

¹⁹ See, e.g., Kairys, *Introduction to The Politics of Law: A Progressive Critique*, at 1 (D. Kairys ed. 1982).

²⁰ See, e.g., Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1057 (1980).

²¹ Legal realism is the intuitive legal philosophy of many non-white Americans: "Then the sheriff came and took my mule and corn and furniture—'Furniture? But furniture is exempt from seizure by law.' 'Well, he took it just the same,' said the hard faced man." W.E.B. DuBois, *The Souls of Black Folk* 161 (Signet Classic ed. 1969).

There was a law on the books that Congress had passed called the Soldiers and Sailors Relief Act that said it was illegal to foreclose. The law was commonly called The Moratorium . . . [but b]ecause of the [anti-Japanese] sentiment in Placer County, it would have been impossible for us to get a favorable judgment.

J. Tateishi, *And Justice For All: An Oral History of the Japanese American Detention Camps* 258 (1984).

Your people will do *anything* to get their hands on our mineral-rich lands. They will legislate, stir up internal conflicts, cause inter-tribal conflicts, dangle huge amounts of monies as compensation for perpetual contracts and promise lifetime economic security. If we object, or sue to protect our lands, these suits will be held in litigation for fifteen to twenty years with "white" interests benefitting in the interim.

Sanchez, *Sex, Class, and Race Intersections, Visions of Women of Color*, in *Gathering of Spirit: Writing and Art by North American Indian Women* 163, 166 (B. Brant ed. 1984).

"Everything is political" is a natural viewpoint for victims. In his study of the political awareness of ghetto youth, sociologist Douglas Glasgow noted "[b]eing politically and socially aware is normal for Blacks, since politicization is an integral part of socialization for survival in racist surroundings." D. Glasgow, *supra* note 12, at 22. Indeed, in explaining Critical Legal Studies to some non-whites it is often necessary to explain that some people believe law is NOT essentially political before one can explain why CLS is significant. See also R. Wilson & B. Hosokawa, *East to America: A History of the Japanese in the United States* 245 (1980) ("Japanese-Americans are not necessarily a litigious people . . . [b]ut they learned early in their struggle for equality and justice that the United States was a nation of laws, most of which were designed to protect people's rights. But laws also could be utilized to perpetuate injustices.").

truth about law before Oliver Wendell Holmes ever picked up a pen.²²

The sophistication of CLS description is also attractive and useful to minority scholars. It is one thing to suspect that law is indeterminate, but it is quite another to grasp exactly how that indeterminacy works in specific contexts. In particular, the development of the concepts of the relative autonomy of law²³ and of legal consciousness²⁴ has reached unprecedented heights

²² Oliver Wendell Holmes, Jr., recognized as one of the fathers of legal realism, was born on March 8, 1841, his birth announced by his father's witty letters referring to the new child as "a second edition of your old acquaintance, an o.w.h." C. Bowen, *Yankee From Olympus* 82 (1944). Frederick Augustus Washington Bailey, later Douglass, was born in 1818, and grew up troubled that, as a slave, he did not know his birthday. He began reading Garrison's *Liberator* in 1839, and began his public career soon after. A central theme in Douglass' writing was the conflict between American law, democratic ideals and the reality of slavery. See, e.g., Douglass, *The Meaning of July Fourth for the Negro* (July 5, 1852), reprinted in P. Foner, *supra* note 15, at 192 ("[Y]our prayers and hymns, your sermons and thanksgivings, with all your religious parade and solemnity, are, to Him, mere bombast, fraud, deception, impiety, and hypocrisy—a thin veil to cover up crimes which would disgrace a nation of savages").

²³ As used here, the "relative autonomy of law" refers to a description of law as connected to but not wholly dependent upon historical, economical and political realities. In contrast to the view of law as completely reflexive, "relative autonomy" attempts to account for the occasional development of law in seeming contradiction to existing material conditions. Cf. Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561, 580 (1983); Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 L. & Soc'y Rev. 571 (1977) (discussing Marx's theory and the relative autonomy description).

²⁴ "Legal consciousness" refers to ideas about law that control human behavior from within rather than from without. In contrast to the phenomenon of people obeying law because they are forced to, or because they lack the means to alter existing power structures, legal consciousness suggests that people sometimes internalize legal norms and become mentally unable to imagine and act on other legal possibilities. Ed Greer suggests Gramsci's example of a factory worker who internalizes the concept of private property and thus does not believe it possible for workers to take over the factory. See Greer, *Antonio Gramsci and "Legal Hegemony,"* in *The Politics of Law*, *supra* note 19, at 305; see also Kennedy, *supra* note 18, at 23. Kennedy defines legal consciousness as:

the particular form of consciousness that characterizes the legal profession as a social group, at a particular moment. The main peculiarity of this consciousness is that it contains a vast number of legal rules, arguments, and theories, a great deal of information about the institutional workings of the legal process, and the constellation of ideals and goals current in the profession at a given moment.

For discussions of legal consciousness, see generally Gordon, *Critical Legal Histories*, 36 Stan. L. Rev. 57 (1984); Hutchinson & Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 Stan. L. Rev. 199 (1984); Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 Stan. L. Rev. 575 (1984); and other articles in the CLS symposium issue of 36 Stan. L. Rev. (1984).

in critical legal scholarship. Knowing when doctrine sticks, when it doesn't, and why—and suggesting why knowing why is important—are major intellectual contributions of the Critical Legal Studies movement. Long before CLS discovered the thought of Antonio Gramsci, Frederick Douglass said: "Find out just what any people will quietly submit to and you have found out the exact measure of injustice and wrong which will be imposed upon them."²⁵ The additional contribution of CLS is the detailed study of legal consciousness in a myriad of technical legal contexts.²⁶

This descriptive work of critical legal scholars is liberating. To those who believe that law is a cage within which radical social transformation is impossible, the critical legal scholar can respond with the sophisticated confidence born of a significant body of scholarship. This is why we read Duncan Kennedy as well as Frederick Douglass. CLS is a legitimation process²⁷ for outsiders.

The Critical Legal Studies movement's prescriptive power is also valuable to people of color. The willingness at least to consider the utopian prospect and the passionate criticism of existing conditions of racism and poverty attract non-white readers to CLS.²⁸ Moreover, an elevated understanding of the tra-

²⁵ F. Douglass, Speech at Rochester (July 5, 1852), reprinted in W. Martin, *The Mind of Frederick Douglass* 175 (1984). (Professor Martin's intellectual biography of Frederick Douglass is a valuable source for critical scholars. This author is indebted to Martin's work as a source of quotations and for insights into Douglass' political philosophy).

Like Douglass, Cesar Chavez concluded, "[I]f the Movement fails, it won't be because the growers are powerful enough to stop it, but because the workers refuse to use their power to make it go." J. Levy, *Cesar Chavez* xxiii (1975).

²⁶ See, e.g., Klare, *Critical Theory and Labor Relations Law*, in *The Politics of Law*, *supra* note 19, at 65; Gabel & Feinman, *Contract Law As Ideology*, in *id.* at 172; Matsuda, *Law and Culture in the District Court of Honolulu 1844-1845, A Case Study in the Rise of Legal Consciousness*, _____ *Am. J. Legal Hist.* _____ (forthcoming in 1987).

²⁷ Critical Legal Studies refers to law as a legitimation process, a formalized system that lends legitimacy to what might otherwise seem illegitimate.

See Freeman, *Antidiscrimination Law: A Critical Review*, in *The Politics of Law*, *supra* note 19, at 96. In his discussion of "Antidiscrimination Law as Legitimation of the Reality of Class Society," Freeman argues that in embracing conventional antidiscrimination law "one must become part of the legitimation process." *Id.* at 110, 114; see also *id.* at 5 ("While law has many important functions, the legitimation function is crucial").

²⁸ See, e.g., Kelman, *Trashing*, 36 *Stan. L. Rev.* 293, 348 (1984) ("We will lead silly lives if we ever stop raging against the usual" [referring to child prostitution and violence against women]).

ditional legal concepts of neutral principles²⁹ and rights³⁰ helps protect victims of oppression from the unsophisticated rights-thinking that can be a seductive trap for those on the bottom.³¹

In summary, the Critical Legal Studies movement has advanced legal thought in directions particularly useful for people of color. This usefulness is magnified by the astounding deftness with which critical legal scholars reveal structure, de-construct, and de-legitimate. Like a pack of super-termites, these scholars eat away at the trees of legal doctrine and liberal ideals, leaving sawdust in their paths.³² That they do it so well, and so single-mindedly, is compelling; it suggests that this is what the smartest are doing. Never mind that no one knows what to do with all the sawdust.

II. The Critique of Critical Legal Studies

The standard critique³³ of critical legal scholarship paints the movement as non-programmatic, over-idealized, inaccessible

²⁹ The classic statement of the neutral principles ideology is Wechsler's *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959). Compare D. Kairys, *Introduction to The Politics of Law*, *supra* note 19, at 6 ("A realistic, understandable approach to the law that explains its operation and social role must acknowledge the fundamental conflicts in society; the class, race, and sex basis of the conflicts; and the dominance of ideology that is not natural, scientifically determined, or objective"); Klare, *The Law School Curriculum in the 1980s: What's Left?*, 32 J. Legal Educ. 336, 340 (1982) (The "claim about legal reasoning—that it is autonomous from political and ethical choice—is a falsehood").

³⁰ See, e.g., Freeman, *supra* note 27; Tushnet & Jaff, *Critical Legal Studies and Criminal Procedure*, 35 Cath. U.L. Rev. 361 (1986); Bell, *The Supreme Court 1984 Term: Foreword: The Civil Rights Chronicles*, 99 Harv. L. Rev. 4 (1985); Gabel & Kennedy, *Roll Over Beethoven*, 36 Stan. L. Rev. 1 (1984). But see Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 Harv. Women's L.J. 1 (1986), for a thoughtful critique and reconstruction of the rights of children.

³¹ Peter Gabel argues that:

[t]his is the essence of the problem with rights discourse. People don't realize that what they're doing is recasting the real existential feelings that led them to become political people into an ideological framework that co-opts them into adopting the very consciousness they want to transform. Without even knowing it, they start talking as if we were rights-bearing citizens who are 'allowed' to do this or that by something called 'the state,' which is a passivizing illusion—actually a hallucination which establishes the presumptive political legitimacy of the status quo.

Gabel & Kennedy, *supra* note 30, at 26.

³² See, e.g., Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 Stan. L. Rev. 591 (1981); Klare, *Labor Law as Ideology: Toward a New History of Collective Bargaining Law*, 4 Indus. Rel. Law J. 450 (1981).

³³ "Standard critique" implies the existence of "standard CLS," a concept CLS members reject. Critical Legal Studies, comprising at this stage hundreds of articles

ble, cynical, anti-rational, and nihilistic. This critique is made artfully from within³⁴ and inartfully from without the movement.³⁵ CLS theorists acknowledge the validity of at least parts of the critique, and strive for a transcendence that, as yet, remains illusory.

Overcoming such criticism is possible. Critical scholars condemn racism, support affirmative action, and generally adopt the causes of oppressed people throughout the world. It is time to consider extending those commitments to the practice of critical scholarship and the development of theory. Such an extension requires deliberate efforts to read and cite the work of minority scholars within and without the law, to consider the intellectual history of non-white America, and to learn about the life experiences of people of color. In short, what is needed now is an expanded method of inquiry, akin to feminist consciousness-raising.³⁶

A bottom-up perspective would both inform the CLS movement and help it transcend the standard critique. Reference to this alternative intellectual tradition would help move CLS beyond trashing into the next stage of reconstruction. Each of the following sections examines a standard critique of CLS and proposes a response that draws upon the experience of people of color.

Recurrent criticisms of CLS, discussed below, are that its claims that the law is incoherent are inadequate and inaccurate; that it is elitist and exclusionary; that its criticism lacks a program; that it is a cynical, anti-law movement; and that it fails to resolve conflicts of value. The responses offered here are not intended to speak for the minority community,³⁷ nor to resolve

and even more scholars, represents a rich and complex body of jurisprudence. At the same time, it weakens the movement to deny its commonalities, in the same way that refusal to identify oneself as "feminist" (as in "I am not a feminist although I agree with most of what they are saying") weakens the feminist movement. Thus, this article will attempt to deal with CLS as a defined school of jurisprudential thought, with apologies to any scholars who feel the subtleties of their particular visions of CLS are slighted herein. For an overview of CLS scholarship skeptical of its unifying concepts, see Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 Stan. L. Rev. 413 (1984).

³⁴ See, e.g., Stick, *Can Nihilism Be Pragmatic?*, 100 Harv. L. Rev. 332 (1986); Note, *'Round and 'Round The Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 Harv. L. Rev. 1669 (1982).

³⁵ See, e.g., Carrington, *Of Law and the River*, 34 J. Legal Educ. 224 (1984).

³⁶ See MacKinnon, *supra* note 11, at 515 (consciousness-raising as feminist method).

³⁷ In attempting a non-white response to CLS, I risk writing about the experiences of other races in ways that may not ring true for some members of that race. Thus it is

conclusively the tensions created by the critiques. Rather, the responses are meant to advance the critical project by expanding CLS dialogue.

A. Responding to the Critique of the Incoherency Description

Standard critique:

"Incoherency" as used here³⁸ is the expression of extreme skepticism that law can produce determinate results free from reference to value, politics, or historical conditions. While no CLS scholar suggests pure incoherency, the highly-developed method of "trashing," or exposing standard liberal legalisms as incoherent, emphasizes the indeterminate elements of law.³⁹

Incoherency, critics contend, is an inadequate and inaccurate description of law that fails to account for the lawyer's experience that, given a specific doctrinal query, certain outcomes are inevitable and technically correct as a matter of law, even when such results challenge existing power.⁴⁰ Those who characterize the law as incoherent are also criticized for portraying those who use legal doctrine, legal principles, and liberal theory for positive social ends as either co-opted fools,⁴¹ or cynical instrumentalists.⁴² Looking to the bottom can help form a response to the critique of the incoherency description.

necessary to state at the outset that I am presenting elements of the non-white perspective gleaned from my reading and my experience for whatever insight the reader chooses to draw. This article is not intended as and cannot be a definitive statement of the minority perspective.

³⁸ "Radical indeterminacy" is also used to mean the same thing. "Incoherency" is used here because some CLS theorists prefer to reserve use of "indeterminacy" to refer to the uncertain connection between law and history. For a discussion of the indeterminacy of legal doctrine in relation to historical conditions, see Gordon, *supra* note 24.

³⁹ See Kelman, *supra* note 28.

⁴⁰ Cf. S. Burton, *An Introduction to Law and Legal Reasoning* (1985) (suggesting coherence in legal reasoning); Burton, *Reaffirming Legal Reasoning: The Challenge From the Left*, 36 J. of Legal Ed. 358 (1986).

⁴¹ The co-opted fool: "All we need is the right to vote and freedom from discrimination, and then racism and poverty will eventually fade away." Cf. Balbus, *supra* note 23, at 577 ("legal equality functions to mask and occlude class differences and social inequalities, contributing to a 'declassification' of politics which militates against the formation of the class consciousness necessary to the creation of a substantively more equal society").

⁴² The cynical instrumentalist: "What I really want is socialism, but since it is politically ineffectual openly to seek socialism, I will pretend that this movement is about the right to vote and that way it will be harder for my enemies to oppose me and I will draw support from a larger mass of followers." See Lynd, *Communal Rights*, 62 Texas L. Rev. 1417, 1420 (1984) (warning against the "political schizophrenia" of "talk[ing] about democracy in public and about socialism in private").

Informed CLS response:

*This is America, dual-brained creature,
One hand thrusting us out to the stars,
One hand shoving us down in the gutter.*

—Pauli Murray⁴³

Walls turned sideways are bridges.

—Angela Davis⁴⁴

The dissonance of combining deep criticism of law with an aspirational vision of law is part of the experience of people of color. These people have used duality as a strength, and have developed strategies for resolving this dissonance through the process of appropriation and transformation. W.E.B. Du Bois noted long ago the resiliency of the consciousness of "Black Folk."⁴⁵ The consciousness he described includes both mainstream American consciousness, and the consciousness of the outsider. Applying the double consciousness concept to rights

⁴³ From the poem "Dark Testament," Murray, *Dark Testament and other Poems* (1970), reprinted in E. Stetson, *Black Sister* 90 (1981). "Dark Testament" is an eloquent statement of a simultaneously radical and liberal vision. The poem, as I read it, is about liberty. A long poem, it closes:

Better our seed rot on the ground
And our hearts burn to ash
Than the years be empty of our imprint.
We have no other dream, no land but this;
With slow deliberate hands these years
Have set her image on our brows
We are her seed, have borne a fruit,
Native and pure as unblemished cotton.
*Then let the dream linger on,
Let it be the test of nations,
Let it be the quest of all our days,
The fevered pounding of our blood,
The measure of our souls —
That none shall rest in any land
And none return to dreamless sleep
No heart be quieted, no tongue be stilled
Until the final man may stand in any place
And thrust his shoulders to the sky,
Friend and brother to every other man.*

⁴⁴ A. Davis, *With My Mind on Freedom, An Autobiography* 347 (1975).

⁴⁵ W.E.B. DuBois, *supra* note 21.

rhetoric allows us to see that the victim of racism can have a mainstream consciousness of the Bill of Rights, as well as a victim's consciousness. These two viewpoints can combine powerfully to create a radical constitutionalism that is true to the radical roots of this country. The strands of republicanism that legal historians are reviving with the feather-brush care of an archeologist are alive and well in the constitutional discourse of non-white America.⁴⁶

The interpretive work of Frederick Douglass is an example of dual conceptions. Garrisonian abolitionists in the 1840's argued that the Constitution was a corrupt document that endorsed slavery. As a Garrison protégé, Frederick Douglass at first accepted this interpretation and its corollary that reformist political action was an ineffectual means to abolish slavery. Douglass later split from the Garrisonians, and argued that the Constitution, including the Preamble and the Bill of Rights, contained a ringing indictment of slavery.⁴⁷

Slavery, Douglass stated in his widely disseminated writings and public lectures, was unconstitutional, un-American, and inconsistent with the basic values necessary for the survival of the nation. Douglass' skill in transforming the standard text of American political life into a blueprint for fundamental social change is instructive. He chose to believe in the Constitution, but at the same time, refused to accept a racist Constitution.⁴⁸ In his hands, the document grew to become greater than some of its drafters had intended.⁴⁹ Douglass' reconstructed Constitution inspired his black readers to endure the tremendous personal costs of resistance. Martin Luther King, Jr.'s recon-

⁴⁶ See, e.g., Mensch, *The Colonial Origins of Liberal Property Rights*, 31 Buffalo L. Rev. 635 (1982) (discussing, *inter alia*, republican attitudes toward property).

⁴⁷ For a careful explication of the Garrisonian position and Frederick Douglass' gradual rejection of it, see W. Martin, *supra* note 25, at 31-39. Martin notes that the Garrisonians read clauses such as the notorious three-fifths provision as supporting slavery, while Douglass argued that the founding fathers looked upon slavery as an evil that would someday be abolished. He noted the absence of an explicit endorsement of slavery, and the numerous clauses that recognized liberty and human rights, such as the preamble, the fifth amendment, the habeas corpus and bill of attainder provisions, art. 4, § 4 (republican form of government), and art. 1, § 8 (the necessary and proper clause, which implicitly authorized Congress to abolish slavery). *Id.* at 37-38.

⁴⁸ Derrick Bell's work in constitutional history reveals the fundamental contradiction between slavery and equality that was written into the Constitution. See, e.g., Bell, *supra* note 30, at 7.

⁴⁹ Some of the slave-holding founding fathers would, no doubt, have found Douglass' reading of the Constitution revisionist. Douglass himself was aware of the racism of some of the founders. See W. Martin, *supra* note 25, at 37.

structed Constitution produced the same effect in the twentieth century.

This ability to adopt and transform standard texts and mainstream consciousness is an important contribution of those on the bottom. Black Americans, the paradigm victim group of our history,⁵⁰ have turned the Bible and the Constitution into texts of liberation,⁵¹ just as John Coltrane transformed the popular song "My Favorite Things" into a jazz fugue of extraordinary power.⁵² This and other examples of the tendency to trope, appropriate, "signify," and otherwise draw transformative power out of the dry wells of ordinary discourse is discussed by Henry Louis Gates in his important article on black language and literary theory, *The blackness of blackness: a critique of the sign and the Signifying Monkey*.⁵³ Gates sees this transforming skill in jazz composition, in black English, in the black church, and in black writers' adaptive uses of standard literary forms. This transformative skill, Gates suggests, is a direct result of the experience of oppression.

Those who lack material wealth or political power still have access to thought and language, and their development of those tools will differ from that of the more privileged. Erlene Stetson realized this distinction when, in her essay on black women poets, she wrote, "[C]reativity has often been a survival tac-

⁵⁰ Here I endorse Professor Williams' use of "black" in her discussion of race in America. Critical scholars are challenged to understand the unique role of racism in American history, and black America's 400-year experience of sustained and brutal American racism does present a paradigm worth consideration. The mistreatment of indigenous Native Americans is another important model, as well as the experience of "other non-whites." Cf. Gotanda, "Other Non-Whites" in *American Legal History: A Review of Justice at War*, 85 Colum. L. Rev. 1186-92 (1985) (considering racism against Americans who are neither black nor white). To an extent not yet clear, color plays a significant role in American racism, with gradations in color roughly paralleling gradations of sustained racism inflicted upon a group. I have found it impossible to think about race and law without drawing heavily from the black experience. To the extent that this may seem imperial, see Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. Pa. L. Rev. 561 (1984), I have attempted to attribute carefully the black sources used here, and especially to welcome criticism from black scholars.

⁵¹ See West, *supra* note 10, at 16-20. See also A.L. Higginbotham, Jr., In the Matter of Color 371-89 (1980), for a discussion of the role of the Declaration of Independence in the intellectual history of the black struggle for equality.

⁵² See Gates, *The blackness of blackness: a critique of the sign and the Signifying Monkey*, in *Black Literature and Literary Theory* 285, 291 (H. Gates, ed.) ("Repeating a form and then inverting it through a process of variation is central to jazz—a stellar example is John Coltrane's rendition of 'My Favorite Things,' compared to Julie Andrews's vapid version").

⁵³ *Id.*

tic."⁵⁴ Studying the centuries-old tradition of American black women's poetry reveals, according to Stetson, three major elements: "a compelling quest for identity, a subversive perception of reality, and subterfuge and ambivalence as creative strategies."⁵⁵ In poetry, the most concentrated form of language, black women have employed words to criticize and transform existing assumptions. Poetry to black women has never been merely aesthetic. It has, first and foremost, been a tool of social change.⁵⁶ Gwendolyn Brooks opened one 1949 sonnet: "First fight. Then fiddle."⁵⁷

Black musicians see fiddling as part of the fight. Objecting to the de-transformation⁵⁸ of black jazz for white audiences and also to the commodification of black musicians,⁵⁹ be-bop artists

⁵⁴ E. Stetson, *supra* note 43, at xvii. Ms. Stetson's work, the source of many of the poetic headings for the subsections of this article, presents a collection of poems that often use the ideals of liberalism in unique ways.

