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SOME OBSERVATIONS ON THE ROLE OF SOCIAL CHANGE ON THE COURTS

*Gerald Torres**

After the remarks by Professors Gerald Rosenberg, Jane Schacter, and John Eastman, what I want to do is to go back to painting with a broad brush. Up until now, our speakers have woven theories about specific changes in society and their relationship to specific changes in the law. At least one has argued against the legitimacy of judicially driven changes—which he takes to be without warrant in the constitutive documents the courts claim to be interpreting.[1] Thus we have had the question of the relationship between legal change and social movements sketched out with specific historical brushes. What I am going to do is to pick up a broad brush and use it to fill in some background, which will enable me to talk about a couple of things that I think are critical to the relationship we are examining. One thing I am going to try to sketch out is the relationship between social movements and legal change and the obverse relationship between legal change and social movements.

I am operating from a basic premise; the premise is that for rule shifting—and this is adopted from Thomas Stoddard—to become lawmaking, there has to be a correlative cultural shift as well.[2] Without that cultural shift, you can have rules which change behavior and individual activity at the margins, but you do not really get the bedrock legal change—the change of particular regulated social relations—until you get a

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1. John C. Eastman, *Philosopher King Courts: Is The Exercise of Higher Law Authority Without a Higher Law Foundation Legitimate?*, 54 DRAKE L. REV. (forthcoming Summer 2006).

2. *See generally* Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967 (1997).

cultural shift.

The question this formulation poses is: What is entailed in producing that cultural shift? I want to start with the following caution, that it is important not to confuse the work that culture does and the work that law does, with the work of politics. They are a part of politics, and how they influence political results is in fact the key question that I am going to try to address. I want to be clear that when I talk about political results I am not referring to electoral results. When I talk about political results in the context of cultural shifts, I mean the rhetorical and ideological scaffolding that supports and legitimizes certain kinds of political resistance.

I am going to proceed by talking about a couple of particular changes that have occurred. I want to be sure, however, that it is also understood that I am making and trying to maintain the critical distinction between ideological resistance and epistemological resistance. That is, the debate over whether something can reasonably be argued about as a subject of politics or whether it is really about being able to say what you know is true.

A friend of mine—in an unpublished article that he wrote a long time ago—summarizes it this way, and I paraphrase: when you have a serious and violent dispute with the dominant ideology, chances are good that you are going to end up in jail. When you have a serious and violent dispute with the dominant epistemology, chances are equally good that you are going to end up in the looney bin.[3]

One of the jobs that culture shifting has to do is change ways of understanding, ways of knowing. That is a long and hard task. What I want to do is try to situate legal changes and rule changes in the general process of culture shifting. I am going to take two examples that I want to talk about as moments in transforming the background story in which rule changes are made and also as the initiation of a conversation that permits the culture to change over time—*Brown v. Board of Education*[4] is certainly one such case. If you think about *Brown* just in terms of whether it performed its role in desegregating schools, the answer to that question is going to be no, it did not. There was not immediate compliance with the decree, even though it clearly meant that the system of school segregation that prevailed in the South was unconstitutional. The opinion was clear about the normative conclusion, but ambiguous about the obligatory

3. Kent Harvey, Law, Science and Economics: Themes in the Dominant Ideology (1975) (unpublished essay, on file with author).

4. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

techniques for achieving its constitutional vision. To assess the immediate impact of the decision I think you can look at the facts. For example, look at Texas. Texas continues to be ranked among the most segregated states in the country.[5] Look at Austin, long considered a liberal bastion in the state of Texas, and even the schools there remain largely segregated. So if the question is whether *Brown* changed the nature of the demographic composition of public schools consistent with the constitutional vision of the integration, the answer is no. The other question, though, is whether the Civil Rights Act of 1964 could have been passed without *Brown*. I think the answer to that question is also no.

The question that I am posing is: What is the relationship between the victory in *Brown*—even though it was not a substantial victory in terms of transforming public schools—and the change in the national debate about the legitimacy of race discrimination? I think that it is a complicated picture, a very complicated picture, and I am not going to attempt to draw direct causal links. But I am going to suggest that what it did was change the background belief of people who were fighting against race discrimination in the South about what was possible. I do not want to suggest that it did not produce backlash—it did produce backlash, there is no question—but the important effect was to transform the range of legitimate claims for change. If you hope to get political change, you actually have to believe that your activities in the service of that change are going to be efficacious. That is, you have to believe there are concrete reasons as well as normative reasons to believe the change is possible; otherwise you are likely to be locked up in the looney bin instead of being opposed for trying to mobilize political resistance.

