

## **Gong Lum V. Rice: The Convergence of Law, Race, and Ethnicity**

**Malik Simba**

In the constitutional case of *Gong Lum v. Rice* (1927), the United States Supreme Court, composed entirely of Bok Guey (whites), adjudged Hon Yen (Chinese) to be in the same social classification as Lo Mok (blacks).<sup>1</sup> The case, which pertained to “racially” segregated schools, reveals the problematic of law, race, and ethnicity.

The Supreme Court’s decision permitted the state of Mississippi to define Martha Lum, a Chinese American, as a member of the “colored races” so that “white” schools could remain segregated. The essential meaning of American ethnicity was, to a large degree, revealed by this convergence of law and race as ideological constructs reflecting real social relations in the second decade of the twentieth century.

This paper will attempt to explicate this convergence in examining *Gong Lum v. Rice* by using critical legal theory.<sup>2</sup> The four basic concepts within critical legal theory are:

1. Legal ideology and legal institutions reflect the material interests of the dominating classes.

2. Ideological forms and/or juridic concepts express the consciousness and world view of those whose hands are on the controls of the “blind insensate machine of law.”<sup>3</sup>

3. The ideological form helps in the structuring of mass consciousness, helps in reproducing social relationships and their material base, while simultaneously obscuring society’s true formation.

4. Law functions within the Gramscian concept of hegemony—that it is a relatively autonomous ideological form which functions to lessen and dilute social antagonisms by “assuring people that their particular conscience can be subordinated, must be subordinated, to the collective judgement of society.”<sup>4</sup>

Antonio Gramsci, the noted Italian social theorist, developed the idea of hegemony to explain how domination is maintained, in part, by the ideology of law. For Gramsci, the law legitimates coercive society by veiling the fact that coercion exists at all. The law does this by persuading mass society that “individual rights” within the structure of “formal legal equality” hold out

“justice” as an end result of the “procedural rights” of due process while actually maintaining the status quo of inequality with the indeterminacy of judge-made decisions. The impression that these decisions are made by a neutral, autonomous, judicial “oracle” gives the mass society the illusion that such mediatory processes are the best that one can hope for in alleviating an unjust situation. The hegemonic function of the law can be clearly seen when racial antagonism is mediated by “closeted” white racist justices who hide their racism behind the “objective deliberative” process of a court hearing and neutral principles of law that are interpreted to maintain white domination over black, or over brown, yellow, or red. Legitimation and the lessening of racial antagonism have occurred when the “losers” return to their communities to await the next opportunity to litigate another “test case” so that their formal rights will, one day, be recognized by law’s “majestic rights consciousness.”

The concept of hegemony as well as the other dimensions of critical legal theory are recognizable variables in the case involving Martha Lum and the state of Mississippi. Separate, but never equal, as established by Southern “state rights” legislative activity following the validating 1896 *Plessy v. Ferguson* decision, was the precedent that Chief Justice William Howard Taft, speaking for an unanimous Court, used against Martha Lum in his decision:

This case then reduces itself to the question of whether a state can be said to afford a child of Chinese ancestry born in this country, and citizen of the United States, the equal protection of the laws by the opportunity for a common school education in a school which receives only colored children of the brown, yellow or black races . . . we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution.<sup>5</sup>

“The Lotuses Among the Magnolias”<sup>6</sup> responded to this decision by creating their own schools with their own Chinese American teachers. This was done to secure their ethnic identity, to prevent their children from attending the black schools of inferior quality, and to maintain their interstitial niche, via accommodationism, between the ruling whites and the servile class composed of African Americans.

This case and the Mississippi Chinese’s response reveal problems in the universal applicability of critical legal theory but also demonstrate its utility. The case demonstrates that: 1) legal ideology, i.e., federalism, supported the world view and interests of the Southern ruling class in keeping with the infamous Compromise of 1877; 2) separate but equal was an ideological form that helped solidify the material basis of society but could not obscure its reality; and 3) law did not function within Gramscian hegemony in structuring a social formation which legitimated classifications of color, race, and ethnicity as defined by those whose hands were on the sensate machine of law because the Chinese saw through the legal veil.