⁵⁵ *Id.* The black female poet's task, as Stetson identifies it, is analogous to the task of the critical theorist. Stetson states:

These poets have brought to their quest a perception of reality that is subconscious and subversive. It is a perception rising out of their disenchantment with the emptiness of American life. It recognizes that the appearance is not reality, but only a partial and ineffective semblance of reality. And finally it is a perception of reality as unified and dialectic rather than fragmented and disjunctive. Subterfuge and ambivalence arise as active strategies for living and for creating art where more direct means for survival and self-expression have been denied.

Id. Audre Lorde makes a similar point in her essay *Poetry is Not a Luxury*, in A. Lorde, *supra* note 12, at 37 ("Poetry is the way we help give a name to the nameless so it can be thought").

⁵⁶ The two central questions Erlene Stetson identifies for black women poets are: "How do we assert and maintain our identities in a world that prefers to believe we do not exist? How do we balance and contain our rage so that we can express both our warmth and love and our anger and pain?" E. Stetson, *supra* note 43, at xvii.

⁵⁷ G. Brooks, The "Womanhood" section of Annie Allen (1949), *quoted in* E. Stetson, *supra* note 43, at xix.

⁵⁸ "Transformation" refers to the creation of the progressive from the conventional. "De-transformation" refers to the feared next level of co-option; the capture of the new progressive form and its return to the banal. In this respect, the journey from Harlem to Benny Goodman to elevator music parallels the use of the civil rights statutes to support the claims of golf professionals. *See* Kurek v. Pleasure Driveway and Park District of Peoria, 583 F.2d 378 (7th Cir. 1978) (termination by Park District of concession rights held by golf professionals is actionable under § 1983 as deprivation of federal rights under color of state law).

⁵⁹ Archie Shepp said, "Give me leave to state this unequivocal fact: jazz is the product of the whites. . . . It is the progeny of the blacks—my kinsmen. By this I mean: you own the music, we make it." 32 Down Beat Music 11 (Dec. 16, 1965), *quoted in* R. Backus, *Fire Music* 1 (1976). Backus' work explores the commodification of black musicians, such as Ornette Coleman, by repeating their own words:

like Thelonious Monk vowed to "create something they can't steal because they can't play it."⁶⁰ Black musicians resist co-option by asserting their moral claim to the jazz form.⁶¹

For the legal theorist, the relevance of the black artists' fight to establish progressive language and music is that the fight over the body and soul of American law is part of the same struggle.⁶² The law, as critical scholars recognize, consists of language, ideals, signs, and structures that have material and moral consequences. Transforming this kind of system into one's own has a long tradition in the black community.

Other non-white Americans⁶³ have also used and transformed mainstream consciousness to their advantage. Chicano⁶⁴ organizers drew upon the teaching of St. Francis to bring the

In jazz, the Negro is the product. On the 28th of February, 1963, I was staying at 278 East 10th Street. . . . When I got there, I saw lots of stuff on the street. I said Oh, . . . somebody's passed in my building. The closer I got, I could see it was my own stuff. The marshal had chopped the door down and put all my shit out on the streets. And I was only one month behind in rent. So when I realized I couldn't pay \$97.50 for an apartment, and I had six records out . . . [t]hat is when I realized I was in the wrong business.

Id. at 44-45. Coleman, hailed by jazz critics as a genius, subsequently became an independent musician, running a jazz school and refusing commercial contracts. The hardships he suffered in this endeavor are documented in the film *Ornette: Made in America*. Coleman's records have been reissued commercially without economic return to Coleman. *Id.* at 46.

Lester Bowie, another jazz artist *cum* legal realist, called record contracts "Legal rip-offs. . . . It means something for them, because they can enforce it; but if you don't have money . . . it takes some backing to be able to say in court that 'you took such and such.'" *Id.* at 47. Making the same point, Billie Holiday said, "I made over 270 sides between 1933 and 1944, but I don't get a cent of royalties on any of them." *Id.* at 48.

⁶⁰ T. Monk as quoted by Mary Lou Williams. Hentoff, *Hear Me Talkin' to You* 340-41 (1955), reprinted in R. Backus, *supra* note 59, at 37.

⁶¹ See R. Backus, *supra* note 59, at 86. "[W]e see jazz as one of the most meaningful social, aesthetic contributions to America," explains Archie Shepp. "[I]t is anti-war . . . it is for Cuba; it is for the liberation of all people. That is the nature of jazz. That's not far-fetched. Why is that so? Because jazz is a music itself born out of oppression, born out of the enslavement of my people."

⁶² The allusion here is to the many interpretative versions of the song "Body and Soul," by Green, Sour, Heyman and Eyton. See, e.g., E. Jefferson's album *Body and Soul* (1958); B. Holiday's album *Body and Soul* (1940); Coltrane, Tyner, Davis and Jones, *Body and Soul*, (recorded October 24, 1960, New York); Dexter Gordon, *Body and Soul* in the film "Round Midnight."

⁶³ See Gotanda, *supra* note 50, for a consideration of racism against Americans who are neither black nor white.

⁶⁴ "Chicano" here refers to Mexican-origin Latinos, in accordance with the usage suggested in Hayes-Bautista & Chapa, *Latino Terminology: Conceptual Bases for Standardized Terms*, 77 *American Journal of Public Health* 61 (1987).

poorest of America's farm workers to the picket lines.⁶⁵ Cesar Chavez used the norms of labor law and the Constitution, in addition to religion, to bring legal and moral authority to the seemingly hopeless cause of unionizing migrant workers.⁶⁶ Mainstream politicians recognized the appeal of this authority, and seized it in their desire to identify with the causes of those on the bottom.⁶⁷

Non-white lawyers have passionately invoked legal doctrine, legal ideals, and liberal theory in the struggle against racism.⁶⁸ Their success is attributable in part to the passionate response that conventional legalisms can at times elicit. These lawyers recited the Bill of Rights and demanded their participatory share of the American polity. At the same time, however, they maintained disrespect for claims of legality that accompanied oppressive acts. Such lawyers needed no reminder that the Constitution is merely a piece of paper in the face of the monopoly on violence and capital possessed by those who intend to keep things just the way they are.

How could anyone believe both of the following statements?

- 1) I have a right to participate equally in society with any other person.
- 2) Rights are whatever people in power say they are.

One of the primary lessons CLS can learn from the experience of the bottom is that one can believe in both of those statements simultaneously, and that it may well be necessary to do so.

⁶⁵ See R. Acuña, *Occupied America, A History of Chicanos* 269 (1981).

⁶⁶ *Id.* at 271-78.

⁶⁷ Robert Kennedy, while seeking the Democratic nomination in 1968, flew to Delano to take communion with Cesar Chavez to commemorate the end of Chavez's fast. Television cameras recorded the event, with one cameraman asking, "Would you mind giving Cesar another piece of bread so we can get a picture." A. Schlesinger, *Robert Kennedy and His Times* 847 (1978). John F. Kennedy had learned earlier the moral and political value of solidarity with rights activists. His well-publicized 1960 phone call to Mrs. Coretta King to express concern over the jailing of Dr. Martin Luther King, Jr. in Atlanta was considered significant in winning the election. R. Blumberg, *Civil Rights: The 1960s Freedom Struggle* xix (1984).

⁶⁸ See, e.g., R. Kluger, *Simple Justice* (1977) (history of the NAACP's battle against the separate-but-equal doctrine); *The Petition for Writ of Error Coram Nobis*, filed with the U.S. District Court for the Northern District of California, January 19, 1983 (No. CR. 2763 W), cited in Yamamoto, *Korematsu Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 25 Santa Clara L. Rev. 1 (1986).

This duality is evident in the thought of Japanese-Americans who describe their bitterness and outrage at being incarcerated by their own government during World War II.⁶⁹ They acknowledge that they were powerless to resist the government's repressive actions. The Constitution, they found, offered no protection from the guns of military police or from the orders of racist generals, yet the victims nevertheless maintained their belief in constitutional democracy.

From behind barbed wire in America's concentration camps, young Nisei (second-generation Japanese-Americans) volunteered to fight in World War II.⁷⁰ They spilled their blood on the beaches of Italy and in the forests of France because of their faith in American constitutionalism and their demand for recognition as citizens.⁷¹ It is important to understand how claims to equality, procedural fairness, and political participation prove so compelling that human beings are willing to die for them.

Consistent with the tradition of belief in constitutional principles, the Sansei (third-generation Japanese-American) lawyers successfully battling to delegitimize the infamous *Korematsu* decision,⁷² base their arguments upon the Bill of Rights.⁷³ CLS

⁶⁹ See, e.g., *infra* text accompanying notes 171-73.

⁷⁰ See C. Tanaka, *Go For Broke: A Pictorial History of the Japanese-American 100th Infantry Battalion and the 442d Regimental Combat Team 5-7* (1982).

⁷¹ Captain/Chaplain George Aki wrote in a dedication to those who died:

They were ordinary youths wanting to live, but they became "extraordinary" as they dared to choose to come forth from the concentration camps to fight for the land that incarcerated them and their families. And they became heroes because they dared to take the first step to become "equals" with others in American society.

And we know that they sincerely desired to return home when their work was done. But they died, not in their homeland, but alone, in agony, in a strange land . . . ignorant of the legacy that their passing would create. . . . They attained the stature of giants as they fought and secured human rights, justice, and equality not only for themselves and their families but for all who were oppressed.

C. Tanaka, *supra* note 70, at iii. Nisei veterans frequently repeated this kind of rhetoric to explain why they fought.

⁷² *Korematsu v. United States*, 323 U.S. 214 (1944). For a recent critique of the *Korematsu* decision, see Yamamoto, *supra* note 68.

⁷³ See *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984) (vacating the conviction of Fred Korematsu because of the manifest injustice resulting from the government's deliberate withholding of relevant information in the original judicial proceedings). Fred Korematsu's exoneration was the result of a Writ of Error Coram Nobis, written by Sansei attorneys, and filed with the U.S. District Court for the Northern District of California, January 19, 1983 (No. CR 27630W). See Yamamoto,

theorists might ask, "Have such rights-based, legalistic claims so muddled the thinking of Japanese-Americans that they can no longer conceive of radical social change?" That question evokes two responses. First, the memory of the internment—the separated families, the infants lost from lack of medical care, the machine gun towers, the primitive facilities and smell of horse manure in the race-track holding camps—remains a part of Japanese-American consciousness. Such recollections prod a mainstream liberal organization such as the Japanese Americans Citizens League (JACL), the Japanese-American equivalent of the NAACP, to rise in vigorous protest at any hint of government bigotry. During the Iranian hostage crisis, for example, JACL members were among the few to condemn the persecution of Iranians in America.⁷⁴ Today they support the Big Mountain People facing relocation from their homeland,⁷⁵ and oppose INS proposals for a Louisiana detention camp for suspected "undesirable" aliens.⁷⁶ This active involvement with unpopular issues indicates a radicalizing influence of the internment experience that enables Japanese-Americans to resist co-option.⁷⁷

An alternative response questions the assumption that rights rhetoric is co-opting. If trust in the Constitution sustains Japanese-Americans in their uphill battle against racist oppression, then the Constitution for them has become a radical document. Their consciousness—legal consciousness, if you will—

supra note 68. See also D. Minami, *Coram Nobis and Redress*, in Japanese Americans: From Relocation to Redress (R. Daniels, S. Taylor & H. Kitano eds. 1986). The decisions to defy the evacuation orders were based upon a deeply held belief in the principles of American democracy and the obligation to challenge injustice. See Hosokawa, JACL in Quest of Justice 175-78 (1982); *The Japanese American Coram Nobis Cases: Exposing the Myth of Disloyalty*, 13 N.Y.U. Rev. of L. & Soc. Change 199 (Winter 1984-85).

⁷⁴ Congressman Robert T. Matsui warned of xenophobic treatment of Iranians at a Japanese American Citizens League installation dinner in Berkeley. *Rafu Shimpō*, March 6, 1981 reprinted in National Council for Japanese American Redress (NCJAR) Newsletter, at 6, col. 11.

⁷⁵ JACL National Council Resolution in Support of the Big Mountain People, Minutes of the JACL National Convention (August, 1984); Uyeda, *A Matter of Injustice*, Pac. Citizen, May 30, 1986 at 5, col. 4. The Big Mountain People are Navajo, presently being removed from their homeland in order to accommodate the development of mineral resources.

⁷⁶ See *JACL Reacts to INS Plan to Put Arabs in Detention Camp*, Pac. Citizen, Feb. 27, 1987, at 1-2.

⁷⁷ JACL members joined marchers calling for higher minimum wages and full employment in the 1960's, and formed official alliances with civil rights and civil liberties organizations. Hosokawa, *supra* note 73, at 242, 318. Cf. B. Hooks, *Ain't I a Woman* 148, 189 (1981) (citing polls showing that greater percentages of black women than white women support the goals of the women's movement).

of the ultimate legitimacy of their fight against racism allows them to hold unpopular and ultimately transformative opinions with confidence, and to risk retribution from powerful opponents.

Critical legal scholars have recognized the lock-grip of legal consciousness as a primary impediment to radical social change,⁷⁸ just as they have recognized that constitutional interpretation in the traditional sense is simply not possible.⁷⁹ The non-white tradition of constitutional interpretation, one that draws upon the experience of racism to read the Constitution as a text of liberation, suggests a critical response to the limited mainstream version of legal consciousness.

The desire for a determinate rule of law committed to the end of oppression exists, it is said, within all of us.⁸⁰ The minority experience of dual consciousness accommodates both the idea of legal indeterminacy as well as the core belief in a liberating law that transcends indeterminacy. This core belief was expressed by one black character in James Weldon Johnson's 1912 novel, *The Autobiography of an Ex-Colored Man*:

But, above all, when I am discouraged and disheartened, I have this to fall back on: if there is a principle of right in the world, which finally prevails, and I believe that there is; if there is a merciful but justice-loving God in heaven, and I believe that there is, we shall win; for we have right on our side; while those who oppose us can defend themselves by nothing in the moral law, nor even by anything in the enlightened thought of the present age.⁸¹

The strength CLS can derive from the experience of people of color is that apparent logical inconsistency in intellectual argument is not inconsistency in the real world. Intellectual arguments may be paradoxical; real experiences cannot be.⁸²

⁷⁸ See *supra* text accompanying note 19.

⁷⁹ See, e.g., Parker, *The Past of Constitutional Theory—And Its Future*, 42 Ohio St. L.J. 223, 237–39 (1981); Schwartz, *supra* note 33, at 413, 439–53.

⁸⁰ Leff, *supra* note 4, at 1229 (“I want to believe—and so do you—in a complete, transcendent, and immanent set of propositions about right and wrong, *findable* rules, that authoritatively and unambiguously direct us how to live righteously”).

⁸¹ J. Johnson, *The Autobiography of an Ex-Colored Man* 148–49 (1912).

⁸² See Chang, *Zen, Law and Language: Of Powers And Paradigms*, 16 N.M.L. Rev. 543 (1986).

"Love it or leave it" is not a valid critique of CLS, for criticism, transformation and validation of law are all part of the same project.

B. Responding to the Critique of Elitism

Standard critique:

It has also been suggested that CLS is elitist and exclusionary. This criticism reflects the style, tone, tradition, and background of critical scholars. Their writings are often dense.⁸³ They follow the tradition of academic discourse, and they presume a background in theory. They are often published in prestigious academic journals,⁸⁴ and there is a sense that critical scholars intend to talk only to each other. Subjects such as the public-private distinction, the relative autonomy of law, or the reductionist critique of Marxism are summed up and thrown out in a few lines, as if to an exclusive audience of insiders.⁸⁵ The articles cite and build upon each other, culminating in Roberto Unger's piece in the Harvard Law Review.⁸⁶ Unger does not cite to anyone. He does not have to, because anyone who can understand the article is necessarily familiar with its antecedents. Finally, the authors tend to be white, male, and upper class. They are generally academics, and if they participate in any form of concrete struggle, that participation is not often revealed in their writings.

Informed CLS response:

Only within that interdependency of different strengths, acknowledged and equal, can the power to seek new ways of being in the world generate, as well as the courage and sustenance to act where there are no charters.

—Audre Lorde⁸⁷

⁸³ See Schwartz, *supra* note 33, at 439–41, for a critique of CLS style and vocabulary.

⁸⁴ See, e.g., 36 Stan. L. Rev. 1 (1984) (symposium issue on Critical Legal Studies).

⁸⁵ See, e.g., Gabel & Kennedy, *supra* note 30.

⁸⁶ Unger, *supra* note 23.

⁸⁷ Lorde, *The Master's Tools Will Never Dismantle the Master's House*, in A. Lorde, *supra* note 12, at 110.

In many respects, the elitism critique is unfair. CLS is rare among legal organizations in devoting an entire annual meeting to issues of feminism⁸⁸ and race.⁸⁹ CLS members have supported minority scholars in the faculty appointments process and have supported non-white scholarship in many ways. The elitism charge stems, in part, from the very incisive and intelligent analysis of law that makes CLS attractive. Response to the elitism critique can be strengthened by formal efforts to establish dialogue with people of color and to add their voices to those that currently dominate the discourse. This article, developed at the invitation of the Conference, illustrates that such an effort is under way. The organizers of the 1985 CLS-Feminism Conference in Boston recognized the need for a deliberate effort at inclusion in order to enlarge the CLS debate. The end of academic apartheid will not come by accident, and the anti-organizational tendencies of CLS can lead to an unintended exclusion. Just as affirmative action in law school admissions required conscious alteration of usual procedures, affirmative action in legal scholarship requires conscious alteration of the typical research path of reading what one's colleagues are reading, and then reading the works cited therein.

A few concrete steps to broaden that path are suggested at the margin.⁹⁰ A personal commitment to read minority and fem-

⁸⁸ The CLS Conference on feminism was held in Boston in 1985.

⁸⁹ The 1987 annual meeting in Los Angeles was devoted to issues of race.

⁹⁰ The Critical Legal Studies Conference might consider adopting the following resolution:

Resolved:

1. that we will read and cite minority writers.
2. that our conferences will include minority speakers and facilitators.
3. that we will actively recruit minority members, subsidizing costs of conference attendance by such members if necessary to achieve minority representation.
4. that we will endeavor to inform ourselves about the culture and experience of non-white America.
5. that we will establish a reading list of minority scholarship.

See also Sanchez, *supra* note 21, at 163, 166 (making suggestions for ending ethnocentric scholarship, including, *inter alia* "that your faculties, conference organizers, community

inist writing in equal quantities with mainstream scholarship⁹¹ enriches one's writing, teaching and thought.⁹²

The perceived elitism that narrows the audience for CLS scholarship will give way to a mutually beneficial dialogue if that scholarship grounds theory in experience, particularly the experience of people of color. One writer described her reaction to Audre Lorde's writing:

I realized how directly Lorde's knowledge was tied to her difference—those realities of Blackness and lesbianism that placed her outside the dominant society. She had information that I, a white woman who had lived most of my life in a middle-class heterosexual world, did not have, information I could use, information I needed.⁹³

Scholars are the foremost consumers of ideas and literature. Their choice of sources is political. Theory depends on academic sources much as judicial decision depends on judicial sources. The truth CLS scholars know about legal decisionmaking applies to the scholarly enterprise. A narrow culture, history, and experience will limit imagination in that realm of law and theory.⁹⁴

Critical commentators should look to the bottom and acknowledge the richness there. Sources available from the non-

organizers stop giving lip service to including a 'Native American' for this or that with the appended phrase: 'if we only knew one!' Go find one. There are hundreds of resource lists or Indian-run agencies, hundreds of Indian women in organizations all over the country—active and available with valuable contributions to make."); Delgado, *The Imperial Scholar*, *supra* note 50.

⁹¹ "Mainstream" refers to the standard androcentric and ethnocentric primary and secondary writings that are the traditional raw materials of legal scholarship. While mainstream scholarship is often valuable, it becomes even more so when read alongside works emanating from the bottom.

⁹² This article flows directly from a self-imposed affirmative action reading plan—one that has suggested new classroom materials and new theoretical perspectives. It has also led to new friendships and changed my habits as a consumer, since I was forced to seek out alternative bookstores, catalogs, and unpublished writers. The progressive critique of reparations in Part III(D) of this article draws in part from the thought of Hayden Burgess, a Hawaiian activist whom I had not taken seriously until I forced myself to read his writings and attend his public lectures.

⁹³ Bereano, *Introduction* to A. Lorde, *supra* note 12, at 9.

⁹⁴ In his essay *Integrating Afro-American History into American History*, Nathan Huggins argues that the project of American historiography cannot succeed without the "view from the bottom up," without "latent matter being brought to the surface so that our view of the fabric is different." D. Hine, *The State of Afro-American History* 159 (1986).

white community include briefs in the great civil rights cases,⁹⁵ speeches and persuasive writings,⁹⁶ art, literature, and oral histories,⁹⁷ as well as standard scholarship, criticism, and theory generated by that community.⁹⁸ Reading, learning from, and citing these materials belies the charge of elitism, and advances the critical project.

C. Responding to the Critique that CLS is Non-programmatic and Uninvolved with Real-life Struggle

Standard critique:

The charge that CLS is non-programmatic and uninvolved with real-life struggle is related to the critique of elitism.⁹⁹ While this critique unfairly ignores the political activity of individual CLS members, it does highlight the emphasis of CLS literature on detailed deconstruction of existing legal concepts, rather than on reconstruction of new concepts and strategies.¹⁰⁰ Within CLS little consensus exists as to what good social organizing looks like, or whether traditional left organizing, as opposed to post-left dis-organizing, is the key to ending oppression.¹⁰¹

In contrast to their graceful description of law, critical legal scholars stumble in depicting Utopia. Exactly what will a just

⁹⁵ See R. Kluger, *supra* note 68, at 523-708; D. Bell, *Civil Rights: Leading Cases* (1980).

⁹⁶ See, e.g., M.L. King, Jr., Nobel Prize Acceptance Speech, Nobel Foundation (1964); A. Walker, *In Search of Our Mother's Gardens* (1983); W.E.B. DuBois *Speaks, Speeches and Addresses 1890-1912* (P. Foner ed. 1970) and W.E.B. DuBois *Speaks, Speeches and Addresses 1920-1963* (P. Foner ed. 1970).

