SOME OBSERVATIONS ON THE ROLE OF SOCIAL CHANGE ON THE COURTS

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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

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,

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.
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> 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

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

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.