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Local Knowledge, Local Color: Critical Legal Studies and The Law of Race Relations

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In order to ascertain the meaning of an intellectual conception one should consider what practical consequences might conceivably result by necessity from the truth of that conception; and the sum of those consequences will constitute the entire meaning of the conception. Law, . . . is local knowledge; local not just as to place, time, class, and variety of issue, but as to accent — vernacular characterizations of what happens connected to vernacular imagining of what can happen. Accordingly, the "problem" is not language, . . . the task is to face the inevitability of politics in the fullest sense, to recognize the extent to which we are inevitably thrown into social struggle as either reproducers or resisters of the reigning order and to face the prospect that we have no guarantees that any specific course is the correct one. We inevitably align with one group or another; there is no place free from the play of social practice, where we could flee from the existential condition that we create our world on the basis of a prior context that we can never fully grasp.

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At least initially, one of the major goals of the Conference on Critical Legal Studies was to integrate academic and theoretical work with the concrete radical or progressive practice of law. Critical legal theory sought to organize its "research program and its conceptual framework with an eye to the aims and activities of those oppositional social movements with which it has a partisan though not uncritical identification." Accordingly, the questions posed by the theory were based on the self-conscious identification with the movements or the interests expressed in those movements. Such an approach presumes, of course, that the attack by Critical Legal Studies (CLS) on conventional legal scholarship is linked in some material way to the theoretical needs of progressive practitioners. It also presumes that law remains (or has become) a central avenue of radical political practice. Holding in abeyance any inquiry into the content of the first presumption, it seems clear that one of the foundations for the second belief has been the success of the civil rights movement in changing the face of American society and culture, as well as its use of law as a primary instrument in that change.

Despite, or perhaps because of, the identification of CLS with progressive currents in the law, it has become one of the most roundly denounced movements in modern legal theory. It is reviled principally because it is thought to be malignant. Its detractors reel in the face of its corrosive message: the destruction of law as a source of social certainty. That the law might exist merely as another source of social irrationality is thought to be an expression of nihilism.

5. The Conference on Critical Legal Studies, founded in 1977, is a loose affiliation of law teachers and practitioners who see themselves as aligned in opposition both to the traditional methods of legal research and the political ends of traditional law practice. They have defined themselves in terms of what and how they study and in terms of those they serve.


8. The author does not wish to slight the contributions of feminist theory and practice to this belief. See, e.g., C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979).

9. Fear exists that the deconstructive theoretical tendencies in CLS allow the law to mean anything through the application of radical indeterminacy, which is tied both to critical theory and to structuralism.

and a lesson too dangerous to loose in the law schools. Attacks on
the CLS movement and its perceived agenda have come from the
left as well as the right. The left attacks CLS because its insights
yield no progressive political program; the right attacks CLS for its
incoherence, nihilism, and leftist sympathies. Yet CLS is perceived
as the only substantial, although at times abstract and even incoher-
et, alternative to Law and Economics approaches.

This essay will examine the meaning and content of CLS, focusing
on the struggle for racial equality. It will suggest ways in which un-
derstanding the relationship between law and culture can enable,
both academics and practitioners, to construct theoretical founda-
tions for the next generation of race relations law. One thesis of this
essay is that understanding how the law of race relations has
emerged and changed over the past twenty-five years is possible only
by understanding how the dominant culture has accommodated itself
to the changed legal landscape. Central to this inquiry is understand-
ing American cultural pluralism as an expression of cultural domina-
tion and subordination within the context of race relations law.

What is currently considered generally acceptable interracial be-
havior reflects a norm of greater tolerance of racial and ethnic diver-
sity than existed in the past. At the same time, this increased toler-

11. Id. Critics such as Carrington see in the theoretical agenda of CLS the de-
struction of law as a distinct intellectual discipline necessarily resulting in the destruction
of the institutional functions of both the law and lawyering.

12. As the Conference of Critical Legal Studies indicates, it is improper to speak
of a unified CLS "agenda." See Tushnet, Perspectives on Critical Legal Studies, 52 GEO. WASH. L. REV. 239 (1985). Yet even the Conference admits the existence of identi-
fiable intellectual and political tendencies among critical legal scholars.

Theory, 8 HARV. WOMEN'S L.J. 59 (1986).

14. The author hesitates to use the designations "left" and "right" because it is
not clear that these terms have retained any of their traditional meaning in American
politics. Suffice to say that the "right" appears aligned with the existing agenda of the
Reagan-led Republican party, see, e.g., Two More Years: A Final Reagan Agenda, 19 THE AM. SPECTATOR 14 (1986), while the "left" consists of those groups in opposition to the "Reagan vision," see generally IN THESE TIMES and SOCIALIST REVIEW. It goes with-
out saying that there are many conflicting subgroups within these two broad categories.
The self-styled "Reagan Revolution" has altered the terms of policy debate to such an
extent that the mild-left characterizations which gained currency in the late 1960's and
early 1970's have been delegitimized. The marginalization of the "left" has taken on as-
pects of both a holy war and a parlor game.

15. See, e.g., Bork, Battle for the Law Schools, 38 NAT'L REV. 44 (1986); Clark,
Philosophies at War in Law Schools, INSIGHT, Sept. 29, 1986, at 52; Reidinger, Civil

16. See Pettigrew, New Patterns of Racism: The Different Worlds of 1984 and
1964, 37 RUTGERS L. REV. 673 (1985). The recent racially motivated attacks in Howard
ance has not been rooted in a wholesale redistribution of material social resources. The continuing struggle over the justifications for such a redistribution forms the core of the theoretical difficulties in the modern law of race relations. Perhaps the recent decline in the fashionableness of the legal fight against domestic racism is due, in part, to the considerable difficulty of making plausible arguments for the redistribution of social resources within the framework of extant law and ideology.

The transformation in legally acceptable race-related conduct is a crucial element in the alteration of acceptable social behavior. This

Beach, New York and Forsythe County, Georgia, as well as ex-Arizona Governor Edwin Mechem's attempt to rescind Martin Luther King Day, highlight the fact that while much has changed, profound racial tolerance is not yet permanently embedded among the core elements of "the American character." While other local and regional cultural and economic factors were at work in each of these instances, none of these factors blunts the racism apparent in each situation.

17. See Jencks, Discrimination and Thomas Sowell (Book Review), Mar. 3, 1983, at 33 (especially the discussion of black income as compared to that of whites). Recent studies have demonstrated that the class expression of racial discrimination is made more stark when one looks to the distribution of wealth between races, rather than merely comparing differences in income. See Calmore, supra note 6.


