

“OTHER SPACES” IN LEGAL PEDAGOGY

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There is an increasing focus upon the material and metaphoric spatial dimensions of various academic disciplines, including law. This essay considers the spatial dimensions of legal pedagogy, focusing on Critical Race Theory (CRT). The essay first explains the “critical program” in law and how CRT grows out of it. The essay then suggests that the critical program, and especially CRT, is as much a human geographic or spatial construct as it is a social, political or historic one, and briefly describes the nature of human geography and legal geography. It next considers how metaphors for understanding CRT’s position in legal pedagogy are found in some of Foucault’s work on geography. In “Des Espaces Autres” (“Other Spaces”), Foucault argues that there are three distinct social spaces in society: real spaces, utopias, and heterotopias. What unites them, Foucault suggests, is a space that includes elements of all of these spaces, a space that he calls the mirror. Applying this frame, this essay posits that CRT, both the explicit courses on the topic and the discipline itself, should be “re-mapped”, that is, barriers to its inclusion in the broader legal pedagogy should be eliminated. In this way, CRT can function as a Foucauldian mirror rather than a heterotopia in legal pedagogy.

I. INTRODUCTION

This essay considers the spatial position of Critical Race Theory (CRT) in legal pedagogy. It draws on literature on human geography, with a particular focus on Michel Foucault’s “Des Espaces Autres” (“Other Spaces”), in which Foucault asserts that there are three distinct social spaces in society: real spaces, utopias, and heterotopias. What unites them, he suggests, is a space that includes elements of all of these spaces, a space that Foucault calls the mirror. This essay posits that CRT, both the explicit courses on the topic and the discipline itself, should function as Foucauldian mirrors in the law school classroom, in the law school curriculum and within the broader academic community.

This essay addresses these points first by exploring the nature of the “critical program” in law: Critical Law Studies (CLS), other critical disciplines, and CRT itself. It then briefly considers how the literature on

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human geography and especially some of Foucault's work on the geography of spaces offers a useful frame for understanding criticality. It then applies these spatial metaphors to law school CRT courses and to law school pedagogy in general. Finally, this essay describes some of the barriers to altering the current spatial dynamics of CRT and argues for a remapping of the existing Foucauldian spatial relationship in the context of CRT.

II. THE "CRITICAL PROGRAM" AND CRITICAL RACE THEORY

The adjective "critical" is one that has been appended to more and more scholarly endeavors over the last seventy-five years. "Critical" in this context does not, of course, have the common lay meaning of disapproving of someone or something (though critical studies may sometimes be critical in that way). Rather, "critical" in this sense refers to closely inquiring into the nature of a thing or an idea, not necessarily to alter it or undermine it, but rather to problematize it, that is, to expose vital questions and problems about a thing or a concept. Being critical means querying mainstream, classical legal thought, especially of the variety that views law as a structured, coherent whole that is typically accessed via the application of long-established, logical, legal rules and norms.¹ Being critical often means adopting an interdisciplinary, intersectional, spectral (as in lying along a spectrum) approach to solutions. This is in contrast to the binary solutions that are common to mainstream approaches. Being critical means avoiding essentialism or claims of universal validity, as such constructs may "mask relations of power."² At a minimum, to the extent that adherents of critical approaches employ essentialist constructs, they are urged to embrace "strategic essentialism,"³ adopting universal norms only to achieve a greater good for the many or to undermine structures of oppression. Even in cases of using strategic essentialism, it is crucial to critical practice that definitions be generated by the group itself and not by external hegemonic actors.⁴

Finally, being critical means rejecting false dichotomies and instead understanding that there are all too often more than two alternatives and that among them several, and not just one, are valid choices.⁵ Consider an example from criminal law: verdicts are often understood as the choice