Applying critical legal studies to history is highly problematic. The problems of interpreting and bringing meaning to human political activity can be a researcher's most difficult task. However, much of twentieth century race relations can be explicated by examining the consequential history of Reconstruction and how racialistic federalism evolved. This development ultimately led to Martha Lum and to a confirmation of the fruitfulness of using this theory, adjusting for its limitations, as a tool of historical analysis.

If the Civil War was the "irrepressible conflict," then the Compromise of 1877 could be rightly termed the inevitable reconciliation. The contradictions within America's capitalist and slave economies had brought about the Civil War. It would be the American philosophical belief in white supremacy that would bring about "Reunion" under a racialistic federalism.

The events that led to the Compromise were brought about by the determination of white Southerners to maintain their way of life. They resorted to a type of guerrilla warfare which included fraud, intimidation, and murder to re-establish their own control over the state governments, which were then in the hands of black Republicans, Northern carpetbaggers, and Southern scalawags. The implementation of "nigra legislation" by the federal government made the South even more determined to resist. They saw the 13th, 14th, and 15th Amendments and subsequent civil rights statutes as the main threat to the Southern status quo of black subserviency and white supremacy. This threat was exacerbated in states such as South Carolina, Mississippi, and Louisiana, where the freedman was densely populated, and in some "Black Belt" counties where they were in the majority.

But the crucial factor that brought about the Compromise was the reality that many Northern whites, prior to the Civil War, went along with their Southern counterparts in looking upon peoples of African descent as an inferior race doomed to the lowest position in white "civilized" society. This is the fundamental reason why racialist federalism could develop as a result of the Compromise of 1877. Before the Civil War, many Northern states had preventive statutes on the quasi-free African's right to vote. Jim Crow existed as a *de facto* norm in Northern society in the years preceding the Civil War. The Northern "Negro" was segregated from the cradle to the grave.<sup>7</sup> The Compromise of 1877, between the Republican and Democratic parties, was precipitated by the disputed Hayes-Tilden presidential election of 1876. Through a series of quasi-secret meetings and discussions, known as the "Wormley Bargain," the parties negotiated reciprocal promises.<sup>8</sup>

This white supremacist rapprochement rested on Northern promises and Southern hopes. On March 2, 1877, Hayes was formally announced the winner of the presidential election. Within a short period, Hayes withdrew the federal troops and put an official end to Radical Reconstruction. He also appointed Senator David Key of Tennessee as Postmaster General. But other hopes and promises went unfulfilled. Southerners did not deliver enough votes to elect the Republican James A. Garfield as the Speaker of the House, and the Republicans did not deliver enough votes to pass the promised Texas and Pacific Railroad bill.

In the end, the North resigned political control of the South (racialistic federalism) to the Democratic party while retaining for itself control of national economic policies.<sup>9</sup>

The role of law (constitutional and “lynch”) and the Supreme Court were vital in making the Compromise effective. One basic assumption of critical legal theory is that legal ideology, in this case federalism, supports the world view and interests of ruling classes. On its face the concept of federalism seeks, as a check and as a balance, to restrain power aggrandizement. Power is divided between state and national government. The convergence of legal ideology and racial ideology which supported the world view and interests of the white ruling classes of both North and South can be clearly demonstrated by examining the Supreme Court cases that laid the judicial precedents for *Gong Lum v. Rice*. The Supreme Court decisions in the *Slaughter House Cases* (1872), *US v. Cruikshank* (1875), *Virginia v. Reeves* (1880), *Pace v. Alabama* (1882), *US v. Harris* (1883), *Cumming v. County Board of Education* (1889), *Plessy v. Ferguson* (1896), and *Berea College v. Kentucky* (1908)<sup>10</sup> solidified a type of racial federalism that permitted the North to rid itself of the “Negro Question” by giving the South states rights powers which it used to reduce the African American:

to a despairing second-class citizenship: voteless in the South; helpless in the face of constant and brutal aggression; indicted by all white grand juries and convicted by all-white trial juries; denied access to places of public accommodation; represented in public office by those whose very elections were dependent on their promises to white voters to double and redouble his disabilities; forced to scrounge and cadge for education; segregated in every phase of life; . . . with no place to turn for redress of his grievances except to the Court that had approved the devices used to reduce him to his helpless and almost hopeless degradation.<sup>11</sup>