19. The concept of ideology is one of the most original and comprehensive concepts Marx introduced. It is also one of the most complex and most obscure, though the term is widely employed today. To clarify it, we shall begin with a few preliminary considerations...

a. It is well known that the term "ideology" originated with a philosophical school (empiricist and sensationalist, with a tendency to materialism) which enjoyed considerable influence in France at the close of the eighteenth and the beginning of the nineteenth century. According to the philosophers of this school, ..., there is a science of ideas, i.e., of abstract concepts, which studies their genesis and can reconstruct it in full starting from sensations (a conception that goes back to Condillac). This science was called "ideology" and the philosophers who practiced it called themselves "ideologists" (ideologues). Marx transformed the meaning of the term — or, more accurately, he and Engels gave their approval to a transformation in meaning which the term underwent once the school of ideologues died out. The term now became a pejorative one. Instead of denoting a theory, it came to denote a phenomenon the theory accounted for. This phenomenon now took on entirely different dimensions. As interpreted by the French ideologists, ideology was limited to accounting for individual representatives by a causal psychology. To Marx and Engels, the phenomenon under study became a collection of representatives characteristic of a given epoch and society.

essay argues that critical legal theory ought to be constructing a persuasive articulation of the legal foundations and justifications for a form of cultural pluralism. This cultural pluralism must escape the ethnocentric assumptions of anglo cultural superiority and challenge the legitimacy of the conventional domination/subordination model of race relations. Dominant cultural imperatives have transformed the meaning of the legal changes won by the civil rights movement and have blunted their progressive impulse. Critical legal theory should explore the nature of the broad social accommodations that have worked that transformation. Understanding the meaning of the legal changes that have occurred will inform our understanding of the law. It will illuminate for us the ways in which the law has enabled racial and ethnic minorities to create a new sense of both their place in the dominant American political culture and the social transformative powers of their own culture.

20. The purpose of focusing on meaning is to shift the focus away from merely understanding the legal import of a particular set of social relations or legislative or judicial activity. In order to think about using law, that is to conceive of law functionally, one must first think about law hermeneutically. To quote Clifford Geertz:

> What will do? That, of course, is hard to say. But it will surely involve a shift away from functionalist thinking about law — as a clever device to keep people from tearing one another limb from limb, advance the interests of the dominant classes, defend the rights of the weak against the predations of the strong, or render social life more predictable at its fuzzy edges (all of which it clearly is, to varying extents at different times in different places); and a shift toward hermeneutic thinking about it — as a mode of giving particular sense to particular things in particular places (things that happen, things that fail to, things that might), such that these noble, sinister, or merely expedient appliances take particular form and have particular impact. Meaning, in short, not machinery.

C. Geertz, supra note 3, at 232.

I. CRITICAL LEGAL STUDIES

A. The Foundations of Critical Legal Theory

CLS, like the work of the Realists, is characterized by a thoroughgoing criticism and rejection of formalism. Rejecting formalism in the law, however, is today a commonplace. CLS moves beyond Realism by incorporating an attack on liberal theory as part of the generalized critique of formalism. The Realists demonstrated that legal doctrine and the tools of legal analysis cannot produce determinant results, or results independent of the analyst. CLS goes further by suggesting that the critique of formalism both in law and in liberal social theory must include a rejection of "the rule of law," as well as a rejection of claims for any remaining viable distinction between legal reasoning and political discourse.

In rejecting both legal formalism and liberal formalism, CLS has articulated an assault on what has come to be termed "liberal legalism." Liberal legalism is the conflation of liberal social theory and the legal justifications it has created that disguise and perpetuate fundamental social contradictions. Those contradictions are masked by the discourse of the law and by the procedures that law

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23. Some have argued that, despite the claims of critical legal scholars, the connection between CLS and Legal Realism is more tenuous than widely assumed — that, in fact, CLS may be "in complete and fundamental opposition" to the project of the Realists. See Note, Critical Legal Studies as an Anti-Positivist Phenomenon, 72 Va. L. Rev. 983 (1986); cf. Note, 'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship, 95 Harv. L. Rev. 1669 (1982).

24. See, e.g., Tushnet, supra note 12.

25. But cf. B. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984) (arguing that the progressive task is a reconstruction of the American legal tradition); Schauer, Formalism, 97 Yale L.J. 509 (1988) (defending formalism from general criticism and positing a "presumptive formalism" as the "heart of the idea of law").


27. Critical legal theorists reject "the rule of law" as a separate analytical category, independent of its ideological function. Because the idea of "the rule of law" does have a powerful ideological dimension, its role in the debate over the nature of legal institutions must necessarily be self-consciously linked to the practical consequences of its ideological role. Since legal debate is largely composed of attempts to persuade, resort to "the rule of law" as a justification for a given outcome must be understood principally as a rhetorical move intended to provide an indisputably "good" reason for supporting that outcome. See R. Bernstein, BEYOND OBJECTIVISM AND RELATIVISM (1983). For a similar argument made in the context of "rights," see Westen, The Rueful Rhetoric of "Rights," 33 UCLA L. Rev. 977 (1986).


provides to evade responsibility for the substantive choices that are
made and necessarily must be made.\textsuperscript{30}

According to critical legal theorists, the core of legal liberalism is
the conviction that law is fundamentally separate from other types of
social control, and that law consists of rules, and rules for manipu-
lating those rules. This collection of rules both defines the proper
sphere of their own application and exists as objective, legitimate,
normative mechanisms. This constellation of beliefs allows law to be
viewed as an autonomous, objective (and hence legitimate) means of
mediating social disputes.\textsuperscript{31}

The system of legalism described by these beliefs is one that is
predicated upon an individualized or atomized conception of society.
In such a conception of social life, disputes are resolved through an
objective ordering of “interests” which are crystallized as rights or
political entitlements. That system of rights separates the public
from the private sphere. The “rule of law” itself is used to keep the
state at bay.\textsuperscript{32} To conceive of law this way is to recognize that the
law, as it reflects liberal theory, is based upon a distinction between
the public and the private, between the state and civil society, be-
tween self and other, between freedom and order.\textsuperscript{33}

CLS does not necessarily reject those contradictions. It merely re-
jects the “faith” that law provides any neutral, objective, or intrinsi-
cally just way of resolving either individual conflicts or the deeper
structural conflicts. The generalized critique of liberal legalism, and
the diagnosis of the inherent antimonies of liberal social theory, is
reflective of the continued critical rejection of the varieties of formal-
ism extant in our law and social theory. It is also part of the analysis
of the hegemonic and legitimating function of law and legal
discourse.

