Of 'deconstruction' and 'destruction' — why critical legal theory cannot be the cornerstone of the LLB curriculum

Willem H Gravett[†]
Senior Lecturer in Law, University of Pretoria

Abstract

My purpose is to shine a light on recent South African critical-theory scholarship arguing for critical legal theory to become the 'substantive pillar' of legal education. However, the radical political agenda of the South African critical theorists is only superficially directed at the LLB curriculum. Their true ambition is revolution, not reform. They not only aim at the 'deconstruction' of the South African legal system, but at its 'destruction'. The central themes of their critical theory are that law is an instrument of social, economic and political domination, that legal outcomes are the arbitrary whim or political bias of decision-makers, and that 'rights' — especially fundamental human rights — are impotent to address social problems. The South African critical theorists seek to excise the traditional conception of 'the law' from the LLB curriculum, and to recast law as a humanities discipline. However, their proposal for a 'critical' LLB curriculum suffers from two insurmountable flaws, namely (i) the explicit rationalisation of negative critique as the *appropriate route in legal education, and the consequent failure to develop — or even portend a blueprint of — a positive programme for the integration of legal theory and social movement; and (ii) their critique of fundamental human rights, which would guarantee that vulnerable groups would lose all the gains that they have made in a liberal constitutional democracy, and, consequently, that these groups would be at exponentially greater risk of prejudice. Most significantly for the future of the university law school, the South African critical theorists' message is exceptionally damaging to law students.*

> '[A]dherents to the philosophical approach to law ... have little interest in training practicing lawyers. Some of these scholars belong to ... the "anti-law" bloc ... in law school faculties. The anti-law people do not want to train practicing lawyers, at least not practicing business lawyers. They do not like practicing lawyers. They do not like the traditional modes of legal analysis and training. They do not respect their conventional colleagues. ... The anti-law people do not speak or comport themselves like lawyers. They are, in short, unassimilable and irritating foreign substances in the body of the law school.' [1]

I Introduction

Legal education is again in a period of flux and introspection. In 2016 the Council on Higher Education ('CHE') undertook an evaluation of the LLB programmes at all the South African law faculties in accordance with the national standards set for the LLB degree. Against the background of the renewed focus on the LLB degree, my purpose is to shine a light on recent

critical-theory scholarship regarding legal education in South Africa that is rooted in the heterodox Critical Legal Studies ('CLS') movement. [2]

CLS is a complicated and controversial subject, and to give a complete account of the ideas associated with CLS would fill volumes. Moreover, the CLS movement is hardly coherent. [3] However, with these caveats, enough common elements exist to permit a general discussion of the CLS movement. [4] To place the South African critical-theory writings on legal education in context, I start with a brief exposition of the principal features of CLS thought. Then I focus on legal education in particular, and I address in detail those fundamental substantive CLS positions that pose the greatest threat to the belief system of the majority of law students in South Africa — those who are serious about a career in the law.

At stake is much more than merely an academic debate. Pursuant to the final reports of the CHE, many South African law faculties are in the midst of curricular reform of their LLB programmes. In light of the South African critical theorists' proposals for the radicalisation of the LLB degree, this debate may have far-reaching consequences for both the content and quality of undergraduate legal education in South Africa.

II Core tenets of CLS

CLS first reared its head on the United States legal academic scene in the mid-1970s, generated much agitation among legal scholars for about fifteen years, and then quietly faded away. [5] The 'Crits', as CLS adherents are called,

were radical legal theorists on the far left politically, with strong Marxist leanings. They were educated at elite law schools and many were professors at elite law schools. [6] The Crit, Mark Tushnet, explained the immediate goal of the CLS movement as getting more like-minded radical leftists appointed to law faculties:

> '[C]ritical legal studies is less an intellectual movement in law (though it is that too) than it is a political location ... for a group of people on the Left who share the project of supporting and extending the domain of the left in the legal academy.' [7]

The principal features of CLS thought, as I see them, are as follows:

(i) If there is a single theme, it is that law is an instrument of social, economic and political domination, both in the sense of furthering the concrete interests of the dominators *and* in that of legitimising the existing order. [8] Or, as Duncan Kennedy puts it pithily: 'The legal system ... screws poor people [while] keeping their loyalty.' [9] In the CLS view, legal outcomes represent nothing but the arbitrary whim or political bias of decision-makers, and legal rules are indeterminate. [10]

(ii) CLS is hostile to legal 'rules'; an antipathy that also extends to 'legalism' and 'formalism'. Instead, it favours broad, flexible 'standards'. According to Crits, precision and predictability of rules invite greedy individuals to operate as closely as possible to the line of illegality against

'communal' interests. [11] Moreover, 'formalism' [12] and 'legalism' [13] are merely a façade for the oppression of the weak by the powerful. [14]

(iii) Rights — including fundamental human rights — as a special category of rules, receive particularly harsh criticism from CLS. [15] By placing a belief in indeterminacy squarely at the centre of judicial rhetoric, CLS challenges the importance of the vindication of rights, especially fundamental human rights. In the CLS view, rights reinforce a soulless, alienating vision of society made up of atomised individuals whose only concern is the protection of their own security and property. [16] Rights, CLS argues, protect only 'ephemeral' things, such as the right to free speech and religion, [17] and are impotent to address social problems. [18]

(iv) Central to CLS is the proposition that law is not what it seems — objective and capable of yielding 'right' answers — but simply politics in another guise. [19] Having identified the role of law as propagandist, the next step then is to expose and undermine it. The proper function of legal education is therefore to inculcate correct (in their view, leftist) political values in law students. [20]

(v) CLS is preoccupied with 'hierarchies', usually classified as 'illegitimate hierarchies'. According to what is surely one of CLS's original claims, the discourse of liberal-rights theory conceals and legitimises unacceptable

'hierarchies' of social power. [21] For example, it views 'hierarchies' such as law societies and other professional organisations as bastions of special privilege masked as beneficent self-regulation. [22]

In light of these radical and provocative propositions, it is not difficult to understand the severe backlash against CLS by the press and mainstream legal academia in the United States. CLS has been deplored for its 'complete rejection' of the rule of law; [23] its espousal of the law as 'a mere deception by which the powerful weaken the resistance of the powerless'; [24] its 'generalized antipathy toward many major institutions and practices of the modern "western" world'; [25] and its belief that 'law is nothing but politics by another name'. [26] One legal scholar has warned that CLS endangers 'the proudest and noblest ambitions of the law' and distorts 'the purposes of law and threaten its very existence'. [27] The scholarly works produced by Crits have been characterised as 'grotesque'; notable for their 'turgidity, invective, and irresponsibility'; [28] representative of 'a pathological phenomenon, a Peter Pan syndrome'; [29] and their tone denounced as 'moralistic, censorious, and preachy — appropriate for apostles whose monopoly of virtue is manifest'. [30]

An editorial in the *Wall Street Journal* declared:

> Harvard Law School in particular is suffering from a nightmare. ... Professors of the Marxist/Anarchist Movement known as Critical Legal Studies are teaching that the law is merely a tool for the rich, and should be toppled forthwith. Professor Paul Bator left Harvard for the University of Chicago because "serious and productive non-left scholars do not want to be at an institution devoted to guerilla warfare".' [31]

In an article entitled 'Radicalism for yuppies', the *New Republic* labelled those adherents of the movement who were law professors at the United States' most prestigious law schools as 'guerillas with tenure'. [32] CLS is

'nihilism gnawing on the law, '60s radicalism turned into '80s legal theory', wrote the Director of Public Affairs at the United States Justice Department in the *Wall Street Journal*. [33]

III CLS and the law teacher

Duncan Kennedy asserts that '[l]aw schools are intensely political places'. [34] Thus, even more than being a scholarly movement, CLS has a very specific mission as a 'network of people who [think] of themselves as activists in law school politics'. [35] In fact, 'trashing' (a favorite CLS term) or debunking traditional methods of teaching law, and 'undermining illegitimate power in law schools' have played a central role in CLS, and have provided the vital impetus for the movement. [36]

The South African critical scholarship on legal education looks to Duncan Kennedy as one of its intellectual gurus. This is likely the case because, as will become clear, the South African scholarship, like that of Kennedy's, is on the radical fringe of the (already radical) critical theoretical spectrum. Also, Kennedy is probably the critical scholar who has been the most prolific on the topic of legal education.

Described as the 'enfant terrible' [37] and 'charismatic pope' [38] of CLS, Kennedy is an iconoclast on the Harvard Law Faculty who revels in ridiculing the legal establishment. [39] His infamous 'little red book' *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* is a scorching jeremiad against legal education. The *Polemic* calls upon law students to '[r]esist the ideological training for willing service in the hierarchies of the corporate welfare state', [41] and to 'hook up with one

another and kick against the traces of the present — by ... protesting *inside law school, against law school*'. [42]

The first duty of the law professor, according to Kennedy, is to 'radicalise' law students: i e to redirect them towards neo-Marxism. [43] 'Find ways to use your ... normal classroom interaction as a political tool, as a political weapon, as an aspect of political activist practice', Kennedy advises leftist law teachers. [44] Specifically in the context of teaching first-year law students, Kennedy admits that he has 'Pied Piper fantasies'; that he 'quite cold-bloodedly' spends his time 'developing ways to convert [his] students to [his] personal political ideology'. [45] He actively tries 'to transform the first-year experience into an intense form of political education'. [46] In his view, first-year courses (in the context of United States legal education, these include the courses that constitute the traditional doctrinal courses of the South African LLB curriculum: criminal law, law of contract, law of delict, law of property, and public law) contain 'irrelevant dreck', and the traditional (i e non-CLS) law professors teaching these courses are 'wrong and corrupt'. [47] Thus, leftist law teachers should, like Kennedy, engage in 'coldly effective political indoctrination', 'delegitimating ... the established order', dissolving 'encrustations of the shit-hierarchy', and 'making some of the pious truths of liberalism, the bar, and the "political philosophers" of the system sound silly'. [48]

Kennedy explains his rationale for targeting the doctrinal courses that constitute the mainstay of traditional legal education as follows:

> 'The incredible difficulty of our task is nowhere more evident that in the compulsory classes that all students consider essential to their success. If we can achieve our goal of political education there, we can accomplish it anywhere in the law school curriculum.' [49]

To Kennedy's mind, these 'manipulative techniques' are justified, 'because that system that is being manipulated is both intellectually and morally

corrupt'. [50] Kennedy implores leftist law teachers and students 'to become at least a little threatening'. [51] 'We must construct a community of radical legal scholars', states Kennedy, because 'the law is ... perhaps the single most important area of bourgeois ideology. ... We *can* create a new kind of academic group — a group that ... subverts academic hierarchy rather than submitting to or reproducing it.' [52]

In an effort to 'subvert academic hierarchy', Kennedy has openly called on law students to 'organize disruptive opposition to the whole style and tone of the classroom'. [53] Moreover, Kennedy's idea of the ideal classroom environment is one in which students have unlimited and uncontrolled speaking opportunities in class:

> 'Each student will get to mouth off ad libitum — just keep on talking. It doesn't matter. No student has to respond to anything another student says, because it is inconsistent with the idea that this is a discussion of each person's personal, individual, subjective values that anyone would say: "Look, you windbag, enough." That would be inconsistent with the whole values approach. So anybody can say anything they want to. There is no requirement that anything be responsive to anything else — a reaction which could be interpreted as me saying, my values are right and your values are wrong.' [54]

If the majority of the class begins to 'boo' the student, the instructor is not to intervene with homilies about free speech. Such intervention would impose upon the class the instructor's system of values, and would 'protect fair process at the expense of the drive to extirpate illegitimate hierarchies (in this case the hierarchy of majorities over minorities)'. [55]

In order to transform the law school into a 'counterhegemonic enclave', Kennedy recommends such measures as equalising all salaries from cleaning staff to dean, regardless of educational qualifications, difficulty of job, or social contribution, and rotating each member of the community through each job; and that admission to law school be by lottery, with quotas within the system for women, minorities and working-class students. [56]

Part of Kennedy's mission to transform radically legal education also involves an avowed strategy of fanning 'factional acrimony' among members of law school faculties. [57] This CLS strategy caused an intellectual debate to sharpen into a 'prolonged, intense and bitter conflict' [58] that raged within his own institution, Harvard Law School, during the 1980s [59] — one that made national headlines and, according to one CLS scholar, turned Harvard into the 'Beirut of legal education'. [60]

Critics of CLS at Harvard contended that the Crits waged 'guerilla warfare' [61] that had an 'absolutely disastrous effect on the intellectual and

institutional life' of the Law School, [62] stymieing appointments and poisoning relationships. [63] In an almost unprecedented step for someone with tenure at the most prestigious law school in the United States, Paul Bator left Harvard for the University of Chicago, citing as his principal reason the 'philistinism' and 'mediocrity' that CLS induced, [64] 'subordinat[ing] academic ideals and standards to political ideals and standards'. [65] On the issues of intellectual integrity and academic excellence, Bator declared, 'there is no right or left. Only right and wrong'. [66] He stated:

> 'Starting with the premise that confrontation, trashing and disparagement are legitimate instruments for creating a radical political ambiance, [the Crits] have created a difficult, contentious, and inflamed atmosphere in which only the most disciplined is able to focus on serious work.' [67]

On the topic of legal education, the South African critical theorists have heeded Kennedy's call to 'resist!' Their writing reveals that they take their mission as law school political activists seriously. They also view the teaching of law as a 'political act'. [68] For them, legal education is a 'site of struggle over the meaning, nature and purpose of law in society'. [69]

Having reviewed their prolific output regarding legal education, it is my thesis that their law-school activism is only superficially directed at the content of LLB curriculum. More fundamentally, theirs is a struggle for the soul of the university law school — a struggle, not to reform or transform it, but to destroy it.