In the *Slaughter House Cases*, Justice Samuel F. Miller, speaking for the majority, emphasized that the 14th Amendment was not intended to change the federal system by bringing civil rights under the purview of national citizenship. This case relegated the fundamental rights of African Americans to the white supremacists in the states rights area of the American South.

The culmination of *Slaughter House* and the cases that followed was in *Plessy v. Ferguson* (1896).<sup>12</sup> In this case the legal principle of “separate but equal” was established. The Court stated that law is just when it follows “the established usages, customs and traditions of the people.” The Southern custom of working Negroes with the lash, the tradition of segregating them in inferior and unhealthy domiciles, and the use of lynch law to break the spirit of black resistance were consistent with northern interests at this point in time, for the North was

hard at work building railroads, spawning corporations, winning the West, creating great fortunes, welcoming hordes of immigrants from Europe to do the necessary labor—and quite willing to resign the Negro to the tender mercies of the South.<sup>13</sup>

The case demonstrates that the ideology of race and legal discourse combined to explain how the status quo of white supremacy and black subserviency would be maintained by rule of law. Rule of law would help the Southerners coerce their labor force into submission, for the purpose of exploiting it to meet the material interests of those who controlled the “lengthening shadow of slavery.” This case and other labor-related peonage cases helped solidify the material basis of a structure of social relations that was based on white supremacy.<sup>14</sup> The development of the NAACP’s campaign to overturn these racialistic case decisions in the early twentieth century indicated that “separate but equal” was an ideological form that helped to contour social relations but could not act hegemonically to obscure its racist reality. Justice Harlan, who dissented in the *Plessy* case, said it best: “The thin disguise of equal accommodations for passengers . . . will not mislead anyone nor atone for the wrong this day done.”<sup>15</sup> Gramscian hegemony did not lessen nor dilute social antagonisms, nor did it assure people, black people, that their particular interests, such as freedom and equality, should be subordinated to the collective and immoral judgments of a white supremacist society. This society and particular classes within had their hands on the controls of the clear-eyed sensate machine of law. The type of racist society legitimized by the US Supreme Court was totally unacceptable to Americans of minority ethnicity (African Americans, Chicanos-Latinos, Native Americans, and those of Asiatic origins). Their respective mass movements of resistance demonstrated a deep disenchantment with an America predicated on racist ideology and racist law.<sup>16</sup>

The coercive dimensions of law, rarely discussed in conjunction with law’s ideological force, became a prominent, primary, and public weapon in breaking the back of black labor’s resistance. Between 1889 and 1922, approximately 3436 people were lynched in this country, the majority of whom were “recalcitrant Negroes.”<sup>17</sup> “Judge Lynch” delegitimized whatever was left of the law’s mask of ritual, magic, and truth. The popular form of the ideology of race that was not so subtly hidden in legal discourse was expressed by such American luminaries as Thomas Dixon, Governor James Vardaman of Mississippi, and Senator Ben Tillman of South Carolina. The novelist Dixon (the 1915 movie *Birth of a Nation* was based on his writings) noted, “My deliberate opinion of the negro is that he is not worth hell-room. If I were the devil I would not let him in hell. . . .” On another occasion Dixon thundered: “Education! Can you change the color of [his] skin, the kink of his hair, the bulge of his lips, the spread of his nose, or the beat of his heart with a spelling book? The negro is a human donkey.” Governor Vardaman continued by emphasizing that “I am opposed to Negro voting [and] it matters not what his advertised moral and mental qualifications may be. I am just as opposed to Booker T. Washington as a voter, with all of his Anglo-Saxon reinforcements, as I am to the coconut-headed, chocolate-colored typical little coon Andy Dotson, who blacks my shoes every morning. Neither is fit to perform the supreme function of citizenship.” Senator Tillman closed this circle of thought by crying out: “Money spent for the maintenance of public schools for Negroes is robbery of the white man and a waste upon negroes. It does him no good, but it does him harm.”<sup>18</sup>