According to critical legal theorists, one of the most pernicious
aspects of the dominance of liberal legalism is the invasive quality of
the ideology it contains, describes, and reproduces. The assumptions

\begin{itemize}
\item \textsuperscript{30} See generally Unger, The Critical Legal Studies Movement, 96 Harv. L.
\item \textsuperscript{31} See Deutsch, Neutrality, Legitimacy and the Supreme Court: Some Intersec-
tions between Law and Political Science, 20 Stan. L. Rev. 169 (1968) (of particular
interest is the critique of Wechsler’s concept of “neutrality.”).
\item \textsuperscript{32} See, e.g., E. Thompson, Whigs and Hunters: The Origin of the Black
Act 258 (1975) (describing the practical content of the belief in “the rule of law”); cf.
Horwitz, The Rule of Law: An Unqualified Human Good? (Book Review), 86 Yale L.J.
561 (1977) (reviewing D. Hay, supra note 18 and E. Thompson, supra).
\item \textsuperscript{33} In liberal theory, these distinctions go back at least as far as Rousseau and
are found replicated in both positivism and natural law theories.
\end{itemize}
which underlie traditional legal discourse are very much a part of the ideology that dominates society. However, presented as part of accepted legal doctrine, those assumptions are effectively removed from the realm of naked power and are clothed with a solemnity and neutrality which appears to have arisen either naturally or from the imprimatur of a tradition beyond reproach. Law operates, then, to validate particular conceptions of society, both by dictating the kinds of arguments that are persuasive within legal institutions and by legitimizing certain concrete social arrangements. Under this analysis, we are blind to the political functions the law performs, especially when those functions occur outside of the institutions we regard as properly political. Indeed, the traditional perception of law consists of a formalized notion of the proper scope of politics and a complete rejection of the idea that law is fundamentally political.

The politics of law is expressed on many levels and through many functions. Most pervasive is the ideological role that law plays in the construction of popular consciousness and perception. To the extent that law successfully fulfills this role, it is a politics without politics. That is to say, legal consciousness provides the structure for conceptualizing political questions without itself being subject to the

34. There is the problem of defining ideology and keeping the use of ideology as an analytic category distinct from other problems of methodology and epistemology. See Stick, supra note 13, for a critique of the CLS approach to traditional legal discourse. See also K. Harvey, supra note 19:

Cart-and-horse confusions notwithstanding, the relationship between a socially specific ideology and epistemology deserves close attention. My own view of the relationship has points of difference with both of those presented above, and may be introduced, accurately if perhaps flippantly through two propositions:

People who differ in a violent or threatening manner with the dominant ideology of a society tend to wind up in jail; people who differ in a violent or threatening manner with the dominant epistemology of a society tend to wind up in mental hospitals.

Id. at 17.

35. This hypothesis can be tested by looking at those places in the law where legal values are subject to popular abuse or in those places where the question of values appears to be beside the point. MacKinnon demonstrates this in her treatment of the law of rape and the jurisprudence of consent. See MacKinnon, Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence, 8 Signs: J. of Women in Culture & Soc'y 635 (1983).


limitations of politics. The formal neutrality at the foundation of legal discourse hides the distributive choices which are made. In this way, law accomplishes political ends while effectively divorcing itself from political means. Only those cases that threaten ingrained distributional patterns are subject to charges of lawlessness. As discussed later, this process has led to the initial focus on civil rights as a necessary precursor and proxy for other social claims. The distinction between law and politics has resulted in the current crisis in race relations law and policy. Law provides both the means and form of social union by eliding the deeper contradictions of a liberal social construction. Law does not stand outside the process of legitimization, for it is both producer and product of the dominant social culture. Legal culture and institutions are, indeed, the clearest articulations of the reigning social vision and, thus, are important elements in the function of both popular beliefs about commonplace relationships and popular acquiescence to the existing distribution of social goods and power. In this construction, law is the mechanism for legitimizing the existing hierarchy of social relations and, hence, for crystallizing existing patterns of domination.

Most critical legal scholars reject Marxism to the extent that traditional versions of Marxist jurisprudence partake of a “vulgar instrumentalism” employing some form of base/super-structure or phenomenal/epiphenomenal analysis. However, it is precisely this rejection of instrumentalism that has led to the focus on political and cultural relations and concern for the process of legitimation. Here the debt to Marxism is less obvious, but just as direct. Through reliance upon the work of the critical theorists of the Frankfurt School and the work of Antonio Gramsci, among others, critical legal theorists have relied on more refined Marxist conceptions in their attempt to understand the role of law in the development of hegemonic

41. See J. Habermas, Knowledge and Human Interests (1971); J. Habermas, Legitimation Crisis (1975).
42. “The Frankfurt School” and “critical theory” refer principally to the work done at the Institute of Social Research in Frankfurt (and abroad during exile) by Max Horkheimer, Theodor Adorno, Herbert Marcuse, and Jurgen Habermas, along with a constellation of others.
43. See Lears, supra note 40.
control. CLS has used critical theory to formulate a conception of the state that escapes the traditional state/civil society dichotomy and to construct a theory which can be used to criticize social domination in all its forms.

B. A "Critical" Review of the Law of Race Relations

The easy analysis of the evolving law of race relations is that the law has merely eliminated the overt expressions of legally permissible racism. From this perspective, the forms of racism that protect white male prerogatives are submerged from view and have been insulated from the kinds of legal attacks that felled Jim Crow. Racism is beyond the reach of law, even if its overt expression is at times illegal and always in bad taste.

A second, less cynical vision perceives law as providing the only remedy for racial discrimination that is readily justifiable. Racism, in this view, is the product of bad people exhibiting individual racial animus. Provide remedies for the victims of racism and penalize those people who discriminate and racism will disappear. Continued discrimination will become inefficient because there will be nothing to be gained socially or economically by continuing to discriminate unfairly on the basis of race. Racism is a purely individuated prob-

45. One fundamental problem with CLS is its failure to develop an adequate theory of the state. This failure has led to confusion in the discourse concerning the so-called public/private distinction. See especially Mensch & Freeman, Liberalism’s Public/Private Split, 3 Tikun 24 (1988).
48. See Note, Racial Steering: The Real Estate Brokers and Title VIII, 85 Yale L.J. 808 (1976) (arguing for extending Title VIII liability to real estate brokers who
lem which one is capable of avoiding.

It is against these two perspectives that the response of critical legal theory arises. Critical theory begins from the perspective that racism is both an individual problem in its concrete expression and a social problem in its generation. The continued effects of the history of racism in this country — reduced opportunity for blacks as a class, for example — occur with no individual ill will at all.49 Our legacy is the historical subordination of various groups of people. Its contemporary expression is the continued racially identifiable distribution of social resources. The effects of racism can continue despite the best of individual intentions.