These critical theorists want theirs to be, if not the only, then certainly the predominant, voice that attempts to lay claim to the ears of our students. They are acutely cognisant of the fact that law teaching does more than merely 'teach' students; 'it also plays some role in moulding their sensibilities and comportment and in constructing their overall consciousness and world-view'. [70] They want to command a much larger part of that 'moulding' and 'constructing' for themselves. Thus, they are not only clamoring to lay claim to an ever bigger slice of the LLB pie for 'jurisprudence' (by which of course they mean their radical brand of critical legal theory), but also for their 'jurisprudence' to suffuse, and become the cornerstone of, the entire LLB curriculum.

The CLS political activism within United States law schools provoked a widely publicised response from Paul Carrington, Dean of Duke Law School, who declared that legal nihilists have no place in the modern law school:

> 'The nihilist teacher threatens to rob his or her students of the courage to act on such professional judgment as they may have acquired. Teaching cynicism may, and perhaps probably does, result in the learning of the skills of corruption, bribery and intimidation. In an honest effort to proclaim the need for revolution, nihilist law teachers are more likely to train crooks than radicals. If this risk is correctly appraised, the nihilist who must profess that legal principle does not matter has an ethical duty to depart the law school, perhaps to seek a place elsewhere in the academy.' [71]

To my mind, Carrington's indictment of CLS nihilists on law faculties perhaps goes too far. I agree with Louis Schwartz who, in recognising the value that the CLS perspective might add to a law curriculum, stated tongue-in cheek: 'Every faculty should have one Kennedy — certainly no more than one ...'. [72] My unsparing criticism of the South African critical theory scholarship on legal education in this article notwithstanding, it is difficult not to find oneself in general sympathy with the *concerns* of the CLS movement. The country and the world *are* fraught with injustice. Income and power *are* grossly maldistributed. The law does indeed embody, to a certain extent, the will of the dominant to continue to dominate. [73]

I recognise and respect that certain law teachers may ascribe to CLS dogma and feel compelled to teach their 'truth' to law students. But there is a world of difference between teaching CLS views to a class of students as part of a 'jurisprudence' module, and having those views constitute the foundation of each and every course in the LLB curriculum. It is on this issue that I part ways with the South African critical theorists.

I aim to show that, should critical theory become the cornerstone of undergraduate legal education in South Africa, its categorical rejection of the notion that law can in fact contribute to incremental but progressive change in our society, would leave our law graduates — especially the ones once concerned with social change — utterly disillusioned and disheartened. In this regard I focus on three closely related issues raised by the South African critical theorists: (i) the explicit rationalisation of negative critique as *the* appropriate route in legal education, and the consequent failure to develop — or even portend a blueprint of — a positive programme for the integration of legal theory and social movement; (ii) the critique of rights, especially fundamental rights; and (iii) the role of law teachers in relation to their students, the majority of whom are headed for the practice of law.

I start with an analysis of the South African critical theorists' views on legal education.

IV The views of the South African critical theorists on lawyers and the legal system

CLS employs various techniques of deconstruction 'to expose mainstream beliefs about determinacy and coherence in the law and to discover the false ideology disguised by such doctrine'. [74] Although, at times, the South African critical-theory scholarship on legal education descends into abstruse and ambiguous philosophical musings laced with social-science jargon, at other times its prose is rather abrasive, and comes as quite the shock to those uninitiated in critical-theory scholarship. This technique of deconstruction is referred to as 'trashing'. The Crits view 'trashing' as a legitimate form of

scholarship to expose and undermine 'the illegitimate hierarchies which pervade society'. [75] Indeed, for some Crits, it is the 'most valid form':

> 'That trashing may reveal truth seems significant if one's mission as a scholar is to tell the truth. If telling the truth requires one to engage in delegitimization, then that is what one ought to be doing. ... I am advocating negative, Critical activity as the only path that might lead to a liberated future.' [76]

If one considers their views on the South African legal system, current legal education, law students and practising lawyers, it is clear that the South African critical theorists have taken to heart the CLS methodology of 'trashing to delegitimise'. For example, in their view, the current LLB curriculum promotes an 'unjust and corrupt vision of social life'; [77] it teaches law students to be 'passive, uncritical consumers of legal materials', which will lead them eventually to become 'lawyers who also passively serve the *status quo* as functionaries of the dominant order'; [78] and it produces 'thoughtless, uncritical young people with no sense of the social and political world around them and with no concerns for values, justice, ethics and humanity'. [79] Furthermore, current legal education transmits a 'Western, conservative, bourgeois and false idea of law'; [80] coerces law students 'into compliance with hegemony, injustice and illegitimate power'; [81] and cultivates 'a legalistic, technicist and corporate-minded sensibility in students' by subjecting them to 'an irrelevant, outmoded and monotonous curriculum and course structure'. [82] Current legal education also has a 'drive to interpellate students into "thinking like a lawyer," which translates into the adoption of an objective, rational, dispassionate, legalistic, formal and stoic demeanour, sensibility and vocabulary'. [83] This 'lawyer' has an 'obviously fabricated and impossible character', and represents 'unethical Machiavellianism'. [84]

The centrality of certain 'core' courses in the current LLB curriculum, such as constitutional and administrative law, corporate law, law of contract, law of delict and property law, as well as criminal law, 'reflects the consolidation of a statist, procedural or bureaucratic, individualistic and capitalist vision of social life'. [85] Apparently, even the CHE is complicit in supporting the 'rationalist, legalist, professional-centric and conservative idea of law and legal education that persists in South Africa'. [86]

Law students whose education has not been grounded in critical legal theory become practitioners who are nothing more than 'legal vending machines that chuck out a solution when one inserts a case'; [87] 'praise singers for this unjust and immoral hierarchical structure'; [88] 'technocrat[s] ... who uncritically serve the dominant hegemony/ruling class'; [89] lawyers who are 'intellectually, politically and morally docile'; [90] and who develop a 'statist ... and establishment-minded approach to things'. [91]

Since the advent of constitutional democracy in South Africa, our legal system 'continues to function as an instrument of oppression and disempowerment'; [92] 'reproduce[s] ... injustice'; [93] 'reinforces systemic inequality and structural poverty'; [94] is 'separat[ed] from morality, and hence from justice, and ... participat[es] in the construction, perpetuation and legitimation of hierarchy and inequality ...'. [95]

One of the South African critical theorists, Joel Modiri, also engages in wholesale trashing of the Constitution of the Republic of South Africa, 1996 ('the Constitution'). He writes that the 'fetishism of law and constitutionality' or 'the fetishism of the legal ... in constitution-obsessed South Africa' leads to lawyers and law teachers 'placing ... disproportionate faith in the Constitution ... "[an emphatically,] modernist, Eurocentric and liberal" document'. [96] The Constitution is itself a product of

> 'the faulty negotiated settlement and compromises in the making of the post-1994 dispensation, which prioritised the economic interests of whites, absolved beneficiaries of colonial apartheid from historical and political responsibility, and prevent large-scale redistribution and reparations (thereby ensuring the survival of the old economic order into the new dispensation)'. [97]

The Constitution 'represents the perfection of colonial conquest'. [98] The 'diety-like status accorded to the Constitution, together with Nelson Mandela and the Truth and Reconciliation Commission ... forms 'the symbolic architecture that legitimises the myth of the rainbow nation that is "post"-apartheid South Africa'. [99]

Karin van Marle, although less exaggerated in tone than Modiri, seems to support this trashing of the Constitution. We should be cautious, she warns, 'to invoke the notion of constitutionalism and human rights', as these concepts are 'a continuance of Western domination and colonialism affirming the status quo (privileges obtained through colonialism and apartheid)'. [100]

V A 'critical' LLB curriculum

In the view of the South African critical theorists, 'South African law today is largely the law of the colonial settler imposed through colonial subjugation and violence'. [101] Moreover, we have been left with law faculties

> 'whose intellectual, knowledge-producing and thinking functions have been usurped by the demands of the corporate legal profession and by a functionalist preoccupation with "practical," "hard law," "real-world" issues and activities which are deemed more relevant than the "theoretical" or "soft-law" ones'. [102]

The question that naturally arises, then, is what do the South African critical theorists propose we teach our undergraduate law students? Not surprisingly, they demand 'an approach to the study and teaching of law grounded in a *critical* jurisprudence'. [103]

(a) Critical legal theory

The South African critical theorists believe that critical legal theory must be the 'substantive pillar' of legal education. [104] Emile Zitzke provides the clearest articulation of what this would entail, when he calls for teaching the law of delict 'critically', as a response to our 'conservative legal culture'. [105] With 'critical' he means 'compliance with broad themes of critical legal theory, especially drawing from Critical Legal Studies ... and its successive theoretical progeny (Feminist Legal Theory, Critical Race Theory and Queer Theory)'. [106] Modiri likewise states that legal education 'must be grounded in theory' (by which of course he means critical legal theory). [107]

Examples of themes and topics that would fit into the meaning of critical legal theory include:

(i) Interrogating 'law's violence and law's limits, and expos[ing] the "formalist error" within the legal culture', [108] and 'the falsity of the liberal constitutional promise'. [109]

(ii) Challenging the 'central tenets of modernity and Enlightenment thinking — its Western hubris, its coloniality and masculinity as well as its naïve exaltation of, and belief in the possibility of objective knowledge and the inevitability of historical progress'. [110]

(iii) Looking to the 'broad humanities', and underscoring the 'crucial importance' of law and legal education as a humanities discipline. [111]

(iv) Engaging in 'inter- and multidisciplinary inquiries as a form of resistance against the disciplinarily of law', [112] including 'postcolonial studies, law and literature, critical strands of social movement theory/transitional justice scholarship, legal pluralism, African jurisprudence and Marxist theories of law', [113] as well as '[p]hilosophy, the critical social sciences, literature, history and art'. [114]

(v) Adopting a 'subversive orientation' that, among other things, must show the fallacy of the 'internal logic of law', and must 'corrode the perceived certainties of the legal system'. [115] This means that 'hegemonic legal concepts, classifications and interpretations (reasonableness, ownership, freedom or individual autonomy, legal subjectivity, the public/private dichotomy, and even "law" itself)' must be 'challenged and exposed for their faulty, violent or contingent foundations'. [116]

(vi) Acknowledging 'attentiveness to history' as central to the curriculum. History in this context 'is broader than just "legal history" ... it would also include a general history of society as it intersects with and influences law and legal culture over time'. [117]

(vii) Abandoning the teaching of legal ethics, and instead embracing ' "insurrectionist ethics," not only rule-bound but also linked to political struggle against marginalisation, exclusion and powerlessness; not only how to conduct oneself as a professional but also how to live in the world with others'. [118]

(b) Transformative constitutionalism

It is on the subject of transformative constitutionalism that there may be a fault line in the South African critical theory scholarship. Zitzke's fundamental point of departure is that '[Karl] Klare's transformative constitutionalism is mandated by the Constitution'. [119] This implies that because the 'Constitution is the supreme law of South Africa and so applies to all law, and encompasses transformative constitutionalism, teachers of the law of delict

(in fact all law teachers) have the constitutional duty to teach their subject in a transformative manner'. [120]

Modiri, on the other hand, 'strongly distances' himself from such authors as, among others, André van der Walt, Dennis Davis and Geo Quinot, who have argued for 'reform of legal education to be centered on affirming the Constitution, constitutional values and "transformative constitutionalism" '. [121] The 'putatively progressive politics' behind the arguments of these scholars is 'severely undercut' by their 'fetished faith in constitutionalism, liberal democracy and the rule of law'. [122] Modiri also attacks the CHE for its position that 'legal education cannot be divorced from transformative constitutionalism': [123]