It was this ideological, institutional, and historical milieu that the first Chinese faced when they arrived in Mississippi between 1869 and 1877. Southern planters recruited “coolie” labor as an alternative to recalcitrant black labor imbued with the independent air of freedom and equality. The *Vicksburg Times* confirmed this recruitment rationale by arguing that “Emancipation has spoiled the negro, and carried him away from fields of agriculture. Our prosperity depends entirely upon the recovery of lost ground, and we therefore say let the Coolies come, and we will take the chance of Christianizing them.”<sup>19</sup> In further analyzing planter motivation, Powell Clayton, Governor of Arkansas, noted that “Undoubtedly the underlying motive for this effort to bring in Chinese laborers was to punish the negro for having abandoned the control from his old master, and to regulate the conditions of his employment and the scales of wages to be paid him.”<sup>20</sup>

The importation of Chinese into the American South was consistent with the importation of Chinese labor into the plantation system of the West Indies after abolition. Both regional ruling classes were suspicious as to whether the ex-slave would work without the “benefit” of the lash. Chinese labor came into a type of social relations in which its status and the ideology of that status were predetermined by the traditions, customs, and institutional usages of three hundred years of black and white relationships. Because of this salient fact, the development of Chinese life in the Mississippi Delta would be contoured by the proper relationships between predetermined superior and inferior “races.”

The period in which the Chinese were used as replacement labor, with a legal status comparable to the freedman, was brief. With the Compromise of 1877, Southern planters stopped the deliberate recruitment of coolie labor. Black resistance was broken by constitutional law and by lynch law, embodied in such terrorist groups as the Ku Klux Klan, the White Line, and the Knights of the White Camelias. But before the planters returned to blacks as a basis for their laboring class, it was obvious that some planters were quite pleased with coolie labor. In 1870, the *Bolivar Times* reported that “Messrs. Ferris and Estell, who are cultivating on the Hughs place, near Prentiss, recently imported direct from Hong Knog, a lot of Chinese, sixteen in number, with whom as laborers, they are well pleased.”<sup>21</sup> By 1880, the US census listed approximately fifty-one Chinese in Mississippi. In 1900, this number had grown to 183 and in 1920, to 322. The majority of these Chinese came from the “Sze Yap or Four Counties district southwest of Canton in South China. . . .”<sup>22</sup>

The “Redemption” of the Southern states by the planter class and the implementation of the old social relations of black and white, coupled with the infamous “Mississippi Plan of 1890” (which led to the rise of *de jure* Jim Crow), left the Chinese as the odd man out. However, coming from an area of China with strong entrepreneurial values, these Chinese began to successfully carve out a niche between black and white in both the social and economic structures of the “New South.” Because of the racist aversion to doing business with “Negroes,” the Chinese were able to develop and dominate the grocery store business that sold commodities to blacks. Other ethnics, Italians and Jews, were also permitted to carve out their niche in selling to the blacks. Referring to this aversion, one

white businessman said of whites who have stores oriented to selling to blacks, “Nobody condemns them for it, but we don’t invite ‘em to our homes and our social life. . . .”<sup>23</sup> Another similar comment was: “Occasionally you find a white merchant down there, but they’re usually either a dago or a Jew.”<sup>24</sup> Another reason why the Chinese were able to establish and dominate the trade with “Negroes” was because they specified their market by locating in black areas and they interacted with their consumers with courtesy and respect. As one black customer stated, “They [Chinese grocers] don’t worry the hell out of you about saying ‘Mr.’ or anything.”<sup>25</sup>