The actual legal response to racism in the United States has been confused.50 The origin of the legal attacks on racial subordination in the South, with its overt system of Jim Crow laws,51 led to the focus on results.52 If the schools were segregated, desegregate them. If the bus station had two waiting rooms, eliminate them. If the state made invidious distinctions on the basis of race, prohibit them. If deeds contained racially restrictive covenants, refuse to enforce them. This result-oriented jurisprudence was bound up in the notion that racism is the product of a dysfunctional system, rather than of bad people. Eradicating racism required the legal overhaul of a basically acceptable social mechanism.53

Brown v. Board of Education54 was the classic expression of the modern law of race relations. In Brown, the Supreme Court unani-
mously rejected the established doctrine of “separate but equal,” holding that “[s]eparate educational facilities are inherently unequal.” The command in Brown was to desegregate the public schools. This deceptively simple directive was quickly transmuted into several abstract principles, proffered as appropriate legal justifications for so radical a shift in established legal doctrine. Professor Wechsler argued that Brown was not about racial discrimination at all, but turned on the notion of freedom of association. Others contended that the decision reflected a basic belief in the value of a color-blind society. A third perspective concluded that Brown effectively incorporated equality of educational opportunity into the equal protection clause. The product of these various interpretations was confusion for those charged with implementing Brown and perilously increased expectations for those who found in the Court's opinion the chance to hope that a dark era in American history was at an end.

The force of the opinion was clearly not limited by justifications premised on freedom of association. The remedy prescribed was to

55. Much discussion has been generated concerning why the opinion had to be unanimous. In Brown, the Court was thought to be playing an explicitly political role in that it was not just declaring a particular action by a legislative body unconstitutional, but was, in effect, redefining the polity. The political sensitivity of their action is what necessitated the “all deliberate speed” action and what made Brown II politically necessary. See Deutsch, supra note 31, at 190-212 (explains the political role of the Court and why the exercise of its judicial functions must be made in full cognizance of institutional pressures on the Court and the difficulty constitutional theory has in providing a sufficient justification for different political cases); Interview with Philip Elman, former law clerk to Justice Felix Frankfurter, The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation 1946-1960: An Oral History, 100 HARV. L. REV. 817 (1987); cf. Kennedy, A Reply to Philip Elman, 100 HARV. L. REV. 1938 (1987); Elman, Response, 100 HARV. L. REV. 1949 (1987).

56. Brown, 347 U.S. at 495.


59. This view is reflected in the following statement of Chief Justice Earl Warren in the Court's opinion:

In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.


Brown (II), 349 U.S. 294 (1955), represented a significant retreat from the strong statement about the importance of equal educational opportunity found in Brown (I).
integrate, not just to allow freedom of choice. The ideal of color-blindness, however, is much more central to the motifs of the liberal state. To the state, citizens should be ciphers, empty except for the attributes all share equally. This ideal would continue to arise in the context of later racial discrimination cases, especially those involving claims of "reverse discrimination."

A string of post-Brown decisions further increased expectations about the nature of legal remedies to racial discrimination. In Griffin v. County School District, the Supreme Court refused to allow Prince Edward County, Virginia, to establish a system of private, segregated schools with state and local financing in place of its public schools. Rather than merely enjoining the county from financing segregated public education disguised as a private venture, the Court held that federal courts are sufficiently empowered both to mandate desegregation and to order the continued operation of public schools. Thus, Griffin created the impression that states were expected to take affirmative steps toward establishing integrated public schools.

Two years later, the decisions in two education cases suggested that discrimination remedies would henceforth be fashioned to correct existing discriminatory conditions. In Green v. County School Board, the Court rejected a desegregation plan that allowed students to choose which of the county's public schools to attend. Finding that the plan failed to have any measurable effect upon school segregation three years after its adoption, the Court concluded that "the burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now." In Monroe v. Board of Commissioners, a similar plan, which allowed the integrated results of rezoning to be undone through voluntary student transfers, was also invalidated. Once again, the Court emphasized the degree to which integration had actually been achieved. In so doing, the Court created the impression that current discriminatory conditions, rather than a history of purposeful discrimination, were the remediable wrong. Inasmuch as

61. See infra notes 95 & 96 and accompanying text.
64. 391 U.S. 430 (1968).
65. Id. at 439.
these cases mandated actual integration, they suggested "that the absence of integration might be just as remediable in a jurisdiction that had not previously been guilty of de jure segregation." 1

Throughout the post-Brown cases, the Court did not need to look for an "evildoer." Racism was perceived as a systemic flaw, remediable by a change in the system rather than by meting out punishment upon an identified perpetrator. The high-water mark of this result-oriented era came in Griggs v. Duke Power Company. 68 In Griggs, a company was accused of violating Title VII of the 1964 Civil Rights Acts in requiring a high school diploma and satisfactory scores on two standardized tests for promotion from the company's lowest paying jobs. These low-paying jobs were held exclusively by blacks. The company contended that it had imposed the education and test requirements in order to increase the overall "quality" of its workforce, although it could not demonstrate that the requirements were in any way related to job performance. The Court was thus faced with an ostensibly neutral practice that operated to perpetuate previous conditions of segregation.

In rejecting the company's arguments, the Court held that, under Title VII, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory practices." 69 Further, the Court noted that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." 70

In effect, Griggs recognized the perspective of individuals who suffer the burdens of an inherently discriminatory system — what Professor Freeman labels the "victim perspective." 71 To its victims, Freeman argues, racial discrimination exists not as the isolated conduct of aberrant individuals, but, rather, as an entire set of economic, political, and social barriers that operate to confine the members of a given class to subservient positions within society. Antidiscrimination law, in order to be effective, must then reach beyond the punishment of individual offenders toward the dismantling and reordering of the structures of discrimination. 72 This at least appeared to be the position adopted by the Court in Griggs. Rather than focusing upon Duke Power Company's allegedly nondiscrimina-

67. Freeman, Legitimizing Racial Discrimination, supra note 46, at 226.
68. 401 U.S. 424 (1971).
69. Id. at 430.
70. Id. at 432.
71. Freeman, Antidiscrimination Law, supra note 46, at 97; Freeman, Legitimizing Racial Discrimination, supra note 46, at 211-12.
72. R.E. FRIEDMAN, supra note 49.
Intentional intentions, the decision targeted the actual conditions produced by the education and test score requirements. What mattered was not whether the company intended to relegate blacks to the most menial positions, but that this was in fact the result.

