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A CRITICAL JEFFERSONIAN MIND FOR A COMMUNITY REINVESTMENT BIND

By: Chaz D. Brooks*

ABSTRACT

The Community Reinvestment Act of 1977 ("CRA") primarily sought to remedy decades of government sanctioned disinvestment in so-called "redlined communities." Through the Home Owners' Loan Corporation and later the Federal Housing Administration, the United States of America created from whole cloth a structure that encouraged and subsidized the explosion of homeownership in white American households. Following decades of racialized wealth generation, the United States had a change of heart. Congress determined that financiers needed a gentle push to invest fairly. Additionally, Congress wanted one thing clear in the drafting of this remedy—it must not allocate credit.

This essay considers how a different pedagogical approach in law schools could better equip legal thinkers to address racial economic harms. Coupling critical legal studies with a Jeffersonian approach to legal education would foster more ambitious remedies. Those remedies would be better informed regarding the power structures and human costs at play. A Critical Jeffersonian mind would be poised to not only know what the law is, but prepared to determine what the law should be. Using the CRA as an example, the essay provides a glimpse into how to better tackle historical harms.

The Community Reinvestment Act of 1977 (the “CRA”) primarily sought to remedy decades of government sanctioned disinvestment in so-called “redlined communities.”¹ To quickly summarize that history: throughout the first two thirds of the twentieth century, the Home Owners’ Loan Corporation (“HOLC”) and later the Federal Housing Administration (“FHA”) created from whole cloth a structure that encouraged and subsidized the explosion of homeownership in white American households.² While laying the foundation of generational wealth for white Americans of modest backgrounds, the United States, through these organizations, fenced in Black Americans from such green pastures of transformational wealth creation. Those metaphorical fences showed up as red lines on the maps of loan originators seeking government backstops for their practices as HOLC and FHA explicitly told financiers that mortgages in communities with Black residents and financing for subdivision development that may include Black residents would receive no government largess.³

Following four decades of racialized wealth generation through these programs, the United States had a change of heart.⁴ Seeing dilapidated communities and mortgage starved prospective homeowners, Congress determined that financiers needed a gentle push to invest in the communities that were formerly designated as *persona non grata* by writ of law. However, Congress determined that one thing be made clear in the drafting of this remedy—it must not “allocate credit.”⁵

As financial institutions determine how to best deploy their financial resources, they allocate those resources to sectors, industries,

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¹ Community Reinvestment Act, 12 U.S.C. § 2901 (2021).

² RICHARD ROTHSTEIN, *THE COLOR OF LAW* 63-64 (2017).

³ *Id.* at 66.

⁴ For purposes of a focus on the CRA, I am choosing to not address the levers of racialized wealth generation pulled by the United States from inception through the 1930s (e.g., the Homestead Act of 1862 which by 1934 had granted over 270 million acres of land to male citizens, widows, single women, and immigrants pledging to become citizens. *The Homestead Act of 1862*, NATIONAL ARCHIVES, <https://www.archives.gov/education/lessons/homestead-act#background> (June 2, 2021). Black Americans were approximately 14% of the U.S.’s population in 1860 and approximately 12% in 1930 yet received only 0.24% of total land granted under the act. See U.S. DEP’T OF COM., ECONS. & STATS. ADMIN., BUREAU OF THE CENSUS, *WE, THE AMERICANS: BLACKS 2* (1993); see also *African American Homesteaders in the Great Plains*, NATIONAL PARK SERVICE, <https://www.nps.gov/articles/african-american-homesteaders-in-the-great-plains.htm> (Dec. 13, 2021).

⁵ RICHARD MARSICO, *DEMOCRATIZING CAPITAL: THE HISTORY, LAW, AND REFORM OF THE COMMUNITY REINVESTMENT ACT* 13 (2005).

or with respect to lending practices, particular borrowers. This process of apportioning financial resources amongst prospective borrowers is generally understood as the allocation of credit. From the year 1934 through 1962, the United States Government allocated nearly \$1 trillion in today's dollars to homeowners, who, by dint of redlining practices, did not live in Black communities, mixed-race communities or real estate developments open to Black residents.⁶ Of course, under the laws of the United States, this was fully legal—it was *the law of the land*. However, following the Fair Housing Act of 1968, these practices became explicitly illegal.⁷ This evolution in the law raises many questions; for example, was such discrimination in fact legal under the Constitution at the time? What was the best legal avenue to end the racist practice? And what legal remedies are available to rectify such past harms?