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1. For a discussion of the nature and function of classical legal thought, see, e.g., DUNCAN KENNEDY, *TOWARD AN HISTORICAL UNDERSTANDING OF LEGAL CONSCIOUSNESS: THE CASE OF CLASSICAL LEGAL THOUGHT IN AMERICA, 1850-1940* (1980).
 2. SHERENE H. RAZACK, *LOOKING WHITE PEOPLE IN THE EYE: GENDER, RACE AND CULTURE IN COURTROOMS AND CLASSROOMS* 21 (1998).
 3. *Id.*
 4. LISA NAKAMURA, *CYBERTYPES: RACE, ETHNICITY AND IDENTITY ON THE INTERNET* 128 (2002).
 5. See, e.g., Jennifer Lee, *Binary Determinations of Guilt or Innocence: Reading Between the Lines of People v. Du*, 37 COLUM. J.L. & SOC. PROBS. 181, 183 (2003) ("the determination of guilt or innocence is a primary example of the binary predicate: the defendant must be either guilty or innocent"). See also Leonard V. Kaplan, *Shame: Bergman on Responsibility and Blame*, 68 BROOK. L. REV. 1159, 1166 (2003); PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (1995).

between “guilty” or “not guilty,” elections made by the finder of fact after proofs have been entered. While many issues in criminal law are decided based on whether criminal conduct has occurred and can be proved, there is a whole region of cases whose outcome is determined based on “deterministic excuses” offered by the accused such as duress, insanity and provocation.⁶ Nonetheless, the false dichotomy between “guilty” and “not guilty” is frequently exploited in discussions of how criminal law operates. It is perhaps equally as important to avoid false harmonies in expressing critical points of view. Again, looking at the example of criminal law, in lay terms, and sometimes even in legal terms, “not guilty” is often conflated with “innocent.”⁷ A critical approach to criminal law would include an examination not only of the agency of the accused, but of the structures that shape our understandings of criminal law.⁸

One of the best known critical endeavors in law, and the one from which many other such endeavors stem, is Critical Legal Studies, or CLS. CLS is a school of thought that mediates for the admission of multiple ways of understanding law and law-like regimes.⁹ CLS rejects many of the claims of traditional legal theorizing, and especially the idea that law is a neutral set of rules or practices. CLS further rejects the notion that general legal principles are embodied in judicial opinions, and that by legal analysis the correct principle can be reached and then dispassionately applied. Rather, CLS maintains that law is an instrument of power and questions the fundamental legitimacy of traditional legal norms. Some early critics asserted that CLS is essentially a polemical internal assault on traditional legal studies, and that it lacked sufficient intellectual rigor or nuance.¹⁰ Even within the discipline there have been many contrasting opinions about the nature of CLS and how it relates to other scholarly endeavors.¹¹

While CLS adherents may disagree about the sum total of its warrants, one of the touchstones of CLS is the belief that law, despite its universalizing formalism,¹² is inherently political, and hence the actions of legal agents are not constrained by rational responses to texts and precedents,

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6. Mark Kelman, *Interpretative Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 598, 611 (1981).
 7. ALAN M. DERSHOWITZ, REASONABLE DOUBTS: THE CRIMINAL JUSTICE SYSTEM AND THE O.J. SIMPSON CASE 38 (1997).
 8. Graham Wright & Jane Hill, *Victims, Crime and Criminal Justice*, in STUDENT HANDBOOK OF CRIMINAL JUSTICE AND CRIMINOLOGY 105, 115 (John Muncie & David Wilson eds., 2004).
 9. For a description and synthesis of much of the early CLS movement, see Alan Hunt, *The Theory of Critical Legal Studies*, 6 O.J.L.S. 1 (1986).
 10. See, e.g., Paul Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984) (suggesting that CLS offers little by way of constructive principles and is nihilistic in its approach). See generally Owen Fiss, *Death of the Law*, 72 CORNELL L. REV. 1 (1986).
 11. See, e.g., Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, 82 CALIF. L. REV. 787 (1994); William A. Edmundson, *Transparency and Indeterminacy in the Liberal Critique of Critical Legal Studies*, 24 SETON HALL L. REV. 557, 558 (1993).
 12. ROBERTO UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 5–14 (1986).

but instead are shaped largely by socio-political forces. Critical Race Theory, or CRT, is but one type of critical approach to law and other disciplines that has grown from CLS. CRT, while not susceptible to a single definition, offers a number of unique features.