By adopting the victim perspective in *Griggs*, the Court appeared ready to disavow what Freeman terms the "perpetrator perspective." The perpetrator perspective centered on the notion that racial discrimination is entirely an individual phenomenon that can and should only be addressed through the identification and legal sanction of individual perpetrators. From this perspective antidiscrimination law ought not extend itself beyond providing relief to "actual" victims of de jure, as opposed to merely de facto, segregation. Those individuals who have avoided engaging in illegal racist behavior while continuing to reap the benefits of a white, male-oriented society are exonerated from blame. Indeed, they are justified in proclaiming themselves unfairly burdened by legal remedies fashioned to overcome existing conditions of racial concentration and segregation. One need look no further than the continued success of so-called "reverse discrimination" challenges to affirmative action programs to observe just how deeply the perpetrator perspective remains embedded within contemporary race relations law.

To the optimistic observer, *Griggs* hinted that perhaps the Court would not confine its result-oriented approach to Title VII cases, instead extending the victim perspective to equal protection challenges as well. Just a month after *Griggs*, the Court appeared to do just that. In *Swann v. Charlotte-Mecklenberg Board of Education*, the Court validated a district-wide school desegregation plan that included cross-district busing. Admittedly, the language of the decision reflects continued reverence for the perpetrator perspective, casting about for specific state policies to identify as the cause of the demonstrated segregation. However, the broadly fashioned desegregation plan actually upheld in *Swann* only makes sense if the legally cognizable injury is segregation itself, be it purposeful or not.

A shift in the focus of the Court from discriminatory motivation to actual conditions of racial concentration and segregation was even more clearly implied by *Keyes v. School District Number One*. *Keyes* upheld a school desegregation plan which involved the entire city of Denver, Colorado, even though only a portion of the city's public school system was found to have been intentionally segre-

73. 402 U.S. 1 (1971).
74. 413 U.S. 189 (1973).
gated. While continuing in its fixation upon de jure segregation, the Court proceeded to hold that evidence of some officially sanctioned segregation might prove sufficient to justify a system-wide desegregation plan. Once again, the Court seemed to adopt the same victim-oriented approach that it had in Griggs, validating a remedy that made no distinction between de facto and de jure segregation.

Taken together, Griggs, Swann, and Keyes reasonably implied that the future of antidiscrimination law lay in the actual eradication of existing racial segregation. This, in turn, suggested the potential for a more generalized shift in American jurisprudence away from atomistic concepts of social relations toward a more system-oriented vision, which perceived racism as woven within the very fabric of American society, and, therefore, remediable only through a reordering of the existing social structure. So radical an alteration in race relations law, however, was in large part dependent upon the Court's willingness to extend the concept of remediable discrimination it adopted in Griggs to the constitutional arena. Although Swann suggested that such an extension was indeed to take place, the Court's 1972 decision in Jefferson v. Hackney\(^7\) foreshadowed a far more dismal future.

Jefferson involved allegations that the state of Texas was discriminating against non-white welfare recipients through its method of distributing federal welfare funds. The state adopted a scheme in which recipients of Aid to Families with Dependent Children (AFDC) were allowed a smaller percentage of their demonstrated need than recipients of other forms of federal support. Despite evidence that this adversely affected non-white AFDC recipients while benefiting the mostly white recipients of other forms of federal support, the Court refused to invalidate the distribution plan. Writing for the majority, Justice Rehnquist dismissed Griggs in a footnote, clearly implying that equal protection challenges to discriminatory conditions would not succeed absent convincing evidence of an underlying discriminatory intent.

The Court's 1974 decision in Milliken v. Bradley\(^6\) further undermined the hope that Griggs would not be confined to Title VII-based challenges to employment discrimination. Despite finding extensive de jure segregation in the Detroit public school system, the Court prohibited the institution of a desegregation plan that called for consolidating Detroit's almost entirely black school district with surrounding, largely white suburban districts. In language indicative of the perpetrator perspective, the Court concluded that "without an interdistrict violation and interdistrict effect, there is no constitu-

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\(^7\) 406 U.S. 535 (1972).

tional wrong calling for an interdistrict remedy.” 77 Milliken thereby sealed off the possibility of successfully challenging the undeniably segregated results of “white flight” from the cities to outlying suburbs. This decision rendered “antidiscrimination law” all the more irrelevant to the struggle against racial domination.

Any lingering hope that Griggs would be extended beyond the context of Title VII was dashed by Washington v. Davis. 78 In Washington v. Davis, the Court expressly held that the Title VII and constitutional standards for adjudicating discrimination claims are not identical. Davis involved an equal protection challenge to a pre-employment examination administered to potential police cadets by the District of Columbia. Evidence was introduced demonstrating that four times as many black as opposed to white candidates failed the examination. However, the failure of the plaintiffs to adduce an overt discriminatory motive behind the test was sufficient to convince the Court that a remediable constitutional violation did not exist. The more probing level of scrutiny called for in Griggs, requiring that any employment practice resulting in racially disadvantaging conditions be justified regardless of the motivation underlying it, was replaced by presumed validity where no “smoking gun” of discriminatory intent could be found. The notion that discriminatory effects standing alone constitute a remediable injury was, and today remains, confined to hiring practices attacked under Title VII. 79

Despite the limitations the Court constructed around the rationale in Griggs, the Court did, in effect, adopt the entire argument of the civil rights litigators up to that point, even if it did not do so in the context of a constitutional claim. Understanding the reality represented by the victorious argument in Griggs is important for a critical analysis of the shift in the structure of successful claims following Griggs and for understanding why the arguments came to grief in Milliken v. Bradley 80 and, ultimately and resoundingly, in Washington v. Davis. 81 The shift does not reflect a change in the material reality of the injury. It does reflect a change in the legitimacy of

77. Id. at 745.
78. 426 U.S. 229 (1976).
81. 426 U.S. 229 (1976). The Court’s decision in Watson, supra note 79, suggests that Griggs v. Duke Power Co., 401 U.S. 424 (1971), will continue to be applied only in Title VII-employment discrimination cases challenging hiring or promotion criteria and will not trigger quotas as a court imposed remedy or as a self-imposed restriction to avoid litigation.
those claims and in the ideological presuppositions underlying the structure of a successful, that is, persuasive antidiscrimination argument.

The ideology that drives society\(^{82}\) affects how claims are perceived and how the law will accommodate those claims. Where there is no cognizable injury there will be no relief. What we have witnessed through these cases is not that the particular injuries were rendered invisible, but that the force of the claim for relief is diminishing through the generalization of the injury. If we have all been injured in a particular way, or if we are all capable of being injured in that way, then the relief a court must fashion will be one that will be limited by the logic of the injury.\(^{83}\) *Griggs* represented a recognition by the Supreme Court of the legitimacy of the perspective of the person who has felt the violation.\(^{84}\) That the violation affects a class of persons does not diminish or dilute the experiential impact on the particular plaintiff. We are seeing the reverse of this phenomenon in the so-called "reverse discrimination" claims. However, the claims of discrimination and reverse discrimination, while superficially logically equivalent, are substantively quite distinct. As one commentator recently noted: "Reverse discrimination is discrete and does not follow the affected individual into her other endeavors, whereas original discrimination is symptomatic of widespread social attitudes that have affected minority individuals in varying degrees at all stages of their lives."\(^{85}\) Unfortunately, a claim of reverse discrimination in this context is just as powerful as the claim of racial or ethnic subordination.