⁹⁷ See, e.g., Stetson, *supra* note 43. See also Gates, *supra* note 52, for suggested readings. Slave narratives are one of the few original American literary forms. Oral histories reveal the experience of law and politics as it affects the lives of human beings. See, e.g., Tateishi, *supra* note 21; S. Sicora, *Selma Lord Selma: Girlhood Memories of the Civil Rights Days* (1979).

⁹⁸ See, e.g., the work regularly cited in the AALS minority section bulletin, and the work of the featured non-legal speakers at the Critical Legal Studies Conference at Los Angeles; B. Hooks, *supra* note 77; R. Acuña, *supra* note 65 (1981); West, *supra* note 10; as well as the books and articles, too numerous to cite, of the members of the CLS minority caucus, of which Derrick Bell's *Race, Racism, and American Law* (1980) is a classic. See also *The Black Law Journal*, for articles revealing issues and perspectives relevant to the black legal community.

⁹⁹ Cf. Schwartz, *supra* note 33, at 455 ("CLS is not offering concrete revolutionary proposals, it is simply offering surrealistic pictures for our minds"). But see Tushnet, *Critical Legal Studies: An Introduction to Its Origins and Underpinnings*, 36 J. Legal Educ. 505, 511 (1986) (discussing programmatic elements in CLS literature).

¹⁰⁰ Some commentators, however, argue that the development of theory is a necessary first stage of struggle. See Kelman, *supra* note 28.

¹⁰¹ See *supra* text accompanying note 7.

and joyous world look like? We are not told. How will we get there? Again, silence.

The implicit message is that greater understanding of the law will lead to the transformation and ultimate achievement of the utopian vision. However, little in critical legal scholarship adds the details of how and when. This long-playing preview of coming attractions is costing the movement credibility.

Informed CLS response:

*Maybe there was a better way to skin that cat but I used
the blade that was put in my hand.*

—Paula Gunn Allen¹⁰²

She feeds on truths and uncreated things.

—Phillis Wheatley, 1773¹⁰³

If the voice of truth is inaudible in the corridors of the law schools and libraries where we work, perhaps we seek the voice in the wrong places. For people of color, many of the truths they know come largely from their experiences outside legal academia. The collective experience of day-to-day life in a country historically bound to racism, reveals something about the necessity and the process of change.

There is a standing¹⁰⁴ concept in movements for social change. One needs to ask who has the real interest and the most information. Those who are oppressed in the present world can speak most eloquently of a better one. Their language will not

¹⁰² From Paula Gunn Allen's poem, "The One Who Skins Cats," referring to Sagawewa's pragmatic survival skills, reprinted in B. Brant, *supra* note 21, at 19, 24 (1984).

¹⁰³ P. Wheatley, *To a Gentleman and Lady on the Death of the Lady's Brother and Sister, and a Child of the Name Avis Aged One Year*, reprinted in E. Stetson, *supra* note 43, at 14. This is a line from a poem Phillis Wheatley wrote to console parents who had lost a child. The child, Wheatley wrote, was in heaven. She wrote this poem within the literary convention of her time yet transcended its constraints, suggesting in the heaven metaphor that black women can believe in their own truth and in the better world to come. Wheatley suggests "uncreated things" as nourishment, and indeed her people in their struggles some 200 years after Wheatley wrote, continue to feed on the belief in a better world to come.

¹⁰⁴ See *Flast v. Cohen*, 392 U.S. 83 (1968); L. Tribe, *American Constitutional Law* 79-114 (1978).

be abstract, detached or inaccessible; their program will not be undefined.¹⁰⁵ They will advance clear ideas about the next step to a better world. The experience of struggling against racism has taught much about struggle, about how real people can rise up, look power in the eye and turn it around.

Again, the example of Frederick Douglass is appropriate. After initial support for radical abolitionist presidential candidates, Douglass switched course and campaigned for Abraham Lincoln, a relative moderate with a realistic chance of victory. While Douglass conceded the racism underlying some of Lincoln's moderate positions, he correctly predicted that Lincoln was the candidate most likely to implement emancipation. Douglass' pragmatism arose from his background as an abused slave.¹⁰⁶ He appreciated what each day of continued slavery meant for its victims, and his knowledge did not allow him the luxury of dogmatism. History suggests that his strategy was the most effective one possible; at the same time, his continuing abhorrence of racism distinguished him from other nineteenth-century social reformers, whose thoughts and deeds sometimes betrayed a lesser commitment to racial equality.¹⁰⁷

"[P]ower," Douglass reminded us, "concedes nothing without a struggle. It never did, and it never will."¹⁰⁸ In the twentieth century, people of color, poor people and indigenous people who accept the truth of Douglass' words are organizing around vital issues. Theorists concerned with the process of change should follow these struggles, accepting the role, albeit with a critical eye, of student rather than teacher.

¹⁰⁵ From the slaves who sang of heaven as a place where all God's children have shoes, to Audre Lorde who sees the availability of medical care as essential to justice, black writers have presented a concrete vision of a better world. See A. Lorde, *supra* note 12.

¹⁰⁶ See F. Douglass, *Narrative of the Life of Frederick Douglass, An American Slave* (1845).

¹⁰⁷ When examining the careers of the noted white social reformers of the nineteenth century—for example, Lincoln, Garrison, Anthony and Stanton—one discovers that their inability to accept blacks as equals and allies in the fight against racism and sexism lost to history the chance to end those evils in the wake of the successful abolition struggle. Though Douglass campaigned actively for women's suffrage, he felt betrayed by the suffragist's willingness to favor the women's rights cause over abolition. Susan B. Anthony and Elizabeth Cady Stanton actively opposed the fifteenth amendment's grant of the franchise to black men, because of the exclusion of women from the right to vote. Anthony, who had worked for abolition, found herself allied with former slaveholders. B. Aptheker, *Woman's Legacy* 44–52 (1982). The nascent coalition between white women and blacks never materialized. See also A. Davis, *Women, Race and Class* (1981).

¹⁰⁸ Douglass, *West India Emancipation* (1857), in W. Martin, *supra* note 25, at 125.

To some degree, this is occurring. Many legal theorists, for example, were dragged by people of color and by idealistic university students into the battle over South African divestment and found themselves proud and happy to participate. Black South Africans like Nelson and Winnie Mandela, Steven Biko and the martyrs of Sharpeville gave birth to and defined the movement that will someday end apartheid.¹⁰⁹ While lawyers and legal theorists can lend important support to that struggle, those with experience in organizing note that volunteers from the ranks of the privileged can leave a cause with the same privilege of choice with which they joined.¹¹⁰ It is those who struggle because they have no choice, because they can no longer tolerate conditions on the bottom, who lend sustained force to a movement. Theorists can and should debate whether a given movement is following the optimum line of attack, keeping in mind that the burden of proving that a particular movement for concrete change is counter-productive remains on the theorist. People are not moved to struggle without good reason. Furthermore, the very process of struggle—the building of coalitions, the development of a voice, the flexing of organizational muscle—is so important, that at a certain level the choice of optimum issue, time and place is less critical. While those who must struggle choose the direction of change, critical scholars retain the important role of theoretical co-conspirators.¹¹¹

¹⁰⁹ See W. Mandela, *Part of My Soul Went With Him* (1985). See generally B. Sacho, *The Road From Sharpeville* (1961) (evolution of political consciousness in South Africa).

¹¹⁰ Cesar Chavez learned early in his organizing that middle-class movement members were easily frightened by red-scare tactics. Chavez recalls, "People were scared, but not the farm workers, not the poor. It was those guys who have little jobs, who protected their little self-interest. That taught me the best lesson, a good lesson about self-interest. From then on, I had a rule: There would be no more middle-class Chicanos in the leadership." J. Levy, *supra* note 25, at 121.

Chavez also recalls a volunteer who accused him of selling out by merging with the AFL-CIO, to which he responded, "You know what? We have no place to go. You're leaving tonight. You're going to forget about us. We've got to stay here." *Id.* at 239. Similarly, Martin noted in his study of Frederick Douglass that "[w]hites became abolitionists out of choice; blacks were abolitionists out of necessity." W. Martin, *supra* note 25, at 25.

A feminist Hawaiian activist wrote of her involvement with the at-times sexist Hawaiian Movement: "There is really no question of *choosing* to fight. In the language of Third World analysis, I am a colonized woman of color. If I wish to survive while preserving something of my integrity and that of my people, I have no choice but to fight. . . ." Trask, *Fighting the Battle of Double Colonization: The View of a Hawaiian Feminist*, in *Critical Perspectives of Third World America*, Vol. 2, No. 1 (Fall 1984).

¹¹¹ Cornel West warns of "neohegemony"—that danger that critical projects can in

Finally, alliance with those on the bottom can also support theorists with a message of hope and inspiration. Limited to academic abstractions, the critical method destroys the rule of law, proves the incoherency of legal ideals, acknowledges existing tragedy—and leaves us despairing observers of human suffering. The experience of the struggle against oppression provides a built-in immunity against realist despair. Critical scholars who take part in and identify with real-life struggles can claim as their intellectual and moral heritage the victories of those on the bottom. To the extent that critical scholars can see themselves as the daughters and sons of heroic people who would walk a thousand miles for freedom,¹¹² who have survived chains and dogs, guns and gas, as well as false legal doctrine; who have stood in the river of history and altered its course,¹¹³ they can see themselves as people who must—and will—prevail.

It is thus suggested here that CLS should study and support the organized struggles of people of color for several reasons. First, such experience will inform the continuing debates within CLS concerning the phenomenology of law and social change. Second, since legal scholars will never be the center of any successful movement for social change, if we believe that change is necessary, we must build coalitions with others. Finally, sharing the struggles and victories of our allies will reward and enrich us in ways that will inspire us to continue.

fact reinforce existing inequities if uninformed by a comprehensive theory of counter-hegemonic struggle. West, *supra* note 10, at 120 (“[n]eohegemonic culture constitutes a new phase of hegemonic culture; it postures as an oppositional force, but, in substance, is a new manifestation of people’s allegiance and loyalty to the status quo”).

¹¹² The reference here is literal. Alice Walker considers her name an homage to her great-great-great grandmother who “walked as a slave from Virginia to Eatonton, Georgia . . . with two babies on her hips.” Walker, *Choice: A Tribute to Dr. Martin Luther King, Jr.*, in *In Search of Our Mothers’ Gardens* 142–45 (1983).

Harriet Tubman made nineteen trips of over 1,000 miles through the Appalachian mountains, helping Southern slaves reach freedom in the North via the Underground Railroad. B. Aptheker, *Woman’s Legacy* 34 (1982).

Dr. Martin Luther King, Jr. reminds us of the black citizens of Montgomery who daily walked to and from work for a year to demand fair treatment on Montgomery buses. M.L. King, Jr., *Stride Toward Freedom* 69 (1958).

The journey to the United States for immigrants who came over the country’s Southwestern border was also one of many miles on foot. A vision of economic freedom inspired the desert marches of generations of Latin Americans, as well as Asian immigrants who were forced to seek entry over the Southern border because of racist exclusion acts. See P. Kochi, *Imin No Aiwa* (1978) (oral history of an Issei progressive who emigrated from Okinawa to the United States over the Mexican border).

¹¹³ Cf. V. Harding, *There Is a River* (1981) (an Afro-American history).

*D. Responding to the Critique of CLS as Wicked, Frivolous
and Cynical*

Standard critique:

Uninformed critics charge that CLS is an anti-law movement that engages in self-indulgent dirty tricks and cynical manipulation of the minds and institutions it encounters.¹¹⁴ CLS scholars themselves disagree over the movement's goals. Loose internal divisions exist between theory-reconstructionists and irrationalists.¹¹⁵ This division parallels a seemingly irresolvable division in program between traditional left organizers and post-modern anarchists.¹¹⁶

These divisions, and the horror with which conservative law school deans react to CLS, arise from the critical function of left legal analysis. Such analysis uses a sharp knife to cut through existing assumptions about law. The sharp knife, as parents teach their children, is a useful but dangerous tool. The challenge for the CLS movement is to maintain a credible and effective praxis along with its deeply critical stance. The alternative tools of "jokes and snippets"¹¹⁷ are revealed as inadequate standing alone: they seem the stuff of child's play—something merely to amuse while the dangerous knife remains safely in the drawer.

¹¹⁴ See, e.g., Carrington, *supra* note 35, at 222 (Legal professionalism "cannot abide . . . the embrace of nihilism and its lesson that who decides is everything, and principle nothing but cosmetic" and those holding such views have "an ethical duty to depart the law school."); Dunsford, *Nihilism and Legal Education—A Response to Sanford Levinson*, 31 St. Louis U.L.J. 27, 28 (1986) ("All I know about the CLS movement is vulgar gossip: that its acolytes alternate between acting giddily sophomoric and solemnly portentous, that they share a neo-Marxist mystique which makes them morally superior to others, and that their faith in their cause is strong enough to authorize them to use devious means to achieve essential ends").

¹¹⁵ See, e.g., Gabel & Kennedy, *supra* note 30 (on the theory/anti-theory debate); see also Stick, *supra* note 34, at 332–33 & n.2 for an explication of the nihilist/rationalist aspects of various CLS writers. For a discussion of irrationalism, see Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. Pa. L. Rev. 685 (1985).

¹¹⁶ See Lizard, No. 1, *The Civility Issue in Critical Legal Studies: A Dialogue Between The Times and Lizard*, 1–2 (1984).

¹¹⁷ See Kelman, *supra* note 28, at 330. Compare the anonymously authored zaphographic text Lizard with the Critical Legal Studies Newsletter. See Lizard No. 1, distributed at the Association of American Law Schools San Francisco Convention, Jan. 5, 1984 ("Lizard is an emanation of a small faction within the critical legal studies movement, sometimes referred to as the True Left"). The deliberately disconcerting issue specifically disclaims representing CLS, and contains articles such as "Oh my God, it's alive!" *Debates About Theory Within Critical Legal Studies*. *Id.* at 2. A related split is that of theory and practice.

Informed CLS response:

*It was Bo Shmo and the neo-social realist gang. They rode to this spot from their hideout in the hills. Bo Shmo leaned in his saddle and scowled at Loop, whom he considered a deliberate attempt to be obscure. A buffoon, an outsider and frequenter of side shows.*¹¹⁸

—Ishmael Reed

An active minority perspective aids first in response to the uninformed critique of CLS as wicked, and second, in response to the internal split in program. A movement committed to the end of racism is not wicked. This country has come far enough that in popular discourse the struggle against racism has legitimating power. As the protagonist in James Weldon Johnson's *Autobiography of an Ex-Colored Man* believed, there is "a basic, though often dormant, principle of the Anglo-Saxon heart, love of fair play."¹¹⁹

In developing a response to the internal anti-rationalist/pro-rationalist split, looking to the bottom again provides an historical perspective that suggests that divergent strategies for change can converge triumphantly for activists who keep sight of common goals. The history of the struggle against racism in America is marked by internal schisms over theory and method that parallel the divisions within CLS. As a matter of survival, it has often been necessary to submerge these differences and to focus instead upon the common vision of an end to racism. Those engaged in the struggle have frequently debated the theoretical questions among themselves in loud, discordant voices. If nothing else, the debates have clarified the available strategies and forced continual reassessment. In responding to the exigencies imposed from without, a united front has often been the better choice.¹²⁰

¹¹⁸ I. Reed, *Yellow Back Radio Broke-Down* (1969), quoted in Gates, *The Signifying Monkey*, *supra* note 52, at 298.

¹¹⁹ J. Johnson, *supra* note 81, at 169.

¹²⁰ One author documents several instances of philosophical disagreements among, as well as the moments of unity for, the NAACP, the Southern Christian Leadership Conference and the more radical Student Non-violent Coordinating Committee. J. Williams, *Eyes on the Prize: America's Civil Rights Years, 1954-1965* 164 (1987) (description of how SNCC's approach differed from SCLC's); *id.* at 165 (disagreements between SNCC and NAACP in Albany in 1961); *id.* at 195 (SNCC, NAACP, SCLC join with other groups to organize March on Washington); *id.* at 228 (SNCC, NAACP, SCLC join with other civil rights groups to form Council of Federated Organizations).

W.E.B. DuBois, for example, disagreed strongly with Booker T. Washington's position that black Americans must temporarily forgo the quest for political equality in order to achieve conciliation with white America, and yet DuBois wrote of Washington with respect and admiration.¹²¹ While Washington's position seems a shocking sell-out by today's standards, it arose in the context of post-emancipation violence against blacks. Washington believed that the only way to achieve political equality and to end racist violence was to set aside immediate demands for the vote and to focus instead on education and economic development in the black community.¹²² Washington succeeded in educating hundreds of poor blacks with money solicited from rich white patrons.¹²³ Despite his opposition to Washington's contentions, DuBois recognized the historical constraints that Washington faced.¹²⁴ His public criticism of Washington was tempered by public praise and acknowledgment of a common goal.¹²⁵

An effort to create a united front can be built upon three considerations. First is the recognition that many approaches to a single problem may eventually get us where we want to go, and that stubborn rigidity in method will block coalition-building. Dr. King saw this when he said, "Anyone who starts out with the conviction that the road to racial justice is only one lane wide will inevitably create a traffic jam and make the journey infinitely longer."¹²⁶ Second, there is the more basic fact of

¹²¹ DuBois called Washington's success "the most striking thing in the history of the American Negro since 1876." W.E.B. DuBois, *supra* note 21, at 240.

¹²²

[T]he agitation of questions of social equality is the extremest folly, and that progress in the enjoyment of all the privileges that will come to us must be the result of severe and constant struggle rather than of artificial forcing. No race that has anything to contribute to the markets of the world is long in any degree ostracized.

B.T. Washington, *Up From Slavery*, in *Three Negro Classics* 149 (1965). These words, conservative on their own, carry greater meaning if read in the context of Washington's biography. His remarkable life and the tensions revealed between the lines of his text win the reader's respect, if not agreement.

¹²³ See B.T. Washington, *supra* note 122, at 116-47, 177-95.

¹²⁴ See W.E.B. DuBois, *supra* note 21, at 241 ("To gain the sympathy and cooperation of the various elements comprising the white South was Mr. Washington's first task; and this, at the time Tuskegee was founded, seemed, for a black man, well-nigh impossible").

¹²⁵ See *id.* at 240-52.

¹²⁶ M.L. King, Jr., *supra* note 112, at 34.

our common goal: the transformation of an unjust into a just world. This transformative vision can bind us together even as our theoretical differences keep us apart. Third, the duality of liberal versus radical programs for change may be a false one. The liberal vision as developed from the bottom may in fact be one of radical social change.

The quotation at the beginning of this section refers to the split, in black American literary circles, between realist and post-realist writers. Shmo, the realist, charges Loop, the post-realist, with writing "esoteric bullshit" that is "off in matters of detail."¹²⁷ The same charges are lodged against CLS writers. Loop responds:

What's your beef with me[,] Bo Shmo, what if I write circuses? No one says a novel has to be one thing. It can be anything it wants to be, a vaudeville show, the six o'clock news, mumblings of wild men saddled by demons.¹²⁸

Similarly, no one says that social transformation has to be one thing. Indeed, in twentieth century America the play of race, class and post-industrial capitalism is so different from anything that has come before that no one knows what the process of fundamental social change will look like in our landscape. Loop belittles the realists, but acknowledges the tradition in black literature of long-suffering realism. Loop's position could not exist except in response to Shmo. Within CLS, the debate between rationalists and irrationalists is a healthy one, forcing both sides to delineate and defend a position, all the while acknowledging a common end.

It is also helpful for CLS scholars to recognize that within the experience of people of color the debate over correct praxis is highly developed and informed by history. Within the Japanese-American community during World War II, for example, there waged a bitter debate between those who rejected and those who accepted American constitutionalism. The first group felt that internment justified rejection of America and refusal to fight in World War II. They were opposed by a larger group,

¹²⁷ Reed, *supra* note 118, at 298.

¹²⁸ *Id.*

including leftists and progressives, who, though bitter about the internment, felt committed to American constitutional values and chose to go to the frontlines to prove their loyalty.¹²⁹ Their choice reflected a conscious decision to fight both Hitler's fascism and America's racism, and to give their lives to those twin battles if necessary.¹³⁰ Over 600 Japanese-Americans sacrificed their lives, and over 9,000 were wounded, making the 100th Infantry Battalion and 442nd Regimental Combat Team the most decorated units in American military history.¹³¹ Racism may have played a part in the decision to send these units into the bloodiest battles of the war, but this suspicion itself encouraged many of the young idealists to continue their fight for full recognition as human beings.

The sacrificial effort of Japanese-Americans echoes that of black Americans, who have an even longer history of choosing military service as part of a conscious effort to counteract racism. The Japanese-Americans falling under machine-gun fire in the assault on Monte Cassino followed the bloody trail of the black Americans slaughtered in the Fifty-fourth Regiment's Civil War assault on Fort Wagner.¹³² These soldiers, separated by 100 years of continuing American racism, felt that their willingness to die for their country would help establish their loyalty and worth as human beings.

Some will argue that these men were fools who died in vain. Racism, indeed violent, life-threatening racism, against Asians

¹²⁹ Minoru Yasui recalls his attempts to persuade internment victims to join the Army: to a young man who asked "Why should I [fight] when the government has taken away our rights and locked us up like a bunch of criminals anyway?" Yasui and JACL representative Joe Grant argued, "When you fulfill your responsibilities, you'll be in a much stronger position to demand your rights." J. Tateishi, *supra* note 21, at 86.

¹³⁰ Said one veteran:

We all felt that we had an obligation to do the best we could and make a good record. So that when we came back we can come back with our heads high and say "[L]ook, we did as much as anybody else for this country and we proved our loyalty; and now we would like to take our place in the community just like anybody else and not as a segregated group of people."

C. Tanaka, *supra* note 70, at 23.

¹³¹ *Id.* at 1.