First, CRT was developed in order to address the extent to which CLS, despite its goal of challenging the hegemony of mainstream thought, failed to give a sufficient account of the role that race played in mainstream formulations. Recognizing the “racedness” of American history, society and culture is crucial to the endeavor. As one scholar observed: “Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual’s race and induce negative feelings and opinions about nonwhites. . . .”¹³ In addition, much of CRT scholarship is exemplified by a critique of liberal ideology.¹⁴ Racial anti-subordination is an explicit goal of CRT, and CRT adherents strive toward this goal by de-privileging and deconstructing certain legal methodologies. This means, for example, sometimes using personal stories and anecdotes to illustrate points instead of relying solely upon arms length, third party recitations of facts—this is another unique feature of CRT. Some of the most iconic scholarship in CRT uses storytelling.¹⁵ However, while race is clearly central to CRT, a central principle of CRT is the notion that race is primarily socially constructed. CRT brings to several disciplines, both critical and mainstream, what one commentator has called a “perspectivist aesthetic.”¹⁶ Reciprocally, CRT is itself informed by a number of other critical disciplines.

13. Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1982) (footnotes omitted).

14. Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography 1993, A Year of Transition*, 66 U. COLO. L. REV. 159, 160–61 (1995).

15. See, e.g., Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law’s Response to Racism*, 42 U. MIAMI L. REV. 127 (1987). Williams tells the story of being excluded from a Benetton store, ostensibly because of her race. Williams defined “spirit-murder” as the psychological damage caused by racially motivated abuses. See *id.* at 127, 129–30. Possible interpretations of Williams’ notion are “spirit involuntary manslaughter” (unintentional but culpable race-based spirit killing, such as engaging in racist behavior or speech without regard for the substantial possibility that it may offend) and spiritual voluntary manslaughter (intentional, racially motivated race-based spirit killing done in the heat of passion—consider for example the comedian Michael Richards who, in a fit of anger, used the “n- word” and other racial epithets to abuse black hecklers during his live comedy show). See also Jessica Heslam, *Nutty Neighbor Shocks Nation With Racist Rant*, BOS. HERALD, Nov. 21, 2006, NEWS, at 3. For a general discussion of the use of storytelling in legal academia, see Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 714–15 (1992). See also Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971 (1991).

16. Pierre Schlag, *Commentary, The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1085 (2002) (“The introduction and development of a perspectivist aesthetic in American law owes much to feminist and critical race theory scholarship of the 1980s and 1990s.”).

Among the various areas of critical thought that have grown from CRT are other “outsider”¹⁷ theories such as Black Critical Theory (Blackcrit),¹⁸ Latino Critical Theory (Latcrit),¹⁹ Feminist Legal Studies (FLS),²⁰ Queer Theory,²¹ Critical Race Feminism²² and Critical Disability Theory.²³

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17. “Outsiders” describes persons who inhabit the margins of society, and includes members of “outgroups, groups whose marginality defines the boundaries of the mainstream, whose voice and perspective—whose consciousness—has [sic] been suppressed, devalued, and abnormalized.” Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1989) (footnote omitted).
 18. Blackcrit theory offers a critical perspective on the law and politics relevant to racism against Blacks. Hope Lewis, *Reflections On “Blackcrit Theory”: Human Rights*, 45 VILL. L. REV. 1075 (2000).
 19. Scholar Kevin Johnson has described LatCrit as “a group of progressive law professors engaged in theorizing about the ways in which the Law and its structures, processes and discourses affect people of color, especially the Latina/o communities.” Kevin R. Johnson, *Celebrating LatCrit Theory: What Do We Do When the Music Stops?*, 33 U.C. DAVIS L. REV. 753, 754–55 (2000).
 20. See generally FEMINIST LEGAL THEORY VOL. I (Frances E. Olsen ed., 1995); FEMINIST LEGAL THEORY: FOUNDATIONS (D. Kelly Weisberg ed., 1993); ALICE ECHOLS, DARING TO BE BAD RADICAL FEMINISM IN AMERICA 1967-1975 (1989); Marie Ashe, *Mind’s Opportunity: Birthing a Post-Structuralist Feminist Jurisprudence*, 38 SYRACUSE L. REV. 1129 (1987); Claire Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 BERKELEY WOMEN’S L.J. 1 (1987-88).
 21. Queer theory is not necessarily characterized by a specific methodology or theme, but in general questions the way in which sexuality is connected to identity and critiques the rampant heteronormativity of the prevailing culture. “One scholar identifies four major claims of queer theory: (1) sexuality is central, not marginal, to the construction of meaning and political power; (2) identity is performative, not natural; (3) political struggle is better understood as ironic parody than as earnest liberation; and (4) popular culture provides a unique insight into the everyday operation of political power that may under certain circumstances transform, rather than simply mirror, status quo power relations.” Nancy Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC’Y 201, 223 (2008) (citing Susan Burgess, *Queer (Theory) Eye for the Straight (Legal) Guy: Lawrence v. Texas’ Makeover of Bowers v. Hardwick*, 59 POL. RES. Q. 401, 401 (2006)); see generally EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET (1992).