As these Chinese businessmen prospered, by frugal self-denial, they began to build communities by smuggling in Chinese women, which was against US immigration law, by importing “merchant wives,” which was legal, or by cohabitating with a “negro woman.” It is interesting that Mrs. Gong Lum was described as an educated lady from Hong Kong—most likely a merchant wife import.<sup>26</sup>

This small community attempted by their lifestyle, their acceptance of Jim Crow, and their conversion to Christianity and starting of churches, to elevate themselves further up the social ladder. But because their status had been historically predetermined, they would remain at the level of interstitiality or worse. One Chinese could assert that, “Before 1942, the Chinese had no status in Mississippi whatever. They were considered on the same status as the Negro. . . .”<sup>27</sup> It is quite obvious that the Mississippi Chinese maintained their existence as a marginal, isolated community from the whites and did little mixing with “Negroes” outside of the business relation.

The interstitial marginality was acceptable as long as the Chinese community was composed of single men or their status did not legally appear to be similar to the blacks. All this changed when the Chinese community developed a family base and the community’s aspirations for its children rose above the status quo.

The *Gong Lum* case sprang from this changing community and the Chinese view of themselves vis-à-vis the whites and the blacks. In the fall of 1924, Martha Gong Lum, daughter of a prosperous Chinese grocer, was first admitted to a white school and then, at “noon recess,” asked to leave by the Rosedale Consolidated High School trustees. Financially able to hire lawyers from an established law firm, Mr. Gong Lum, through his lawyers, argued that the *Plessy* dictum should be maintained by admitting Martha to the white school since “She is not a member of the colored race nor is she of mixed blood . . .”<sup>28</sup> and because the state of Mississippi had not established a school for Chinese children under the separate but equal dictum. Victorious at the circuit court level, the Gong Lums and their lawyers had to face the school trustees’ appeal to the state supreme court, where they lost. The Mississippi Supreme Court stated categorically that “Chinese are not white and must fall under the heading, colored races.”<sup>29</sup> The Court relegated Martha to the separate but unequal school for “Negroes.”

On appeal to the US Supreme Court, the Gong Lum lawyers took an ingenious tack in their argument. Recognizing the convergence of law, race, and ethnicity, the lawyers used the logic of the racialistic legal discourse that the US Supreme

Court had developed since the *Slaughter House Cases*. Their arguments bring validity to critical legal theory in several ways but, by the mere fact that Mr. Gong Lum saw law as partially unjust, reject other assumptions of the theory. The lawyers asserted that the whites make the law in their image and interest. The image is the white supremacist world view, and their interest is the maintenance of their racial domination, in part by establishing superior schools for whites and inferior schools for blacks. The lawyers then argued that the Chinese should be included in the social order at a level commensurate with their non-Negro status and their economic level. The lawyers argued that "If there is danger in the association [with Negroes], it is a danger from which one race is entitled to protection just the same as another. . . . The white race creates for itself a privilege that it denies to other races; exposes the children of their races to risk and dangers to which it would not expose its own children. This is discrimination."<sup>30</sup> This was an intriguing argument that came close to validating Gramscian hegemony theory in accepting white supremacist assumptions about legal relationships; however, the Court rejected this argument and sent a non-hegemonic message to the Gong Lums: If you live in the South, then you fall under the Mississippi "policy of the lawmakers . . . to preserve the white schools for members of the Caucasian race alone."

Speaking for the Court, Chief Justice Taft referred to other post-Compromise of 1877 cases. The Court cited over twenty state and federal cases beginning in 1849 and concluding in 1896 that upheld the power of the states to impose various types of segregation on the "colored races." Obviously peeved or just plain bored with such cases in controversy, he noted,

Were this a new question, it would call for very full argument and consideration, but we think that it is the same question which has many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution.

What is most intriguing about Taft's reasoning is that he attempted to support this entire racialistic artifice by analogous logic. He cited the 1849 case of *Roberts v. City of Boston*, which upheld the separation of colored and white schools. Taft inferred that if white Northerners, the supposed friends of the "Negro," can rightly segregate them, then why not his "enemies"? Taft noted:

Similar laws have been enacted by Congress under its general power of legislation over the District of Columbia as well as by the legislatures of many of the States, and have been generally, if not uniformly, sustained by the Courts. . .