Professor Rosenberg argues that the civil rights movement's strategy for allocating its budget was predicated on a misunderstanding of the efficacy of litigation.[6] Believing in the necessity of litigation as part of an overall social change strategy is different from believing that all of the important changes are being driven by the litigation. In order to fully appreciate the way in which their resources were allocated, what they were doing in the South should be situated with the general social change that was taking place. By doing that, you could begin to see the many things that were going on and how it might have affected their capacity to enlist

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5. *See generally* GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., *BROWN* AT 50: KING'S DREAM OR *PLESSY'S* NIGHTMARE 27–29 (2004), http://www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf.

6. Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. (forthcoming Summer 2006).

those outside of the immediate locality in the various struggles and to see all of them as one. In the South, the churches were a fundamental locus of mobilization, and their capacity to leverage resources should not be overlooked. More importantly, you had the women in the churches who were taking a leadership role—and here I am thinking of women like Septima Clark and her citizenship schools in the South—who, in an effort to confront the limitations on voting, would teach people to read by teaching them to read about current events.[7] These efforts have to be understood as part of the struggle of which litigation (overvalued by some) was only a part, by correctly understanding litigation as only a tool or a tactic. The critical idea was that you had to mobilize people politically to change the future, even as you had to use litigation as a source of wider mobilization and legitimization.

When you look at the autobiography of Constance Baker Motley's,—the late judge and an important figure in the civil rights movement—one of the key points occurs when she goes to see Reverend Abernathy, and Reverend King locked up in a fetid southern jail.[8] She said the Inc. Fund never undertook a legal activity nor ever put themselves in legal jeopardy unless there was a clear way out.[9] Here, she saw two leaders locked up in a jail that she says made her nauseated to have to enter and they had no clear path out.[10] But, she said that they were willing, in the belief of change, to put themselves into the kind of jeopardy that the legal advocates were not.[11] That scene crystallized for her the complexity of visions driving the change that was afoot in the South. It also made clear for her that the litigation-driven vision of change was only one, and perhaps not the most important, vision. So it was only through the combination of those two types of advocacy that the idea for change could be communicated to those people who were not lawyers, who could not vote—in large measure—but nonetheless knew what they knew.

Here, I turn to Charles Black in his famous rejoinder to Herbert Wechsler's *Toward Neutral Principles of Constitutional Law*.[12] Wechsler,

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7. *See generally* SEPTIMA POINSETTE CLARK, READY FROM WITHIN: SEPTIMA CLARK AND THE CIVIL RIGHTS MOVEMENT (Cynthia Stokes Brown ed., 1986).

8. *See generally* CONSTANCE BAKER MOTLEY, EQUAL JUSTICE UNDER LAW: AN AUTOBIOGRAPHY (1998).

9. *Id.* at 157.

10. *Id.* at 158–59.

11. *Id.* at 159.

12. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

you may recall, challenged the legal legitimacy of the desegregation decision. Charles Black, in an inimitable way, asked a simple question: Was the Court in *Plessy v. Ferguson*[13] merely asking whether it meant the same thing to exclude black people from the white car as it did to exclude white people from the black car? Of course, he also answered in his inimitable way:

> But if a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated "equally," I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter. The only question remaining (after we get our laughter under control) is whether the segregation system answers to this description.
>
> Here, I must confess to a tendency to start laughing all over again. I was raised in the South, in a Texas city where the pattern of segregation was firmly fixed. I am sure it never occurred to anyone, white or colored, to question its meaning. The fiction of "equality" is just about on the level with the fiction of "finding" in the action of trover.[14]

Black people knew this. They knew it. They did not think they were crazy thinking: "I should not experience this badge of inferiority. I should experience this as merely a system to organize society in a way that will reduce friction and allow social events to pass with the greatest ease among all of us." They knew that was not true. And it is that knowledge that allowed the debate to be shifted to the realm of ideology and politics. Law played an important role in that reframing, but the litigation reflected what everyone *knew* to be the case.

Let me shift grounds entirely and get you out of civil rights, and talk about takings. The case of *Kelo v. City of New London*[15] was recently decided, and one of the things that has happened in our lifetime is a radical transformation in the nature of the takings debate.

It started back with the Sagebrush Rebellion and President Ronald Reagan.[16] If you go back and look at the debate that occurred, what had to

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13. Plessy v. Ferguson, 163 U.S. 537 (1896).

14. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960).

15. Kelo v. City of New London, 125 S. Ct. 2655 (2005).

16. Forest History Society, 1980 Sagebrush Rebellion,

happen for the arguments of the Sagebrush rebels to be taken seriously was a challenge to the legitimacy of government acting *like a government* in the management of public resources that private persons had come to depend on for their livelihood.[17] The Sagebrush Rebellion took this idea and summarized it this way: Land in the West ought to revert to the people who live there.[18]

Now, if you understand that as a legal claim, what it presumes is that the people in the West had title before the federal government took it because that is the only way it could revert. If they had that legitimate claim, then the exercise of federal jurisdiction over land in the West was not just burdensome, it was *illegitimate*. So it was not just a claim of felt injustice, it was also a claim of constitutional illegitimacy. It is that claim that has progressed through the courts and has shifted the debate about what the broad parameters of acceptable behavior are in regard to private property. So now *Kelo*, which should have been—in my view—a relatively easy case given existing case law, has become a lightning rod for opposition to government action and has been discussed in the press as though it were an exceedingly difficult case.

In both instances, the civil rights cases on one hand and the property rights cases on the other, what you had to have was a transformation in the way the basic relationships were understood. You needed litigation in some cases to do that, but then you also needed the movement. It is the movement that you need in order to change the culture to ultimately make a rule shift. This is why the Civil Rights Act of 1964,[19] in fact, was quite an important piece of legislation. It did not just reflect the victory in *Brown*; it reflected a radical transformation in the belief that change could occur and that the social movement attendant to that resistance changed belief. It really did change the contours of the debate about anti-discrimination. Now, did it produce backlash? There is no question. But you can also say that what it did was produce a political process in which black people could participate in a way that they had been unable to up to that point. That is a critical and important change even if every single time you try to make a rule shift, you do not succeed.

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http://www.lib.duke.edu/forest/Research/usfscoll/policy/States'_Rights/1980_Sagebrush.html (last visited June 14, 2006).

17. *Id.*

18. *Id.*

19. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e (2000)).

I believe as an absolute personal belief—that reflects, I suspect, a kind of lapse in my commitment to reason—in the idea of blessings in disguise. (Of course, this determination can only be made in retrospect.) I am sure all of you have experienced situations where you really wanted something, but you did not get it. You feel miserable about not getting it, but it then turns out that the fact you did not get it made something else possible, and so you can look back—and maybe it is just a way to rationalize the defeat—and say, "Well, this thing would not have been available if I had taken that other thing."

Stoddard explains a version of this phenomenon when he discusses the passage and impact of the anti-discrimination ordinance in New York City that included protection for gay people.[20] In his essay he begins by observing the law in New Zealand.[21] He says that if you look at the positive law in New Zealand, virtually every change that the gay movement wanted was already the law there.[22] Flying to New Zealand, he imagined that he would find a gay paradise. [23]Yet, when he arrived, he realized it was New York City thirty years ago.[24] How could he explain the disjunction? The difference, according to him, is that there had been a change in the culture of gay life in New York City.[25] How had that occurred? Part of the answer, it seemed to him, was contained in the fifteen years of defeat the gay community had suffered in an effort to pass an anti-discrimination ordinance in New York City.[26] But over those years, while each defeat felt miserable, each campaign put the question on the public agenda, and it was the educational process over that period that allowed the ordinance when it was finally passed to be relatively unexceptionable. The culture had been prepared to endorse the legal change.

And so when I talk about blessings in disguise, those defeats, I am sure, felt like defeats every time they occurred, but they did change politics. They changed the ideological structure of the debate. Each engagement with the question of what constitutes permissible discrimination changed what people could claim to *know*, because we now know that the anti-discrimination statute is not going to cause the unraveling of social life in New York. And we know that discrimination on the basis of status is

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20. Stoddard, *supra* note 2.
21. *Id.* at 967–69.
22. *Id.*
23. *Id.*
24. *Id.* at 969.
25. *Id.* at 981–82.
26. *Id.* at 981.

wrong. And now we can push the limits of *that* question.

I started by cautioning that it is important not to confuse the work that culture does and the work that law does with the work of politics. Yet I hope I have also convinced you not to slight the work that culture does even as it would be a mistake to slight the work that lawyers do in helping to produce the framework for a more just future. It is a complex process, but politics are about collective action, and litigation is part of the process of determining the legitimate contours of collective action—but not the determinative factor. That responsibility lies with all of us.