II. USING CRITICAL LEGAL THEORY TO UNDERSTAND THE ROLE OF CULTURE

By using, developing, and refining concepts like hegemony in pursuit of an understanding of the processes of legitimation and validation, CLS has moved the critique of liberal legalism into a more generalized critique of culture. This is necessarily so, since "the concept of culture is at the heart of the conception of consciousness as conscious existence, in which consciousness is seen both as bound up with the existing state of affairs and as a condition which makes it

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82. "Society" denotes the mass of people who share a particular culture, including the rules they adopt for sorting out complex and competing claims to social resources.
84. For a discussion of the evolution of the victim perspective in a different context, see C. MacKinnon, *supra* note 8, at 1-9, 101-143; C. MacKinnon, *Feminism Unmodified* 103-16 (1987).
possible to change that state of affairs." Put another way, culture provides the meaning of and reason for social action. Thus, the role of law in changing the meaning of social action is central to material transformation and to the possibility of imagining a social transformation. The development of a critique of culture holds the most promise for integrating the academic and theoretical work of CLS with the work of progressive practitioners. A cultural interrogation of the law yields insight into the meaning of law rather than insight only into its function. Fully understanding the meaning of law logically precedes articulating a functional prescription for the use of law as a tool of social transformation.

Culture can be defined broadly as the whole way of life of a society. That whole way of life is comprised of the “learned repertory of thoughts and actions exhibited by members of social groups — repertoires transmissible independently of genetic heredity from one generation to the next.” Law functions as a part of that complex repertory. Its social relationship to the other factors that comprise a culture is problematic. However, that general conception does allow for the further refinements necessary to investigate and include “subcultures” within society. Distinct subcultures not only comprise another “whole way of life,” but, to the extent that they represent challenges to the dominant culture, they also hold the potential for the development of alternative social visions. If the legitimating function of the law is central to its ideological role in a liberal society, then an investigation into the role of culture in the transmission of legal consciousness is both theoretically and practically central.

This hopeful view must be tempered by a realization that “subcul-

87. The rubric of “progressive practitioners” used here includes other “cultural workers.” The term “culture workers,” though subject to some skepticism, adequately conveys the notion of people involved in self-conscious political transformation. Hence, not only lawyers, but all those who work with law in an attempt to transform culture are legal “practitioners.” This includes law teachers, for whom law creates an opportunity to participate in social transformation.
88. M. Harris, Cultural Materialism: The Struggle for a Science of Culture 47 (1979). There are difficulties with both broad definitions of culture. Indeed, both seem behaviorist in origin, but more clearly defining the relationship between law and the creation of culture is an important task for progressive lawyers. This necessarily requires a better definition of just what “culture” is. Through a better understanding of culture, we can begin to move beyond merely functional definitions of law.
tures" are exactly that: cultural groups that are beneath or within a dominant cultural structure. Subcultures then are also subject to the hegemonic domination of the larger society; that is, members of that subculture are not free, by virtue of their membership in an identifiable and self-consciously separate group, to make their own future independent of the larger cultural and social structure within which they exist and function. Members of a self-conscious subculture, through identification with their group, are able to construct and identify a place within the larger society that provides a relatively autonomous sphere within which social life is lived and created, even if primary identification remains with the subgroup. It is here that issues of class, race, gender, and ideology are refracted and meaning is changed from the conventional understandings that underlie the premises of the dominant culture. It is here, as well, that the external aspect of "what law means" is perhaps most pronounced, because here there is a double translation occurring.

III. CRITICAL LEGAL THEORY AND THE LIBERATING POTENTIAL OF CULTURAL PLURALISM

Culture might also be more narrowly (but only slightly more narrowly) defined as that set of shared understandings, whether consciously held or not, which makes it possible for a group of people to act in concert with one another. These shared understandings are reflected as much or more in the way life is lived, as in any conscious articulation of cultural solidarity. Thus, any viable subculture is necessarily going to be fluent (as expressed in action) in the cultural cues of the dominant society, whether those cues reflect the underlying values of the dominant culture. Where there is a failure of translation or where there is a profound conflict between the values

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90. The ideology of cultural nationalism does not have to exist for this statement to be true. This is something like the role feminism has played in creating a new way of understanding the role and condition of women in society. Feminism has contributed to an emergence of a "new way of appreciating reality." See FEMINISM AS CRITIQUE: ON THE POLITICS OF GENDER (S. Benhabib & D. Cornell eds. 1987).

91. This definition is a paraphrase of one proffered by Professor Errol Meidinger in Meidinger, Regulatory Culture: A Theoretical Outline, 9 LAW & POL'Y 355, 359 (1987). Professor Meidinger's approach validates some of the author's perspectives on the path of CLS. A definition of culture as "shared understandings" may be characterized and criticized as a "consent-based" notion; however, that gloss on the proffered definition applies a degree of volition which is unnecessary. A "consciously held" understanding need not be "consciously chosen."

92. See id. In fact, it might be argued (and likely is somewhere) that a full articulation of the "shared understandings" that make up a culture is impossible and that articulation itself makes these "understandings" less powerful or more easily avoided or denied altogether. One exception may be the cultural development of feminism, which uses consciousness-raising as a method of both theoretical development and cultural development and solidarity. See, e.g., MacKinnon, An Agenda for Theory, supra note 36.
or understanding of the dominant culture and the subculture, that disjunction will be expressed either through some form of situational accommodation or through the marginalization of the subculture and its members.\(^9\) This marginalization may take many forms.\(^9\) However, some discontinuity is necessary for the continued integrity of the subculture.\(^9\) The social meaning of that continued integrity is what is at the heart of the law of race relations.