These questions, and more, can be both raised and answered within the modes of thought engendered by a traditional legal education. However, in my view, they are the wrong questions. The questions that should be asked by a justice-minded scholar of the law are more foundational. Where traditional law school education asks its scholars to ask and then answer, “what was the law?” and “what is the law?”, the education demanded of justice-minded scholars would first ask “what were the harms of the law?” and then answer, “what *should* the law *be*?” I propose that a Critical-Jeffersonian Framework for legal education could nurture minds to do just that.

Before applying my forecasted results from a new mode of legal education to the credit allocation bind of the CRA, let us take a look deeper into the past of legal education. In addition to being a founding father and the third President of the United States of America, Thomas Jefferson played at being a designer of legal curriculum. In the 18th and early 19th centuries, at a time when much of legal education was self-directed and occurred in apprenticeships.⁸ Would be lawyers would apprentice under practicing lawyers, learning the ins and outs of making pleadings. Jefferson stood outside of this pedagogic approach. Rather than pure practitioners of civil law, Jefferson saw lawyers as leaders in a nascent republic.⁹ To Jefferson, those leaders needed to not only understand the technicalities of pleading or English Common Law. Rather, Jefferson thought, future leaders needed a firm foundation in what we today call the humanities—

⁶ GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS 6* (20th Anniversary ed. 2018) (discussing the amount of new home financing between the FHA and VA in the period from 1934 to 1962); *Inflation Calculator*, FED. RESRV. BANK OF MINNEAPOLIS, <https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator> (last visited Dec. 20, 2021).

⁷ 7 C.F.R. § 1901.203 (2021).

⁸ Davison M. Douglas, *The Jeffersonian Vision of Legal Education*, 51 J. LEGAL EDUC. 185, 189 (2001).

⁹ *Id.* at 185.

political theory, philosophy, and history.¹⁰ Jefferson's goal was to foster leaders able to formulate laws reflective of the morality and dynamic social values of society, as comfortable extolling the virtues of republicanism as they were drafting a memorandum.¹¹

To be clear, a pure return to the "men of letters" formulation of legal education does not meet the moment. The Jeffersonian impulse to train young scholars to pursue an understanding of political theory and comparative history as part of engaging with law only goes so far. If today's legal education is to foster the vibrancy of legal leadership in the United States' founding, or second founding for that matter, a discipline grounded in the humanities must also be coupled with an inculcation of critical analysis of what power structures are behind and bolstered by present formulations of law.

"Law is politics" is seen by many in the Critical Legal Studies project to be a unifying theme in critical legal analysis.¹² It is a simple phrase that to some reads as a cynical attack on jurisprudence. This creed denotes an express rejection of a formalist view of the law constituting a self-standing body of thought that may be understood purely from a study of itself—but it takes a step further than a realist view that empirical analysis from other disciplines can better resolve the inconsistency of legal doctrine and application.¹³ The central questions critical legal thought asks are "to whose purposes does this law serve?" and "what historical context existed at the time of codification of any such law?" Even the objective analytical empirical studies from other disciplines fail to directly address the critical and normative questions prompted by a critical approach. Relentless questioning must be sensitive to the dangers of nihilistic cynicism. I maintain that it also fosters academic humility.

Legal education focused on fostering innovative leaders in its students might meld an early 19th century framing of legal education with a late 20th century school of legal scholarship. Neither are all old things no longer relevant nor new things recklessly radical. From the Jeffersonian model, legal education should again find merit in inculcating a greater understanding in its students of the plethora of ways humanity has expressed its morality and understanding of the world in other fields—be it science, literature, philosophy, economics, religion or political theory. Critical Legal Studies should be employed to foster in students the ability to wrestle with the question how any such human expression reflects power, and whether it is fundamentally just. Certainly, most law students come to law school fully

¹⁰ *Id.*

¹¹ *Id.* at 194-95.