Racial and gender norms are firmly entrenched in our society; we are all expected, for the most part, to be transparent on matters of personal racial or gender identity. This means that sometimes strangers feel that they can ask and receive an answer to the question “What are you?” when it comes to racial identity. As a society, we are even more demanding when it comes to understanding the gender identity of persons. Most individuals are very uncomfortable with “Pat-like” (the Saturday Night Live character with ambiguous gender) persons. Interestingly, though, we seem to feel much less willing to ask the gender of adult strangers (Imagine—“Excuse me sir or madam, are you a man or a woman?”). For discussions of the gender-ambiguous character “Pat” and gender ambiguity, see, e.g., I. Bennett Capers, *Cross Dressing and the Criminal*, 20 YALE J.L. & HUMAN. 1, 14–15 (2008) (“... [Pat] “discombobulates everyone with her gender ambiguity, her genderless clothes, her very illegibility.”); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence* 105 YALE L.J. 1, 18 n.44 (1995) (“Pat notoriously is of indeterminate sex, yet we are thrown into confusion not because she sends out conflicting gender signals, but precisely because she seems to send out none at all—she is undifferentiated.”).

22. See generally ADRIEN KATHERINE WING, CRITICAL RACE FEMINISM: A READER (2d ed. 2003); Mary Jo Wiggins, *Foreword: The Future of Intersectionality and Critical Race Feminism*, 11 J. CONTEMP. LEGAL ISSUES 677 (2001).

One critical discipline, Critical Whiteness Studies, seems from its name to exist in direct contradiction to CRT. However, Critical Whiteness, with its focus on understanding the way in which members of various ethnic groups “become white” and in understanding the nature of white privilege, is actually an important corollary to CRT.²⁴ There are also a number of Critical Discourse theories such as Critical Discourse Analysis (CDA),²⁵ Critical Rhetoric²⁶ and Critical Legal Rhetoric (CLR)²⁷ that offer important insights into the use of language and rhetorical constructions. These various critical genres, while offering their own distinct approaches, are more and more informing CRT. Much of this is seen in the discussion of “intersectional analysis”—the undertaking of multifaceted analysis based upon an examination of the ways in which various socially or culturally constructed categories interact.²⁸ Critical disciplines are also increasingly be-