> 'That an interpretatively contested, possibly dated, concept developed by a white male North American scholar hold such sway over "progressive" legal academics and now has the bureaucratic affirmation of the CHE, confirms its status as unquestionable dogma of "post-apartheid jurisprudence" but it may also reveal the conceptual and political hollowness of the term.' [124]

Modiri argues against 'centering legal education mainly on the Constitution — given how contested it is currently, and also how moderate its politics is in contrast to a politics of decolonisation and liberation'. [125] This approach tends to 'assume and affirm Western liberal constitutionalism and moderate politics to the exclusion of more radical alternatives'. [126]

(c) Decolonisation and transformation of the LLB curriculum

According to the South African critical theorists, what a transformed and decolonised LLB curriculum would entail 'remains complex and multifaceted'. [127] However, it will, at a minimum, involve 'a thoroughgoing re-education in African thought and a re-connection to Global South voices, perspectives and realities, but *not necessarily* a total denunciation of Western thought'. [128] The South African critical theorists would

begin the transformation of the LLB curriculum

> 'by taking account of ... the historical, political and ethical violence of law: not just law's historical role in constructing and supporting racial and sexual oppression but also law's ideological role in normalising and legitimising the social power and worldview of dominant social groups'. [129]

Law's particular identity as 'a product of Western modernity and its co-emergence with and express facilitation of colonialism would also have to be interrogated and related to the present South African context'. [130] Moreover, 'socio-economic justice, reparations and redress, and the influence of race, class, gender and sexuality on law and society, ought to be examined across the spectrum of legal study including private, public, mercantile, and procedural law ...'. [131]

VI The South African critical theorists want to take 'the law' out of law school

Notwithstanding their claim that 'the grounding of legal education in theory and history is not to abandon doctrine [which I take to mean the principles of substantive law]', it is clear that the South African critical theorists want to excise the traditional conception of 'law' from the undergraduate legal curriculum to the greatest extent possible. [132] They assert that '[c]ase law, legislation and other sources of law should not be displaced; just deconstructed and read in context' [133] [by which of course they mean a critical theoretical context]. Apparently, by 'doctrinal analysis' the South African critical theorists mean reading legal texts 'for their omissions, repressions and distortions, [and] for signs of the oppressive power and symptoms of the traumas created by law'. [134]

Clearly, what I have always perceived as 'doctrinal analysis' is worlds removed from the meaning that the South African critical theorists ascribe to that concept. As I see it, doctrinal analysis is what occurs in 'traditional' (i e non-CLS) law classroom instruction, and in treatises, casebooks, journal articles and other *legal* texts. It involves the careful reading and comparison of court decisions with a view to identifying ambiguities, exposing inconsistencies among cases and lines of cases, developing distinctions, reconciling findings, and otherwise exercising the characteristic skills of *legal* analysis. [135] To my mind, doctrinal education is crucial to the lawyer's professional development, as it is an indispensable part of a lawyer's technical development. A lawyer, by definition, is skilled in the law, just as a doctor is skilled in

the human body. Any hack can misread cases, statutes and other legal texts; it is difficult to read them well.

A careful parsing of the South African critical-theory scholarship makes clear that these critical theorists eschew traditional doctrinal analysis. They seek to craft a way 'of teaching and conveying legal materials that emphasise critical thinking, conceptual engagement and theory while immersing students with the current social reality'. [136] Thus, it is clear that my idea of doctrinal analysis would play absolutely no part in a 'critical' LLB curriculum.

The proposals of the South African critical theorists regarding the content of a 'critical' LLB curriculum begs the question: when — as part of all the teaching of postcolonial studies, law and literature, critical strands of social movement theory/transitional justice scholarship, legal pluralism, African jurisprudence, Marxist theories of law, philosophy, the critical social sciences, history and art, that we as legal academics are supposed to engage in — would we have time to teach our law students traditional doctrinal analysis? Parenthetically, would it not make more sense pedagogically first to instill in our students knowledge and understanding of the rudiments of the South African legal system, before we expect them to deconstruct it?

Like Kennedy, the South African critical theorists urge law teachers to teach in an unabashedly political fashion — but not *any* politics. As is apparent from the content of a 'critical' LLB curriculum expounded upon above, liberal law teachers would, for example, not be free to teach politics, history, literature and philosophy according to the core values of the liberal democratic tradition, including those values with 'western' roots. All law teachers would be limited to a one-dimensional, and thus impoverished, version of these social-science disciplines as viewed through a critical, neo-Marxist lens. It escapes me how law graduates, if given a second-class education in political science, philosophy and history by law teachers, could improve South African society? [137]

Significantly, the South African critical theorists reject traditional doctrinal analysis, because, fundamentally, they do not believe in legal rules. As explained above, one of the core tenets of CLS is that there simply is no such thing as objective, neutral legal rules. Crits hold that legal rules are socially constructed to reflect prevailing interests of power and domination, and the 'mythology of legal discourse serves to mystify and pacify the oppressed'. [138] Karl Klare, another one of the South African critical theorists' intellectual gurus, [139] suggested in the 1980s that law students be 'totally freed from the

tyranny of belief in the false coherence or compellingness of legal argument'. [140] Likewise, another leading US Crit, Peter Gabel, declares that 'legal reasoning is an inherently repressive form of interpretive thought which limits our comprehension of the social world and its possibilities'. [141] Other critical theorists go so far as to deny the very notion of a legal order. [142] The South African critical theorists advocate that we should teach our students 'to develop critical distance for the present legal order', apparently to prepare them for a time when that order 'may inevitably come to a crisis of legitimacy and coherence'. [143]

As a movement, CLS is fanatically committed to exposing the indeterminacy of the legal order. [144] The Crits have sought to demonstrate that the legal process in general, and its discrete doctrinal components, such as law of contract, law of delict, constitutional law, labour law, criminal law and the like, are fundamentally indeterminate and manipulable. [145] For Crits, no objectively correct legal results exist, regardless of whether presented in terms of legal doctrine or policy analysis, and no matter how skilled the advocate or judge may be. [146] Accordingly, the resolution of every doctrinal dispute or other legal conflict is simply an arbitrary choice.

In this tradition, the South African critical theorists would have law teachers 'constantly challenge the formalist assumptions that law is determinate and that legal choice is strictly limited'. [147] We must also expose the fallacy of the 'internal logic of law', and 'corrode the perceived certainties of the legal system'. [148] That also includes the principle of Constitutional supremacy. According to Modiri, 'acknowledgment that both the content and spirit of the Constitution is in serious contest ... must be placed at the heart of legal education'. [149]

The message of the South African critical theorists to students is not simply that law is indeterminate and legal outcomes arbitrary, but also that the law is evil. The 'ideal of the rule of law' simply masks the existence of hierarchy and contradiction in liberal society. [150] According to South African critical theorist Tshepo Madlingozi, our 'conservative legal culture' ignores, and is therefore complicit in, the proliferation of 'ongoing injustices, inequalities and exclusions' in present-day South Africa. [151] To Modiri's mind, 'the continuation of racial inequality, of a colonial symbolic and cultural order, of sexual violence, and of poverty in South Africa should be at the heart of legal education'. [152]

Paradoxically, in the course of their constant efforts at delegitimisation, the South African critical theorists speak and think about 'the law' as if it were nothing more than litigation, doctrines, and case outcomes — precisely the narrow view they accuse traditional South African law teachers of harbouring. [153] These critical theorists cannot even conceive of legal strategies for the purpose of building social movement. They utterly reject the proposition that the law has any capacity as a tool for addressing social ills. [154] They deny that '[f]rom time to time ... opportunities may arise where courts could offer real, concrete relief'. [155]

A debate that took place some years ago between Thsepo Madlingozi and Anton Kok is instructive of the critical theorists' misguided view of the law. Madlingozi called on legal academics to embrace 'participatory action research', according to which we should move out of the comfort of our offices and go into the field. The poor communities (the researched) then become co-researchers who, together with the legal academic, come up with 'conclusions'. [156] In response, Kok asked:

> '[W]hat is *legal* about the action Madlingozi proposes? Do lawyers and law teachers ... not use the *law* in interpreting and understanding the

> world? If a particular community suggests to a (legal?) academic that their most pressing need is ... access to clean water, what is it that the legal academic/activist can offer them that a sociologist or anthropologist or philosopher cannot offer them? Is it not the chance that a *court* will listen to their plight and order the state to implement reasonable measures in ensuring access to water? ... Madlingozi seems to abandon "the law" altogether in his search for a better tomorrow.' [157]

Kok continued: '[L]egal rules and courts do not seem to play a role in the world Madlingozi imagines ...'. [158]

In their efforts to strip from legal education as much of 'the law' as possible, the South African critical theorists insist that a critical legal education is 'inseparab[le] ... from a conception of law as a humanities discipline'. [159] They lament the fact that 'none of the major political currents dominating the social sciences and humanities and public discourse have led to a meaningful revision of how we teach law and how we structure the LLB curriculum'. [160] They also remonstrate with legal academics who are not prepared to embrace the notion of law as a humanities discipline, as lacking humility and being closed to 'new worlds'. [161] Insisting on an identity as a 'legal academic' or an 'academic lawyer' apparently expresses 'self-importance, exceptionalism, and expertise, [and] confesses the haughtiness and ruthlessness so often associated with lawyers'. [162]

The South African critical theorists make no secret of their ultimate objective. They state emphatically that their effort to 'apprehend law as a humanities discipline' is also an effort to 'distinguish or distance law and legal study from [the] typical styles of legal inquiry and pedagogy ...'. [163] According to them, the educational objective of training law students to develop the cognitive mindset of 'thinking like a lawyer' is informed by the 'problematic' assumption that the 'primary ... role of the law school is to produce law graduates who are capable of entering the private legal profession'. [164] They propose that we give our law students 'the freedom to be educated, to pursue academically multiple possibilities without too quickly, prematurely limiting them to the realities of practice'. [165]

The South African critical theorists argue vehemently that 'the value of legal education should not be indexed by how well it serves the needs and expectations of the legal profession and the judiciary'. [166] They explicitly reject an 'understanding of the crises in legal education linked to the profitability and marketability of law graduates and their ability to quickly acclimate to the conditions of the private legal profession'. [167] According to the South African critical theorists:

> '[L]aw faculties ... all over the country are being browbeaten, successfully it would seem, by the General Bar Council and the South African Law Society "to produce graduates who are ready for the professions". ... At every turn we are being told that we have to teach students in a manner that will enable them to "hit the ground running" when they complete their studies.' [168]

The South African critical theorists charge the 'bureaucratic powers in the judiciary and the legal profession' with being 'staggeringly unimaginative and myopic' in their understanding about what the teaching of law should entail. [169] The legal profession's views on the reform of the LLB curriculum 'reduces universities into factories whose sole purpose must be the mass production of efficient and effective participants in the market'. [170] Quoting Duncan Kennedy, Madlingozi states that law teachers, too, are 'trapped into just serving the status quo by carrying out the professionalisation process'. [171] Even the recent review of the LLB degree by the CHE seems to be, according to them, 'motivated by professional and instrumental concerns'. [172] The South African critical theorists accuse law faculties of 'unduly privileg[ing] the concern of law firms, the market and the State'. [173] They also disapprove of law schools encouraging the involvement of law firms in faculty activities. [174]

In sum, because the South African critical theorists do not believe in legal rules, they have no interest in educating lawyers. This is abundantly clear, not only from their proposals with regard to what we should teach our undergraduate law students, but also in their stated objective of producing not just graduates ready for the profession, but 'citizens, activists and intellectuals'. [175] In his response to Madlingozi, Kok asked pertinently: 'Do we turn law graduates into social science researchers?' [176]

VII The insurmountable flaws inherent in a 'critical' LLB curriculum

There are two major fallacies at the heart of an LLB curriculum grounded in critical theory.

(a) South African constitutional democracy is trashed ... Now what?

There is little mystery about what CLS is *against*. It is against capitalism, liberalism, especially legal liberalism, and illegitimate hierarchies. It is much

harder to determine what it is *for*. For a movement that claims to be political, and more importantly, that claims authority to speak for the poor and the oppressed, this is truly an astonishing vacuum. [177]

There comes a limit beyond which the drumbeat of any viewpoint numbs the mind when it remains on the attack, content merely to trash other intellectual positions. I can imagine a time, not too far into their 'critical' LLB studies, when law students would throw up their hands in submission and cry out: 'Doubtless, it is all a mess. But what, exactly, do you propose to put in place of the legal system you are attacking?' [178] Herein lies the rub of a 'critical' LLB curriculum.

The extensive South African critical-theory critique of the South African legal system is purely negative and without any constructive potential. These critical theorists want to unmask the South African legal system, but not to make the law into an effective instrument of good public policy or equality. The aim of their critique is critique. [179] Trashing the status quo is the game — a game that would be spoiled if the critical-theory scholar had to assume responsibility for devising social arrangements to replace those to be discarded.