Incongruence between culture and subculture provides the window for assessing the relationship of law to cultural formation and to the development, maintenance, and creation of the structure of social relations generally. Comparing the structure of meaning within the dominant culture with that of a subculture allows the identification of the means by which legal consciousness is transmitted across cultures and across generations, as well as the identification of the ways in which law and legal meaning change. “Local law” thus takes on a specifically cultural meaning. The relationship of law to culture provides the chance to test provisional theories of legitimation and hegemonic domination. The most promising place to construct theories about the relationship of law and culture is the law of race relations.\(^9\) The jurisprudence of race relations most clearly exposes the structure of economic and racial dominance and its accommodation to changing values in a generally liberal culture. This body of law also exposes the significant difference in meaning that the accommodation has been given by white society and by the subordinate cul-


95. Perhaps this is best illustrated by the ways in which white ethnic groups accommodate themselves to the dominant culture. The celebration of St. Patrick’s Day, for example, is actually an expression of the extent to which the Irish have been assimilated into the dominant culture, rather than an expression of “separateness.” Of course, this observation is made from an external perspective. Irish people may well experience themselves as separate, but there is no clear material expression of that separateness in American culture. This is not to deny white ethnics their ethnicity; however, their ethnicity is not a factor in general social relations, nor does it have, in most instances, an intersubjective component. Likewise, chicanos will both win and lose when the mayor of New York City displays a “Kiss Me, I’m Mexican” button on the Fifth of May.

tures within that society. A clear understanding of the relationship between law and culture is necessary for constructing new legal strategies to attack concrete manifestations of racism and its system of legitimation.

It is difficult to underestimate the role of "civil rights" law or "anti-discrimination" law or "the law of race relations" on transforming the beliefs and class structure of contemporary American culture. Even the choice of terms used to characterize the legal struggle against racism reveals particular conceptions of law and social relations. The vogue of a particular characterization is tied to the particular legal strategies used for attacking racial subordination.

The civil rights law characterization betrays a conception of the conflict as one involving the right to participate in civil society, in short, to be a citizen in the Athenian sense.\(^7\) That conception is the genesis of the formal equality limitation that is at the core of the "antidiscrimination" view.\(^8\) The "law of race relations" crystallizes the view of law as fundamentally a tool of management that sits outside or beyond the political struggles that make up "race relations." The "law of race relations" formulation does, however, best capture the notion that there are distinct sets of rules that govern the general social relations of the "races," and that individual racial relations are governed by this matrix of rights, duties, and obligations. That characterization also suggests that there are mutual rights, duties, and obligations being balanced in a neutral and objective way and thus validates the removal of evolving race relations from their

\(^7\) ARISTOTE, POLITICS 1.1.10 (Loeb Classical Library ed. 1932).
\(^8\) The antidiscrimination view has fostered a reinvigoration of the color-blindness principle as a device for limiting the reach of race-conscious, group-based remedies. See, e.g., DeFunis v. Odegaard, 416 U.S. 312 (1974). The dissent by Justice Douglas demonstrates the tension inherent in this area as well as the tension bound up in attempting to understand or make claims related to cultural pluralism:

The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans and not to place First Amendment barriers against anyone. . . . [However] [t]he melting pot is not designed to homogenize people, making them uniform in consistency. The melting pot as I understand it is a figure of speech that depicts the wide diversities tolerated by the First Amendment under one flag.

Id. at 334 (Douglas, J., dissenting). Compare Justice Blackmun's opinion in Regents of the Univ. of Cal. v. Bakke:

I suggest that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot — we dare not — let the Equal Protection Clause perpetuate racial supremacy.

An interesting study done by Professor Thomas Pettigrew reveals that the formal lessons of the legal struggle against racism have been learned. He argues that:

Ambivalence, denial, even guilt all act to cause modern antiblack prejudice to be expressed in increasingly indirect and subtle forms. Three such forms are: indirect micro aggressions against blacks, avoidance of face-to-face interaction with blacks, and opposition to racial change for ostensibly nonracial reasons. Survey evidence suggests that opposition to racial change for apparently nonracial reasons is a widespread expression of modern prejudice. As noted, white Americans overwhelmingly reject blatant forms of discrimination.

Using the older model of direct racial bigotry, one could dismiss such contradictions by arguing that the large majorities who oppose abstract discrimination are simply giving lip service to the new norms but do not really mean what they say. This old-style interpretation misses the essence of modern prejudice. There is considerable evidence for accepting these survey data largely at face value: whites do oppose both blatant discrimination and concrete remedies to correct them. This apparent contradiction is fueled by subjective threat and shaped by a particular conception of opportunity in America.

This data seems to support the legitimating function hypothesis in the theory of legal consciousness and ideology developed by CLS. The law of race relations as it has developed over the past twenty-five years, but especially in the past fifteen, encapsulates precisely the vision captured by Pettigrew.

The remedies provided by the legal attacks on racial domination have been the kind which would yield a “subjective threat” to working-, lower-middle-, and lower-class whites. The remedies appear to provide for racial discrimination by the courts. The dismantling of the Jim Crow laws and the overt system of racial subordination

100. Id. at 690-91.
101. See Freeman, Antidiscrimination Law, supra note 46; Freeman, Legitimizing Racial Discrimination, supra note 46. For a critique of cultural hegemony as manifest in the legal scholarship surrounding the law of race relations, see Delgado, The Imperial Scholar, supra note 1.
eliminated official badges of inferiority without implicating the basic individualized "conception of opportunity," until the various forms of affirmative action were instituted as a fundamental policy for remediing racial imbalance. The notion that racial imbalance is the harm to be remedied is tied to the remedial structure of the early law of race relations. Affirmative action, on the other hand, especially where it is separated from proof of specific or intentional discrimination, must be justified by reference to the historical subordination of blacks (or in some instances Hispanics and women). This challenges the fundamental belief that we are not responsible for our history.

One of the pervasive myths of American culture is that each generation creates the world anew. Children are presumed to be offered the chance for "a better future." The extant distribution of social goods, the context into which we are born and out of which we lead our lives, is thought to reflect merely good or bad luck, not a material system of domination and subordination. The developing law of race relations had to challenge that belief directly yet preserve its hopeful content. Once Jim Crow was vanquished, the possibility of providing a compelling justification removed from social, as opposed to individual, conditions became quite problematic.