¹³² Henrietta Cordelia Ray honored Robert Gould Shaw, the Negro colonel killed leading the assault on Fort Wagner, South Carolina, in a poem closing: "O hero! thou who yielded breath That others might share Freedom's priceless gains, In rev'rent love we guard thy memory." Ray, *Robert G. Shaw*, reprinted in E. Stetson, *supra* note 43, at 37. See also Bell, *Racial Remediation: An Historical Perspective on Current Conditions*, 52 Notre Dame L. Rev. 5, 9-11 (1976) (discussing historical connections between military participation by blacks and advances in civil rights).

and blacks continues in this country.¹³³ The soldiers' efforts contributed significantly, however, to the defeat of racist regimes in both wars. More importantly, their efforts provided a stinging indictment of those who sought to deny them the full rights of citizenship. When Southern racists opposed statehood for the "mongrelized" voters of Hawaii, for example, they were silenced by the moral authority of the disabled Japanese-American veterans.¹³⁴ In the political battles to end alien land laws and racist immigration laws, the JACL used the memory of Nisei soldiers to win over the courts, the Congress and the formerly anti-Japanese California electorate.¹³⁵ Before the war it was inconceivable that California voters would oppose the anti-Japanese land laws in referendum. After the war Nisei veterans successfully campaigned for the removal of the laws.¹³⁶ Many individual racists admitted a change of heart after learning of the wartime heroism of Japanese-Americans.¹³⁷ The Nisei

¹³³ Witness the murder of Victor Chin in Detroit in 1982, the 1986 murder at Howard Beach, and the bombing of the Southern Poverty Law Center's Montgomery Klanwatch office in August 1983. The recent epidemic of racist violence is so great that there is a demand for litigation manuals such as the Center for Constitutional Rights' *Racially Motivated Violence: Litigation Strategies* (1984). The Asian American Legal Defense and Education Fund monitors acts of racial violence directed at Asians. See *Outlook*, Summer '86, at 1-2 (noting dates and localities of stabbings, beatings, arson, vandalism and KKK cross-burnings directed against Asians in the United States). A 1986 chronology of anti-Asian violence was published in *Pac. Citizen*, Jan. 2-9, 1987, at 11, col. 3.

¹³⁴ Senator Daniel Inouye attributed Hawaii's statehood as well as the repeal of the Oriental Exclusion Act to the sacrifices of the Nisei soldiers. C. Tanaka, *supra* note 70, at 170.

¹³⁵ Wilson and Hosokawa state that the briefs in the *Masaoka* case, for example, noted that three of the Masaoka sons were wounded in battle, and a fourth killed. The court held that an alien land law violated the fourteenth amendment. Wilson & Hosokawa, *supra* note 21, at 281. Nisei veterans also successfully campaigned for a referendum to remove the alien land laws from the California statute books, and for repeal of immigration laws that used race as a determinative factor. *Id.* at 282-85. The history of alien land laws and other anti-Japanese legislation is documented in F. Chuman, *The Bamboo People* (1976).

¹³⁶ Wilson & Hosokawa, *supra* note 21, at 282.

¹³⁷ Wilson Makabe lost a leg in Northern Italy. He was still in the hospital when he received the news that his family's hand-built home had been burned down by anti-Japanese agitators. Makabe returned to his hometown a disabled veteran, and encountered a service station owner: "He said, 'Y'know, I was one bastard. I had signs on my service station saying 'No Jap trade wanted.'" He said, "Now, when I see you come back like that, I feel so small." And he was crying." J. Tateishi, *supra* note 21, at 259.

The white officers and infantrymen who fought alongside the Nisei soldiers denounced the racists who harassed Japanese-Americans. When night-riders threatened the sister of medal-of-honor winner Kazuo Masuda, Gen. Stilwell said, "[W]e ought to take an ax-handle to such people." C. Tanaka, *supra* note 70, at 168-69. Lt. Col. James M. Hanley sent an angry letter to his hometown newspaper after reading an anti-Japanese editorial, chastising the editor, "the Hood River Legion post, Hearst, and a few others [who] make one wonder what we're fighting for. I hope it isn't racial

veterans believe that their experience in the war made a difference.¹³⁸

The point of this illustration is that the choice to lay claim to a piece of America in the conventional, liberal sense was a valid and informed one for the black and Nisei soldiers. It was a choice that led to material improvement in their lives and the lives of other blacks and Japanese-Americans, and that forced the recognition of their existence and personhood upon their fellow Americans. Given the context of the times, it was a progressive choice. The insight available to CLS scholars from this example is that rationalism, pragmatism and, yes, even liberalism are sometimes legitimate positions, especially if informed by the dissenting voices of those who reject the choice. The voices of one's peers labeling the choice to fight foolish, co-opted and purposeless calls for a careful and realistic decision. It forces acknowledgment of the limits and costs of the battle, and realistic assessment of the probable gains. When the irrationalist voices within CLS caution against fuzzy-headed optimism and over-confidence in the thing called law, CLS scholars can look to the non-white experience to give historical context to the debate.

prejudice." *Id.* at 87. A group of soldiers from Iowa responded to anti-Japanese statements in the Des Moines Register: "Whenever you have been near enough to see these boys die for their country, then is the time to voice your opinion . . . they have proven themselves better Americans than some that were not of Japanese descent." *Id.* at 45.

¹³⁸ Senator Daniel Inouye stated, "I would like to believe that our wartime sacrifice had something to do with the extension of civil rights and dignity, not only to Japanese-Americans, but to all citizens of this nation." C. Tanaka, *supra* note 70, at 170.

The CLS emphasis on consciousness counsels consideration of the rhetoric and belief system of Nisei veterans. Consider Senator Daniel K. Inouye's words:

I believe the achievements of this distinguished United States military unit helped to dispel in a most dramatic and bloody manner any doubts that may have been harbored as to the patriotism of Japanese Americans. Although this demonstration of citizenship was a most costly one, it did show that Japanese Americans were second to no one in loyalty and bravery. . . . We each have a special responsibility to make our nation a more open and just society for all.

C. Tanaka, *supra* note 70, at x; and Senator Spark Matsunaga:

In the sacrifices made by the veterans of the All-Nisei Combat Team, in their courage and loyalty, we can find the strength and determination to continue our endless battles against discrimination and injustice—to make ours a greater nation in a better world.

Id. at xi.

Matsunaga and Inouye, by no means radicals, consistently vote in favor of civil rights legislation.

That historical context lends new meaning to the concept of rights—one that extends beyond the rules of process and formal equality sanctified in mainstream liberal theory. It was for substantive rights that the soldiers fought and the marchers marched—the right to walk freely, to work, to eat, to raise a family in peace and to enjoy the blessings of a liberty that was more than abstract. Dr. King's version of rights, could America ever attain it, would require a radical transformation of existing social structures.¹³⁹ The Montgomery bus boycotters were not risking their lives merely in order to sit in the front of the bus.¹⁴⁰ They, and the bomb-throwing racists who opposed them, knew that the existing conditions of domination were at stake, and that the goal of the struggle was a fundamental change in existing economic and social relations.

A component of the change, however, was liberal in the conventional sense. That component was the recognition of the value and dignity of each individual human being. The treasure of the little light shining in each person is one deserving protection in Dr. King's version of rights. While critical scholars ask whether we can escape the alienated and oppressive individualism that seems to stand in the way of substantive justice, his memory tells us that the recognition of the worth of non-white individuals was an important victory. Basic political recognition allows the fight for substantive justice to continue on higher ground.¹⁴¹

In addressing the rights debate, another voice from the Third World requires acknowledgment. Thus far this article has

¹³⁹ From the very beginning of his career as a civil rights activist, Dr. King was concerned with ending poverty and closing the gap between the rich and the poor. While he rejected Marxism, he said of Marx's indictment of economic inequality that it "challenged the conscience of Christian churches." M.L. King, Jr., *supra* note 112, at 95. King agreed with Marx's analysis of the "weaknesses of traditional capitalism" and the need for "a definite self-consciousness of the masses."

The unity of economic and political rights characterizes much of the rights rhetoric of the black community. See, e.g., Wright, *What Does the Negro Want of Democracy* (1919), reprinted in B. Aptheker, *A Documentary History of the Negro People in the United States 1910-1932*, at 285 (1973) (listing and defining, inter alia, "1. A chance to vote, 2. Justice in the courts, 3. Representation on jury, 4. Representation in Government, 5. Better Living Conditions, 6. Fairer Wages . . .").

¹⁴⁰ In fact, the boycotters initially demanded only a more courteous segregated system. The demand for courteous treatment on the buses challenged a culture of white domination that governed social and economic relations in the South. See M.L. King, Jr., *supra* note 112, at 63.

¹⁴¹ Richard Wright connected lynching to the lack of political rights: "[s]heriffs are slow to protect those who do not vote for them." Wright, *supra* note 139, at 290.

considered whether pursuit of political recognition and appropriation of legal consciousness has transformative potential. Any discussion of law, its uses, and its limits in America presupposes the right of those engaged in the debate to stand on American soil and resolve the questions. Yet this assumption ignores the claims of indigenous peoples to their sovereignty over this land.¹⁴² Native Americans had a conception of the physical universe, and of the limits of human claims to it, that existed long before the rest of our ancestors arrived here. Because the sovereignty of native people was never legitimately extinguished, any conclusions the rest of us may come to about law and social change are subject to the special priority of indigenous Americans.¹⁴³ This position, extremist as it may seem to some readers, also expands the dialogue about rights and praxis in useful ways. The voices that seem different—extreme, wicked or frivolous—may or may not be those things. Even if they are, however, the process of theory-building is advanced by listening and responding to them.

*E. Responding to the "Sez Who"¹⁴⁴ Challenge to
Critical Jurisprudence*

Standard critique:

CLS, some contend, has not transcended the value-choice lottery.¹⁴⁵ It offers no concrete description of utopia, nor any means for identifying the utopian or anti-utopian elements of a given legal doctrine, theory, or practice.¹⁴⁶ Critical scholars disparage the principles and methodology offered by mainstream

¹⁴² See R. Dunbar Ortiz, *The Great Sioux Nation, Sitting in Judgment on America* (1977); see also *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 Harv. C.R.-C.L. L. Rev. 000 (1987).

¹⁴³ For an analysis of the colonial model applied to Hawaii by a Native Hawaiian scholar, see H. Trask, *Hawaiians and Self-Determination* (1984) (unpublished manuscript). See also R. Acuña, *supra* note 65 (questioning the legitimacy of the U.S. takeover of the Southwestern United States from Mexico).

¹⁴⁴ See *supra* text accompanying note 4.

¹⁴⁵ See Johnson, *Do You Sincerely Want to Be a Radical?*, 36 Stan. L. Rev. 247 (1984) (suggesting that the quest for transcendent value is more appropriately termed "religious" rather than political, and criticizing CLS for mystifying that quest).

¹⁴⁶ Philip Johnson calls the CLS program "platitudinous." *Id.* at 283. Johnson, however, does identify specific elements of the CLS programmatic vision such as Brest's concept of participatory democracy, and Frug's decentralized city. *Id.* at 282-84. Allan Hutchinson and Patrick Monahan charge that CLS scholars "must offer their own tangible vision of a 'good society.'" Hutchinson & Monahan, *supra* note 24, at 227.

liberal theorists, while maintaining the belief that is the core of the movement: there is a difference between a just and an unjust world. Rejecting liberalism, and sensing the inadequacy of simple assertion or intuition, critical scholars, according to this critique, finesse the question of normative priority.

Informed CLS response:

Catherine MacKinnon suggests that the feminist technique of consciousness-raising is method.¹⁴⁷ Consciousness-raising in the feminist context is the collective discussion and consideration of the concrete, felt experience of gender in order to identify commonalities and build a theory of the cause, effect and means of eradication of sexist oppression.¹⁴⁸ Consciousness-raising deliberately examines the detail of life in a gender-biased society. As method, it differs from the typical top-down, abstract method of male-dominated jurisprudential inquiry.¹⁴⁹ The method can, however, respond to the same inquiries: what is law, how does it work, what can it be, what should it be?

Consciousness-raising about race can include self-inquiry into one's attitudes toward race, dialogue across racial lines, and inquiry into the life experiences of people of color.¹⁵⁰ Such examination may reveal that the pain of racial division is so great as to outweigh the pain of ending it. A theory of the good thus derived will require an end to racism. The experience of racism can guide our hands as we grope further for the outlines of justice.

Liberation theologians suggest that God is on the side of the oppressed. A more modest claim is made here: those on the bottom know how bad life is without the substantive and intangible goods the philosophers ponder. An expanded consciousness of the actual experience of racism is a method of theoretical

¹⁴⁷ MacKinnon, *supra* note 11, at 227.

¹⁴⁸ See generally C. Hymowitz & M. Weissman, *A History of Women in America* 351-55 (1978); G. Lerner, *The Majority Finds Its Past: Placing Women in History* (1979).

¹⁴⁹ For a feminist critique of androcentric philosophy, see generally Feminist Theory, *A Critique of Ideology* (N. Keohane, M. Rosaldo & B. Gelpi eds. 1982); Vickers, *Memoirs of An Ontological Exile: Methodological Rebellions of Feminist Research*, in *Feminism in Canada, From Pressure to Politics* (A. Miles & G. Finn eds. 1982); C. Gilligan, *In a Different Voice* (1982).

¹⁵⁰ See, e.g., E. Bulkin, M. Pratt & B. Smith, *Yours in Struggle* 196 (1984) (consciousness-raising includes questions directed at issues of racism and anti-Semitism, such as "recall an instance in which . . . you identified . . . racism or anti-Semitism but said nothing").

inquiry available to CLS scholars in responding to the problem of normative priority.¹⁵¹ This method will generate new theories of justice provable in the only sense available: through intuition, guided by reason, tested against the lives of real people—a formula that is familiar to twentieth century philosophers. The method suggested here merely factors a wider experience into the equation.

The normative intuitions of those on the bottom are often different from the intuitions of those on top. Japanese-Americans interned during World War II report the kindnesses they received from black porters as they made the difficult journey to their exile in the deserts.¹⁵² In considering the humane acts of these black porters, one can hypothesize that the internment, now recognized as one of the great failures of American constitutionalism, could never have occurred if black military officers, politicians and judges had been included in the process of decision.¹⁵³ It was black soldiers who objected to anti-Japanese racial slurs that were used by the U.S. Army in the Pacific theatre.¹⁵⁴ Black Americans, because of their experiences, are quick to detect racism, to distrust official claims of necessity and to sense a threat to freedom. These intuitions generated from the bottom are useful in making normative choices.

A minority perspective cuts across class lines. Reading the editorials and letters in *Black Enterprise*, a slick and conven-

¹⁵¹ Some CLS writers have given careful consideration to victims' perspectives. See, e.g., Freeman, *supra* note 27. Cf. Abel, *Risk As An Arena of Struggle*, 83 Mich. L. Rev. 772, 800 (1985) (reviewing D. Nelkin & M. Brown, *Workers at Risk: Voices From the Workplace* (1984), and noting the significance of the accident victim's perspective). This article suggests victim consciousness as a standard method of critical inquiry.

¹⁵² One internee recalls in an oral history how a porter helped him sneak a letter to his family:

I asked the porter, "Could you get me a pencil and a paper and a envelope?" I want to write a letter to the family! He didn't say nothing but he show with the eye where he going to put them. . . . He mailed the letter. That black porter, he really take chance because even the bathrooms, they wouldn't let us shut the door. The MP was standing right there.

J. Tateishi, *supra* note 21, at 202. Minoru Yasui also noted the empathy of black stewards. *Id.* at 75-76.

¹⁵³ William Hastic, one black man who held a high governmental position during World War II, eventually resigned in bitterness after his efforts to eliminate racism from the War Department failed. G. Ware, *William Henry Hastic: Grace Under Pressure* (1984).

¹⁵⁴ See F. Kofsky, *Black Nationalism and the Revolution in Music* 56 (1970) (noting the work-stoppage of black Seabees to protest anti-Japanese racist propaganda).

tional magazine directed at an audience of black entrepreneurs, reveals that even economically successful black capitalists are critical of the Reagan Administration's effect on the poor.¹⁵⁵ There is something about color that doesn't wash off as easily as class. The experience of racism, it seems, causes the normative choices of black capitalists to diverge from the choices of others in their class.

To the question "How can one know that a rule or principle is just?" the CLS scholar could reply, "Ask someone who has suffered and fought against oppression, study their experience, and understand their world vision. They will help you find the right answer." Those on the bottom who speak out against the odds for their vision of justice, often become powerful people in the popular mind. The critical scholar can invoke Sojourner Truth, as she silenced a hostile crowd with the power of her slave experience; Cesar Chavez, as he fasted for the forgotten farm workers; Minoru Yasui, who like Homer Plessy before him, orchestrated his own arrest to bring to the highest court in the land a case that revealed the poverty of the American legal system;¹⁵⁶ and Rosa Parks, who dared to imagine that a black woman could remain seated on a Montgomery bus while a white man stood.¹⁵⁷ CLS adherents, by joining these crusaders, can derive the authority to say, "We are on their side, we are right and we will prevail."

Alliance with the bottom lends moral force to the project of critical scholarship and helps complete the utopian vision. CLS offers simultaneously a cutting critique of American law and a utopian commitment to justice. The volume and sophistication of CLS work is unprecedented in the intellectual history

¹⁵⁵ A recent issue, for example, carried alongside articles extolling the virtues of thrift and Oregon wines a Publisher's Message decrying "the myth that Ivy League schools are only too willing to embrace minority applicants" and "myths concerning how much we have progressed [while] black Americans still remain at the bottom rung of the economic ladder." Publisher's Page, *Black Enterprise*, Jan. 1987, at 9.

¹⁵⁶ Minoru Yasui, a successful young lawyer at the time of evacuation, said in an oral history interview: "If we believe in America, if we believe in equality and democracy, if we believe in law and justice, then each of us, when we see or believe errors are being made, has an obligation to make every effort to correct them." J. Tateishi, *supra* note 21, at 71. Yasui thus notified the FBI and local police of his intent to violate the evacuation order. After a police officer refused to arrest him, Yasui went to the local police station to argue himself into jail. *Id.*

¹⁵⁷ See A. Thomas, *Like It Is* 44 (1981) (interview with Mrs. Parks, mother of the civil rights movement, who remained seated on a Montgomery bus when asked to rise for a white man on December 1, 1955—an act that inspired the Montgomery bus boycott).

of left legal theory. This important intellectual development requires the attention of people of color and, as the preceding discussion suggests, the CLS movement is enriched to the extent that it considers and incorporates the experience of the bottom. The section that follows applies the method presented above and suggests reparations as an example of reconstructed legalism, derived from the bottom, appropriate for consideration by CLS scholars.

III. Reparations as a Critical Legalism: An Example of Law Derived from the Bottom

The challenge facing critical legal scholars is the development of new norms and new law that will achieve and maintain the utopian vision. Following the methodology suggested in Parts I and II, this part suggests a new, reconstructed legalism that attempts to meet that challenge. Reparations is a legal concept generated from the bottom. It arises not from abstraction but from experience. This discussion begins by summarizing the factual basis for two reparations claims that are presently under consideration by the United States government.¹⁵⁸ Whether this concept of reparations is consistent with standard liberal legal¹⁵⁹ thought is then considered, with emphasis upon

¹⁵⁸ The claims, advanced by Japanese-Americans and Native Hawaiians, are discussed in detail below. See *infra* text accompanying notes 160-212.

¹⁵⁹ "Liberal legalism," as used here, refers to both the ideology of liberalism (exemplified by individual rights, procedural fairness, equality and liberty) and the corollative commitment to legalism (an appeal to legal reasoning and the rule of law as somehow logical, coherent and determinant). The question presented in this section is whether, ascribing for the moment at least some moral and descriptive validity to a liberal concept of law, it is possible to derive reparations for Native Hawaiians and Japanese-Americans from such law. Cf. Klare, *Law Making As Praxis*, 40 *Telos* 123, 132 n.28 (1979):

I mean by "liberal legalism" the particular historical incarnation of legalism "the ethical attitude that holds moral conduct to be a matter of rule following," which characteristically serves as the institutional and philosophical foundation of the legitimacy of the legal order in capitalist societies. Its essential features are the commitment to general "democratically" promulgated rules, the equal treatment of all citizens before the law, and the radical separation of morals, politics and personality from judicial action. . . .

Liberal legalist jurisprudence and its institutions are closely related to the classical liberal political tradition, exemplified in the work of Hobbes, Locke and Hume. The metaphysical underpinnings of liberal legalism are supplied by the central themes of that tradition: the notion that values are subjective and derive from personal desire, and that therefore ethical discourse is conducted profitably only in instrumental terms; the view that society is an artificial aggregation of autonomous individuals; the separation in political philosophy

the minority perspective. This part concludes with a consideration of the power of a theory of reparations to withstand corruption.

A. Japanese-American Claims for Redress

Japanese-Americans have organized the Redress movement to obtain compensation for their internment during World War II.¹⁶⁰ This internment, now recognized as a constitutional violation,¹⁶¹ was initiated without any reasonable cause to believe the Japanese-Americans were a threat to national security,¹⁶² as

between public and private interest, between state and civil society; and a commitment to a formal or procedural rather than a substantive conception of justice.

¹⁶⁰ See text accompanying notes 173–78 (describing the Japanese-American redress effort).

¹⁶¹ Contemporary constitutional scholars are in virtual agreement that the *Korematsu* decision is "bad law" according to conventional legal analysis and moral theory. See, e.g., Yamamoto, *supra* note 68; Takahata, *The Case of Korematsu v. United States: Could it be Justified Today?*, 6 Hawaii L. Rev. 109 (1984); Rostow, *The Japanese American Cases—A Disaster*, 54 Yale L.J. 489 (1945). John Tateishi quotes Senator Sam Ervin as calling the relocation: "the single most blatant violation of the Constitution in our history." J. Tateishi, *supra* note 21, at xvi. This view eventually came to be shared by Chief Justice Earl Warren, who, as Governor of California, had supported evacuation. In his memoirs, Warren wrote,

I have since deeply regretted the removal order and my own testimony advocating it. . . . Whenever I thought of the innocent little children who were torn from home, school friends, and congenial surroundings, I was conscience-stricken. It was wrong to react so impulsively. . . . It demonstrates the cruelty of war when fear, get-tough military psychology, propaganda and racial antagonism combine. . . .

R. Wilson & B. Hosokawa, *supra* note 21, at 291 (quoting The Memoirs of Chief Justice Earl Warren 149 (1977)). Some have suggested that Warren's judicial career, marked as it was by care to protect civil liberties and rights, was influenced by his remorse over the treatment of Japanese-Americans in California. One journalist suggested that the Nisei paid the ransom that finally liberated the blacks. *Id.* at 290; see also, Smith, *Education of Earl Warren*, The Nation, Oct. 11, 1958, at 206.

¹⁶² General DeWitt, whose final report on the evacuation was heavily relied on by the *Korematsu* majority in upholding the constitutionality of the evacuation orders, cited the fact that no Japanese-American had yet committed an act of sabotage as a "disturbing and confirming indication that such action will be taken." J. Tateishi, *supra* note 21, at xv. After all, as then-California Attorney General Earl Warren reasoned, Pearl Harbor had been a well-timed surprise. *Id.* at xv–xvi. Mr. Justice Murphy cites that "amazing statement" from the final report in a footnote to his dissenting opinion in *Korematsu*, 323 U.S. at 241, n.15. His opinion uses the Final Report extensively to demonstrate the obvious racial discrimination in the orders.