First, a principal problem of purely negative criticism is that it is meaningless without a standard of reference. Liberal democracy might be oppressive and hierarchical as judged against some ideal standard, and yet is less oppressive and hierarchical than most or even all other societies that have ever existed. [180] Churchill's aphorism that '[d]emocracy is the worst form of Government except all those other forms that have been tried from time to time' has apparently left no impression on critical theorists. [181] Critical legal writers systematically evade the question, 'Compared to what?'

Secondly, the critical theorists claim that 'traditional' legal education has the effect of 'curtailing the legal and political imagination of students and shutting them out from the view of law as it ought to be'. [182] However, the South African critical theorists offer absolutely no 'view of law as it ought to be'. They fail to make a positive case for critical legal theory by showing that it posits something other than the destruction of the current legal order. [183] They fail utterly to provide a coherent radical vision of social change.

I am not unmindful that some critical theorists glory in the absence of a positive programme, because, they reason, until and unless we have successfully jettisoned our dominant belief systems, any attempt to formulate a positive programme will inevitably reintroduce the very patterns of domination

and alienation that we seek to escape. [184] I am likewise aware of the critical-theory argument that the only way to break out of the straightjacket of 'liberal legal consciousness' is to concentrate on delegitimating — 'trashing' as the Crits prefer — its conceptual underpinnings. [185] I am even prepared to accept that trashing for trashing's sake may be a legitimate position to hold as a scholar.

However, critical theorists who are members of law faculties are not only scholars; they are also teachers. The students they teach are, in the main, not going to be scholars. They are going to be practitioners. What do critical-theory law teachers have to say to these students — other than instilling in them cynicism and continually pointing out to them that their discipline is a whole-cloth fraud? [186] The complete vacuity of the South African critical- theory scholarship when faced with the task of proposing remedies, explains why it is so unsatisfying to persons of

a practical bend. The danger that I perceive in the South African critical-theory scholarship is that it would not lead towards genuine human and social progress in South Africa. If the attack on the status quo is merely a 'game of jurisprudential polemics divorced from the real world and devoid of practical proposals for progress', [187] nothing will change. It is this absence of a positive programme — indeed the *disdain* for a programme by some critical-theory scholars — that is the central difficulty that feminists and people of colour in the United States have with the movement. [188]

The tendency of the South African critical-theory scholarship to engage in indiscriminate demolition of existing legal structures without thought of replacement strikes me not only as politically unappealing, but also grossly irresponsible. For critical legal theory to become the cornerstone of the LLB curriculum, no matter how cogent the South African critical theorists' trashing of traditional legal thought may be, they must still suggest an alternative to liberal democracy. To retain credibility, sustain allegiance and mobilise support, they must offer their own tangible version of the 'good society'. Their work, like that of CLS in the United States, will ultimately be consigned to the dustbin of history if they fail (or, more likely, refuse) to translate their theories into some attainable dimension of human experience: 'To nurture the seeds of social progress [there must be] ... some concrete conception of the soil in which they are intended to grow.' [189]

The lack of a constructive alternative to the present social and legal order has been an issue that has subjected CLS to much criticism from traditional legal scholars: 'Critical legal writing provides a way of sounding like a radical when you don't know how to be one'; [190] there are 'few grains of wheat in this mountain of chaff'; [191] 'the CLS program is platitudinous ... peddling sheer fantasy'; [192] CLS expresses unwillingness 'to step off the utopian pedestal and share the practical difficulties of the human condition'; [193] '[w]e do not deal here with reason but with volcanic sub-rational emotions; we are in the domain of id, not ego'; [194] 'CLS is not offering concrete revolutionary proposals; it is simply offering surrealistic pictures for our minds'; [195] 'CLS is certainly colorful, but often little more than that ... there seems more flash than substance in its existence'; [196] CLS is 'inflated with ... an all-too-familiar quasi-generalized left emptiness ... [an] indeterminate indeterminism'; [197] CLS 'appears now as a mere witness to the powerless atomization of an emasculate radical Left discourse'; [198] CLS has 'missed the opportunity to become a strong leftist movement — instead of an almost cartoon-like caricature of one — with an enduring legacy' [199]

Phillip Johnson describes the CLS movement as 'a pathological phenomenon, a Peter Pan syndrome:

> 'We expect adolescents to come up with grand criticisms of the existing order without proposing a realistic alternative, but by the time one graduates from law school ... we generally expect the former adolescent to have developed a willingness to come to terms with reality. And yet here is a movement composed of supposedly radical law professors who proudly proclaim themselves to be "utopian" and whose positive program seems to contain nothing more substantial than an instinctive dislike for "domination" and "hierarchy".' [200]

Madlingozi wants legal academics to engage in 'progressive politics', the aim of which is 'to overturn liberal democracy for participatory democracy'. [201] In light of the devastating criticism of critical legal theory's lack of a positive programme, the intriguing question is why Madlingozi does not

elaborate on what his vision of 'participatory democracy' would look like? It is my thesis that he does not, because he cannot — and he cannot, because critical legal theory is shackled to Marxism.

Many people in academic life sincerely want to be radical. The South African critical theorists are no different. They want to use their intelligence to plan a better society, and they feel contempt for the 'bourgeois mentality' that prevails in the law, business and government. [202] For such people, Marxism (or neo-Marxism) has a practically irresistible attraction.

Some of the writings of the CLS movement — and the work of the South African critical theorists falls squarely in this category — are explicitly neo-Marxist, and the CLS movement as a whole has employed Marxist jargon and methods of analysis. But Marxist *theory* is where it stops. Critical theorists hardly ever propose Marxist *solutions*. [203] This is likely because of the consistently abominable record of Marxist regimes — the slave labour camps, the mass deportations, the suppression of labour unions, the denial of freedom of conscience, the bureaucratic rigidity, the personal cults. [204] All communities (socialist or capitalist) inevitably circumscribe individual autonomy; however, none more so than twentieth-century socialism, with its overwhelming state interventionism. [205] If critical theory's primary concern is for social equality and the abolition of hierarchies of power, Marxist dictatorship is obviously no solution to *these* issues. [206]

There are a number of places one might look for the beginnings of a solution to the problem of what oppresses people when they have a relatively high degree of economic opportunity and a democratic constitutional government. Playing with Marxism is not a promising way to start. [207] As we know all too well, bureaucratic socialist states of recent history did not cure alienation, competitive individualism, greed, power-seeking, or the other ills that the critical theorists ascribe to capitalism. [208]

Paradoxically, the political implications of the South African critical theorists' failure to propose a positive programme, is fundamentally conservative. If they not only do not tell us how to get there from here, but also do not tell us where 'there' is, does it not follow that we should stay where we are until we have an idea of where we are going? If the point of the South African critical theorists is that some vague notion of 'participatory democracy' is the alternative to conventional liberal legal thought, then they are making the strongest possible pragmatic argument for maintaining our liberal democratic conventions. [209]

(b) Fundamental human rights? Who needs them!?

Critical legal theory's avowed commitment to neo-Marxist theory causes it to view the development of the capitalist welfare state — a development that comprehends much legislation protecting the interests of vulnerable groups, such as workers, the unemployed, and the aged against the crude impositions of property owners — as a mere trick by which capitalism disarms its opponents. [210] Kennedy opposes liberal-rights theory as 'wrong' and 'incoherent'. [211] Liberal democracy's most vaunted principles, including the fundamental human rights of individual freedom, equality and free speech, and procedural fairness, do not serve the values of human self-realization and true equality; rather, they serve the purposes of the market and bureaucratic structures that provide the institutional setting of liberalism. [212] For example, in critiquing Dworkin and 'other writers in the liberal tradition', Peter Gabel suggests that they 'defend a liberty that is only an anxious privatism and a legal equality that conceals practical domination'. [213] In Gabel's analysis, the function of liberal rights is to legitimise and romanticise 'the requirement of free market capitalism'. [214] It does this by creating the illusion that the system is fair and changeable and that inequalities are the result of personal deficiencies. [215] Almost the only concession made to the liberal legal system is that it occasionally does actual justice in order to maintain credibility: i e to enhance its legitimating function. [216]

Moreover, many critical theorists argue that no right can be 'universal' or 'inalienable'. Rights only make sense or not in different societies at different times. Their very meaning is historically conditioned. [217] It thus follows that not every person can be said to have an 'inalienable right' to 'free speech' or to 'human dignity' or to 'organise with one's fellow workers'. CLS views such 'rights' as nothing more than 'universalistic pietisms' in capitalist societies to avert the eyes of citizens from the concrete injustices in social relations.

An utter contempt for human-rights discourse is also evident in the writing of some of the South African critical theorists. As we have seen above, Modiri is downright disdainful of 'the now widespread worship of the Constitution', which he describes as characterised by 'its epistemic and political coloniality, its practical ineffectiveness and its ideological conservatism'. [218] Madlingozi also argues that the discourse on human rights does not

lead to greater activism, but that, if anything, it has the effect of pacifying and depoliticising. [219]

The South African critical-theory scholarship begs the question: what kind of justice will be achieved and what kind of life promoted in a

socialist 'participatory' democratic system that does not recognise and defend certain inalienable rights of each human being, including the right of free speech and political dissent, and the right of working people to join mutual associations of their own choice and control? [220]

For one thing, in a 'participatory' democracy there would not be much of a legal system of which to speak. The only CLS view of the role of law in a 'transformed' society, albeit in the most general and abstract terms, comes from Roberto Mangabeira Unger, and it is enough to fill any liberal lawyer with dread. Unger insists on the creation of 'informal communitarian legal institutions' in which legal expertise would consist of a 'loose collection' of legal and political insights. [221] In his transformed society, institutional roles — the bar, the judiciary — will be abandoned, as well as 'all claims to monopolize in the name of expert knowledge an instrument of power'. [222]

Critical theorists can give absolutely no guarantee that racism, sexism, classism, homophobia, and xenophobia, for example, would not resurface in a 'participatory' democracy. About the only thing that they *can* guarantee is that there will be no formal structures — rules, rights, statutes, or courts — to counteract these forces. [223] Victims will have to rely on informal 'standards' such as goodwill and communal understanding. The conclusion is therefore inescapable that in a 'participatory' democracy, vulnerable groups will have lost all the gains (limited as some believe they may be) that they have made in liberal democracy, and these groups would be at exponentially increased risk of prejudicial treatment.

In their sweeping dismissive critique of rights discourse, critical theorists have seemingly lost any appreciation of the potential contribution of rights, a potential that coexists with their negative potential. [224] Marx developed the perspective — a perspective that has become deeply imbedded in critical-theory thinking — that the 'fundamental rights' of each person as set forth in

the Bill of Rights, are rights that subtract from those of other people, or, at best, separate people from one another. [225] But what about the ability of the right to free speech and dissent to *increase* the next person's ability to exercise these rights?

It is not the social legitimisation resulting from the formal recognition of rights that inhibits transformative social struggle. To the contrary, rights such as free speech and dissent *protect* the ability of people to challenge their society, better their group circumstances, and expand their freedom. [226] Critical theorists have refused to acknowledge the dual nature and potential of rights. Just as much as rights may be instruments of legitimising oppression, they are also affirmations of human values. Just as often as they are used to frustrate social movement, they are also among the basic tools of social movement. [227]

The view that rights separate and alienate the individual from the rest of society might be true for critical legal theorists in their law-school offices, but for the poor and the oppressed, they often serve as a rallying point, as 'invigorating cloaks of safety' that unite them in a common bond. [228] Critical theorists fail utterly to focus on the possibility that the poor and the oppressed might be empowered through rights activism. If we learn nothing else from twentieth-century life, we should learn that human values of autonomy and solidarity require legal expression and protection. Thus, legal recognition of inalienable human rights is a necessary — although, granted, an insufficient — protection against oppression. [229]

For all their sins in the eyes of CLS, liberal lawyers are deeply committed to freedom of speech. Freedom of speech is much more than the mere 'universalistic pietism' that critical theory makes it out to be. It is an indispensable instrument, which together with a fundamental commitment to the protection of the individual, lies at the very heart of what we know today as liberal constitutional democracy. Thus, liberal democracy at least provides the mechanism for its own critique. Can the same be said of 'participatory' democracy? [230] The answer is an emphatic 'No!' That is because a propensity for coercion (violence) and paternalism is central to critical theory. There are many on the radical left — the South African critical theorists included — who do not have an earnest (or, for that matter, *any*) commitment to freedom of speech. They are all too happy to see the silencing of voices that speak out against accepted radical dogma.