¹² Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1517 (1991).

¹³ G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 Sw. L.J. 819, 820 (1986).

understanding that art, literature and morality are inherently subjective expressions. Law schools would do a great service by creating an environment where students can comfortably deconstruct not just the arguments and empirical analysis of others but approach their own arguments with the same critical lens.

Though the combination of sources of my suggested pedagogical reform may be novel, critiques of the existing curriculum as unduly beholden to the political and economic status quo are not. For example, the modern clinical education movement has its origins in a widespread critique of traditional doctrinal legal education.¹⁴ Jerome Frank's seminal article "Why Not a Clinical Lawyer-School?", arguing that the Langdell system's hyper focus on reading judicial opinions leads to law students resembling "architects who study pictures of buildings and nothing else."¹⁵ Frank proffered that law school curriculum exhibited a dearth of experiential learning for law students and failed to teach law students how to practice as lawyers.¹⁶ Frank importantly points to the propagation of a "naive assumption of inviolability of the *stare decisis* doctrine [and a] implied belief that in a study of precedents and nowhere else is to be found the answer to the question, 'How does a court arrive at its decisions?'" as traditional law school curriculum's greatest fault.¹⁷ Coupled with a focus on the necessity of experiential learning for law students, Frank states that students "should be taught to see the inter-actions for the conduct of society and the work of the courts and lawyers."¹⁸ Meaning that the best legal education necessitates teaching grounded in the social sciences, as future influencers of society and drafters of law should understand the society in which they will hold the pen on influencing.

As a practicing clinician myself, I most assuredly have no intention to argue that law schools should have less experiential learning, quite the contrary. A Critical-Jeffersonian Framework must not produce curriculum with no room for students to witness and participate in the law in motion. Where the Critical-Jeffersonian Framework would seek the most reform is in stamping out the embers of the Langdell system that burn brightest in the first-year curriculum of law schools. Across the nation, first-year law students (referred hereafter with a faint sense of nostalgia as "1Ls") spend the bulk of their studies learning the skills necessary to argue whether "a decided case will or will not, should or should not, control legal

¹⁴ Jerome Frank, *Why Not a Clinical Lawyer School*, 81 U. PA. L. REV. 907 (1932-33).

¹⁵ *Id.* at 912.

¹⁶ *Id.* at 911-12.

¹⁷ *Id.* at 912.

¹⁸ *Id.* at 921.

consequences in different factual situations.”¹⁹ An important skill, no doubt, especially for the sea of law school application letter future constitutional law scholars and law firm appellate litigators—though this second idealized career path usually materializes after 1L. However, practicing law encompasses more than this skill, and outside the brief reprieve that legal research and writing classes give 1Ls, much of their curriculum remains keenly focused on the very particularized skill of applying existing precedent to somewhat novel facts.

If law schools are to produce the “public citizens” Jefferson imagined when designing his model of law school curriculum, they must ensure that their students have opportunities to experience the practice of law under close instruction, and not just learn the same skills related to applying judicial opinions to disparate fact patterns. A pedagogical preoccupation with looking back to past opinions will not hone the skills necessary for law students to engage as leaders in public discourse. Rather than naïvely assuming that judicial opinions represent the law through the pure logic of their written words, law students must perform exegesis informed by an understanding of the context in which a given law, decision or opinion is written. A Critical Jeffersonian Framework would nudge students along in engaging with human expression and understanding across other disciplines and couple that with acknowledgement of how those recorded contemplations can embed themselves in any manifestation of law for the purposes, or benefit, of the individuals who hold the pen. If Jefferson saw the ideal lawyer as “public citizens” it only follows that even in the 18th century, there was an acknowledgment that “law is politics.” Let’s make sure students grasp what is already widely known, but vigorously denied, and arm them with the tools necessary to wrestle with that understanding deftly and humbly.