The popular views recorded by Pettigrew have their analog in the law, the sophistication of their expression notwithstanding. In education, Swann and Keyes ordered the dismantling of segregated school systems because they harmed the educational opportunities of minority school children. Yet, the moral force of those decisions was mitigated by Milliken, which declared that the harm stopped at the school district line. Sweatt v. Painter and Brown, which declared that the state could deprive neither black adults nor children of public education and said that the state educational resources must be redistributed, were resolved into Bakke. Bakke held that the state may take race into account in admitting students to public schools, but that the state may not, self-consciously, take its racial


history into account. In employment, *Griggs*\(^{111}\) declared that private employers may not interpose burdens unrelated to job performance in order to keep the workplace segregated, but *Washington v. Davis*\(^{112}\) said that the Constitution imposed no such requirement. The reasoning supporting the affirmative action plan approved in *Weber*\(^{113}\) was rejected in *Stotts*\(^{114}\). It is just this movement in the law that minority and critical legal scholars have captured so profoundly,\(^{115}\) even as traditional scholars have ably predicted where the law would go as they offered prescriptions for change.\(^ {116}\) Each faction has charted the path of the law. Despite this, there has been little fruitful communication between them.\(^ {117}\)

Yet, despite the incorporation of the gains of the legal struggle for racial equality into the mainstream of legal ideology and the use of those gains for the legitimation of an ahistorical individualized conception of social life, the law was used to effect concrete, material (and ideological) gains for traditionally subordinated groups, even though it did not change the fundamental character of that subordination. While some critics dismiss these gains as the mere "embourgeoisification" of a small number of blacks and other minorities in order to gain social peace,\(^ {118}\) the access of those communities to a greater share of the social product leads not only to the assimilationist choice — the wholesale adoption of the dominant norms (and styles) — but also creates the material conditions for those subcul-


\(^{116}\) See Brest, supra note 47; Ely, supra note 47; Fiss, supra note 47; Sandalow, supra note 47.


\(^{118}\) See, e.g., R. Rodriguez, supra note 93; Freeman, *Antidiscrimination Law*, supra note 46, at 110.
tures to remain viable even as they are changed. 119

Perhaps the most significant product of the legal victories is their capacity to create a space for cultural pluralism. 120 To the extent that subcultures retain their vitality they contain the potential for new social visions. This vision will define the subculture as part of the dominant society even if not a thoroughly homogenized part of the dominant culture. One of the tensions that continues to exist in the structure of traditional American pluralism is the tension between the political and ethnic definitions of American culture. The evolution of modern race relations law has promised that the civic definition of equality includes the rejection of an ethnic definition of American culture or, at minimum, a rejection of an ethnic definition that presumptively excludes the historically excluded and subordinated. That promise is that the path to belonging is one that must be trodden by both the dominant and subordinate groups.

The significance of the ideological changes wrought by the legal struggle against racism is that even as the remedies for historical racial domination are rejected, the legitimacy of that domination is weakened. The destruction of the legitimacy of blatantly racist behavior suggests a cultural accommodation that permits the subordinated groups to see their future defined in terms of liberation rather than mere equality. 121 The power of that internal subcultural ideological transformation allows the average person of color to understand the social content of substantive rather than formal equality. The formal equality conundrum which plagues the law does not exist in this formulation since social equality consists of more than either logical or civic equality. Thus Bakke, for example, represents a reaction to the efforts of historically subordinate groups to develop a strategy of independence. As Dean Bell, among others, has reported, 122 Brown may stand for integration in some circles, but integration stands merely as proxy for a legitimate claim to a greater share of social goods. 123

119. See Wilson, The Declining Significance of Race, in R. Brooks, supra note 96.
120. See, e.g., Karst, supra note 47; see also Comment, Cultural Pluralism, 13 Harv. C.R.-C.L.L. Rev. 133 (1978).
121. "Mere equality" is here defined as the opportunity to be just like the dominant group.
122. Bell, supra note 39, at 471; C. Lawrence, One More River to Cross-Recognizing the Real Injury in Brown: A Prerequisite to Shaping New Remedies, in SHADES OF BROWN 49 (D. Bell ed. 1980); Professor Kujovich demonstrates just this point by highlighting the pressure that desegregation has placed upon the ability of black schools to redefine their role in service to the black community and to secure the material resources to continue serving a black constituency. See Kujovich, Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal, 72 Minn. L. Rev. 29 (1987).
123. There is an explanation for this difference in perception. The explanation goes to the heart of what things mean. There must be a greater understanding of what legal changes mean to those other than the parties litigating. That particular legal decisions
As suggested earlier, one fruitful way of analyzing the law of race relations is not just in terms of its legitimating function, but in terms of the development of the necessary conditions of existence for viable cultural alternatives. These alternatives represent the potential to understand the relationship between the overall structure of social life and the particular elements of that structure. If subcultures are, like the law, both the product and producer of the general social structure, then understanding how culture functions will tell us much about how law functions in the creation of consciousness.

Additionally, the emergence of alternative cultural norms and social visions informs our understanding of how rights function within the legal system, as well as our understanding of the evolution of a type of collective right. This occurs even as the courts have tried to reduce the remedies for racial subordination to individual rights. The law of race relations also reveals that rights discourse ought not to be completely abandoned, even though it can be demonstrated that rights are inherently incoherent. Thus, the evolution of the law of race relations exposes a kind of dialectical tragedy in the use of the law to create the capacity for alternative cultural futures. Even as challenges to the dominant cultural prerogatives exist, legal

stand for more than the discrete issue in dispute is what accounts both for the role of legal decisions as precedent and for their existence as a cultural symbol. To that extent, then, every legal change that is able to be concretely represented is a sign in the Peircean sense. That is, it is something that stands for something else. Understanding and identifying that "something else" is critical for deciding what to do next. There are a number of things that a particular decision or series of decisions can stand for; their meaning depends upon who interprets them and for what purpose. The interpretation results in complex material differences. Thus, a decision to open up the public school to black schoolchildren may "mean" that a state cannot discriminate on the basis of race in the provision of public services. It may also "mean" that black people no longer have to accept that which a white-dominated state will give them. See E. Genovese, Roll Jordan, Roll: The World the Slaves Made (1974).

Similarly, the so-called "black English" case, Martin Luther King, Jr. Elementary School Children v. Ann Arbor School Dist., 473 F. Supp. 1371 (E.D. Mich. 1979), was not a demand that everyone be taught in a non-standard or subliterate version of English. Rather, it was a demand that educators recognize that blacks had developed a language of their own. Thus, the remedy in that case is instructive: teach the teachers about the language so that they might respect the students who speak it. The change in how the language is understood is necessarily tied to a change in attitudes toward the speakers. For a fuller description of the sign, indexical, and iconic function of legal decisions, see R. Kevelson, The Law as System of Signs 1-13 (1988) (discussing the application of the Peircean taxonomy to law).

124. See Williams, supra note 115.
126. See Crenshaw, supra note 1.
remedies create the potential for the assimilation of subcultures. Assimilation means cultural elimination. Yet, failure to grasp the offer of assimilation means that members of a subculture must continue to endure varieties of nativist attacks, calls for English to be made the official language, and other gratuitously antagonistic gestures.\textsuperscript{127} The role of critical legal theory must be to change the understanding of the bargain which must be struck.

\textsuperscript{127} See \textit{Cal. Const.} art. I, § 6, declaring English the official state language; Karst, \textit{supra} note 47.