Furthermore, Taft stated that these cases

arose, it is true, over the establishment of separate schools between white pupils and black pupils, but we can not think that the question is any different or that any different result can be reached, assuming the cases above cited to be rightly decided, where the issue is as between white pupils and the pupils of the yellow races.

In referring to *Plessy* as one of those cases rightly decided, Chief Justice Taft was promoting the majority decision in *Plessy* that

every exercise of the police power must be reasonable and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class.

Neither Justice Henry Billings Brown in 1896 nor Taft in 1927 understood the obvious, as stated by *Plessy*'s lone dissenter, Justice John Marshall Harlan, "that the statute in question had its origin in the purpose . . . to exclude colored people. . . ." Mr. Gong Lum's lawyers affirmed Harlan's correct perception by emphasizing the "annoyance or oppression" was aimed directly at Chinese American citizens.

As for equal facilities, the Taft Court had to just look at the material underpinnings on which the statute rested to see the vast and deep inferiority of "Negro" schools. Separate but unequal schooling was reflected in the disparity in expenditures the school board allotted for white versus colored schools. As early as 1912, Southern states were spending less than \$2.00 per colored student while spending around \$15.00 per white student.<sup>31</sup>

The Taft Court continued by laying to rest the issues of federalism by citing Harlan's decision in *Cumming v. Richmond County Board of Education*.<sup>32</sup> This was a case concerning the power of a local school board to close down a colored school, because of a budget shortfall, while maintaining a school for white children. Harlan decided

the education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools can not be justified. . . .

In citing this case, the Court argued that "the right and power of the state to regulate the method of providing for the education of its youth at public expense is clear." The Taft Court's insistence on supporting local autonomy at the expense of black rights was certainly in keeping with the infamous Compromise of 1877. Settling the "Negro Question" was more important than giving the "brown, yellow or black races" a truly equal protection of the laws.

By affirming the Mississippi Supreme Court's decision, the Taft Court agreed that Mr. Gong Lum could "educate his child in a private school if he so desires. But the plaintiff is not entitled to attend a white public school." This agreement reveals how legal ideological discourse affirms a certain reality—that Chinese grocers had achieved a comfortable class status which was so recognized by the Court's decision. The discourse then attempts to obscure the inequality of "free choice" by not addressing the substantive quality of such private schools and the social stigma attached. As Justice Brown noted in *Plessy*, if whites think that the colored races are inferior and should be segregated, then "law cannot change custom." Obviously, Brown could not, nor would not, concede that legal legitimacy would help mold the consciousness of segregationist whites to make them feel that they were doing the right thing. The law's ideology could and did legitimize the material interests, as expressed via the structure of separate

schools, of those whites who supplicated ever so successfully before the US Supreme Court.

However, with the loss of this case, and in refutation of the theory of hegemony, the Gong Lums and other Chinese families either left the state of Mississippi or the South entirely. Others brought in Chinese teachers from California and started their own “resistance school” (Chinese Baptist Mission School). The county assisted by hiring two white school teachers to aid in this separation.<sup>33</sup> Social tensions remained high and bitterness continued for many years. The decision did not assure the Mississippi Chinese that their interest should be subordinated to the “collective judgments” of white society. The ideological discourse of law did not convince the Chinese that social antagonism would lessen. The Chinese felt antagonism toward them would be increased as they were lumped into a group that had received the brunt of legalized violence.

This examination of *Gong Lum v. Rice* reveals what is promising about critical legal theory and also its dead end when it is applied to racialistic law as it developed in this country between 1872 and 1927. Federalism and equal protection of the laws as legal ideological constructs were contoured to meet the exigencies of race and politics during this period. Racism as a dominant cultural and political world view of both Northern and Southern ruling classes was expressed through legal doctrine to legitimize and support the material interest of these classes. The North was able to set aside the volatile “Negro Question” which had so enthralled and bogged down national political direction since the Civil War. Northern interest in developing a strong unified national economy and the Southern need to regain control over a disenfranchised and radicalized labor force led to the Compromise of 1877. This Compromise received a legal and Constitutional salutation in a series of Supreme Court cases that intertwined legal discourse and racism. This salutation culminated in the “separate but equal” doctrine in 1896.