In the neo-Marxist perception, because liberal legal reformism assures the continued evolution and survival of democratic capitalism, it constitutes one of the major obstacles to cataclysmic utopianism. [231] Even worse, a hierarchical social system survives by pointing to the occasional concession to, or periodic court victory, by the oppressed, as evidence that the system is fair and just. [232]

It is not much of a leap to conclude that people who think that the rule of law is nothing but a mask for class domination, who deny the possibility of neutral justice, and who deprecate 'reformism', compromise and bargaining, might be drawn to violent solutions of social issues. [233]

Kennedy elucidates the CLS attraction to coercion: 'We can achieve real freedom only collectively through *group* self-determination. ... [This] implies the use of force against the individual.' [234]

Kennedy is clearly not averse to using violence to solve the 'problem' of the tension between individual freedom and the inescapable coercion that the community must exert to prevent encroachments by individuals upon each other's personhood. Of course, for liberals there is no 'problem'. Freedom of religion and freedom of speech preclude the use of force against 'bad' opinions. The fact that the contrary position commends itself to CLS neo-Marxists is not surprising in view of the suppression of individual liberty wherever Marxism has assumed power. [235]

Closely related to the CLS attraction to coercion is its overweening paternalism, which proposes to force on the masses not what they want, but what the CLS 'omniscients' think the masses should want once they have been liberated from the psychic distortions induced by bourgeois liberalism. [236] A 'purely "voluntary" movement is inconceivable', asserts Kennedy: '[T]he only alternative is the assumption of responsibility for the totalitarian domination of other peoples' minds — for "forcing them to be free".' [237] Although I use Kennedy as an example, he is by no means the only critical theorist who has advocated violent, disorderly solutions, rather than mediated and peaceful compromise, [238] and whose writing is unyieldingly paternalistic in outlook. [239]

VIII The 'law' graduates produced by a 'critical' LLB curriculum

I have deliberately belaboured the views of the South African CLS scholars on current legal education, the South African legal system and lawyers, as well as their vision for a 'critical' LLB curriculum, to make a point. Imagine being a law student and being inundated with these teachings for four or five years. Every single day, in every single class in every single course the central message is that the law is not in any way virtuous or redemptive, and that it is powerless to address social and historical injustice. Rather, law is violent, has colonial roots, is affiliated to oppressive social powers, is unable to effect real change, and produces poverty. [240] In short, imagine an LLB curriculum in which the focus is exclusively on law's 'hidden cruelties'. [241]

Secondly, in the face of the incessant bombardment of the South African critical theorists' central message that law is a mere deception by which the powerful weaken the resistance of the powerless, and that respect for and obedience to the law is morally degenerate, what law student could fail to become dispirited, and to have doubts about the validity of her professionalism as a lawyer? [242] If students leave law school without any appreciation of the law as a generative force in our public life, the law will become to them 'law without inspiration'. [243] This will mean the death of law, as we have known it throughout history, and as we have come to admire it.

There is dread in dispiritedness and disbelief. The tendency of CLS to see politics at the root of law is wholly unsatisfying to someone who wants to practise law. Politics deals with the accommodation and adjustment of claims backed by power. To see nothing but politics in law is to adopt the claim that justice is the will of the stronger. That amounts to nothing short of nihilism, and a lawyer who succumbs to the legal nihilism preached by some of the South African critical theorists must contemplate the grim reality of a society in which the only right is might. [244] Moreover, lawyers lacking confidence that legal principles actually influence the exercise of power, have no professional tools with which to do their work. In due course they must

choose between neglect of their work or the application of common cunning.

A 'critical' LLB curriculum will most certainly rob law students of the courage to act on such professional judgment as they may have acquired during their time at law school. Imbued with unrestrained cynicism of the legal system, what would remain for law students but, at best, simply to pursue the same buck as everyone else, or, at worst, to embrace corruption, bribery and intimidation in all their many forms as legitimate alternatives to an illegitimate legal order? [245]

Arguably the most harmful message that a 'critical' LLB curriculum would send to undergraduate law students is: 'If you practise law, you are a sell-out.' Like Duncan Kennedy, the South African critical theorists clearly want to train students only for social activism. Modiri bemoans the 'fact' (his perception) that '[w]e have a legal education mostly divested of public-spiritedness, law graduates who lack a substantive commitment to the eradication of marginalisation and subordination, and law faculties ... usurped by the demands of the corporate legal profession'. [246]

The South African critical theorists want 'law' graduates 'who constantly seek to resist old and new forms of illegitimate power [such as, in the Crit view, the law and legal system], to challenge the *status quo*, to transgress'. [247] They want 'law' graduates who are one-dimensional radical ideologues who will set about destroying the basis of individual freedom in our constitutional democracy (perhaps without even realising it).

Crits refuse to participate in the legal process because participation to them is counterproductive; it legitimises. By remaining outside of the law, Crits seek to 'characterise', rather than participate in, 'the ways in which law contributes to the legitimisation of oppression'. [248] They therefore regard themselves as engaging in 'insurgency' from without in order to make explicit the political bias that underlies judicial and scholarly doctrine. [249] Many Crits will not manipulate doctrine, for example, by distinguishing cases, even in the cause of the socially disadvantaged, because to do so would only serve to reinforce the false legitimacy of the legal order. [250] The role of the critical theorist is a critical one only: 'He engages in politics, but he disengages himself and his pupils from legal practice.' [251] Critical 'legal' theory, then, is not law, but pure politics. [252]

The 'dominant legal discourse' in South Africa, writes Madlingozi, 'is complicit in th[e] unfair socioeconomic situation'. [253] Legal academics should thus realise that 'victory in a court case could actually insulate the system that reproduces social misery from any fundamental critique that seeks to challenge it'. [254] Madlingozi admonishes legal academics that they would do well 'to reflect on Peter Gabel's claim that: "Every time you bring a case and win a right, that right is integrated within an ideological framework that has as its ultimate aim the maintenance of collective passivity." ' [255]

To continue Kok's earlier example, a lawyer using the law and legal process to obtain a court order directing a municipality to provide clean water to a community may postpone the revolution, or it may not. In the meantime however, the order keeps a number of poor families, including the very young and the very old, from contracting life-threatening diseases. It smacks of paternalism to assert that the possibility of revolution later outweighs the certainty of clean water now. Indeed, some incremental changes may bring revolutionary changes closer, not postpone them. Not all small victories induce complacency.

The South African critical theorists' message to law students is that it is a contradiction in terms to be a 'radical lawyer', because one is inevitably corrupted by the medium in which one works. [256] Thus, unless they become social activists (or, I suppose, Crit scholars in their own image) who do not actually engage in the practice of law or use the law in any way, they will be 'sell-outs' to the true cause of 'progressive politics' — a critical-theory term for a radical leftist political agenda, the aim of which is 'to overturn liberal democracy for participatory democracy'. [257]

The South African critical theorists want their 'law' graduates to stand, just like them, on the outside looking in, carping from the sidelines, just 'dwellers on the threshold'. [258] They want their 'law' graduates to also assume roles as 'insurgents' from without, merely seeking to delegitimise and ultimately overthrow the current legal order through revolution.

A 'critical' LLB curriculum would not prepare law students for a practice located in the world outside the law school, where injustice, legal procedures and social movement constantly intermingle. [259] It is likely that 'critical' law graduates would become disillusioned with radical critical-theory ideology, as the 'real world' fails to conform to their radical expectations.

It is noteworthy that Madlingozi, in his call to legal scholars to engage in 'participatory action research', does not suggest that the law teacher and the community work together to come up with a 'solution'. The most he aspires to is 'conclusions'. Madlingozi seems to miss the point completely that we cannot build a new society of compassionate human beings if we do not *act* to help our fellow humans *now*. However small the ways, we are what we do.

If we rob our law students of the ability to do legal work that is helpful to oppressed human beings in South African society, the so-called 'radicals' that the South African critical legal theorists want our law faculties to produce will be nothing more than hollow fakes and dangerous imposters. [260] Thus, ironically, the radical critical legal theorists are likely to lead more students *away* from, rather than into, social struggle.

In the eyes of the South African critical theorists, becoming a practising lawyer is sedition, but becoming a *commercial* lawyer is high treason. The rising enrollments in the BCom LLB study route is 'an effect of the rising hegemony of neoliberal capitalism' that views law as 'subordinate to, and as a tool of ... the economic system'. [261] Law in the business/corporatist model 'functions primarily to facilitate commercial transactions and to support economic growth in line with the demands of trade, industry, commerce/banking, technology, labour and investment'. [262]

When did it become an unpardonable sin to want to be a commercial lawyer, a legal advisor to a bank, or a financial regulatory expert? When did an interest in mercantile law and a commitment to social justice and transformation become mutually exclusive? Kok rightly asks: 'Is there not room [in the university law school] for all kinds of research and all kinds of projects by all kinds of lawyers and academics and activists .... all in the service of transformation?' [263]

This begs the question: are the South African critical theorists not running the risk of introducing a new orthodoxy? By trashing and attempting to sweep away the prevailing structures, are they not foisting their own structure of thought on others? [264] Are they not merely seeking the replacement of one form of consciousness with another: 'liberal consciousness' for 'critical consciousness'? [265] Would the South African critical theorists' agenda not be equally illegitimate, and would it not amount to just another form of domination? [266] Are they not ultimately vulnerable to the same critical sword that they so conceitedly wield to slay liberalism? [267]

IX The duty of the law teacher

I certainly do not claim that our legal system is without fault. The remarkable popular hostility to the legal profession is only the most immediate barometer of the level of public dissatisfaction with the workings of the legal system. There is much to be critical of in the ways of the law — the ever-growing complexity and confusion of legal rules and regimes; the glut of litigation that clogs our courts; the fact that dispute resolution is too expensive to be available to any but large corporations and the wealthiest individuals, thus excluding everyone of modest, little or no means; the decline in civility and mutual respect among those involved in the law; to name but a few. These are not the signs of a healthy enterprise.

As a teacher of civil procedure, I would be the first to admit that the system is broken and in need of fundamental reform. But that is the

beauty of the legal system. The central fact about it is that we made it all up. God never decreed that contracts need of consensus. Doctors and engineers deal with an objective world with limitations of anatomy and gravity. They are stuck with their reality. Lawyers are not. The scope for reform of the legal system is virtually limitless.

A favourite CLS technique is to attribute falsely ridiculous positions to ideological opponents and then to demolish those positions. [268] Thus, Modiri writes that non-CLS law teachers teach students to be 'passive, uncritical consumers of legal materials', which will lead them eventually to become 'lawyers who also passively serve the s*tatus quo* as functionaries of the dominant order'. [269] The liberal law teacher who holds this belief is a figment of Modiri's imagination. The South African critical-theory scholarship on legal education is tilting at windmills. There are many urgent reforms to be made in the legal system, and I know of no legal academic who teaches students to simply staff the system, rather than to change it. I reject utterly the South African critical theorists' accusation that 'traditional' (i e non-Crit) law teachers simply instill in their students complacent careerism and apathy. Of course, teaching a craft involves teaching its current customs. Thus, one of the main objects of law teaching has always been to familiarise students with the body of conventional rhetorics and practices. But legal education does not — and has not ever — ended there. It does more than merely teach unreflective acceptance of the current conventions.

Most law teachers that I know teach their students that lawyers are more than the legal mechanics and technicians that the South African critical theorists make them out to be. There is nothing inherent in the notion of professionalism that precludes lawyers from thinking about, and using law to help promote — even radical — political change. [270] A true professional works to bring the practice of law into closer harmony with its utopian ideals

— such as fair process, restraint of power, equality, dignity — embodied in law but only imperfectly realized in the current professional practices. I believe that most legal academics are reformist in their aspirations. If lawyers or judges or legislators do bad things, we point that out and attempt to get them to mend their ways. [271]

For those university law teachers who are able to keep the faith of the secular religion, let there be no shame in the romantic innocence with which they approach the ultimate issue of their profession. [272] To limit might, the public needs lawyers who acclaim the hope and expectation that rights will be enforced. Seeing her blemishes and knowing her perfidies, true lawyers can nevertheless love the law and have 'pride in [their] occupation [that] surpasses the pride of Kings'. [273] We love law not because reason requires it, but because our commitment to our discipline serves the needs of the public to whom, and for whom, we are responsible. Sharing this commitment may be our most important power and responsibility. [274]

X Conclusion

It would be a mistake simply to dismiss the South African critical theorists as a ' "smarter-than-thou" association', [275] or a 'lonely hearts club for left-wing professors', [276] and their scholarship as 'Critical Legal Balony'. [277] We should be vigilant against their radical political agenda within the law school. As I have attempted to show, for Crits, intellectual critique is merely a prelude to, and platform for, political action. [278] The ambition of the Crits is revolution, not reform. [279] According to Peter Gabel, conditions for total transformation of society cannot be created by 'tinkering with a legal system'. [280] That is why the CLS movement mounted 'a full frontal assault' on the edifice of modern jurisprudence. [281] Similarly, the South African critical theorists not only aim at

the 'deconstruction' of the South African legal system, including its foundation in constitutional supremacy, but at its 'destruction'.