Ironically, Japanese in Hawaii, who retained stronger cultural ties to Japan, were not interned because their labor was vital to the economy and because Hawaii lacked the racist sentiments of the West Coast. *Id.* at xvii.

recently revealed documents confirm.¹⁶³ The government's own conclusion that Japanese-Americans were loyal citizens was withheld from the Supreme Court in an act of fraud so egregious that federal judges have seen fit to use the extraordinary writ of error corum nobis to set aside the convictions of internment resisters some forty years after the fact.¹⁶⁴

The internment was the result of racist hysteria fueled in part by the vicious Hearst newspapers¹⁶⁵ and the longstanding resentment of Japanese-Americans' modest economic success on the West Coast.¹⁶⁶ Many interned families lost homes and possessions in bargain basement evacuation sales, while others lost property in racially motivated escheat trials promoted by the California government.¹⁶⁷ Farm families that had spent generations reclaiming unusable land lost the fruits of their toil.¹⁶⁸

¹⁶³ See Yamamoto, *supra* note 68, at 2. Materials recently obtained through Freedom of Information Act requests:

revealed two extraordinary facts: first, government intelligence services unequivocally informed the highest officials of the military and of the War and Justice Departments that the West Coast Japanese as a group posed *no* serious danger to the war effort and that *no need* for mass evacuation existed; and second, that the Supreme Court was deliberately misled about the "military necessity" which formed the basis of the *Korematsu* decision.

Professor Yamamoto notes the concurrence of the lower federal courts on this point. See *Horhi v. United States*, No. 84-5460, slip op. (D.C. Cir. 1986); *Korematsu v. United States (Korematsu II)*, 584 F. Supp. 1406 (N.D. Cal. 1984).

¹⁶⁴ See *Korematsu II*, and *Hirabayashi v. United States (Hirabayashi II)*, 627 F. Supp. 1445 (W.D. Wash. 1986); see also, Irons, *In Re Hirabayashi*, *The Nation*, Mar. 1, 1986, at 229.

¹⁶⁵ See Tateishi, *supra* note 21, at xiv, xvi (quoting syndicated columnist Henry McLemore: "I am for immediate removal of every Japanese. . . . Herd 'em up, pack 'em off and give 'em the inside room in the badlands. Let 'em be pinched, hurt, hungry and dead up against it. . . . Personally[,] I hate the Japanese. And that goes for all of them.").

¹⁶⁶ See Smith, *Racial Nativism and Japanese American Relocation*, and Coombs, *Congressional Opinion and War Relocation, 1943*, in *Japanese Americans: From Relocation to Redress*, *supra* note 73.

¹⁶⁷ In 1945, the California State Legislature earmarked \$200,000 to the state attorney general to prosecute escheat actions against Japanese-Americans, offering the counties a 50% share of recoveries as an incentive for filing. The incarcerated land owners were hardly in a position to defend, although a few tried. See R. Wilson & B. Hosokawa, *supra* note 21, at 257-58.

Numerous reports of losses—homes, farms, businesses, family heirlooms and livelihoods—are recorded in J. Tateishi, *supra* note 21. See also C. Tanaka, *supra* note 70, at 5-6.

¹⁶⁸ This reference is in part literal. Families were taken, in many cases right before spring harvest, from the farms and orchards they had carefully built up over the years, often on land others had found unsuitable for agriculture. See J. Tateishi, *supra* note 21, at xix. Internees often recall the date of evacuation in relation to harvest time. "The evacuation took place about a week or ten days before the first harvesting of the lettuce crop," *Id.*, at 120, "They evacuated us and put us in camp just a week before he started

Even more devastating than the loss of property was the loss of opportunity. Many of the Issei, or first-generation immigrants, were deprived of their most productive years, the period when their hard work, experience and careful investments might have yielded the financial security that many were never able to achieve after internment. Nisei internees report the end of promising careers, businesses and educational opportunities as a result of their incarceration.

Internees endured physical suffering during the dusty desert days and freezing nights.¹⁶⁹ Families were crammed into tiny one-room, tar-papered units, and shared communal toilet and dining facilities, making normal family living impossible. Food supplies were erratic. Special meals and facilities required for infants, diabetics and others with medical needs were non-existent; inadequate health facilities could not address problems suffered by a camp population ranging from newborns to the frail elderly. Death and permanent injury resulted from lack of medical care.¹⁷⁰

to harvest the Thompson grapes. . . . I checked with a friend. They had strawberries, and they had everything all ready to harvest, and then suddenly they went to camp in Salinas." *Id.* at 142-43. A Japanese farmer lost a \$600,000 strawberry crop at Floin-Elk Grove outside Sacramento. Hosokawa, *supra* note 73, at 185. See also Okihiro & Drummond, *The Concentration Camps and Japanese Economic Losses in California Agriculture, 1900-1942*, in *Japanese Americans: From Relocation to Redress*, *supra* note 73.

¹⁶⁹ An internment victim recalls: "Up at Manzanar it's 100 degrees during the day, but at night it's cold as hell. . . . You had a dust storm come through. You get a half an inch of dust. . . . Used to come from underneath the floor. The floor used to have at least half an inch openings." J. Tateishi, *supra* note 21, at 95.

Internees were held at racetracks, stables and fair grounds while permanent detention centers were built. Jerry Enomoto testified to the conditions at the holding camps: "Evacuees ate communally, showered communally, defecated communally. . . . [N]o partitions had been built between toilets. . . . [T]he stench became oppressive in the summer heat, especially in stables which had been merely scraped out and no floors put in." N. Kitztrie, *The Tree of Liberty* at 615 (1986).

¹⁷⁰ One man recalls the death of his wife and twin daughters at childbirth:

And so they worked on her and then all I can remember is telling, you know, help me, help me. Through junior high school in the rough neighborhood and everything like that, I could always protect her physically; but I just stood there holding her hand you know, holding on to her, and she just drained away. . . . I don't know what happened to the babies. . . . Whether it was carelessness. Or that it was something that was going to happen. I know for a fact that the twins were born and the camp did not have facilities. . . . Years later I found out one of the twins had lived twenty-four hours.

J. Tateishi, *supra* note 21, at 96.

Mabel Ota tells of her father's death from a diabetic coma, misdiagnosed as melancholia and treated with electroshock therapy. *Id.* at 111. Another woman recalls being shipped to Arkansas with her two-week old infant who had pneumonia: "We were

These physical and economic deprivations, though significant, were not the greatest harms inflicted upon internees. These victims have expressed their greatest bitterness and anger over the betrayal by a government they supported and believed in. The Japanese-Americans on the West Coast were predominantly assimilationist.¹⁷¹ They shared the tastes and aspirations of the non-Japanese. The Nisei, in particular, excelled academically, fully absorbing the rhetoric of American liberal ideals. They followed baseball and big bands, and considered themselves full-fledged Americans. Many disparaged and ridiculed Japan. The shock of the un-American label to those who knew no other culture wounded deeply.

The Nisei struggled to reconcile patriotism with the fact of internment. One woman recalls planning a Fourth of July program while imprisoned at the Fresno fair grounds:

supposed to be on a medical train. There was only one doctor . . . and his wife couldn't even get hot water for the baby's formula." *Id.* at 126-27. The same woman lost a mother-in-law to cancer. There were no facilities for cancer treatment in camp. *Id.* at 131.

Dr. Oda reported "suicides[,] . . . shortened lives[,] . . . heart disease and cancers, the depressive states, all brought on by the terrible consequences of the Evacuation" in an August 28, 1981 letter to the editor of *The Rafu Shimpo*, a Japanese-American community newspaper.

A nurse recalls shortages of supplies and staff, leading to "a lot of unnecessary deaths in camp. You wouldn't believe it. It's just that there were not enough people to watch the patients. . . ." J. Tateishi, *supra* note 21, at 150. Women died in childbirth because no surgeons were available to perform cesareans when necessary, and untrained staff inadvertently killed patients, as in one case of mercury poisoning from a broken thermometer. *Id.* Yoshiye Togasaki, the first Japanese woman graduate of Johns Hopkins Medical School, recalls treating the sick in the camps without the necessary vaccines, sanitary facilities or medications. *Id.* at 224-25.

Mabel Ota reports dismay at finding her diabetic father eating a camp meal of bread, potatoes and spaghetti. *Id.* at 111.

One mother describes leaving behind her three-year-old with measles. "It was easier for me because he was asleep. I don't know. But when I thought about how he might wake up and be in a strange place, with strange people, I just really broke down and cried. I cried all morning over it, but there was nothing we could do but leave him. He stayed at general hospital and joined us at Manzanar in three weeks." *Id.* at 24.

In some cases, families were forced by the government to institutionalize handicapped relatives who had been cared for at home before relocation. *Id.* at 8.

¹⁷¹ Attorney Minoru Yasui, for example, described his father's assimilated status: "Masuo Yasuo Yasui was a member of the local Rotary Club, a member of the board of the Apple Grower's Association, a pillar of the local Methodist Church[,] . . . a friend and neighbor of the local bank president, the most prominent lawyer in town, the editor of the local newspaper, and all the 'important people in Hood River, Oregon.'" J. Tateishi, *supra* note 21, at 64.

Internment victim Helen Murao recalls, "as children, we went to school as the only Japanese family . . . our peer associations were not with Japanese people at all, so this [internment] was my first experience among Japanese people." *Id.* at 44.

[W]e decided to recite the Gettysburg Address as a verse choir. We had an artist draw a big picture of Abraham Lincoln with an American flag behind him. Some people had tears in their eyes; some people shook their heads and said it was so ridiculous to have that kind of thing recited in a camp. It didn't make sense, but it was our hearts' cry. We wanted so much to believe that this was a government by the people and for the people and that there was freedom and justice.¹⁷²

These betrayed Americans have made it their cause to seek redress for the illegal evacuation and incarceration.¹⁷³ Senate Bill 1053 and House Bill 442 seek monetary reparations for each internment victim. Thus far neither bill has been reported out of committee.¹⁷⁴ A group of internment victims has also initiated class action litigation against the federal government for damages.¹⁷⁵ This litigation faces many procedural hurdles,¹⁷⁶ but

¹⁷² J. Tateishi, *supra* note 21, at 14.

¹⁷³ For a comparison of the Japanese-American claim with that of the Jewish people against post-war Germany, see Osaka, *Japanese-Americans and Central European Jews: A Comparison of Post-War Reparations Problems*, 5 Hastings Int. Comp. L. Rev. 211 (1981).

¹⁷⁴ S. 1053, 99th Cong., 2d Sess. (1986); H.R. 442, 99th Cong., 2d Sess. (1986).

¹⁷⁵ *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984), *aff'd in part and rev'd in part*, 782 F.2d 227 (D.C. Cir. 1986), *reh'g en banc denied*, 793 F.2d 304 (D.C. Cir. 1986); *cert. granted*, 107 S.Ct 454 (1986).

¹⁷⁶ The *Hohri* case was dismissed in its entirety by the district court. 586 F. Supp. 769 (1984). The plaintiffs alleged that the actions of the United States government violated their rights under the first, fourth, fifth, sixth, eighth, ninth, tenth, and thirteenth Amendments. With the exception of a takings claim under the fifth Amendment, the court held that recovery pursuant to the plaintiffs' claims was barred by the doctrine of sovereign immunity. *Id.* at 783. Although the court found that that "plaintiffs have stated a valid takings claim," *id.* at 784, such a claim was time barred by the statute of limitations. *Id.* at 786-91. Finally the court held that neither the Tucker Act nor the Federal Tort Claims Act constituted a waiver of federal sovereign immunity. *Id.* at 793-94.

The Court of Appeals reversed in part and affirmed in part the decision of the lower court. The Appellate Court agreed that the doctrine of sovereign immunity was applied correctly, 782 F.2d at 244, but found that the takings claim was not time barred by the statute of limitations. *Id.* at 246. Examining the facts of the case, the court found that the government had fraudulently "concealed the fact that there was no military necessity justifying the exclusion, evacuation, and internment program." *Id.* at 250. This concealment thus tolled the statute, and made the plaintiffs' filing timely. *Id.* at 252. Finally, the Appellate Court held that the statute of limitation continued to be tolled until one of the political branches made an authoritative statement "that there was reason to doubt the basis of the military necessity rationale." *Id.* at 253. "That statement came

Judge J. Skelly Wright has breathed life into the claims by sustaining at least one count of the complaint.¹⁷⁷ The U.S. Supreme Court granted certiorari and will consider the case this term.¹⁷⁸

B. The Native Hawaiian Claim for Reparations

Native Hawaiians are also seeking reparations from the United States for the overthrow of native Hawaiian rule and loss of native lands.¹⁷⁹ Native Hawaiians are unique among indigenous Americans in that they lived prior to annexation under a western-style constitutional government,¹⁸⁰ whose sovereignty was recognized internationally as well as by the United States.¹⁸¹ That sovereignty ceased, however, upon the overthrow of the Hawaiian monarchy—an overthrow in which the United States participated. The Hawaiians' claim for loss of their government as well as their land forms a unique basis for reparations.

The Hawaiians descended from Polynesian voyagers who settled in the Hawaiian Islands, establishing a communal, agrar-

only in 1980 when Congress passed the Act creating the Commission of Wartime Relocation and Internment of Civilians (CWRIC)" in 1982. *Id.*

A majority denied the request for a rehearing en banc. 793 F.2d 304 (D.C. Cir. 1986). Five judges, Bork, Scalia, Starr, Silberman and Buckley, dissented, on the ground that the plaintiffs' claims were time barred. Judges Wright and Ginsburg reaffirmed their prior holdings concerning the validity of the takings claim.

¹⁷⁷ 782 F.2d at 242. Judge Wright held that the Tucker Act, 28 U.S.C. § 1346(a)(2)(1982) constituted a waiver of sovereign immunity for the takings claims, noting that "[g]iven the alleged damage to the appellants' real and personal property directly caused by the evacuation program, there is no question that appellants have stated a claim cognizable under the Takings Clause." *Id.*

¹⁷⁸ *Cert. granted*, 107 S. Ct. 454 (1986).

¹⁷⁹ Studies favoring reparations include: Native Hawaiian Study Commission Minority Report; Appendix to M. MacKenzie, *Sovereignty and Land: Honoring the Native Hawaiian Claim* (1982) (this article was written for the Office of Hawaiian Affairs (OHA), an elected body representing Native Hawaiians, and represents the OHA position on reparations); Blondin, *A Case for Reparations for Native Hawaiians*, 16 *Hawaii B. J.* 13 (1981); Lopez-Reyes, *The Demise of the Hawaiian Kingdom: A Psycho-cultural Analysis and Moral Legacy—Something Lost, Something Owed*, 18 *Hawaii B. J.* 3 (1983). For arguments against reparations, see Hanifin, *Hawaiian Reparations: Nothing Lost Nothing Owed*, 17 *Hawaii B. J.* 107; Native Hawaiian Study Commission Majority Report, *supra* note 179.

¹⁸⁰ North American Indian claims are typically based on treaty violations or statutory rights. *See, e.g.*, Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. 649 (D. Me.) *aff'd*, 528 F.2d 370 (1st Cir. 1975). The Passamaquoddy claims were eventually settled by a Congressional grant. *See* Maine Indian Claims Settlement Act of 1980, 25 U.S.C. § 1721 (1982).

¹⁸¹ *See* United States v. Fullard-Leo, 331 U.S. 256, 265 (1947) (stating that Hawaii existed as a sovereign nation "as far back as history and local tradition reaches").

ian society governed by a regime of custom and ruled by hierarchical leadership.¹⁸² The Hawaiian leaders, who governed the islands for over a thousand years before the arrival of Captain Cook, proved adept at responding to the influx of outside influence during the nineteenth-century period of Pacific exploration and trade.¹⁸³ King Kamehameha used Western military devices to consolidate control of the islands,¹⁸⁴ and his royal descendants instituted a Western-style constitutional monarchy in order to establish Hawaiian sovereignty in Western eyes.¹⁸⁵ The major international powers, including the United States, formally recognized Hawaiian sovereignty.¹⁸⁶

The Hawaiian monarchy quickly adopted Western laws and acquired Western tastes in royal accoutrements.¹⁸⁷ The missionary-educated native Hawaiian population, while sometimes critical of royal expenditures and the favors granted Western advisers, generally supported the monarchy. Commoners in particular favored those monarchs who promoted Hawaiian culture and nationalism.¹⁸⁸

White Americans, a growing economic presence in the islands, resented the Hawaiian leadership.¹⁸⁹ These planters, merchants and traders desired annexation by the United States.¹⁹⁰

¹⁸² See generally K.R. Howe, *Where the Waves Fall* 152–76 (1984); Finney, *New Perspectives on Polynesian Voyaging*, in *Polynesian Culture History* (G. Highland, R. Force, A. Howard, M. Kelly & Y. Sinoto eds. 1967).

¹⁸³ See K.R. Howe, *supra* note 182; R. Kuykendall, *The Hawaiian Kingdom* (1938); R. Cordy, *Polynesians Settle Hawaiian Islands About 1,400 to 1,600 Years Ago*, Honolulu Star Bulletin, Feb. 17, 1987 at 27, col. 1.

¹⁸⁴ R. Kuykendall & A. Day, *Hawaii, A History* 23–29 (1961); R. Kuykendall, *supra* note 183, at 29–60.

¹⁸⁵ R. Kuykendall & A. Day, *supra* note 184, at 49–55 (adoption of Western law).

¹⁸⁶ The Hawaiian Kingdom entered into treaties with the United States, France and Great Britain, *id.* at 63, as well as Denmark. *Id.* at 72. Daniel Webster stated the official view of the U.S. government that “no power ought either to take possession of the islands as a conquest, or for purpose of colonization, and that no power ought to seek for any undue control over the existing Government” *Id.* at 64–65. Officials from the U.S., Great Britain, France, Germany, Sweden, Norway, Japan, Portugal, the Netherlands, Belgium, Denmark, Mexico and Russia attended King Kalakaua’s coronation in 1883. *Id.* at 165. Medals of recognition awarded to the Hawaiian monarchy are today part of the collection of the Bishop Museum in Honolulu.

¹⁸⁷ See *id.* at 165–71.

¹⁸⁸ Native support for the monarchy is discussed in Trask, *supra* note 143.

¹⁸⁹ See R. Kuykendall & A. Day, *supra* note 184, at 169–71; see also L. Thurston, *Memoirs of the Hawaiian Revolution* (1936).

¹⁹⁰ See R. Kuykendall, *supra* note 183, at 411–27 (discussing annexation movement of 1853–1854). But see T. Osborne, *Empire Can Wait* (1981). Osborne points out that sugar interests were not united in their support of annexation. Some sugar companies preferred to avoid U.S. constitutional and statutory provisions that might protect plantation laborers. *Id.* at 17–27.

They accused the Hawaiian monarchy of incompetence, waste and anti-democratic rule.¹⁹¹ Dissatisfaction came to a head in 1893, when a handful of foreigners and white subjects of the Kingdom carried out a revolution.¹⁹²

Native Hawaiians, the overwhelming majority of the population, together with white loyalists, opposed the quest for annexation. U.S. government representatives, however, saw the threatened revolution as an opportunity to wrest the islands from indigenous control.¹⁹³ United States Minister for Hawaii John L. Stevens had written earlier to the State Department, "The Hawaiian pear is now fully ripe, and this is the golden hour for the United States to pluck it."¹⁹⁴

The self-appointed revolutionaries were a small band of poorly-armed merchants and planters. Alone, they were no match for Queen Liliuokalani's military forces. However, Stevens landed U.S. troops on the islands to secure the Queen's surrender. The Queen, desiring to avoid bloodshed and trusting that the United States government would adhere to its treaties respecting Hawaiian sovereignty, temporarily surrendered and appealed to the President to restore her to the throne.¹⁹⁵ Stevens later asserted that his intent had been merely to protect American citizens in Hawaii. His correspondence, however, made no pretense that his goal was anything other than an overthrow of the monarchy.¹⁹⁶

Newly-installed President Grover Cleveland dispatched an emissary to investigate the U.S. involvement. He determined that the takeover was indeed a result of American military intervention against the will of the majority of Hawaiian citizens, a violation of international law as well as American foreign policy.¹⁹⁷ The government's commitment to legality, however, faltered in the face of powerful political considerations, includ-

¹⁹¹ R. Kuykendall & A. Day, *supra* note 184, at 169-71. See also L. Thurston, *Memoirs of the Hawaiian Revolution* (1936).

¹⁹² *Id.* at 175-79.

¹⁹³ R. Kuykendall, *supra* note 183, at Vols. I-III 629. Annexationists were told by U.S. officials that President Harrison sympathized with their cause. L. Thurston, *supra* note 191 at 231-32.

¹⁹⁴ President Grover Cleveland's Special Message to Congress, Dec. 18, 1893, 26 Cong. Rec. 309.

¹⁹⁵ Liliuokalani, Statement of Surrender, Jan. 17, 1893 in Liliuokalani, *Hawaii's Story by Hawaii's Queen* 387 (12th ed. 1976).

¹⁹⁶ See Cleveland, *supra* note 174.

¹⁹⁷ *Id.*; M. MacKenzie, *supra* note 179.

ing strategic and economic benefits, that favored annexation.¹⁹⁸ The Hawaiian government was never restored to power, and after a five-year congressional stand-off between anti-imperialists and annexationists, Hawaii became a territory in 1898.

Native Hawaiians never voted in any plebiscite on either the overthrow or annexation.¹⁹⁹ In fact, the highly literate and politically astute Hawaiians overwhelmingly supported their native government and mourned the U.S. takeover.²⁰⁰

In the process of the takeover, the United States obtained vast acreages of land that had belonged to the Kingdom and had been held in trust for the Hawaiian people.²⁰¹ Some of this land remains in federal hands today, as vast military bases, national parks and open spaces.²⁰² The remainder was returned to the State of Hawaii,²⁰³ which agreed to hold the land in trust for the native Hawaiian people. The State, however, has never complied with the trust mandate. Proceeds from trust land are commingled with other revenue and are not targeted to benefit the indigenous Hawaiian community.²⁰⁴ While the state's own legislative auditor recognizes the state's questionable record of upholding trust responsibilities, courts have ruled that individual Hawaiians lack standing to sue for these violations.²⁰⁵

Native Hawaiians seek reparations for the overthrow of the Hawaiian government and loss of land. They request a formal recognition of the illegal destruction of Hawaiian sovereignty and an apology from the United States.²⁰⁶ They also seek re-

¹⁹⁸ See generally, T. Osborne, *supra* note 190.

¹⁹⁹ See T. Osborne, *supra* note 190, at 2 (President Harrison dissuaded from seeking a plebiscite).

²⁰⁰ See Trask, *supra* note 110, at 118, 131 (noting that Hawaiians opposed annexation by a margin of 5 to 1).

²⁰¹ Joint Resolution of Annexation, July 7, 1898, 30 Stat. 750 (1898); see Levy, *Native Hawaiian Land Rights*, 63 Cal. L. Rev. 848, 863 (1975); M. MacKenzie, *supra* note 179, at 28; Constitution of the Republic of Hawaii, 1894.