DISCUSSION

PROFESSOR MARK KENDE (Moderator): I now turn to our panelists for any comments.

PROFESSOR JOHN EASTMAN: The 800 pound gorilla that has been missing from this discussion is the role of Hollywood, for example, in defining the culture that drives the core rather than the other way around. I will use the example of the church takings case we resolved. We never even served the lawsuit. There was an election going on. We had candidate pledge statements out there and protests. The developer was boycotted which eventually resolved the dispute. But on Professor Schacter's issue, I think *Lawrence*, over the course of time, is going to have a lot less to do with the change in our understanding of these issues than Billy Crystal's role on *Soap* in the 1970s.

Orange County, California is a pretty conservative place. A lot of upper middle class white kids—we probably have trouble meeting our ALS guideline—come there because I have a pretty high profile in the area and a lot of students agree with me and want to study with me. I cannot find a single kid in my classes these days that thinks *Bowers v. Hardwick* was rightly decided. My guess, however, is that if you would go back twenty years you would not be able to find a single kid in that same class who would think that *Bowers* was wrongly decided. This had nothing to do with the court decisions; it had to do with *Soap*. It had to do with a much more clever media strategy by the gay rights movement in the early days than now. Now, it is so blatant that it is risking a backlash, and I think that is an important consideration here.

PROFESSOR GERALD TORRES: I agree with you. When I talk about cultural change, politics is a way to change culture. Art is a way to change culture and a way in which we understand problems. Litigation is also a way to understand our social relations. So you have litigation. The problem with litigation in the Civil Rights movement is that it did take a leadership role. If you read the autobiography of Constance Baker

Motley, she left the South when the Inc. Fund achieved some early victories because she thought the work was done. In fact, however, that was just the beginning of the work, as the real work is converting these social movements into actual agents of change.

PROFESSOR JANE SCHACTER: Can I respond to John and then ask Gerald a question?

I completely agree with you in talking about, for example, the difference between *Bowers* and *Lawrence.* No one came up with a brilliant new legal theory. The basic arguments are all in the briefs in *Bowers. Bowers* was decided by one vote and Justice Powell almost voted the other way. In your reference to *Soap*, I say it is *Will & Grace*—and I mean the TV show,—not the concept that made the difference.

It also comes back to the point about the effects of these decisions on different people. After *Lawrence* was decided many people inside the gay rights movement said, "This is our *Brown.*" Now, Professor Torres might agree with that, but not in the way they intended it. So the question that takes me back to Professor Torres is, when do you think a court decision will produce the sort of change in the prevailing narrative and the understanding of a question, and when will it not? Are there any guides to what allows a court decision to do that?

PROFESSOR GERALD TORRES: Well, first of all, I think *Lawrence* is really a critical decision, and it is similar to *Brown* in the sense that it essentially changes the social equation about how we can relate legitimately to one another through the instrument of law. I think that whenever a court makes that kind of decision it has the potential to be culture-shifting because it changes the nature of the political debate, or can change the nature. So in *Romer v. Evans*, what the briefs really are all about is changing the conception of the relationship of this group to the polity.

When you look at Indian law, and the history of Indian law, things were done that would be absolutely unacceptable today. For example, in order to prevent disputes between various missionaries, Congress divided

up the country into various denominations so that Methodists could convert certain Indians, and so on. The Catholics were left out, but the Spanish did their job. Today, it would be inconceivable to have Congress instruct the Secretary of the Interior to divide the nation up into denominations for the purposes of preventing disputes between religions. Why was that possible? It was possible because these people were outside the polity. When they need to come into the polity—and we are now reaping the results through the Indian Child Welfare Act which alters the nature of the jurisdiction in child custody cases—it creates tremendous tension between the states.

These kinds of changes are on a historic level, and they are slow. Part of the thing that I realize—maybe it's because I'm old—are things that I thought were easy to change, of course, are not really easy to change. There is a certain level of patience you have to have.

I mention the blessings in disguise concept. My father came back from World War II and could not buy a house in the town he grew up in. So he moved to the big city of San Bernardino. The reality is that moving to San Bernardino meant that I got a better education. Blessing in disguise? Well, maybe; maybe not, because then you get *Reitman v. Mulkey* and the fair housing law. My father votes for the initiative which says, "You can decide who you can sell your house to and the state cannot interfere." He is now a property owner, and if he does not want to sell his house to a particular person, he is not going to. So I am sitting there thinking, "Have you lost your mind?" But part of what had to change—and there you get the civil rights and the takings areas—was the idea of private property being an important element of who we are. What you have to do is slowly peel away one layer and reveal how one conceals the other.