Within the university law school, in their attempts to disavow their identity as 'law teachers', and to convert the faculty of law into just another department of the faculty of humanities, the South African critical theorists seek the intellectual annihilation of law as an academic discipline. They are not constructively critical. Their critique is entirely of the destructive, trashing variety. They 'seem to want to completely eradicate what is currently in place', [282] without suggesting a practical alternative to the present legal order. The only substantive vision that they offer of how law graduates can act to the betterment of society is by abandoning law altogether. Their brand of critical theory, which in its extreme form amounts to nothing less than legal nihilism, would ultimately lead to the demise of the university law school.

I realise that this might be a hard dictum, but I do not believe it to be unjustified. A university law school with critical legal theory as its grundnorm is akin to a faculty of theology with atheism as its central tenet. The South African critical theorists do not believe in law. To them, legal outcomes represent nothing but the arbitrary whim or political bias of decision-makers. I do not perceive in their work even a grain of regard for law or the true lawyer's hope that officials will abide by principle in applying the lash of power. [283]

They undermine the respectability of what practitioners and judges do on a daily basis. By looking down upon practising lawyers as 'bureaucratic functionaries ... whose work requires knowledge, precision, fairness, but never judgment', [284] the South African critical theorists completely negate the ability of the practising lawyer to shape the law to respond to new needs of clients and society. In fact, their limited vision transforms the lawyer into an obstacle to making the law responsive to society's demands for change and growth. [285]

The South African critical theorists have to foresee that their dispiriting message might cause law students to abandon the law. They have to foresee that the law school that only trains social activists (and Crit scholars) — the law school that is not attuned to the needs of the profession — is the law school that will become increasingly obscure and irrelevant, and ultimately obsolete. But that, I contend, is precisely their goal.

United States Federal Appellate Judge, Harry Edwards, relays this comment from one of his former law clerks about his (the clerk's) time at Harvard Law School — a comment that strikes a warning note to South African law teachers about any law school experience in which Crits dominate:

> 'I was fortunate to get mainly Traditionalists my [first year], and after that avoided Crits at all costs. That is why I feel that my legal education made sense. Other [first-years] were not so lucky. They got stuck with Crits, and ended up at best wasting a year, and at worst becoming alienated from law school and the law. Of course, some students — mainly those who were in law school not because they were genuinely interested in the profession but because they couldn't think of anything else to do with themselves — actually chose to go to the Crit [Harvard Law] School, and in my experience those students were almost completely ignorant of the basic rudiments of law as practiced.' [286]

In this time of renewed flux and introspection in legal education in South Africa, we as law teachers would do well to remember Felix Frankfurter's injunction: 'In the last analysis, the law is what the lawyers are. And the law and lawyers are what the law schools make them.' [287]

† BLC LLB (UP) LLM (Notre Dame) LLD (UP). Member of the New York State Bar.

1 Richard A Posner 'The present situation in legal scholarship' (1981) 90 *Yale LJ* 1113 at 1128.

2 Tshepo Madlingozi 'Legal academics and progressive politics in South Africa: Moving beyond the ivory tower' 2006 *Pulp Fictions* 5; Karin van Marle 'Jurisprudence, friendship and the university as heterogenous public space' (2010) 127 *SALJ* 628; Karin van Marle & Joel Modiri ' "What does changing the world entail?" Law, critique and legal education in the time of apartheid' (2012) 129 *SALJ* 209; Joel Modiri 'Transformation, tension and transgression: Reflections on the culture and ideology of South African legal education' (2013) 24 *Stellenbosch LR* 455; Joel Modiri 'The crises in legal education' (2014) 46 *Acta Academia* 1; Karin van Marle 'Reflections on legacy, complicity, and legal education' (2014) 46 *Acta Academia* 196; Emile Zitzke 'Stop the illusory nonsense! Teaching transformative delict' (2014) 46 *Acta Academia* 52; Joel Modiri 'The time and space of critical legal pedagogy' (2016) 27 *Stellenbosch LR* 507.

3 Mark V Tushnet 'Perspectives on Critical Legal Studies' (1984) 52 *Geo Wash LR* 239 at 239. Fischl states that there are likely as many positions on any given concrete issue as there are scholars who associate with the movement. Richard Michael Fischl 'Some realism about Critical Legal Studies' (1987) 41 *U Miami LR* 505 at 507.

4 I offer this 'generalisation' about CLS in the same spirit as generalisation about any intellectual movement, cognisant of the fact that generalisations always

overlook some significant individual differences.

5 Brian Z Tamanaha 'The failure of Crits and leftist law professors to defend progressive causes' (2013) 24 *Stanford LR* 309 at 315. In a sense it would probably be more accurate to discuss CLS in the past tense, since by all accounts the movement has all but died out in the United States and Europe (with the exception of isolated scholars and the progeny of the CLS movement embodied in Feminist Theory, Critical Race Theory and Critical Queer Theory). However, I refrain from doing so because CLS ideas permeate recent critical theory scholarship about legal education in South Africa. In this sense the CLS movement seems alive and well in South Africa.

6 Tamanaha op cit note 5 at 315. Harvard Law School was considered the 'Rome of CLS', with three of the movement's leading progenitors — Duncan Kennedy, Morton Horowitz and Roberto Unger — on its faculty. Kindred spirits elsewhere could mainly be found on the faculties of the University of Wisconsin Law School and Stanford Law School. David Margolick 'Education watch; The split at Harvard Law goes down to its foundation' *New York Times* 6 October 1985, available at *http://www.nytimes.com/1985/10/06/weekinreview/education-watch-the-split-at-harvard-law-goes-down-to-its-foundations.html*, accessed on 18 August 2017; Ken Emerson 'When legal titans clash' *New York Times* 22 April 1990, available *at http://www.nytimes.com/1990/04/22/magazine/when-legal-titans-clash.html* accessed on 17 August 2017.

7 Tushnet op cit note 3 at 1515, 1516.

8 Mark Tushnet's invitation to the first Conference on Critical Legal Studies in 1977, as cited in Louis B Schwartz 'With gun and camera through darkest CLS-land' (1984) 36 *Stanford LR* 413 at 417. See also John Henry Schlegel 'Notes towards an intimate, opinionated, and affectionate history of the conference on critical legal studies' (1984) 36 *Stanford LR* 391 at 410–11. In the CLS view, law serves an ideological purpose as well: by lending a pseudo-legitimacy to capitalism and masking exploitation with seeming concern for freedom and individual rights, the law lulls the victimised masses and 'co-opts' them into supporting the very system that oppresses them. David M Trubek 'Max Weber on the law and the rise of capitalism' 1972 *Wisconsin LR* 720 at 724; Peter Gabel 'Reification in legal reasoning' (1980) 3 *Research in Law and Sociology* 25 at 29.

9 Duncan Kennedy, as quoted in Schwartz op cit note 8 at 423.

10 Whether the transformation they seek can be achieved through the law is, in Modiri's words, 'highly contested'. Modiri 2014 *Acta Academica* op cit note 2 at 13.

11 Duncan Kennedy 'Form and substance in private law adjudication' (1976) 89 *Harvard LR* 1746 at 1771.

12 In CLS, 'legalism' refers to an excessive literalism in applying rules of law. Schwartz op cit note 8 at 431.

13 'Formalism' is the CLS caricature of the notion that law is a deductive and autonomous science that is self-contained in the sense that particular decisions follow from the application of legal principles, precedents, and rules of procedure without regard to values, social goals, or political or economic context. Schwartz ibid at 431. See also Trubek op cit note 8 at 748–9.

14 Trubek ibid.

15 See, for example, Alan David Freeman 'Legitimating racial discrimination through antidiscrimination law: A critical review of Supreme Court doctrine' (1978) 62 *Minnesota LR* 1049.

16 Mark Tushnet 'An essay on rights' (1984) 62 *Texas LR* 1363 at 1384.

17 Richard Delgado 'The ethereal scholar: Does Critical Legal Studies have what minorities want?' (1987) 22 *Harvard Civil Rights-Civil Liberties LR* 301 at 304.

18 Van Marle & Modiri op cit note 2 at 216. Whether the transformation they seek can be achieved through the law is, in Modiri's words, 'highly contested'. Modiri 2014 *Acta Academica* op cit note 2 at 13.

19 Owen M Fiss 'The death of law' (1986) 72 *Cornell LR* 1 at 9. See also Mark Tushnet 'Critical Legal Studies: A political history' (1991) 100 *Yale LJ* 1515 at 1517. Mark Kelman, in attempting to expose the intellectual tricks by which judges allegedly conceal the non-rational, value-laden political choices embodied in all adjudication, notes the 'complacency-inducing, conservatizing impact of the perceived separateness of legal and political discourse'. Mark Kelman 'Interpretive construction in the substantive criminal law' (1981) 33 *Stanford LR* 592 at 671–2.

20 Duncan Kennedy 'First year law teaching as political action' (1978) 1 *Law and Social Problems* 47 at 52.

21 E Dana Neacsu 'CLS stands for Critical Legal Studies, if anyone remembers' (2000) 8 *J Law & Policy* 415 at 422. Kennedy opposes 'liberal rights theory' as 'wrong' and 'incoherent'. Duncan Kennedy 'Critical labor law theory: A comment' (1981) 4 *Industrial Relations LJ* 503 at 506.

22 William H Simon 'The ideology of advocacy: Procedural justice and professional ethics' (1978) *Wisconsin LR* 29 at 133.

23 Terry Eastland 'Radicals in the law schools' *Wall Street Journal* 10 January 1986 at 16.

24 Paul D Carrington 'Of law and the river' (1984) 34 *J Legal Educ* 222 at 227.

25 Robert Clark 'Remarks of Robert Clark' in *A Discussion on Critical Legal Studies at the Harvard Law School, Presented by the Harvard Society for Law and Public Policy and the Federalist Society* (1985) 1 at 4 (hereinafter *Federalist Society Meeting*).

26 Paul M Bator 'Remarks of Paul Bator' *Federalist Society Meeting* 12.

27 Fiss op cit note 19 at 1.

28 Schwartz op cit note 8 at 414, 419–20.

29 Phillip E Johnson 'Do you sincerely want to be a radical?' (1984) 36 *Stanford LR* 247 at 248.

30 Schwartz op cit note 8 at 440.

31 'Veritas at Harvard' (Editorial) *Wall Street Journal* 3 September 1986 at 26.

32 Louis Menand 'Radicalism for yuppies' *New Republic* 17 March 1986 at 20.

33 Eastland op cit note 23 at 16.

34 As quoted in Van Marle & Modiri op cit note 2 at 210.

35 Gerard J Clark 'A conversation with Duncan Kennedy' (1994) 24 *The Advocate: The Suffolk University Law School Journal* 56 at 56.

36 Adrienne E van Blerk 'Critical legal studies in South Africa' (1996) 113 *SALJ* 86 at 98.

37 Tamanaha op cit note 5 at 315.

38 Schwartz op cit note 8 at 413.

39 A US Crit has described Kennedy as a 'cross between Rasputin and Billy Graham. Machiavellian ... with the seductiveness of a revivalist preacher. ... Kennedy wants your soul.' Schlegel op cit note 8 at 392. Elsewhere, Kennedy is described as flaunting 'a confrontanional '60s style of incivility and antic provocation' of his colleagues. Richard Lacayo & Joelle Attinger 'Critical legal times at Harvard' *Time* 11 November 1985 at 88.

40 Duncan Kennedy *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (1983), also published, in somewhat altered form, as Duncan Kennedy 'Legal education and the reproduction of hierarchy' (1982) 32 *J Legal Educ* 591.

41 Kennedy *Polemic* op cit note 40 at i.

42 Ibid at 7. 'Meaningful organized opposition can occur within the institutions of the bureaucratic capitalist, welfare state', contended Kennedy, and '[l]aw schools are such institutions; we can resist within them'. Kennedy op cit note 20 at 51.

43 Louis B Schwartz to Paul Brest ' "Of law and the river," and of nihilism and academic freedom' (1985) 35 *J Legal Educ* 1 at 20. The strategy he advocates is that of 'building a left bourgeois intelligentsia' that might one day 'join together with a mass movement for the radical transformation of ... society'. Kennedy 1982 *J Legal Educ* op cit note 40 at 610. This means 'developing a practice of left study, left literature and left debate about philosophy, social theory, and public policy ...'. Ibid.

44 Duncan Kennedy 'Goals in law teaching' (1979), mimeographed transcript of a speech given at a conference of the Society of American Law Teachers at New York University Law School on 16 December 1979 at 8, as cited in Schwartz op cit note 8 at 419.

45 Kennedy op cit note 20 at 55–6, 60.

46 Ibid at 52.

47 Ibid at 55, 57.

48 Ibid at 49, 55, 56.

49 Ibid at 56.

50 Ibid at 55. The critique of liberalism is '*true*', proclaims Kennedy, 'and to suppress it is immoral, a violation of the teacher's responsibility to his or her students'. Ibid at 53.