²⁰² See M. MacKenzie, *supra* note 179, at 43-45; see also Note, *Hawaii's Ceded Lands*, 3 U. Hawaii L. Rev. 101 (1981); Native Hawaiian Study Commission Report, *supra* note 179, at 107-09.

²⁰³ Admission Act of March 18, 1959, 73 Stat. 4, § 5; see also M. MacKenzie, *supra* note 179, at 45-48.

²⁰⁴ Legislative Auditor of the State of Hawaii, Final Report on the Public Land Trust, Report to the Legislature of the State of Hawaii, Report No. 86-17, Dec. 1986 [hereinafter *Final Report*]; M. MacKenzie, *supra* note 179, at 49-53.

²⁰⁵ See *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 588 F.2d 1216 (9th Cir. 1978), *cert. denied*, 444 U.S. 826 (no private right of action to enforce the Admissions Act); *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n* (*Keaukaha II*), 739 F.2d 1467 (9th Cir. 1984); Ing, *Right to Sue*, 4 Ka Wai Ola O OHA 10 (1987).

²⁰⁶ See *Towards Reparations/Restitution*, in M. MacKenzie *supra* note 179 [hereinafter *Towards Reparations*]. The Office of Hawaiian Affairs (OHA) was established

sumption of Hawaiian rule, return of at least part of the lands presently held by the federal and state governments, and monetary compensation.²⁰⁷ In one survey of Hawaiian opinion, a majority of respondents favored reparations in the form of land and programs benefiting Hawaiians collectively, as well as individual monetary awards.²⁰⁸

Non-Hawaiian opponents of reparations argue that the American takeover was an historical inevitability, and that present-day taxpayers are not responsible for the wrongdoing of government officials of 100 years ago.²⁰⁹ Yet the recent judicial

by amendment to the Hawaii Constitution to represent the interests of Native Hawaiians, particularly with respect to any award of reparations from the U.S. government. Trustees to OHA are elected by persons claiming at least partial Hawaiian ancestry. Hawaii State Const., art. XII, § 5. See also Hawaii Rev. Stat. § 10. OHA has stated, "[t]he first step toward reparations should be a clear acknowledgment of the United States' responsibility for the overthrow of the Hawaiian government."

²⁰⁷ See *Towards Reparations*, *supra* note 206, at 4-19.

²⁰⁸ Native Hawaiian Study Commission Survey Report, *supra* note 179. The survey asked respondents their opinion as to the optimum form of settlement, allowing them to indicate one or more of the following:

	Percent indicating <i>this option</i>
Land only	9.8%
Money only	3.8%
Land and Money	59.4%
Program	63.4%
Other/No Response	10.0%

²⁰⁹ Sam Slom, president of Small Business Hawaii, stated in an interview:

I don't believe that any segment of the population is entitled to reparations be it the Japanese, or Eskimos, or Indians, or anyone else because we've got a problem of fixing responsibility if there in fact was a wrong done to a group of people or to individuals. I think that you have a problem with time and you have a problem with responsibility. If, for example, don't feel responsible for problems that happened long before I was here and able to do something about them. I would be responsible if there is something I see now or that I contribute to. But I think it's unfair to try to force people living today to pay for a wrong which may have been committed by their ancestors or perhaps by someone with whom they have no connection at all.

The other problem with reparations is in the area of help. Do you really help a people if you give them something which they may in fact not directly be entitled to? Do you help a people by encouraging them to become dependent on someone else? What we should be doing is to give them opportunities to insure that those mistakes or errors or crimes do not occur again.

The solution is not to take from one group of people in order to give to another. The solution is not to convert emotion into monetary damages in order to address a responsibility that is not there.

Interview with Sam Slom, in *Hawaiian Reparations: Three Points of View*, Ka Wai Ola O OHA, Feb., 1986 at 1, col. 1.

and congressional recognition of moral and legal obligations for treaty violations and uncompensated takings of the land of Native North Americans has encouraged Hawaiians to press their claims.²¹⁰ A study commission established by Congress, with commissioners appointed by a Republican administration, concluded that reparations were not due the Hawaiians.²¹¹ A minority of the commissioners, however, filed a strong dissenting report.²¹²

The Native Hawaiian and Japanese-American claims for reparations each represent emerging norms and social movements generated from the bottom. Sympathetic academics can now develop the concept. The following section attempts to use CLS methodology in conjunction with the method of looking to the bottom to develop a theory of reparations.

C. Reparations Claims Within the Context of Liberal-Legalism

This section considers standard objections to reparations and suggests critical responses that can be strengthened by looking to the bottom.²¹³

1. Standard Doctrinal Objections to Reparations

The standard doctrinal objections to reparations claims fall under four general categories:

1. factual objections and excuse or justification for illegal acts;

²¹⁰ See, e.g., Alaskan Native Claims Settlement Act of 1971. 43 U.S.C. § 1601 (1982), discussed *infra* at note 258.

²¹¹ Native Hawaiian Study Commission Majority Report, *supra* note 179.

²¹² *Id.* For individual expressions of both the majority and minority viewpoints, see *id.*; Hanifin, *supra* note 152; interview with Sam Slom, *supra* note 209; Bauman, remarks *infra* note 251.

²¹³ This article discusses the Native Hawaiian and Japanese-American claims for reparations because they are presently before the U.S. government and because they are useful models for formulating a theory of reparations. Native Americans, pioneers in pressing reparations claims, have successfully obtained compensation for treaty violations. For example, Native Americans have been granted fishing rights in recognition of past government obligations. See *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). Compensating other victim groups—such as black Americans for the wrong of slavery and the failure of Reconstruction, or Chicanos for violations of the Treaty of Guadalupe-Hidalgo—would also fall under this analysis. See Bittker, *supra* note 13, for a discussion of the constitutional bases for black reparations.

2. difficult identification of perpetrator and victim groups;
3. lack of sufficient connection between past wrong and present claim;
4. difficulty of calculation of damages.

Refutation of the first set of arguments is not within the scope of this article. For readers skeptical of the factual assumptions that form the basis of reparations claims, several historical texts and documents are available, as well as the reasoned opinions of those who have studied the facts.²¹⁴ For consideration of the related defense that even if the facts occurred as alleged, the acts were legitimate, legal or otherwise justified by the exigencies of the time, again the reader is referred to the existing scholarship addressing that issue.²¹⁵

The purpose of this section is to establish a doctrinal basis for claims of reparations. Thus, the preliminary question presented here is whether, assuming the fact of past illegal and unjustified acts directed against particular ethnic groups, reparations makes sense to the legal mind. Under an expanded version of liberal legalism²¹⁶—a version that considers the experience of victims—the answer is yes.

*a. Identification of Victims and Perpetrators*²¹⁷

The problem of specific identification of wrongdoers and victims is a common objection to reparations. This reservation reflects a penchant for horizontal and vertical logic in legal doctrine. Privity, standing, and nexus are typical conceptual expressions of this compulsion for close and ordered relations between individual disputants. Reparations challenges this rigid order by suggesting new connections between victims and perpetrators.

²¹⁴ See *supra* notes 140, 154; see also, M. Weglyn, *Years of Infamy: The Untold Story of America's Concentration Camps* (1976); P. Irons, *Justice at War* (1983); *Commission on Wartime Relocation, Personal Justice Denied* (1983).

²¹⁵ See generally *id.*

²¹⁶ See *supra* note 138.

²¹⁷ Alan Freeman's victim/perpetrator dichotomy is of obvious use in reparations analysis. See Freeman, *supra* note 27.

The standard legal claim resembles:

Plaintiff A
(individual victim)

v.

Defendant B
(perpetrator of recent
wrong-doing)

A claim in reparations looks like this:

Plaintiff Class A
(victim group members)

v.

Defendant Class B
(perpetrator descendants and current
beneficiaries of past injustice)

Several components of the standard legal claim are not part of the second illustration. First, the horizontal, intra-group connections are absent. Not all members of the victim group are similarly situated. Some are rich, some poor. Some feel betrayed, others do not. Some are easily identifiable as group members, others have weak claims to membership. Camp internees, for example, include the all-American veteran carrying deep psychological scars from internment, the wealthy retired capitalist who recovered easily from internment, and anti-American protestors. Native Hawaiians have intermarried and assimilated so that native ancestry is found both among those who continue to live within the Hawaiian culture and those who left it long ago. Non-Hawaiian loyalist citizens of the Hawaiian Kingdom also lost land, status, and power in the U.S. takeover, yet proof of past loyalty seems an unworkable and awkward criterion for victim identification.

Similarly, of those taxpayers who must pay the reparations, some are direct descendants of perpetrators while others are merely guilty by association. Under a reparations doctrine, the working class whites whose ancestors never harbored any prejudice or ill-will toward the victim group are taxed equally with the perpetrators' direct descendants for the sins of the past.²¹⁸

²¹⁸ To the extent that victims are taxpayers, they will in a sense pay part of their

Looking to the bottom helps refute the standard objections to reparations. In response to the problem of horizontal connection among victims and perpetrators, a victim would note that as the experience of discrimination against the group is real, the connections must exist. The hierarchical relationship that places white people over people of color was promoted by the specific wrongs of the past.²¹⁹ The destruction of Hawaiian sovereignty and the internment of Japanese-Americans are tied to the idea of white dominance and non-white difference. Each specific act of oppression against a minority group reinforces, entrenches, and promotes the assumption that non-whites are different and appropriately treated as different.

Victims necessarily think of themselves as a group, because they are treated and survive as a group. The wealthy black person still comes up against the color line.²²⁰ The educated Japanese still comes up against the assumption of Asian inferiority.²²¹ The wrongs of the past cut into the heart of the privileged as well as the suffering.²²²

own damages. The significance of setting aside part of the national budget for reparations, however, outweighs the incongruity of this overlap of roles.

²¹⁹ See J. Kovel, *White Racism, A Psychohistory* (1970) (including a Freudian analysis of racism and history); W. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812* (1968). Thus reparations, according to the National Council for Japanese American Redress, are necessary because "[w]e and our children have the right to live free from popular prejudice and the stigma of having been suspected as spies and saboteurs." NCJAR Newsletter, Summer 1979, at 5.

²²⁰ The "color line" is Dr. DuBois' famous metaphor for the American race problem. W.E.B. DuBois, *Forethought to The Souls of Black Folk*, *supra* note 21.

Hank Aaron, for example, reports the death threats to his family and racist hate mail he received the year he broke Babe Ruth's home run record. A. Thomas, *supra* note 157, at 26. For his 755 home runs, Aaron received one commercial endorsement. Aaron noted: "I can remember when Mickey Mantle and Roger Maris hit that many home runs between the two of them, and they had all kinds of endorsements." *Id.* at 27.

Successful blacks also face discretionary racism that is easily masked in professional employment. Cf. Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945 (1982).

²²¹ See, e.g., Gotanda, *supra* note 50.

²²² Oral accounts of the internment are the same across economic classes of Japanese-Americans. In one such account, the mother begins by describing her six-year-old son's food poisoning and her desperate attempts to obtain medical care for him. He was taken to a hospital outside the internment camp, but the mother was not allowed inside the hospital. The next day the parents wanted to call the hospital, but military officials refused. Three internees threatened violence, and finally permission was granted to make the call. The mother succeeded in getting to the hospital to retrieve her child. She then describes what followed:

The continuing group damage engendered by past wrongs ties victim group members together, satisfying the horizontal unity sought by the legal mind. Indigenous Hawaiians, for example, are on the bottom of every demographic indicator of social survival: they have lower birth weights, higher infant mortality, and, if they survive, higher rates of disease, illiteracy, imprisonment, alcoholism, suicide and homelessness.²²³ Hawaiians realize their forgotten status in their own land. Poor and rich, Democrat and Republican, commoner and royalty—native Hawaiians largely agree that they have been robbed.²²⁴

Japanese-Americans, as well, bear the continued burdens of racism. Though on the whole successful by standard indicators, many former internees still have not recovered from the economic setback of the evacuation. The Japanese-American elderly frequently live below the poverty line.²²⁵ Even those

... here's this little six-year-old kid; he was lying on his side and just crying, but silently, you couldn't hear him. I asked him what was the matter and he just threw his arms around me and held on to me. And he said, "Oh, take me back to camp. They were going to let me die last night." I said, "What are you talking about?" And he said, "Well, the nurse said, 'Let this little Jap die, don't even go near him.'" And to this day he remembers that. He's forty-five years old now, but he still remembers that.

J. Tateishi, *supra* note 21, at 218.

²²³ G. Kanahale, Current Facts and Figures About Hawaiians 8 (1982) (life expectancy); *id.* at 9 (infant mortality); *id.* at 12 (disease); *id.* at 13 (suicide); *id.* at 21 (arrests); *id.* at 35 (income). For acknowledgment of Hawaiians' low rank in the standard indicators of well-being, see Native Hawaiian Study Commission Report on the Culture, Needs and Concerns of Native Hawaiians, Vol. 1, 33-145 (education, health, housing statistics). See also Hawaiian Reparations: Three Points of View, *supra* note 209 (remarks of Senator Inouye, citing "the largest number of drop-outs, the highest incidence of diseases, whether it be cancer or Hansen's disease, the lowest number of professionals—they are all native Hawaiians").

²²⁴ Hawaiians who have publicly supported reparations include: Melody MacKenzie, an attorney with the Native Hawaiian Legal Corporation; Karen Blondin, attorney and Deputy Ombudsman for the State of Hawaii; Abigail Kawanakoa, descendant of Hawaiian royalty who would probably be in line for the throne if the monarchy still existed, see Kim, Interview: Abigail Limoiki Kekaulike Kawanakoa, 21 Honolulu No. 5, 67, 76 (Nov. 1986); Rep. Kina'u Boyd Kamalii, Republican state legislator and member of the Native Hawaiian Study Commission, who broke with other Reagan appointees and dissented from the Study Commission Report, see Report of the Minority, *supra* note 181; as well as the thousands, including those from poor and rural areas, who have attended meetings and public hearings in support of reparations. Cf. Survey, *supra* note 208.

²²⁵ This fact is demonstrated by the existence of organizations such as the Japanese Welfare Rights League in Los Angeles, headed at one time by Paul Kochi, an Issei activist; and construction of low income housing projects for service to the Issei. See

who are younger and more affluent face various forms of discrimination. University administrators are under attack for excluding Japanese-American applicants on the basis of a myth that Asians are "overrepresented" in the professions.²²⁶

The myth of Asian success fails to confront the crucial question of costs of conventional success.²²⁷ Japanese-Americans are often over-educated for the jobs they hold, and, like white women, frequently report that they must be twice as good in order to receive half the recognition. Many whites hold stereotypes of Japanese as "passive" or "good with numbers," and resent Japanese who exhibit assertiveness or verbal skills. Japanese-Americans are often passed over for leadership positions and are patronized by whites who are surprised to find out, for example, that an educated Japanese-surnamed person can write well-crafted English prose. Exploring the experience of Japanese-American life shows that the surface success has had significant internal costs. Japanese-Americans live with the suppressed rage of knowing that their success comes at greater personal cost, and in the face of pervasive discrimination.²²⁸

Added to this subtle bigotry is the overt racism of epithets, slurs, and stereotypes pervading popular discourse, revived every December 7 by ignorant Americans who have not yet

Housing Projects for Seniors, Disabled Near Completion, Pac. Citizen, Jan. 2-9, 1987, at 6, col. 1 (income qualification for the project is a maximum of \$12,050 for two people).

²²⁶ See Kim & Hurh, *Korean Americans and the "Success" Image: A Critique*, 10 *Amerasia* J. 3 (1983). University of California President David Gardner said that overrepresentation of Asians may require changes in admission criteria. See *UC President's Statement Adds to Admissions Debate*, Pac. Citizen, Jan. 30, 1987, at 1, col. 3.

²²⁷ One study noted, for example, that while native born Asian-American men have higher average levels of educational achievement and professional experience than white men, their income levels are not generally higher. Hirschman & Wong, *Trends in Socioeconomic Achievement among Immigrant and Native-born Asian Americans*, 22 *Sociological Quarterly* 495 (1981); see also Chun, *The Myth of Asian American Success and Its Educational Ramifications*, 15 *IRCD Bulletin* 1 (noting that standard success indicators such as educational attainment and family income mask the longer hours of work, the numbers of family members working, and the disproportionate percentage of family resources going to education in lieu of other life amenities, in order for Asians to achieve parity with whites).

²²⁸ Kim and Hurh note that success free from discrimination does not exist for Asian-Americans if:

(1) they are equal to whites in rewards or achievements, but have made greater costs or investments, or (2) they attain less than whites in rewards or achievements, but have made equal costs or investments. In both cases, the reward (achievement) rate per unit of cost (investment) is smaller for Asian Americans than whites.

learned to distinguish between Japanese-Americans and Japanese nationals.²²⁹ Finally, the recent upsurge of physical attacks on Asians increases the threat of racist violence. In short, the experience of the Hawaiians and Japanese-Americans as members of a victim group is raw, close and real.

A horizontal connection exists as well within the perpetrator group. Members of the dominant class continue to benefit from the wrongs of the past and the presumptions of inferiority imposed upon victims. They may decry this legacy, and harbor no racist thoughts of their own, but they cannot avoid their privileged status.

Any non-native resident of Hawaii, for example, benefits from the loss of Hawaiian sovereignty and the demise of the Hawaiian land ownership. If Hawaiians had not lost their land, others would not be living on it. If the Hawaiians had not been pushed to the bottom of the socioeconomic pile, non-natives would not hold as many positions of power and influence. Beneficiaries not required to prove their intelligence, responsibility, and worth to the same extent as victim group members are protected by a subtle magic they may not notice because they

²²⁹ Japanese-Americans campaigning for redress are frequently asked to explain why reparations is fair in light of Japan's atrocities at Pearl Harbor and Bataan. See, e.g., letter from G.L. Penner to William Hohri, National Committee for Japanese American Redress Newsletter, Nov. 3, 1979 (on file with Harvard Civil Rights-Civil Liberties Law Review). American blue-collar workers use the specter of Pearl Harbor in campaigns against Japanese imports, raising Japanese-American fears of misplaced retaliation. Cf. *Union Pickets Japan Embassy to Protest Toyota's Policies*, Pac. Citizen, Dec. 5, 1986, at 1, col. 3 (AFL-CIO officials considering a demonstration to protest the hiring of non-union workers by Toyota on Dec. 7, despite fears that the Pearl Harbor rally might be perceived as appealing to racial prejudices).

Newspaper reporters continue to ask Japanese-American leaders their opinion of current events in Japan, although they rarely direct similar questions about European politics to Americans of European descent. See, e.g., Marutani, *The Pearl Harbor Syndrome*, Pac. Citizen, Nov. 28, 1986, at 4, col. 3. Mike Wallace, in a recent "60-Minutes" broadcast lauding Asian success asked Vietnamese-American students, "what is the difference between your parents and plain old American parents," implicitly suggesting that "American" and "white" are equivalent (CBS television broadcast Feb. 1, 1987). A Washington Post reporter apologized for remarks referring to deceased astronaut, Ellison Onizuka as: "an Asian-American from Hawaii, Japanese descent, our enemy during the war." *Reporter Regrets Onizuka Remark*, Pac. Citizen, May 30, 1986, at 2, col. 4.

John McCloy, an instrumental figure in the relocation, stated in a 1981 congressional hearing: "I don't think the Japanese population was unduly subjected considering all the exigencies to which—the amount it did share in the way of retribution for the attack on Pearl Harbor."

Congressional commissioner Bill Marutani asked, "Do I understand your statement that because of what the Japanese did at Pearl Harbor, what happened to the Japanese Americans here was fair or it was not retribution?"

have never had the experience of life without it. In addition, the abundance of material comforts in this nation results in part from the labor of the non-white workers who have been relegated to some of the hardest, most dangerous, and least compensated work. This list includes black slaves, Chinese railroad workers, Chicano miners, and legions of today's undocumented toilers in factory and field.²³⁰ One cannot be detached from privilege while enjoying the benefits of this country's high standard of living; in that sense, we are all part of the beneficiary class.²³¹ Victims and perpetrators belong to groups that, as a matter of history, are logically treated in the collective sense of reparations rather than the individual sense of the typical legal claim. Looking to the bottom, we can expand our narrow vision of what a legal relationship should look like, addressing the historical reality before us.

b. Linkage Between Act and Present Claim

The linkage of victims and perpetrators for acts occurring in the immediate past is another trait of standard legal claims.

²³⁰ See generally R. Acuña, *supra* note 65; E. Beechert, *Working in Hawaii: A Labor History* (1985); Bell, *The Dilemma of the Responsible Law Reform Lawyers in the Post-Free Enterprise Era*, 4 *Law & Inequality*, 231-32 (1986) ("[S]lavery has provided the wealth with which the nation gained its freedom").

²³¹ To the extent beneficiaries retain a privileged status at the expense of another's disadvantage, they are unjustly enriched. The common law recognizes a similar principle; a possessor of stolen goods cannot claim good title as against the theft victim, *cf.* U.C.C. §§ 2-403, 3-302 (1978), nor can the beneficiary of goods and services keep the benefits without paying restitution if retention works an injustice. Restatement of Restitution § 1. See, e.g., *Small v. Badenhop*, 67 Haw. 628, 701 P.2d 647 (1985) (plaintiff who sold land for nominal sum in hopes of future benefit from development entitled to restitution from new owner).

In the area of restitution by criminals to crime victims, commentators have argued:

When a criminal is punished by society the retribution visited upon him is a spiritual restitution to the victim. This spiritual phenomenon becomes complete only when it is accompanied by a material restoration to the victim. . . . True, another forum is available for obtaining a monetary transfer, but that forum is not part of the moral statement that society makes with each conviction. Through criminal restitution, the victim's economic loss is alleviated and his sense of social justice reinforced, all within the context of the state's condemnation of criminal acts. In short, criminal restitution is not the equivalent of an action for damages or for recovery of an ordinary debt; it uses compensatory means to further punitive ends. Criminal restitution is a stabilizing force in society because it facilitates a coherent, collective response to crime. An awareness of the social purposes of restitution, long recognized, but often neglected in modern times, has led some states to revive restitution provisions.

Note, *United States v. Weldon: The Constitutionality of the Victim and Witness Protection Act of 1982*, 79 Nw. U.L. Rev. 566, 573-74 (1984) (arguing against the district court's striking down of a restitution award as violative of the eighth amendment).