The promise of critical legal theory is somewhat confirmed if one sees the consensus of racism structuring white mass consciousness and social relations while obscuring the inherent inequality of these relations to the whites themselves. The dead end, of course, is that the inequality of legal doctrine was obvious to the various racial minorities who challenged racialistic law. One can also argue the promise of hegemonic theory by seeing that these racial minorities used law, specifically separate but equal doctrine, to support their legal complaint.

The flaw in this line of thinking is that Mr. Gong Lum, et al., were merely using the doctrine tactically and never permitted its verbal “fig-leaves” to obscure the reality of racial discrimination and oppression as they assessed their own material condition and the broader set of social relations in the “New South.”

Critical legal theory can help legal scholars in their examination of American legal history. This paper demonstrates that the theory has to be severely adjusted when it is applied to the history of race relations law. American law and its brethren, Judge Lynch and Lynch Law, have consistently revealed to America’s racial minorities the illegitimacy of law, its ideologies of fairness and justice, and its functionaries. *Brown v. Board of Education*,<sup>34</sup> which overturned *Gong Lum*, is remembered today, by many critics, as the first time that the Supreme Court

had recognized a constitutional right and then denied it “with all deliberate speed.” The 1991 confirmation of African American conservative Clarence Thomas to the Supreme Court will not ensure a different type of fairness, nor justice, in the legal remedies held out to minorities. Inversely, his presence, for those who are very much ahistorical, will legitimate the illusion of justice which is legal hegemony’s purpose. The appeal for legal relief by racial minorities has more to do with their understanding of the law’s coercive dimension if they take their grievances to the “proverbial” streets than with a belief by these minorities that the oracle of law is magical, objectively ritualistic, and serves truth. Racially oppressed minorities, more so than other Americans, understood and understand the ideological masks and contradictions inherent in the law, as expressed by O.W. Holmes who suggested, in his *Common Law* (1880), that the felt necessities of the time or the prejudices of men determined the paths of law rather than syllogistic logic.<sup>35</sup> The *Gong Lum v. Rice* decision reflects this observation and, in its insistence on a racialistic, federally protected “equality,” reveals a much deeper revelation as expressed by Anatole France:

The law in its majestic impartiality forbids rich and poor alike to sleep under bridges, to beg in the streets, and steal bread.<sup>36</sup>

#### Notes

<sup>1</sup>R.S. Quan, *Lotus Among the Magnolias: The Mississippi Chinese* (Jackson, MS: Jackson University Press, 1982), 155-60.

<sup>2</sup>M. Tushnet, “Critical Legal Studies: An Introduction to its Origins and Underpinnings,” *Journal of Legal Education* 36 (1986): 505-17.

<sup>3</sup>L.M. Friedman, *A History of American Law* (New York: Simon and Schuster, 1973), 14.

<sup>4</sup>E. Genovese, “The Hegemonic Function of Law,” in *Roll, Jordon, Roll: The World the Slaves Made*, ed. E. Genovese (New York: Pantheon, 1974) 27; A. Gramsci, *Selections from the Prison Notebooks*, eds. Q. Hoare, and G.N. Smith (New York: International, 1977), 246-47.

<sup>5</sup>*Gong Lum v. Rice*, 275 U.S. 78 (1927).

<sup>6</sup>Quan, Introduction.

<sup>7</sup>L. Litwack, *North of Slavery: The Negro in the Free States 1790-1860* (Chicago: University of Chicago Press, 1961), 280-303.

<sup>8</sup>C.V. Woodward, “The Unknown Compromise” in *Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction*, ed. C.V. Woodward (Garden City: Anchor, 1956), 277-83.

<sup>9</sup>Woodward.

<sup>10</sup>R. Bardolph, *The Civil Rights Record: Black Americans and the Law, 1849-1970* (New York: Thomas Y. Crowell, 1970), 58-68, 148-58.