PROFESSOR MARK TUSHNET: On the blessing in disguise point, two things occur to me: One is, of course, that I think it is fairly obvious that you cannot make that point to activists in the moments after the decision.

PROFESSOR GERALD TORRES: Absolutely not.

PROFESSOR MARK TUSHNET: Their response is, "No, it is really a curse."

PROFESSOR GERALD TORRES: Absolutely.

PROFESSPR MARK TUSHNET: You have to wait some time.

PROFESSOR GERALD TORRES: You can only make it in retrospect, because there is no way you know. I mean, take will and grace as the concept as opposed to the show. You never know whether it is will or grace.

PROFESSOR MARK TUSHNET: The other thing is—and my guess is this has been said before—that the backlash can also be a blessing in disguise. And now, from the point of view of the people who are experiencing the backlash, this is arguably comforting. From the point of view of the people who are generating the backlash, it might provide grounds for rethinking the position they are holding. The example I give—again, I apologize if this has been used before—is that from one point of view the immediate effect of the Massachusetts marriage decision was to make domestic partnership the centrist position. Five years ago, that was where all the fighting was.

PROFESSOR GERALD TORRES: Right. Let me give you one other example: When the *Hopwood* case was decided in Texas, and colleges could not take race into account as far as admission decisions, the response from Texas was to pass the ten percent plan. This plan basically said that the top ten percent of all high school graduates in Texas are presumptively admitted to any University of Texas campus. As Texas is highly racially segregated, this meant that the number of African-American and Mexican-American students eligible to attend the University of Texas was radically increased. What has been most telling, however, is that it has economically integrated Texas in a way that even the proponents of the plan could not have anticipated. Now, you get all of the poor whites from

West Texas. Many counties that had never sent a single student to the University of Texas are now doing so and suddenly you get class integration. Well, what happens? What happens is that you now have the poor whites who would not have had a common cause with the African-American citizens before the *Hopwood* decision—in fact, would have been on the opposite side—now recognizing that they have something in common. Now, the chances that this plan is going to be repealed are very low because now the poster child of the ten percent plan is not a black kid from the fifth ward of Houston, but a kid from Dimmit, Muleshoe, or Dime Box.

PROFESSOR JOHN EASTMAN: We are actually seeing a slightly different unpredicted consequence of the same ten percent plan in California. Suburban white kids who are not going to hit the ten percent at their school are starting to go to inner-city minority schools. The University of California system sees this as a failure because it is not getting the numbers of minority students; but the collateral effect is that it is integrating schools that for thirty years people have been unsuccessfully trying to integrate.

PROFESSOR GERALD TORRES: That may be a good collateral effect. I would like to see the data but that has not been true in Texas. One of the critical things in California, that has largely gone unnoticed, is that when Proposition 209 was on the ballot the grievance of white parents was that access to higher education was being constricted and the people responsible for the restriction were unqualified minority students who were taking places at Berkeley, UCLA, and Irvine. However, there was a bigger decision being made. The year Proposition 209 was on the ballot was the first year in California's history that public spending on prisons exceeded all spending on education in the state. California made a decision—a public decision on spending. It was not a visible decision, but the constriction on the supply of educational resources was felt. It is just that the wrong party was blamed.

That was also the year when prison guards in California earned more per year than assistant professors at the University of California-Berkeley, and they became a potent political force. This is the story that needs to be told so that questions over public decisions about how we use public money are resolved, and this is why the GIS mapping technique is an important

political tool.

PROFESSOR GERALD ROSENBERG: Two brief comments. I think you were absolutely right in the way in which you have talked about cultural shifts. If the same-sex marriage movement would ever listen to me, they would stop litigating and buy an ad during the Super Bowl. I am quite serious here. They would find some famous Super Bowl play and show it, and then have a guy talk about this play and say, "Here is my partner, and it's so unfair that I am denied rights." That is worth a million times more than any court decision.

I also think you are right that we need to think about the way in which courts play into this dynamic. I think this is an empirical question—when does a court decision have the ability to drive social change and when not? I have written extensively about *Brown*—and here you and I disagree—but I think that the evidence does not support the claim that *Brown* pushed the movement other than with the lawyers inside the NAACP. But that is a debate for another time.

PROFESSOR GERALD TORRES: Any sociologist that could help me unravel that, I invite you to give me a call.