51 Ibid at 56.

52 Ibid at 57–8.

53 Kennedy as quoted in Eastland op cit note 23 at 2.

54 Duncan Kennedy op cit note 44 at 17–18.

55 Ibid.

56 Kennedy 1982 *J Legal Educ* op cit note 40 at 614–15. One should resist the urge to simply ascribe Kennedy's exaggerated Marxist rhetoric to his trademark sarcasm and irreverence. That he meant every word is abundantly clear from his 'Dissent from the Report of the Committee on Educational Planning and Development of the Harvard Law School', unpublished manuscript prepared as a dissent to the Report of the Committee on Educational Planning and Development, Harvard Law School (May 1982) on file with the *Stanford Law Review*, as cited in Schwartz op cit note 8 at 413–14.

57 Emerson op cit note 6.

58 Lacayo & Attinger op cit note 39 at 88.

59 Ibid at 87. The dean, James Vorenburg, in an unprecedented letter to 28 000 alumni, was forced to respond to widespread concern that a 'war-like atmosphere' was threatening intellectual standards at the most influential law school in the United States. Al Kamen 'War between professors pervades Harvard Law' *The Washington Post* 21 December 1985, available at *http://washingtonpost.com/archive/politics/1985/12/21/war-between-professors-pervades-harvard-law/*, accessed on 21 August 2017.

60 David Trubek, as quoted in Jennifer A Kingston 'Harvard tenure battle puts "Critical Legal Studies on trial" ' *NY Times* 30 August 1987, available at *http://www.nytimes.com/1987/08/30/weekinteview/harvarvard-tenure-battle-puts-critical-legal-studies-on-trial.html,* accessed on 15 April 2017. More broadly, within the legal world in the United States in the 1980s and early 1990s, the confrontation between this radical movement and the traditional establishment developed into a full-blown battle. Allan C Hutchinson & Patrick J Monahan 'Law, politics, and the critical legal scholars: The unfolding drama of American legal thought' (1984) 36 *Stanford LR* 199 at 200.

61 Lacayo & Attinger op cit note 39 at 87.

62 Jonathan M Moses '26-year law professor leaves for Chicago' *The Crimson* 18 September 1985, available at *http://www.thecrimson.com/article/1985/9/18/26-year-law-professor-leaves-for-Chicago*, accessed on 18 August 2017.

63 Margolick op cit note 6.

64 Lacayo & Attinger op cit note 39 at 88.

65 Bator op cit note 26 at 13–14.

66 Lacayo & Attinger op cit note 39 at 88.

67 Margolick op cit note 6. Robert Clark, another critic of CLS on the Harvard faculty, stated that the presence of CLS scholars on a law school faculty disrupts its proper functioning. The Crits turned Harvard 'into an "armed camp" inimical to scholarship'. Ibid. In the wake of Paul Bator's departure, an assistant dean, Charles Nesson, stated that several of his colleagues, wearied by the 'vilification, name-calling, back-stabbing, and character assassination' wished they had the courage to follow Bator. Ibid.

68 Modiri 2013 *Stellenbosch LR* op cit note 2 at 456. In expressly political terms, Modiri describes the law faculty of the University of Pretoria as one of the 'most conservative, untransformed, and ideologically right-wing ... law faculties in the country'. Ibid at 457.

69 Ibid at 456.

70 Modiri 2014 *Acta Academica* op cit note 2 at 9.

71 Carrington op cit note 24 at 227. Carrington's views generated a large literature in response. See introduction and correspondence in 1985 *J Legal Educ* op cit note 43 at 1ff.

72 Schwartz op cit note 8 at 419.

73 See ibid at 420–1.

74 Van Blerk op cit note 36 at 96.

75 Ibid.

76 Alan D Freeman 'Truth and mystification in legal scholarship' (1981) 90 *Yale LJ* 1229 at 1230–1.

77 As quoted in Zitzke op cit note 2 at 54.

78 Modiri 2013 *Stellenbosch LR* op cit note 2 at 458.

79 Ibid at 459.

80 Modiri 2014 *Acta Academica* op cit note 2 at 6.

81 Modiri 2013 *Stellenbosch LR* op cit note 2 at 478.

82 Modiri 2016 *Stellenbosch LR* op cit note 2 at 507–8. Traditional legal education desires to produce 'conformist law students who are so in love with the law and adhere so tightly to the values of established doctrine that they can be economically useful in propping up and maintaining the conservative nature of the legal culture and the pro-business interests of the legal profession'. Modiri 2013 *Stellenbosch LR* op cit note 2 at 469–70. Non-Crit South African law teachers are 'unable to think globally about the legal education being offered ... and that is also the reason why law courses and course materials are often so formulaic, outdated and stale. These excessive conceits are partly the result of a lack of humility on the part of law teachers ...'. Modiri 2014 *Acta Academica* op cit note 2 at 16.

83 Modiri 2016 *Stellenbosch LR* op cit note 2 at 512.

84 Ibid.

85 Ibid at 513. Both the content and structure of the [current] LLB curriculum represents 'a very particular worldview ... — one structured by the logics and aims of neoliberal capitalism and liberal legalism'. Ibid at 512–13.

86 Ibid at 532.

87 Madlingozi op cit note 2 at 17.

88 Ibid at 18.

89 Van Marle & Modiri op cit note 2 at 214.

90 Modiri 2013 *Stellenbosch LR* op cit note 2 at 458.

91 Ibid at 466. The Crits warn that, unless the LLB curriculum is not reformed 'correctly' (that is, according to the Crits' radial political agenda), then we 'run the risk' of producing 'technicians without ethics ... graduates without values ... enterprise without community'. Jonathan Jansen as cited in Van Marle & Modiri op cit note 2 at 211.

92 Modiri 2013 *Stellenbosch LR* op cit note 2 at 457.

93 Modiri 2016 *Stellenbosch LR* op cit note 2 at 525.

94 Madlingozi op cit note 2 at 8.

95 Modiri 2014 *Acta Academica* op cit note 2 at 2. South African law, so the Crits assert, has historically unfolded as part of the larger project of ' "dark modernity" comprising European supremacy, racial capitalism and sexism', and its development 'substantively and procedurally [was] forged in the cauldron of slavery, colonisation and apartheid'. According to the Crits, nothing much has changed. They expound, as significant characteristics of the post-1994 South African legal order, 'colonial apartheid, ... the devaluation of African legal knowledge systems and the role of rights discourse in constructing poverty'. Modiri 2013 *Stellenbosch LR* op cit note 2 at 467–8. Our legal system has also 'actively participated in securing and entrenching the material subordination, invisibilisation and degradation of Blacks, women, and homosexuals ...', and disguises 'the preferences, interests, moral impulses and world view of socially dominant and powerful groups'. Modiri 2014 *Acta Academica* op cit note 2 at 11.

96 Modiri 2016 *Stellenbosch LR* op cit note 2 at 513–14.

97 Ibid at 516.

98 Ibid. The 'key ideological and practical function of the Constitution is to inhibit the decolonisation of the country and the realisation of social justice'. Ibid. Modiri continues: 'Not only does the Constitution privilege euro-modernist colonial legal systems, cultures and institutions, it also secures the material privilege of whites and as a result maintains the symbolic and ontological debasement of Blacks that was initiated in 1652 through colonialisation, land dispossession and cultural decimation.' Ibid. South African constitutionalism and constitutional scholarship 'turns out to be invested — at some level — in the prolonging of an anti-Black colonial project'. Ibid.

99 Ibid.

100 Van Marle 2014 *Acta Academica* op cit note 2 at 211, 212. Van Marle also writes: "[O]ne should ... not be too quick to accept the new value framework as one that reflects a radical or revolutionary break. What and more pertinently whose framework, perspectives and voices were again excluded, suppressed and ignored with a shift from parliamentary sovereignty to constitutional supremacy, from authoritarianism to seeming transparency, racism, sexism and other discrimination to seeming equality.' Ibid at 197.

101 Modiri 2016 *Stellenbosch LR* op cit note 2 at 523.

102 Modiri 2013 *Stellenbosch LR* op cit note 2 at 463.

103 Modiri 2014 *Acta Academica* op cit note 2 at 1. Van Marle and Modiri suggest that the 'four-year LLB must be critically evaluated ... at present it does not sufficiently provide opportunities for critical thinking/acquisition of skills ...'. Van Marle & Modiri op cit note 2 at 212.

104 Modiri 2014 *Acta Academica* op cit note 2 at 10.

105 Zitzke op cit note 2 at 55.

106 Ibid.

107 Modiri 2013 *Stellenbosch LR* op cit note 2 at 473.

108 Modiri 2016 *Stellenbosch LR* op cit note 2 at 527.

109 Ibid at 509.

110 Modiri 2014 *Acta Academica* op cit note 2 at 12. It would also involve acknowledging 'law's ... role in the maintenance of White colonial domination and hetero-patriarchal power and its facilitation of the economic injustices of capitalism' (ibid at 6), and responding to and acknowledging 'the crises and tragedies of colonialism and apartheid' (ibid at 9).

111 Van Marle 2014 *Acta Academica* op cit note 2 at 209, 212.

112 Modiri 2014 *Acta Academica* op cit note 2 at 13.

113 Ibid at 12.

114 Ibid at 13. It also includes cultivating in students 'a broad sense of culture, knowledge and language', and a 'more complex, multidimensional picture of law and its inextricable relation to society, politics, morality, history, ideology, power and community' (ibid at 11, 16), and integrating 'racial, sexual and cultural difference ... at all levels of teaching' (Modiri 2013 *Stellenbosch LR* op cit note 2 at 463).

115 Modiri 2016 *Stellenbosch LR* op cit note 2 at 510.

116 Ibid at 511.

117 Modiri 2013 *Stellenbosch LR* op cit note 2 at 473.

118 Modiri 2016 *Stellenbosch LR* op cit note 2 at 528.

119 Karl Klare suggested a project of transformative constitutionalism as a response to the legacy of South African private law (based on Roman-Dutch law) and as a way to develop the private-law doctrine in light of the Constitution in such a way as to address issues of substantive and social justice. See Karl E Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146; Van Marle 2014 *Acta Academica* op cit note 2 at 198.

120 Zitzke op cit note 2 at 55.

121 Modiri 2016 *Stellenbosch LR* op cit note 2 at 514.

122 Ibid.

123 As quoted in ibid at 529.

124 Ibid at 530.

125 Ibid at 529. Modiri believes that 'optimism about the Constitution's transformative capacity is ... naïve', and 'centering the reform of legal education on the Constitution can itself border on the uncritical'. Modiri 2014 *Acta Academica* op cit note 2 at 10.

126 Ibid at 10–11.

127 Modiri 2016 *Stellenbosch LR* op cit note 2 at 522.

128 Ibid at 521 (emphasis supplied). Modiri asserts that 'it is well-recognised' that the curricula at South African universities ... are overwhelmingly grounded in European and American epistemological paradigms which most closely correlate with the cultural perspective and social sensibilities of whites'. Thus, the 'structure of knowledge in South African universities reveals them to be in the grip of a Northbound gaze'. Ibid at 518.

129 Ibid at 522.

130 Ibid.

131 Ibid at 523.

132 Modiri 2013 *Stellenbosch LR* op cit note 2 at 473. Zitzke is also 'not proposing that doctrine has become irrelevant'. Zitzke op cit note 2 at 60.

133 Modiri ibid at 474.

134 Costas Douzinas & A Geary as quoted in Modiri 2014 *Acta Academica* op cit note 2 at 5–6.

135 See Posner op cit note 1 at 1113.

136 Modiri 2016 *Stellenbosch LR* op cit note 2 at 523.

137 See Schwartz op cit note 8 at 434. That is of course not to claim — and liberals do not claim — that law should be taught in isolation from the influence of social sciences (a point I return to below).

138 Andrew Altman 'Legal Realism, Critical Legal Studies, and Dworkin' (1986) 15 *Philosophy & Public Affairs* 205 at 216.

139 As set forth above, although Modiri also once was a disciple of Klare, at least on the issue of transformative constitutionalism, it seems as if he has now broken with Klare.

140 Karl Klare 'The law school curriculum in the 1980's: What's left?' (1982) 32 *J Legal Educ* 336 at 340.

141 Gabel op cit note 8 at 25.

142 According to Trubek, CLS has defined itself by its critique of legal order by challenging the idea that legal order exists in any society. David M Trubek 'Where the action is: Critical Legal Studies and empiricism' (1984) 36 *Stanford L Rev* 575 at 577.

143 Ibid at 514.

144 CLS pushes the realist theme of exposing the indeterminacy of the legal order to its outmost extremes. Van Blerk op cit note 36 at 90.