The contours of the curriculum for the first year of law school in a Critical Jeffersonian Framework would see the class time devoted to traditional case law study halved. To accomplish this, I would suggest combining several of the conventionally assumed foundational classes and recognizing that largely the substance of these topics have never been the focus of study but rather the skills attendant to understanding and applying the rules established by judicial opinions. Legal research and writing courses would remain an integral part of the first- year curriculum, as such classes provide students a firm footing in knowing how to find sources of legal authority, organizing the results of such research, and writing effectively and persuasively—things any future public citizen certainly needs. In the balance left by halving credits in the typical first-year law

¹⁹ Anthony G. Amsterdam, *Clinical Legal Education--A 21st Century Perspective*, 34 J. LEGAL EDUC. 612, 613 (1984).

courses, a Critical-Jeffersonian Framework would include courses in moral philosophy, sociology, economics and history, with a focus on each their influence on the law. Given that law students come to law school with varying degrees of humanities, I would suggest that law students be given an option to test out of some of the core humanities classes, though in lieu of any foundational humanities they test out of, it would be advisable to still have such 1Ls take an elective in another humanities topic and its effect on law.

Where Critical Legal Studies would find itself in this proposed Critical-Jeffersonian Framework would be in how the connection between the humanities and law is evaluated. Distinct from the reification of judicial opinion as logical and dispassionate encapsulations of the law, students would instead review the opinions and related records (legislative, case and otherwise) within the historical, moral and philosophical context of the relevant decisionmakers. Much of this does occur in the typical class case discussion, but generally in the vein of helping students hone their arguments for how they may arrive at a better holding in keeping with relevant precedent and authority. A critical lens would go beyond this and center the analysis on a just outcome, while not attempting to hide the ball on where one's view of what constitutes "just" comes from. Thinkers deployed with legal training better versed in the humanities and critical analysis would be better equipped to tackle thorny issues and institutional blind spots.

How might this mode of thinking further students' understanding of the complications of the CRA? How might it guide their path toward approaching the CRA as critically minded "public citizen"?

First, with an understanding of history. With the formation of FHA in 1934, the U.S. government became directly involved in the allocation of credit away from Black individuals as well as communities tainted by an inclusion of, or even proximity to, Black individuals.²⁰ To increase the availability of mortgages, the FHA would insure mortgages covering up to 80% of a home's purchase price.²¹ The appraisal process was the key mechanism for administering this credit allocation. The FHA would appraise a property and determine its risk of default. Subject to an Underwriting Manual provided by the FHA, the FHA directed its agents—often government employees—to consider such factors as, for example, if there were "[n]atural or artificially established barriers ... protecting a neighborhood and the locations within it from ... inharmonious racial groups."²² Coupled with the Veterans Administration, which through local

²⁰ ROTHSTEIN, *supra* note 2, at 64-65.

²¹ *Id.* at 64.

²² *Id.* at 65; FED. HOUS. ADMIN., HA FORM NO. 2049, *Part II—Mortgage Risk Rating, Section 9 Rating of Location*, in Underwriting Manual: Underwriting and Valuation Procedure under Title II of the National Housing Act para. 101, 935 (1938).

administrators also heavily discriminated against Black veterans, the FHA financed new housing in the amount of over \$120 billion from 1934 to 1962.²³ Less than 2% of such financed new construction was made available to families of color.²⁴ To give a true sense of scale, ignoring the inflation between 1934 and 1962, \$120 billion in 1962 dollars is akin to over \$1 trillion today.²⁵

I am avoiding a rehashing of the racist impulses against Black Americans that were pervasive in public and private life during this era of expansive middle-class growth. Where I would like to apply a Critical-Jeffersonian framing is how the CRA in the 1970s purported to address these decades of discrimination and disinvestment. As the CRA's primary sponsor, Senator William Proxmire stated in 1977, "[B]anks and savings and loans ... take deposits and instead of reinvesting them in that community, they ... invest them elsewhere, and they ... actually or figuratively draw a redline on a map around areas of their city, sometimes in the older neighborhoods, sometimes ethnic, and sometimes black, but often encompassing a great area of their neighborhood."²⁶ Given the history of redlining and related restrictive covenants that targeted Black individuals more than any other group, the level of indirection with which Senator Proxmire described how banks avoided investments in Black communities should strike one as odd. Why such a hesitance to state outright that even after a decade following the passing of the Fair Housing Act, Blacks were still being discriminated against in the housing market? Why so little reference to the role the United States directly played in such discriminatory practices prior? Likely because "law is politics" and Proxmire may have known that the most direct remedy to the harms inflicted upon Blacks in real estate were politically untenable. But the question that should be addressed in a law school classroom is: were they morally necessary?