<sup>11</sup>L. Miller, *The Petitioners: The Story of the Supreme Court of the United States and the Negro* (New York: Pantheon, 1966), 180.

<sup>12</sup>*Plessy v. Ferguson*, 163 U.S. 537 (1896) in *The Supreme Court on Racial Discrimination* ed. J. Tussman (New York: Oxford, 1963).

<sup>13</sup>Miller, 114.

<sup>14</sup>P. Daniel, *The Shadow of Slavery: Peonage in the South 1901-1969* (New York: Oxford, 1972), 193-98.

<sup>15</sup>*Plessy v. Ferguson*.

<sup>16</sup>B.A. Glasrud and A.M. Smith, *Promises to Keep*, vol. 2 (Chicago: Rand McNally, 1972), 187-369.

<sup>17</sup>J.H. Franklin and A.A. Moss, *From Slavery to Freedom* (New York: Borzoi, 1988), 319.

<sup>18</sup>Miller, 208.

<sup>19</sup>J.W. Loewen, *The Mississippi Chinese: Between Black and White* (Prospect Heights: Waveland, 1966), viii.

<sup>20</sup>Loewen, 23.

<sup>21</sup>Loewen, 23.

<sup>22</sup>Loewen, 24.

<sup>23</sup>Loewen, 49.

<sup>24</sup>Loewen, 50.

<sup>25</sup>Loewen, 51.

<sup>26</sup>Quan, 46.

<sup>27</sup>Quan, 61.

<sup>28</sup>Loewen, 67.

<sup>29</sup>Loewen, 67.

<sup>30</sup>Loewen, 67.

<sup>31</sup>Miller, 210.

<sup>32</sup>*Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899).

<sup>33</sup>Quan, 47.

<sup>34</sup>*Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); 349 U.S. 294 (1955).

<sup>35</sup>A.H. Kelly, W.A. Harbison, and H. Belts, *The American Constitution* (New York: Norton, 1983), 468.

<sup>36</sup>A. Hunt, "Law, State and Class Struggle," *Marxism Today* 20 (1976): 178-87.

### Critique

Law in the United States may of course be viewed through a number of different perspectives. Over the past several decades, racial minorities have used litigation and legislation to reform institutional policies and practices, and this has given impetus to perspectives of law as a significant tool of constructive social change. While such frameworks have validity, Malik Simba's paper is a relevant reminder of the ideological and coercive dimensions of law and of its long history as a means of oppressing racial minorities.

Simba presents critical legal theory as a fairly straightforward perspective that sees law as an ideological form which reflects the material interests of the dominant classes and helps structure society and its material base but at the same time obscuring this and performing a hegemonic function to lessen social antagonisms. Simba effectively uses this interpretation to describe the role of law in solidifying white supremacy in the post-Civil War South and to examine the theory's utility through the case of *Gong Lum v. Rice*.

Critical legal theory clearly has promise for the historical analysis of race relations law, though its basic concepts have broad meanings and implications and may require some specification before they can be applied to other situations. Also, as Simba correctly points out, critical legal theory has a serious shortcoming. Legal institutions have not functioned to veil inequality and injustice from racial minorities. Therefore, adjustments to critical theory must be made before this perspective can be applied to other circumstances.

Simba argues that, by the time of the *Gong Lum* case, the Chinese in Mississippi had achieved a marginal, interstitial status between the blacks and the whites. This is an area that requires further analysis because it may reveal another problem with critical legal theory. Sociologist Robert Quan contends that the Chinese were moving toward the creation of a tri-racial society. At the time of the *Gong Lum* case, they had achieved the first steps in this process through the immigration of wives and intact families, their conversion to Christianity, and the economic foundation of their grocery stores. This process was aided by the whites, who, for example, taught the Chinese the English language, American values, and Southern Baptist religion.<sup>1</sup> More needs to be known about the extent of white assistance and the nature of the emerging tri-racial society. But the whites clearly benefited from the latter. The tri-racial