145 Hutchinson & Monahan op cit note 60 at 212. '[E]very mode of reasoning used by lawyers, every application of legal principles to a specific scenario and every method of argumentation based on legal materials involves a normative and contestable vision of law and social and political life.' Modiri 2013 *Stellenbosch LR* op cit note 2 at 471. Zitzke also states that we should reconcile ourselves with the reality that 'rules are indeterminate and that there is no such thing as an objectively perfect answer in law'. Zitzke op cit note 2 at 60.

146 Hutchinson & Monahan op cit note 60 at 208.

147 Modiri 2013 *Stellenbosch LR* op cit note 2 at 473.

148 Modiri 2016 *Stellenbosch LR* op cit note 2 at 510.

149 Ibid at 516.

150 Hutchinson & Monahan op cit note 60 at 212.

151 Modiri 2013 *Stellenbosch LR* op cit note 2 at 457.

152 Modiri 2016 *Stellenbosch LR* op cit note 2 at 516.

153 See Ed Sparer 'Fundamental human rights, legal entitlements and the social struggle: A friendly critique of the Critical Legal Studies movement' (1984) 36 *Stanford LR* 509 at 560.

154 See Anton Kok ' "Legal academics and progressive politics in South Africa: Beyond the ivory tower" — A response to Tshepo Madlingozi' 2006 *Pulp Fictions* 26.

155 Ibid at 27.

156 Madlingozi op cit note 2 at 20.

157 Kok op cit note 154 at 28.

158 Ibid at 29–30.

159 Modiri 2014 *Acta Academica* op cit note 2 at 15, 19; Modiri 2013 *Stellenbosch LR* op cit note 2 at 475.

160 Modiri 2016 *Stellenbosch LR* op cit note 2 at 508–9.

161 Modiri 2014 *Acta Academica* op cit note 2 at 15.

162 Ibid.

163 Ibid at 16–17. Modiri describes his perception of the three currently typical styles of legal inquiry and pedagogy, namely the doctrinal approach, the scientific approach and the business/corporatist approach. Ibid.

164 Modiri 2013 *Stellenbosch LR* op cit note 2 at 460.

165 Van Marle 2010 *SALJ* op cit note 2 at 644. The Crits set themselves the goal of 'defending a deep and broad university education against attempts to convert it into mere job training'. Modiri 2014 *Acta Academica* op cit note 2 at 3.

166 Ibid at 1.

167 Ibid at 2.

168 Madlingozi op cit note 2 at 17.

169 Modiri 2014 *Acta Academica* op cit note 2 at 3.

170 Ibid at 18. Van Marle also writes: 'Most often, the lack of skills is lamented by academics relying on responses coming from legal practice. It is of concern that these are perceived as mere technical skills that should serve a narrow instrumental purpose.' Van Marle 2014 *Acta Academica* op cit note 2 at 209.

171 Duncan Kennedy, as quoted in Madlingozi op cit note 2 at 17.

172 Modiri 2016 *Stellenbosch LR* op cit note 2 at 529.

173 Modiri 2013 *Stellenbosch LR* op cit note 2 at 462.

174 Ibid at 464.

175 Modiri 2014 *Acta Academica* op cit note 2 at 16. See also Madlingozi op cit note 2 at 18.

176 Kok op cit note 154 at 29.

177 Johnson op cit note 29 at 281.

178 See Eugene D Genovese 'Critical legal studies as radical politics and world view' (1991) 100 *Yale J L & Hum* 131 at 133.

179 Owen M Fiss 'The death of law' (1986) 72 *Cornell LR* 1 at at 10.

180 Johnson op cit note 29 at 260.

181 As quoted in Schwartz op cit note 8 at 424.

182 Modiri 2013 *Stellenbosch LR* op cit note 2 at 474.

183 Richard L Barnes 'Searching for answers without questions' (1989) 34 *South Dakota LR* 220 at 221, 222.

184 Harlon L Dalton 'The clouded prism' (1987) 22 *Harvard Civil Rights-Civil Liberties LR* 435 at 436.

185 Ibid.

186 Paul D Carrington to Owen M Fiss in 1985 *J Legal Educ* op cit note 71 at 25.

187 Schwartz op cit note 8 at 421.

188 See Dalton op cit note 184 at 436; Neacsu op cit note 21 at 424.

189 Hutchinson & Monahan op cit note 60 at 227. It seems that the Crits believe that if they can demolish (or, as they like to say, 'trash') the intellectual foundations of Western liberalism as revealed through the writings of traditional legal scholars, something better will rise from the ashes. But they make no effort to justify that faith. See Richard A Posner 'A manifesto for legal renegades' *Wall Street Journal* 27 January 1988 at 23. They attack the legal system in a way that merely assumes the existence of a constructive alternative. But the burden is on the Crits to elaborate and defend a practical alternative to the present social order and legal system. See Genovese op cit note 178 at 133.

190 Johnson op cit note 29 at 249.

191 Ibid at 265.
192 Ibid at 283, 285.
193 Ibid at 291.
194 Schwartz op cit note 8 at 455.
195 Ibid at 455.
196 Neacsu op cit note 21 at 416.
197 Ibid at 419.
198 Ibid at 433
199 Ibid at 434.
200 Johnson op cit note 29 at 248.
201 Madlingozi op cit note 2 at 6.
202 Johnson op cit note 29 at 265.
203 Ibid at 257.
204 Ibid at 258.
205 Schwartz op cit note 8 at 428. See also Johnson ibid at 284.
206 Johnson ibid at 259.
207 Ibid at 291.
208 Ibid at 284.
209 Ibid at 262.
210 Schwartz op cit note 8 at 425.
211 Kennedy op cit note 21 at 506.
212 Sparer op cit note 153 at 520.
213 Peter Gabel 'Book review' (1977) 91 *Harvard LR* 302 at 315 (reviewing Ronald Dworkin *Taking Rights Seriously* (1977)).
214 Sparer op cit note 153 at 521.
215 Schwartz op cit note 8 at 425.
216 Ibid.
217 Robert W Gordon 'Historicism in legal scholarship' (1981) 90 *Yale LJ* 1017 at 1025.
218 Modiri 2016 *Stellenbosch LR* op cit note 2 at 533.
219 Kok op cit note 154 at 30. Modiri claims that 'the rise of constitutionalism and rights discourse has been something of an "anti-politics" and has incited a widespread juridification, even judicialisation of politics that has ... engender[ed] passivity and reduc[ed] broad political conflicts into narrow legal questions'. Modiri 2016 *Stellenbosch LR* op cit note 2 at 515. This is of course part and parcel of the CLS dogma that Western legalism is fatally flawed, because it uses rights rhetoric to mystify the ideological role of the legal system, and thus to enshrine and legitimise hierarchies, hegemony and power arrangements. John W van Doren 'Illusive justice: Applicability of critical legal studies to South Africa' (1989) 4 *SA Public Law* 104 at 105.
220 Sparer op cit note 153 at 522.
221 Roberto Mangabeira Unger 'The critical legal studies movement' (1983) 96 *Harvard LR* 561 at 668.
222 Ibid.
223 See Delgado op cit note 17 at 314.
224 Sparer op cit note 153 at 519.
225 See ibid at 529–30. Crits argue that rights are alienating, because they force one to look at onself and others as isolated right-bearers, rather than as interdependent members of a community, and make it impossible for us to imagine what a truly non-hierarchical society would be. Delgado op cit note 17 at 304.
226 Sparer op cit note 153 at 530.
227 Ibid at 555.
228 Delgado op cit note 17 at 305, 307.
229 Sparer op cit note 153 at 514.
230 I am grateful to one of the anonymous peer reviewers of an earlier draft of this contribution for this insight.
231 Schwartz op cit note 8 at 426. Critical theorists reject the idea of incremental reform, as piecemeal change only postpones the wholesale reformation of society that must occur. Delgado op cit note 17 at 307.
232 Ibid.
233 Schwartz op cit note 8 at 437.
234 Kennedy op cit note 11 at 1774.
235 Schwartz op cit note 8 at 437.
236 Ibid at 438.
237 Duncan Kennedy 'The structure of Blackstone's Commentaries' (1979) 28 *Buffalo LR* 205 at 212.
238 Katherine van Wezel Stone 'The post-war paradigm in American labor law' (1981) 90 *Yale J* 1509 at 1565 ('It is in disorder that workers experience and exercise their power in the production process'); William H Simon 'The ideology of advocacy: Procedural justice and professional ethics' 1978 *Wisconsin LR* 29 at 128 ('The health of a legal system might depend on its willingness to tolerate conflict, even the persistent, proliferating conflict which leaves open wounds on the body politic'); David Freeman 'Book review' (1981) 90 *Yale LJ* 1880 at 1884 (reviewing Derek Bell *Race, Racism and American Law* (1980)) ('The poor gain more through mass defiance and disruptive protests than by organizing for electoral politics and other more acceptable reform policies ...').
239 Mark Spiegel, in discussing the doctrine of informed consent, makes it clear that it is not the client's actual wishes that should control, but what the client should wish if he or she were properly liberated from the distorting influences of the status quo (Mark Spiegel 'Lawyering and client decisionmaking: Informed consent and the legal profession' 1978 128 *U Penn LR* 41 at 79–80). See also Mark Kelman 'Choice and utility' 1979 *Wisconsin LR* 769 at 782–95.
240 Modiri 2016 *Stellenbosch LR* op cit note 2 at 529.
241 Ibid.
242 Carrington op cit note 24 at 227.
243 Fiss op cit note 19 at 15–16.
244 Ibid.
245 Ibid.
246 Modiri 2013 *Stellenbosch LR* op cit note 2 at 463.
247 Ibid at 474–5.
248 Van Blerk op cit note 36 at 87.
249 Ibid.
250 Ibid. I recognise that there are some Crits who are more nuanced in their approach. They are likewise suspicious of legal rights, but would nevertheless use them strategically in cases where they believed that it would benefit their overall political and economic struggle.
251 J W Harris *Legal Philosophies* as quoted in ibid.
252 Ibid.
253 'Law and legal doctrine reflect, confirm, and reshape the social divisions and hierarchies inherent in a type ... of social organisation such as "capitalism".' Madlingozi op cit note 2 at 11.
254 Ibid.
255 Peter Gabel & Duncan Kennedy 'Roll over Beethoven' (1984) 36 *Stanford LR* 1 at 36.
256 See Dalton op cit note 184 at 435.
257 Madlingozi op cit note 2 at 6.
258 Van Morrison, as quoted in Hutchinson & Monahan op cit note 60 at 245.
259 Sparer op cit note 153 at 573.
260 See ibid at 574.
261 Modiri 2014 *Acta Academica* op cit note 2 at 17.
262 Ibid.
263 Kok op cit note 154 at 30.
264 Hutchinson & Monahan op cit note 60 at 229.
265 Ibid.
266 Ibid.
267 Ibid at 236.

268 Schwartz op cit note 8 at 446.
269 Modiri 2013 *Stellenbosch LR* op cit note 2 at 458.
270 See Robert W Gordon to Paul D Carrington in 1985 *J Legal Educ* op cit note 71 at 6.
271 Ibid at 13.
272 Carrington op cit note 24 at 227–8.
273 Mark Twain as quoted in Carrington ibid at 228.
274 Ibid.
275 David Gray Carlson as quoted in Van Blerk op cit note 36 at 102.
276 John Henry Schlegel as quoted ibid at 102–3.
277 Schlegel as quoted ibid at 103.
278 Hutchinson & Monahan op cit note 60 at 244.
279 Van Blerk op cit note 36 at 87. Modiri writes that we 'find ourselves confronted with a clear option: to educate for liberation or to educate for domination'. Modiri 2016 *Stellenbosch LR* op cit note 2 at 528. Modiri also notes that 'transformation is often distinguished from reform through the insistence for a more radical change in the social, economic and political structure and not simply superficial improvement in the *status quo*'. Modiri 2014 *Acta Academica* op cit note 2 at 12–13. Madlingozi wants legal academics to engage in 'progressive politics, the aim of which is 'to overturn liberal democracy for participatory democracy'. Madlingozi op cit note 2 at 6.
280 Quoted in Van Blerk op cit note 36 at 87
281 Hutchinson & Monahan op cit note 60 at 199.
282 Kok op cit note 154 at 26.
283 Paul D Carrington to Owen M Fiss op cit note 71 at 25.
284 Anthony T Kronman as quoted in Van Marle 2014 *Acta Academica* op cit note 2 at 211.
285 Leonard D Pertnoy 'Skills is not a dirty word' (1994) 59 *Missouri LR* 169 at 170.
286 Harry T Edwards 'The growing disjunction between legal education and the legal profession' (1992) 91 *Mich LR* 34 at 39–40.
287 Felix Frankfurter as quoted ibid at 34.