In contrast to the soft touch around issues of Black discrimination in the housing markets exhibited by the CRA's supporters, the CRA's critics were explicit in their concern—though subtle around their motivations. Keep in mind that prior to the mid-1980s polling of white Americans showed that less than 50% of white Americans would support any community law forbidding homeowners from refusing to sell their home to an individual on the basis of race or color.²⁷ Knowing that, it becomes hard to not see concerns such as

²³ ROTHSTEIN, *supra* note 2, at 70; LIPSITZ, *supra* note 6, at 6 (indicating the amount of new home financing between the FHA and VA in the period from 1934 to 1962).

²⁴ LIPSITZ, *supra* note 6, at 6.

²⁵ FED. RSRV. BANK OF MINNEAPOLIS, *supra* note 6.

²⁶ MARSICO, *supra* note 5, at 13.

²⁷ M. Krysan & S. Moberg, *Tracking Trends in Racial Attitudes*, UNIV. OF ILL. SYS. INST. OF GOV'T & PUB. AFF., Figure 2 (Apr. 2021), <https://igpa.uillinois.edu/programs/racial-attitudes-2021>.

those shared by Senator Robert Morgan that the CRA would be “a significant step in the direction of credit allocation by the Congress of the United States,” and that “the day will come when a financial institution may be forced to make an unsound loan in a specific location in order to meet its quota”²⁸ as being most concerned about the possibility that the law would be used to direct credit away from white households and to Black households. Given Morgan’s prior stint as the campaign manager for I. Beverly Lake’s failed segregationist bid for governor of North Carolina,²⁹ it takes little stretch of the imagination to contemplate that race may have been on the mind when it came to “credit allocation.” However, absent acknowledgment of the history of the United States and relevant sentiment polling for the time, abstractions can be taken at face value and policies can be drafted in response to disingenuous concerns.

What would be a more responsive policy than the CRA? To design a better program, policy designers have to be more honest about what role federal and local policy played in creating racial disparities in the first place. Having done so, in my mind the correct firmament from which to start would be to, as Frederick Douglass once said, “disgorge-disgorge-disgorge your horrid plunder” and return to Black Americans the value of the opportunity lost to them through direct government action.³⁰ Whereas my Langdell inspired training might impress upon me the need to first consult with U.S. Supreme Court precedent regarding racially targeted remediations, a Critical-Jeffersonian lens would have me start with a deconstruction of the moral and historical context of the law at present and approach my desired policy informed and guided honestly by my principles, research of present disparate socio-economic realities, history and what a just outcome would be.

Fully embedded in legal education, a Critical-Jeffersonian Framework could revolutionize the practice of law. Removing the veneer of dispassionate logic and reified case law and replacing it with an approach to the law that no longer masks what it has always been—human express—I believe can drive greater policy responses, encourage bolder leadership in young lawyers and reinvigorate a field to tackle our greatest challenges. The CRA is but one tangle our unencumbered minds could unwind. As an initial matter, however, we as a profession must accept, what we already know—that law is politics and that we are to be public citizens.

²⁸ MARSICO, *supra* note 5, at 19.

²⁹ Adam Clymer, *Robert B. Morgan, Senator Undone by His Panama Canal Votes, Dies at 90*, N.Y. TIMES (July 18, 2016), <https://www.nytimes.com/2016/07/19/us/robert-b-morgan-senator-undone-by-his-panama-canal-votes-dies-at-90.html>.

³⁰ Letter from Frederick Douglass to Francis Jackson (Jan. 29, 1846), in 1 LIFE AND WRITING OF FREDERICK DOUGLASS 135 (Philip Foner ed. 1950).