Concepts such as the time-bar,²³² proximate cause,²³³ and laches²³⁴ ensure that claims are fresh, capable of factual determination, and reasonably connected in time and space to the act of an individual wrongdoer. These rules promote efficiency by allowing people to go about their business without waiting for the ax of the long-gone past to fall. They also satisfy a sense of fairness: the sins of the past should not forever burden the innocent generations of the future, nor should the consequences of one false step create disproportionate fault into eternity.²³⁵

At what point should we lay to rest the sins of the past and concede to these classical legal doctrines? Traditional discourse limits these doctrines through standard exceptions. Plaintiffs operating under a disability are not required to press their claims until the disability is removed;²³⁶ a continuing wrong does not start the clock running under a statute of limitation until the wrong culminates in an act of finality;²³⁷ fraud in concealing the availability of or grounds for an action is another standard exception.²³⁸ All of these exceptions apply to claims for reparations. Indeed, the need for reparations arises precisely because it takes a nation so long to recognize historical wrongs against those on the bottom. Something other than a rigid conception of timeliness is required.

Reparations claims are based on continuing stigma and economic harm. The wounds are fresh and the action timely given

²³² Cf. *Developments in the Law—Toxic Waste Litigation*, 99 Harv. L. Rev. 1602, 1605–09 (1986); Kozyris, *Interest Analysis Facing Its Critics—And, Incidentally, What Should Be Done About Choice of Law for Products Liability*, 46 Ohio St. L.J. 569, 571–72 n.12 (1985); Note, *A Comprehensive Statute of Limitations for Litigation Arising from Defective Custom Computer Systems*, 37 Stan. L. Rev. 1539, 1549–51 (1985) (discussing policy behind statutes of limitations).

²³³ See *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928). For a critical analysis of tort law concepts of causation, see Horwitz, *The Doctrine of Objective Causation*, in *The Politics of Law*, *supra* note 19, at 201.

²³⁴ Laches is the doctrine barring unreasonable delay in seeking equitable remedies. See D. Dobbs, *Remedies* 43 (1973).

²³⁵ See *Restatement (Second) of Torts* § 281 (1965).

²³⁶ But see *Tyson v. Tyson*, 55 U.S.L.W. 2273 (1986) (child abuse victim who recalls abuse at age 26 as a result of therapy time-barred from bringing action against her father, despite claim that she could not have discovered the abuse sooner).

²³⁷ See, e.g., *Verzosa v. Merrill Lynch Pierce Fenner & Smith*, 589 F.2d 974 (9th Cir. 1978) (continuing violation in employment context); D. Dobbs, *supra* note 237, at 336 (discussing effect of continuing trespass on running of statutes of limitations).

²³⁸ See Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard*, 71 Geo. L.J. 829 (1983) (discussing, *inter alia*, fraud and laches). Many statutes of limitations contain express exceptions for fraud. See, e.g., Fla. Stat. Ann. § 95.11(4) (b) (West, 1982) (medical malpractice statute of limitations with extension for cases of fraud).

ongoing discrimination. Furthermore, the injuries suffered—deprivation of land, resources, educational opportunity, personhood, and political recognition—are disabilities that have precluded successful presentation of the claim at an earlier time. Outright fraud and factual misrepresentation have also delayed presentation of claims.²³⁹

The question of causal connection in tort law is typically bifurcated into actual and legal, or proximate cause.²⁴⁰ On the question of whether the wrongs of the past actually caused any harm, the record is available to a finder of fact, and will show the requisite but-for causation.²⁴¹ The more significant causation question concerns whether the wrong and the harm are so closely connected that the imposition of damages is fair.²⁴² In the case of reparations the vertical gap of time is particularly troublesome.²⁴³ Even mainstream jurists, however, recognize that the proximate cause question is essentially political.²⁴⁴ They

²³⁹ See, e.g., Yamamoto, *supra* note 68 (discussing Justice Department's withholding of evidence from the court).

²⁴⁰ Prosser speaks of causation-in-fact as a subset of proximate cause. See W. Keeton, Prosser and Keeton on Torts § 41 (5th ed. 1984). The initial question of whether an event is at all part of the causal chain is determined by the "but-for" or "substantial factor" test. *Id.* The second question is whether, given a causal connection, the connection is close enough as a matter of law to constitute proximate cause. *Id.* at § 42.

²⁴¹ The Japanese-American claim presents few questions of actual cause. The loss of land and livelihood was clearly a result of incarceration. The Hawaiian loss of sovereignty presents an easier case than the Hawaiian loss of land, because the latter was the result of a number of factors, of which the demise of the Hawaiian monarchy is one. For a discussion of the factual claim of casualty in the case of Hawaiian land, see Lam, *The Imposition of Anglo-American Law of Land Tenure on Hawaiians*, 22 J. Legal Pluralism 103 (1985); M. MacKenzie, *supra* note 179; Native Hawaiian Study Commission Minority Report, *supra* note 179.

²⁴²

It seems evident that in all of these proposed rules and formulae the courts and the writers have been groping for something that is difficult, if not impossible, to put into words: some method of limiting liability to those consequences which have some reasonably close connection with the defendant's conduct and the harm which it originally threatened, and are in themselves not so remarkable and unusual as to lead one to stop short of them.

W. Keeton, *supra* note 240, at § 43.

²⁴³ *Id.* (discussing remoteness in time and space).

²⁴⁴ Professor Prosser, the leading conceptualist of the law of torts, stated:

Some boundary must be set to liability for consequences of any act, upon the basis of some social idea of justice or policy . . . the legal limitation on the scope of liability is associated with policy—with our more or less inadequately expressed ideas of what justice demands, or of what is administratively possible and convenient.

Id. at § 41.

have suggested that more egregious wrongs, such as intentional torts, justify reaching across wider gulfs of time and space to connect act and injury.²⁴⁵ Proximate cause analysis is typically reduced to consideration of the innocence of the victim, the culpability of the wrongdoer, the foreseeability and magnitude of the harm, and the weight of the broad social goals of fair compensation, deterrence and retribution.²⁴⁶

An act of racism against a powerless victim is a classic case justifying imposition of a proximate causal connection. The typical reparations claim involves powerless victims in no way capable of contributing to the illegal acts. These situations involve the gross imbalance of moral claim between the innocent and guilty to which the law is peculiarly sensitive.²⁴⁷

In determining foreseeability, the classical legal mind typically considers whether a reasonable person contemplating the consequences of a particular act would have imagined the harm that in fact occurred.²⁴⁸ It would have required no clairvoyant skill to predict the harm that would befall Hawaiians from the loss of their nation and land, or the harm that would befall Japanese-Americans taken abruptly from their homes to the desert relocation centers. What a reasonable person would have predicted would occur, did in fact occur, thus satisfying one classic test for proximate causal connection.²⁴⁹

Deterrence²⁵⁰ is particularly advanced by reparations doctrine. The very process of determining the validity of claims will force collective examination of the historical record.²⁵¹ The dis-

²⁴⁵ See W. Keeton, *supra* note 240, at § 43 (citing, inter alia, Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. Pa. L. Rev. 586, 592-96 (1983)).

²⁴⁶ See generally W. Keeton, *supra* note 240, at 263-321 (analysis of proximate cause).

²⁴⁷ Cf. *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980) (market share liability imposed on drug manufacturers despite unavailability of proof linking particular manufacturer to plaintiff's injury), *cert. denied*, 449 U.S. 912 (1980); *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 180 P.2d 436 (1944) (strict products liability imposed on manufacturer).

²⁴⁸ W. Keeton, *supra* note 240, at 281-82 ("Limitation of Liability to the Risk"), 283-84 (the "Same Hazard" test).

²⁴⁹ Restatement (Second) of Torts § 435, comment b (1965).

²⁵⁰ Imposition of liability for monetary damages has proven an effective deterrent, prompting manufacturers of dangerous products to recall, retrofit, or remove from the marketplace products that injure consumers. See W. Keeton, *supra* note 240, at 25-26. Government regulation and self-regulation have proven less effective means to induce safety. Cf. M. Conway, *Rise Gonna Rise* (1979) (textile workers' efforts to impose safety standards in southern cotton mills under inadequate NLRB supervision and severe anti-union activity).

²⁵¹ Congressman Bauman argued during the debate over the Commission on War-time Relocation and Internment of Civilians Act that funding the commission would

covery and acknowledgement of past wrongs will educate us, and help us to avoid repeating the same errors. Acknowledging and paying for the wrong of the World War II relocation, for example, would help us analyze current proposals for preventive detention.²⁵² Victim-consciousness, including an acute awareness of threats to freedom, could become part of mainstream consciousness.

The reparations concept also serves the goal of retribution.²⁵³ The decision to award reparations is an act of contrition and humility that can ease victims' bitterness and alienation. A classic legal justification for imposing public liability—avoiding the chaos of individual, private revenge-seeking—is advanced, thereby strengthening the social order.

Still, opponents might argue that some outer limit is required lest claims trace back to the beginning of time,²⁵⁴ requiring compensation for such past events as the Norman Conquest.

mean "many other groups who have suffered at the hands of the Government throughout our 204-year history and even beyond should also have their commission, their investigation, their examination of history with a report issuing forth." 126 Cong. Rec. 18,864 (1980). While Bauman intended to condemn the reparations concept, his statement raises the potential for a national consciousness raising in human rights. The belief that 200 years is a long time is, perhaps, uniquely American. Professor Haunani-Kay Trask points out that native Hawaiian self-governance lasted over 1,500 years in comparison to the less than 100 years of American domination of the islands. Trask, *supra* note 143.

²⁵² Attorneys for the government continue to cite the Korematsu case for support of the proposition that government assertions of public necessity justify curtailment of civil liberties. See Brief for the United States On Writ of Certiorari to the United States Court of Appeals for the Second Circuit at 16, *United States v. Salerno*, 794 F.2d 64 (2d Cir. 1986) (No. 86-87) (arguing in favor of pretrial detention of indicted defendants under the Bail Reform Act of 1984). To their credit, government attorneys acknowledge in a footnote that the World War II internment has "since been criticized as resting on unwarranted racial characterizations." *Id.*

²⁵³ Retribution is recognized as an unstated goal of tort law. See W. Keeton, *supra* note 240, at 26. Richard Abel identifies a general consensus that compensation, reduction of future misfortune and expression of moral judgment are the three goals of a compensation system. Abel, *Pounds of Cure, Ounces of Prevention*, 73 Calif. L. Rev. 1003 (1985). Cf. Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 4 (1984) (identifying the multidimensional goals of restitution in the criminal law, including deterrence, compensation, retribution and rehabilitation of the offender); Fletcher, *Punishment and Compensation*, 14 Creighton L. Rev. 691 (1981) (discussing the philosophical basis for compensation systems).

²⁵⁴ Slippery slope objections to reparations are mentioned in Gordon, *Casualties of History*, The New Republic, Aug. 15 & 22, 1983, at 11, 14 ("[P]utting a price tag on mistakes of the past establishes an unwieldy precedent"). To the argument that reparations to one group will encourage others to press their claims, one can respond that groups pressing claims for past injuries is a sign of a healthy democracy. Cf. *Address of Justice William J. Brennan, Jr.*, 6 U. Haw. L. Rev. 1 (1984) (fears of "too much litigation" fail to recognize the greater danger that arises when citizens abandon the legal process as a legitimate avenue for redress of grievances).

The victim's perspective provides an alternative time-bar. The outer limit should be the ability to identify a victim class that continues to suffer a stigmatized position enhanced or promoted by the wrongful act in question. Thus, in a European context, the Norman Conquest would not be compensable since those victims no longer constitute an identifiable and disadvantaged class, while the conquest of identifiable indigenous groups that continue to suffer a degraded position, such as the Sami people of Scandinavia, might be.

c. Relief

Finally, the impossibility of a fair damage assessment is a standard doctrinal objection to reparations. How can we attach a monetary figure to the loss of a right? Amorphous ideas such as sovereignty, dignity, personhood and liberty are incapable of uniform valuation.²⁵⁵ We risk under-valuing the right to avoid bankrupting the government, or, conversely, over-valuing it in relation to actual economic losses.

This objection should carry little weight. Judges and juries calculate non-quantifiable damages all the time. As Richard Delgado points out, the refusal to formulate compensation for racial hate messages is in itself racist,²⁵⁶ given a tort law system that calculates damages for loss of such intangibles as privacy, reputation and mental tranquility.²⁵⁷ Similarly, the selective choice to refuse to quantify damages for reparations claimants is suspect.

Damages are also inappropriate, it is charged, because distribution might include the undeserving.²⁵⁸ Courts in other con-

²⁵⁵ Cf. *Memphis Community School District v. Stachura*, 106 S. Ct. 2537 (1986) (damages disallowed for loss of "abstract" rights in absence of "actual injury").

²⁵⁶ See generally, Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev. 133 (1982).

²⁵⁷ See, e.g., *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), *on remand*, 332 So. 2d 68 (1976) (damages for mental suffering from false report of adultery); *Anderson v. Sears Roebuck & Co.*, 377 F. Supp. 136 (E.D. La. 1974) (calculation, inter alia, of damages for physical and mental pain of burn victim); *Sullivan v. City and County of San Francisco*, 95 Cal. App. 2d 745, 214 P.2d 82 (1950) (damages for loss of sexual desire); *Bundy v. Swift & Co.*, 34 Cal. App. 2d 656, 94 P.2d 389 (1939) (damages for loss of senses of taste and smell). See also W. Keeton, *supra* note 240, § 12 (infliction of mental distress); La Croix & Miller, *Lost Earnings Calculations and Tort Law: Reflections on the Pfeifer Decision*, 8 U. Haw. L. Rev. 31 (1986); W. Keeton, *supra* note 240, at 54-66 (discussing infliction of mental distress).

²⁵⁸ Cf. Lazarus & West, *The Alaska Native Claims Settlement Act: A Flawed Victory*, 40 Law & Contemp. Probs. 132 (1976); Note, *American Indian Land Claims: Land Versus Money As A Remedy*, 25 U. Fla. L. Rev. 308 (1973) (discussing problems in distribution of reparations awards to Native Americans).

texts, however, tolerate inexact distribution. The *cy pres* doctrine in trust law and commercial law, for example, allows such inexactitude. If named trust beneficiaries are absent, a court will determine alternative beneficiaries.²⁵⁹ The problem of identification is not a sufficient reason to abandon other legal goals and obligations. The courts will attempt to achieve the goals of the law to the extent possible, accepting a certain level of misallocation.²⁶⁰ If actual victims of a rate-making violation cannot be identified, the court may award damages to the next best class.²⁶¹ Similarly, in price-fixing cases, a future price roll-back is an appropriate remedy even though some victims have ended their market participation and some beneficiaries are newcomers to the market.²⁶² Exactitude is less important than other social goals of the law. Better a windfall to non-victims than to wrongdoers; better rough justice than no justice at all.

²⁵⁹ "Cy pres que possible" means "as near as possible." Comment, *Mandatory Cy Pres and the Racially Restrictive Trust*, 69 Colum. L. Rev. 1478 (1969) (considering *cy pres* alternatives to racially discriminatory devises). The doctrine itself is associated with the history of race and law in America. In *Jackson v. Phillips*, 96 Mass. (14 Allen) 539 (1867), the court was faced with a trust created to benefit the cause of abolition and the case of fugitive slaves. When the thirteenth amendment ended slavery, the literal beneficiaries no longer existed. The court allowed payment instead for the welfare and education of freed slaves. See Browder, *Construction, Reformation, and the Rule Against Perpetuities*, 62 Mich. L. Rev. 1 (1963) (trust law: *cy pres* response to gifts that are invalid as violations of the rule against perpetuities); Note, *Collecting Overcharges from the Oil Companies: The Department of Energy's Restitutionary Obligation*, 32 Stan. L. Rev. 1039, 1072 (1980) (arguing that restitution by oil companies for overcharges should go to the class of petroleum product consumers generally in the form of "energy savings, research and development, mass transit, and the like" in lieu of payments to individuals); Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. Chi. L. Rev. 448 (1972) (use of *cy pres* in class action litigation).

²⁶⁰ Cf. *Colson v. Hilton Hotels Corp.*, 59 F.R.D. 324, 326 (N.D. Ill. 1972) (approving settlement of antitrust suit against hotel, providing for, inter alia, \$5,157,405.97 "to be credited to future guests at a rate of 50 cents per occupied room per stay"); *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 732-34 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971) (damage fund for overcharging by pharmaceutical companies used "for the benefit of all the citizens of the government entity involved"); *Market Street Ry. Co. v. Railroad Commission*, 28 Cal. 2d 363, 171 P.2d 875 (1946) (*cy pres* award of funds to improve railroad facility as remedy for overcharging passengers).

²⁶¹ But see *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (rejecting "fluid class recovery" remedy for monopolization of odd-lot trading fees, allowing for reduction of odd-lot differentials until fund of unclaimed damages is depleted).

²⁶² Cf. Miller, *Problems in Administering Judicial Relief in Class Actions Under Federal Rule 23(b)(3)*, 54 F.R.D. 501 (1972) (arguing in favor of one-time damage awards in lieu of individual claims in order to achieve the deterrent goals of anti-trust and securities regulations). In the area of government restitution of improperly collected taxes to business entities, the impossibility of calculating damages where the improper taxes were passed on to the consumer is no bar to recovery. See Woodward, "Passing On" the Right to Restitution, 39 Miami L. Rev. 873 (1985).

A requirement of scientific precision in reparations claims would set a higher standard for reparations claimants. Minorities have often sought to disassociate from the negative stereotypes attributed to their group only to find that others refuse to think of them as individuals. To be then deprived of benefits because they lack sufficient evidence of group coherency is a double insult.

Group members themselves are in the best position to identify those entitled to relief. Deference to victims respects their rights to personhood and self-determination. Some native Hawaiians, for example, have suggested that a willingness to take an oath of loyalty to the Hawaiian government could be a prerequisite to membership in the beneficiary class.²⁶³

Victims are also wisely consulted in addressing concerns over ignorant and wasteful use of reparations awards. The assumption that a beneficiary will make inefficient use of an award is unfair. All successful plaintiffs are subject to such temptations. To prevent waste, education programs and investment advice can accompany awards. Trusts or structured awards are available upon proof of incompetence. That the victims are unaware of the potential for abuse or are incapable of devising appropriate solutions is itself a racist argument.

Within the victim community, debates continue over the optimum form of reparations. Some may argue that individual monetary awards will not as effectively solve social problems as would other forms of reparation such as educational programs, small business loans, land grants, and Great Society-type community services. Nonetheless, consensus is emerging that individual cash awards are an appropriate starting place.²⁶⁴ Whatever the form and administration of an award, the choice does not necessarily belong to the perpetrators. As one Ha-

²⁶³ Interview with Hayden Burgess (Dec. 22, 1986). See also Burgess, *An American Illusion*, 3 Ka Wai Ola O OHA 2 (Feb. 1986).

²⁶⁴ A Rafu Shimpō poll of Japanese-Americans indicated that 90% of respondents favor monetary redress.

Native Hawaiians, after several years of discussion, are also largely in favor of monetary awards. See Native Hawaiian Study Commission Survey Report, Office of Hawaiian Affairs, *supra* note 179.

Within the Japanese-American community, several years of debate preceded the emerging consensus supporting monetary redress. One former internee asserts: "That's the way Americans are—if you do something wrong, you have to pay for it in dollars." J. Tateishi, *supra* note 21, at 58.

waiian lawyer has explained, "We don't let criminals pick their own sentence. We don't let tortfeasors choose the damage they will pay."²⁶⁵

CLS method reveals the flexibility of legal doctrine and invites new consciousness of what law can be. This method complements the demands for reparations made by those on the bottom. Given the doctrinal basis for reparations thus revealed, the question becomes one of whether, given our conception of justice and our social goals, we wish to exercise that doctrinal option. The following section considers the concept of reparations from the standpoint of restructured liberal ideals and from the standpoint of critical legal thought, with both views informed by non-white experience.

D. Traneing:²⁶⁶ Reparations as Transformed Liberalism

And when we say peace and freedom for everybody it will mean Everybody, everywhere. It will mean me.

—Margaret Goss Burroughs²⁶⁷

The preceding section suggests the doctrinal door for reparations. The next question is whether we should open the door. Just as John Coltrane could "trane" standard melodies into sounds so unique that no mainstream musician could ever appropriate them, radical lawyers hope to transform standard constitutionalism into something their own that no mainstream attorney can exploit. This section considers the transformation of standard liberal and constitutional values to include reparations. Also considered is whether such a transformed consciousness has true critical power, or whether it is fair game for reappropriation.

²⁶⁵ Interview with Hayden Burgess, *supra* note 263.

²⁶⁶ "Traneing" is a verb derived from the name of jazz musician John Coltrane. It means, roughly, doing what John Coltrane does. As used here, it refers to the ability to take something ordinary and limited, and to transform it into something extraordinary and unlimited in its potential for promoting the human spirit.

²⁶⁷ These are the closing lines of Margaret Goss Burrough's poem "Everybody But Me," in *The Forerunners* 45 (1975). The poem refers to the rhetoric of democracy, Washington's and Lincoln's birthdays, King George, the Constitution and the Bill of Rights, and World War I.

1. *The Refrain of Reparations Within the Victims' Constitution*

In interpreting the Constitution and distilling its values, those on the bottom have found the inspiration for a new order. Constitutional interpretation, whether originalist, intentionalist or pluralist, is expanded by considering the version of the document supported by people of color at Concord, Appamattox, Anzio and Selma.

For those Americans, the constitutional promise of liberty holds special meaning. Liberty, viewed from the bottom, has encompassed physical liberty from constraint of the person.²⁶⁸ It has encompassed life itself—freedom from life-threatening abuse²⁶⁹ as well as the right to seek the nurturance and livelihood human beings need for survival.²⁷⁰ Liberty has meant personhood and participation—the recognition of one's existence as a human being, free and equal, with power and control over the

²⁶⁸ Helen Murao describes her elation the day she was freed from the relocation center:

We took a bus to the railroad siding and then stopped someplace to transfer and I went in and bought a Coke, a nickel Coke. It wasn't the Coke, but what it represented—that I was free to buy it, that feeling was so intense. You can get maudlin, sentimental about freedom; but if you've been deprived of it, it's very significant.

J. Tateishi, *supra* note 21, at 48.

²⁶⁹ Audre Lorde, in trying to explain to white feminists the difference in their experience as mothers, said, "You fear your children will grow up to join the patriarchy and testify against you, we fear our children will be dragged from a car and shot down in the street. . . ." A. Lorde, *supra* note 12, at 119. Or, as Lorde put it in another essay, "'If you want us to change the world someday, we at least have to live long enough to grow up!' shouts the child." *Id.* at 38. Beth Brant's anthology of Native American women's writing carries reminders of violent death in her community. B. Brant, *supra* note 21. The book is dedicated to two victims, and several of the poems included in the anthology eulogize the prematurely dead. See, e.g., Moran, *I picked up your cast away hide* ("written for my brother who died 10/17/80 with a bullet in his head"), in *id.* at 81; Chrystos, *Dance a Ghost* ("for Mani, murdered with his friend Marcus outside a phoenix bar"), in *id.* at 97; see also Kanona, *For Those Who Died While We Were Growing Up*, from the poem *Ho'omana'o Pua Ke'oke'o*, in Malama 39 (D. Hall ed. 1985).

²⁷⁰ Martin Luther King, Jr. recognized "that the inseparable twin of racial injustice was economic injustice," M.L. King, Jr., *supra* note 112, at 90, and throughout his life made no distinction between the rhetoric of the Constitution and the rhetoric of economic justice. By 1968, King recognized the limits of political rights, stating "there must be a better distribution of wealth," and testified in favor of a federally guaranteed minimum income. See D. Garrow, *Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference* (1986).

political processes that govern one's life.²⁷¹ The promise of liberty, for those on the bottom, has meant freedom from public and private racism, freedom from inequalities of wealth distribution, and freedom from domination by dynasties.²⁷² This interpretation of liberty, implicit in the founding document of this nation,²⁷³ is the interpretation that has convinced so many on the bottom to work for, rather than against, the Constitution. That so many have believed in this version of the Constitution, and fought to establish and preserve the union on the basis of that belief, lends historical support to the victim's interpretation.

This interpretation supports a doctrine of reparations. Reparations recognizes the personhood of victims. Lack of legal redress for racist acts is an injury often more serious than the acts themselves,²⁷⁴ because it signifies the political non-personhood of victims. The grant of reparations declares, "You exist. Your experience of deprivation is real. You are entitled to compensation for that deprivation. This nation and its laws acknowledge you."²⁷⁵

²⁷¹ Many non-white people report the feeling of not existing in the eyes of white Americans. Cf. Internment victim Donald Nakahata:

People will approach you and say, "You speak English well; how long have you been in this country?" And now I'm fifty-two years old, I know damn well that I've been in this country longer than a lot of those people who ask that question. But they still ask it because we don't look white American. That's why we have to make it part of American consciousness, that you don't have to look like a genuine American to be one.

J. Tateishi, *supra* note 21, at 36. Harvard-educated Japanese-American law professors are not immune from similar misperceptions. See Gotanda, *supra* note 50; see also Lawrence, *A Dream: On Discovering the Significance of Fear*, 10 Nova L. Rev. 2 (1986), in which a black professor dreams he is invisible to white law professors; and K. Shanley, *Thoughts on Indian Feminism*, in B. Brant, *supra* note 21, at 213, 215 (arguing that equality from the Native American feminist perspective must include sovereignty—"legal recognition . . . enables Indian people to govern ourselves according to our own world view").

²⁷² Bell Hooks says, "Freedom . . . positive social equality that grants all humans the opportunity to shape their destinies in the most healthy and communally productive way can only be a complete reality when our world is no longer racist or sexist." Hooks, *supra* note 77, at 117.

²⁷³ See, e.g., U.S. Const. amends. I, IV, V, VI, IX; *Roe v. Wade*, 410 U.S. 113 (1973); Radin, *Property and Personhood*, 34 Stan. L. Rev. 957 (1982).

²⁷⁴ Ralph Nader coined the phrase "second collision" to refer to the injury sustained by automobile riders from their own cars as a secondary effect of collisions. R. Nader, *Unsafe At Any Speed* (1965). The legal system, as the "vehicle" that should protect the interests and rights of victims, inflicts an analogous injury by its inaction and complicity.

²⁷⁵ Patricia Williams' identification of formality as an element of the black quest for human dignity is directly related to this point. See Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 Harv. C.R.-C.L. L. Rev. 401 (1987).

This recognition is an important pre-requisite to the victim's political participation. Classic democratic theory holds that broad participation invigorates and informs the process of governance,²⁷⁶ and yet the United States tolerates one of the lowest voter participation rates in the universe of nominally democratic countries.²⁷⁷ Affirming the legitimacy of victims' claims could bring back into the polity those who had concluded that this government has nothing to offer them. This in turn would bring new legitimacy to the government. The price of a continuing failure to recognize the experience of those at the bottom is the social dislocation and even violence²⁷⁸ that follow when outsiders conclude they can gain nothing by participating in existing governmental processes. Further, discrimination that is officially condoned or ignored can lead to increasingly violent attacks on the victims of that discrimination.²⁷⁹ All of us, in this sense, are victims. We suffer from the deep divisions between races, the bitter prejudices maintained by both victim and perpetrator groups, and the inability to form community that comes when old wounds go unsalved.

Reparations also begins to address the substantive barriers to liberty. Money for education, housing, medical care, food, job training, cultural preservation, recreation and other pressing needs of victim communities will raise the standard of living of victim groups, promoting their survival and participation. In addition, the transferral of resources alleviates in part the destabilizing inequities in wealth distribution.

²⁷⁶ See G. Wood, *The Creation of the American Republic, 1776-1787*, 181-88, 363-89, 596-609 (1969); B. Bailyn, *The Ideological Origins of the American Revolution* 161-75 (1967); and *Reynolds v. Sims*, 377 U.S. 533 (1964) (invalidating unequal apportionment scheme in Alabama legislature as violative of the Equal Protection Clause).

²⁷⁷ The average voter turnout in the United States during the period 1945-82 was 47.1%. In comparison, there was an average turnout of over 90% during the same period in Australia, Austria, Belgium, Iceland, Italy, Luxembourg, and the Netherlands; over 80% in Denmark, West Germany, Israel, New Zealand, Norway, Portugal and Sweden; over 70% in Canada, Finland, France, Greece, Ireland, Japan, Spain, and the United Kingdom; and over 65% in Switzerland. T. Mackie & R. Rose, *The International Almanac of Electoral History*, Table A.5 (2d ed. 1982); see also *Voter Turnout of 37.3% Was the Lowest Since 1942*, *Wall St. J.*, Nov. 6, 1986, at 18.

²⁷⁸ See Chase, *In the Jungle of Cities* (Book Review), 84 Mich. L. Rev. 737 (1986) (reviewing B. Porter & M. Dunn, *The Miami Riot of 1980* (1984), and L. Curtis, *American Violence and Public Policy* (1984)) (observing that incidents of mass urban violence in the 1980's have been characterized by almost total despair and disillusionment, as compared to urban riots of the 1960's, which usually had an element of hope for positive social change).

²⁷⁹ See *supra* note 112.

Reparations is thus consistent with constitutional ideals. Yet critical scholars fear laying claim to these ideals. The rhetoric of process, fairness, participation and personhood, as CLS lawyers know, can bite back.²⁸⁰ Any critical writer employing constitutional rhetoric must recall Derrick Bell's bitter formula:

White Racism v. Justice = White Racism
White Racism v. White Self-Interest = Justice²⁸¹

Bell, after reviewing the history of the struggle for racial equality, concludes that the rights of minorities are recognized only when they coincide with the interests of those in power.²⁸² Bell acknowledges the cynicism in this message,²⁸³ yet his own work in civil rights advocacy demonstrates a belief that the Constitution can work toward just ends.²⁸⁴

Bell's position might be characterized as faith in the potential for change tempered by historical knowledge of resistance to change. As long as progressive scholars remain just this side of hopelessness and despair, their voices calling for a larger reading of the constitutional text can work against those voices that would use the Constitution to maintain existing inequity.

Assuming, then, that a constitutional interpretation encompassing reparations is possible, the question remains whether such interpretation is desirable from the critical perspective.

2. Into the Cage: The Critical Choice to Adopt the Concept of Reparations

Ishmael Reed captured the outsider's wary approach to mainstream consciousness in his poem "Dualism: in ralph ellison's invisible man":

²⁸⁰ See, e.g., L. Lokos, *The New Racism* (1971) (arguing that affirmative action violates the rights of whites).

²⁸¹ D. Bell, *supra* note 98, at 41. Of reparations, Bell has stated that "short of a revolution, the likelihood that blacks today will obtain direct payments in compensation for their subjugation as slaves before the Emancipation Proclamation, and their exploitation as quasi-citizens since, is no better than it was in 1866. . . ." Bell, *Dissection of a Dream* (Book Review), 9 Harv. C.R.-C.L. L. Rev. 156, 157 (1974) (reviewing B. Bittker, *The Case for Black Reparations* (1973)).

²⁸² D. Bell, *supra* note 98, at 239-44.

²⁸³ *Id.*, at 41 (referring to the formula as "somewhat simplistic and sardonic").

²⁸⁴ See *id.*

i am outside of
 history. i wish
 i had some peanuts, it
 looks hungry there in
 its cage.

i am inside of
 history. its
 hungrier than i
 thot.²⁸⁵

If critical legal scholars adopt the concept of reparations, will they find themselves once again in the cage with a hungry beast? Critical legal histories warn of neutral principles and liberal-legalisms used to advantage those on top. Reparations, however, is not a neutral principle. It is tilted toward the bottom.

Staughton Lynd contends that labor rights—the rights to organize and engage in concerted activity—are progressive, communal rights less subject to co-option as an instrument of oppression.²⁸⁶ Reparations, like the right to strike, is a concept for the have-nots. As such, it has primarily progressive power.

One valuable lesson from CLS, however, is the difficulty of escape from the incoherence of seemingly concrete concepts. There can be regressive strikes, regressive unions, and regressive claims for reparations. If critical theorists are to cling to legality, and in a scary world perhaps they must, the pertinent inquiry is the probability that a particular legal concept will promote good rather than evil. General Motors may seek reparations for the American bombing of its plants in Hitler's Germany, but such claims are rare, and they cost the General Motors Companies of the world more than they realize in terms of lost legitimacy. Reparations, unlike tax breaks and other corporate coddlings in the common law, are generally awarded as outright cash grants in a highly visible arena. This openness sets political limits on the ability of the privileged to resort to the concept.

Reparations is a "critical legalism," a legal concept that has transformative power and that avoids the traps of individualism,

²⁸⁵ As quoted in Gates, *supra* note 52, at 316.

²⁸⁶ Lynd, *supra* note 42, at 1417.

neutrality and indeterminacy that plague many mainstream concepts of rights or legal principles. Reparations avoids standard liberal pitfalls because, first, it is a concept directed at remedying wrongs committed against the powerless. Unlike "free speech" or "due process," payment for past injustice is a one-way valve. Those on the bottom—minority group members, political outsiders, the exploited—will receive reparations.

Second, reparations doctrine supports group rights rather than individual rights and thus escapes some of the ideological traps of traditional rights thinking.²⁸⁷

Finally, reparations is at its heart transformative. It recognizes the crimes of the powerful against the powerless. It condemns exploitation and adopts a vision of a more just world. The reparations concept has the aspirational, affirming, idealistic attraction of rights rhetoric, without the weak backbone. While rights rhetoric turns to dust time and again, reparations theory, should we accept and internalize it, may prove more dependable.

This progressive tilt of reparations, however, can mask lurking dangers. Some detect a certain commodifying vulgarity²⁸⁸ in throwing money at injured people. Richard Abel raises this point in his objection to tort damages for accidental property damage or for negligent infliction of emotional distress.²⁸⁹ Reparations, one could argue, promotes the idea that

²⁸⁷ See Horwitz, *The Jurisprudence of Brown and the Dilemmas of Liberalism*, 14 Harv. C.R.-C.L. L. Rev. 599 (1979) (noting that because classical liberalism is hostile to the idea of "natural" groups, such as social classes, and because the legal system is overwhelmingly geared toward redressing individual grievances, the battle against racial discrimination has taken place within a political and legal culture that defines a problem exclusively in terms of the rights of individuals, not groups).

²⁸⁸ Cf. Balbus, *supra* note 23 (elaborating Marx's notion that under capitalism money becomes the universal equivalent of essentially unequal things, such as human labor, products, and objects).

²⁸⁹ See Abel, *Should Tort Law Protect Property Against Accidental Loss?*, 23 San Diego L. Rev. 79 (1986); Abel, *Torts*, in *The Politics of Law*, *supra* note 19, at 185. Abel suggests that "damages for pain and suffering commodify experience" and damages "for injuries to relationships commodify love." *Id.* at 195. Abel thus advocates "an end to compensation for non-pecuniary loss, both for this reason [that human experience is unique] and because I believe that damages for intangible injury dehumanize by substituting money for compassion, arousing jealousy rather than expressing sympathy, and contributing to a culture that views experience and love as commodities." *Id.* at 198-99. But cf. Kastely, *Compensation for Lost Aesthetic and Emotional Enjoyment: A Reconsideration of Contract Damages for Nonpecuniary Loss*, 8 U. Haw. L. Rev. 1 (1986) (arguing in favor of direct compensation for aesthetic and emotional losses in breach of contract cases).

Abel's cogent analysis warns against easy resort to monetary damages. Unfortunately, in both the tort and reparations context, the non-pecuniary injury is often the

everyone has a price, that every wound is salved by cash, that success merely means more money.

The practical shortage of resources in the injured communities weighs against the commodification risk. Monetary grants will not compensate for the terrible losses sustained. No sum can make up for loss of freedom or sovereignty. The award serves a largely symbolic function, much as the passing of a pig in a Pacific-island apology ceremony.²⁹⁰ The judgment states, "Something terrible has happened for which we are responsible. While no amount can compensate for your loss, we offer here a symbol of our deep regret and our continuing obligation."

Resistance to commodification is important. If reparations are viewed as an equivalent exchange for past wrongs, continuing claims are terminated. Any obligation to victim-groups

most significant injury suffered. Abel points out that poor drivers of old cars often suffer little actual pecuniary loss in accidents. Abel, in *Torts, supra*, at 190. Given the social reality in a capitalist system of the necessity for money to obtain basic needs, the refusal to compensate non-pecuniary injury can be unfair to such victims.

In arguing against damages for accidental loss of property, Abel again warns against equating property with individual self-worth. Abel, *Should Tort Law Protect Property Against Accidental Loss?*, *supra*.

It is important to distinguish Hawaiian concepts of property from twentieth-century Western conceptions in considering reparations for loss of land. Hawaiians used lands communally, and felt bonded to the land that under Hawaiian religion shared a common genealogy with the Hawaiian people. The Hawaiian sense of self and well-being was tied to the land. The loss of land, then, represented to the Hawaiians something closer to personal injury than to property damage in the modern sense. *Cf.* Matsuda, *supra* note 26 (discussing changing conceptions of property in Hawaii); Radin, *supra* note 273 (arguing that to achieve proper self-development—to be a person—an individual needs some control over resources in the external environment, and therefore at least some conventional property interests ought to be recognized as personal).

²⁹⁰ When teaching tort law in the Federated States of Micronesia, I was informed by Micronesian judges that the family of a Micronesian tortfeasor will rush with gifts to the family of the victim. This can be the first news of an accident that a family will receive. The obligation to provide apology gifts—for example by going to work in the victim's taro field—continues long after the accident, and the apology ritual is intended to keep peace on the tiny Micronesian islands. For a fascinating case in which the victim's family objected to the criminal prosecution of the perpetrator on the ground that the perpetrator had already apologized, see *Federated States of Micronesia v. Mudong*, Cr. 1981-512 (April 28, 1982). See also Friedrich, *Ritual Reconciliation and the Obviation of Grievances, A Comparative Study in the Ethnology of Law*, 15 *Ethnology* 269 (July 1977).

One internment victim is quoted as saying:

[H]ow can we be repaid fully for the properties lost, the health destroyed, the education denied, the employment opportunities lost? We are talking about a tangible gesture that can be seen and gauged which says to us that a genuine act of contrition has taken place in the heart of this great nation.

M. Katafiri, testimony before the Commission on Wartime Relocation and Internment, as quoted in *A Tangible Gesture*, in M. Polner, *Commonwealth* 581, 582, Oct. 23, 1981.

would end since their injury is transformed into a commodity and the price paid. A reparations claim would become a dangerous gamble for victims, and a welcome *res judicata* opportunity for perpetrators.²⁹¹ One generation could sell away their claim at bargain-basement prices, to the detriment of future generations, in an effort to cash in at the earliest opportunity. Commodification must be resisted if reparations is to be more than a coercive quit-claim mechanism.

A related and indeed troubling objection to reparations comes from looking to the bottom. Some thoughtful victim group members are inclined to reject reparations because of the political reality that any reparations award will come only when those in power decide it is appropriate. Hayden Burgess, a native Hawaiian nationalist lawyer, suggests that any award of cash reparations is inadequate, for it ignores the Hawaiian's primary need: restoration of the Hawaiian government and removal of the United States presence in Hawaii.²⁹² Rather than a top-down model of reparations granted by the United States, Burgess prefers negotiations between the Hawaiians and the United States as equals, perhaps mediated by a neutral third party in an international forum, to determine an appropriate remedy for the overthrow of the Hawaiian government.²⁹³ Burgess suggests that self-determination for the Hawaiian people is guaranteed by international law, and that self-determination includes the right to negotiate with the United States for the return of the Hawaiian Islands.²⁹⁴ Reparations would merely enforce the role of the United States as lawgiver and patron.

²⁹¹ The Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 668 (1971) (codified as amended at 43 U.S.C. §§ 1601-1628 (1982)), critics allege, offered just such a devil's compact. See Kizzia, *Billion Dollar Settlement Act Sows Unhappiness in Alaska*, Wash. Post, Nov. 9, 1985, at A3. The Act granted Native Alaskans title to nearly forty million acres of Alaskan land and awarded them one billion dollars in compensation in exchange for the extinguishment of all claims to land based on aboriginal use and occupancy. To avoid the sell-out danger, the World Council of Indigenous Peoples argues that indigenous peoples should never have the right to alienate group lands, in keeping with the pre-Western concept of property as owned by no one and entrusted to the care and use by all. Hawaiians have argued that reparations should not extinguish claims. Akaka, *Reparations and Our Future*, 3 Ka Wai Ola O OHA 2 (1986).

²⁹² Interview with Hayden Burgess, *supra* note 263; Laenui, *Law and Morality*, 3 Ka Wai Ola O OHA 2 (1986) (disavowing "any association with reparations as a payoff for a concession that we are now legitimately America").

Similarly, some black theorists have called for a separate black nation as an alternative to other remedies for the wrongs of the past. See, e.g., R. Browne & R. Vernon, *Should the U.S. Be Partitioned?* 4 (1968).

²⁹³ Interview with Hayden Burgess, *supra* note 263; see also Burgess, *Reparation or Ho'oponopono*, Ka Wai Ola O OHA, Mar., 1986 at 2, col. 2.

²⁹⁴ *Id.*

Reparations awards, in this view, portray the government as benign and contrite. Reparations buys off protest, assuages white guilt, and throws responsibility for continued racism upon the victims. "We paid you, why are you still having problems? It must be in your genes."²⁹⁵

To avoid this corruption, victims must define the remedies, and the obligation of reparations must continue until all vestiges of past injustice are dead and buried. Reparations is not, then, equivalent to a standard legal judgment. It is the formal acknowledgment of historical wrong, the recognition of continuing injury, and the commitment to redress, looking always to victims for guidance.

Finally, there is the difficult problem of the effect of reparations to one group upon other victim groups that remain uncompensated. Just as affirmative action in employment and college admission—a form of reparations—may impact negatively on the white underclass, monetary reparations to one victim group may result in a new group slipping to the bottom.

Reparations will result in a new form of disadvantage only if they are made outside of a broader consciousness that always looks to the needs of the bottom. A critical theory of reparations recognizes economic as well as racial injustice. It looks to human experience to guide compensation to those in need. Such an approach would view each reparations award to a successful claimant group as a step forward in the long journey toward substantive equality. Thus, progressive Hawaiians view awards already made to Native Americans on the mainland United States not as a chunk taken out of a limited fund, leaving less for Hawaiians, but as a symbol of the possibility of reparations for Hawaiians as well. The arguments that victims will have to make and perpetrators will have to accept before any reparations are awarded will raise consciousnesses about the obligation and need to correct past wrongs. Each separate commitment to the concept of reparations thus internalizes new norms and moves us closer to the end of all forms of victimization.

A theory of reparations formulated in consideration of both a victim's consciousness and the insights of critical legal theorists provides a critical legalism, moving us away from repression and toward community.

²⁹⁵ Cf. Horwitz, *supra* note 287, at 608 (pointing out that if one believed equality of opportunity existed, then the only logical explanation for inequalities of condition between groups would be a theory of genetic inferiority).

IV. Conclusion: "The Pen is Ours to Wield"²⁹⁶

Critical legal scholars have much to offer people of color. They also have much to learn from them. Looking to the bottom will expand the critical scholar's ability to work toward positive change.

The standard critiques of critical legal theory raise questions that require reference to alternative sources. This article has referred throughout to such sources, with the goal of encouraging the kind of dialogue between critical legal scholars and people of color that will help both groups in their struggles to reach a common goal.

The jurisprudential method of looking to the bottom suggests versions of liberalism, legal consciousness and legal doctrine that possess critical power. Reparations, the idea of acknowledgment of and payment for past injustice to victims of racism, is such a critical legalism. For the CLS lawyer, reparations as here defined may represent the type of legalism worthy of support.

Critical legal scholars may ask whether any appeal to law is ultimately corrupting as long as lawmakers remain representative of existing power. Some may argue there is no such thing as a critical legalism. The debate is important. This article is intended to fuel it, and to argue for the consideration of new voices in the critical chorus.

"Lift every voice," Paul Robeson sang,²⁹⁷ and I believe he meant even lawyer-intellectuals who struggle with pen and paper. The doctrine we construct, the better world we imagine, are acts of solidarity with those who "have come over the way [t]hat with tears hath been watered."²⁹⁸ By listening to those

²⁹⁶ This line is from a poem by a black woman poet named Ada, published in E. Stetson, *supra* note 43, at 18. The poem is inspired by Angelina Grimke's poem "An Appeal to Christian Women of the South." Concluding that women are not as free as men to make public speeches against slavery, the poet nonetheless believes that women, too, must assume moral responsibility. As a woman, then, the poet cannot speak:

Nor yet be mute. The pen is ours to wield
The heart to will, the hands to execute.

Id.

²⁹⁷ The words are from James Weldon Johnson and J. Rosamond Johnson's anthem "Lift Every Voice and Sing" (1900).

²⁹⁸ *Id.* This line was also used by Martin Luther King, Jr. in his last SCLC presidential address, "Where Do We Go From Here?," in 1967. A copy of the speech appears

who have paid the greater price for their commitment to a just world, we can move forward with them, closer to the place of peace.

in *A Testament of Hope: The Essential Writings of Martin Luther King, Jr.* 245 (J.M. Washington ed. 1986). The speech was published under the title, *New Sense of Direction*, in 15 *Worldview*, Apr. 1972, at 5. The words recall as well the Cherokee people's Trail of Tears. See G. Foreman, *Indian Removal* 294-312 (1932) (roughly 4,000 Cherokee died during capture, detention, and a forced westward removal in 1838-39); Awiakta, *Amazons in Appalachia*, in B. Brant, *supra* note 21, at 125-30.