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23. Critical Disability Theory concerns itself in large part with the way in which the notion of “disability” should be understood. It rejects biomedical models of disability and favors an understanding of disability as a social construct created by social norms. As such, even modern notions of disability may be limited in their ability to capture the full diversity of human beings and their ways of living. Janine Benedet & Isabel Grant, *Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues*, 52 MCGILL L.J. 515, 517–18 (2007). For a broader discussion of critical disability theory, see CRITICAL DISABILITY THEORY: ESSAYS IN PHILOSOPHY, POLITICS, POLICY AND LAW (Dianne Pothier & Richard Devlin eds., 2006). See also Bill Hughes & Kevin Paterson, *The Social Model of Disability and the Disappearing Body: Towards a Sociology of Impairment*, 12 DISABILITY & SOC’Y, no. 3, 325 (1997); Liz Crow, *Including All of Our Lives: Renewing the Social Model of Disability*, in JONATHAN RIX, MELANIE NIND, KIERON SHEEHY, KATY SIMMONS & CHRISTOPHER WALSH, EQUALITY, PARTICIPATION AND INCLUSION 1: DIVERSE PERSPECTIVES, 124 (2010).
 24. See generally Zeus Leonardo, *The Souls of White Folk: Critical Pedagogy, Whiteness Studies, and Globalization Discourse*, 5 RACE ETHNICITY & EDUC., no. 1, 29 (2002); CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1997).
 25. CDA was developed within several disciplines in the humanities and social sciences, such as rhetoric, anthropology, or philosophy. It is sometimes used interchangeably with “critical linguistics.” Ruth Wodak & Michael Meyer, *Critical Discourse Analysis: History, Agenda, Theory and Methodology*, in METHODS OF CRITICAL DISCOURSE ANALYSIS 1 (Ruth Wodak & Michael Meyer eds., 2009). CAD is a broadly interdisciplinary approach to the study of discourse that views language as an element of social practice. See generally LILIE CHOULIARAKI & NORMAN FAIRCLOUGH, DISCOURSE IN LATE MODERNITY (2000).
 26. Critical rhetoric was coined to describe the two-part task of first analyzing the opposing discursive forces of dominating power and next, critiquing liberating power, or freedom. See Raymie E. McKerrow, *Critical Rhetoric: Theory and Praxis*, 56 COMM. MONOGRAPHS 91, 92–93 (1989) (describing domination as the construction of an order by the ruling class, and the imposition of sanctions for dissenters as a means of establishing bounds accepted by the people in a community).
 27. “Critical legal rhetoric” grows out of the broader critical rhetoric approach. The concept appears to have been introduced by Marouf Hasian, Jr. Hasian describes critical legal rhetoric as a process of legal analysis that goes beyond looking at precedent and “black letter” law and being skeptical about scholars’ claims about the nature of law. MAROUF ARIF HASIAN, LEGAL MEMORIES AND AMNESIAS IN AMERICA’S RHETORICAL CULTURE 2 (2000). See generally Lolita Buckner Inniss, *A Critical Legal Rhetoric Approach to In Re African-American Slave Descendants Litigation*, 24 ST. JOHN’S J. L. COMM. 649 (2010).
 28. See Patricia Hill Collins, *Gender, Black Feminism, and Black Political Economy*, 568 ANNALS 41, 42 (2000). Intersectionality is a term coined by scholar Kimberlé Crenshaw.

ing used in ways that are not always obvious, as scholars seek new insights into old problems. For example, some scholars are using CRT to inform critical disability theory and feminist theory.²⁹

In summary, the critical program comes in a variety of forms. All of these forms, including CRT, examine social conditions in order to uncover hidden structures. Perhaps ironically, the critical program in law, and especially critical race theory, is overwhelmingly normative, seeking not only to expose the limits of dominant legal theoretical norms but also to bring about change in those renderings. Like other aspects of the critical program, CRT takes a skeptical view of truth claims made in traditional mainstream formulations. This skepticism is, as one scholar observes, essentially an assault on the notion of the particularity of law, and the idea that law is a “closed” discipline that is autonomous and self-sufficient.³⁰ In this regard, the critical program, and most especially CRT, is as much a human geographic or spatial construct as it is a historic or social one.

III. HUMAN GEOGRAPHY IN BRIEF

Human geography is a relatively recent branch of the general study of geography that considers the relationships between human societies and the built and natural environments in which they are established. Since all geography is “human” in some sense, being the product of human endeavor, it requires stating that human geography is not contrary to a general geography where the human element is somehow excluded.³¹ Rather, human geography “suggests a more synthetic knowledge between the physical laws that govern the earth and the humans that popu-

See Kimberlé Crenshaw, *Women of Color at the Center: Selections from the Third National Conference on Women of Color and the Law: Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241, 1244 (1991). It should be noted however that intersectionality is closely related to the broader notion of complex inequality propounded by other scholars. See, e.g., Jan Pakulski, “Complex Inequalities,” *ENCYCLOPEDIA OF IDENTITY* 119, 1220 (2010). Complex inequality critiques the dominant stratificationist and Marxist accounts of inequality and simple hierarchical accounts. Some recent discussions of intersectionality have acknowledged the potential spatial aspects. See, e.g., Gill Valentine, *Theorizing and Researching Intersectionality: A Challenge for Feminist Geography*, 59 *THE PROF. GEOGRAPHER* 10 (2007).

Professor Gowri Ramachandran offers an alternate view of intersectionality, defining the word “intersectional” as a noun meaning “persons who are members of more than one “low-status” category, such as women of color, queer persons of color, or indigent women.” Gowri Ramachandran, *Intersectionality As “Catch 22”: Why Identity Performance Demands Are Neither Harmless Nor Reasonable*, 69 *ALB. L. REV.* 299, 301 (2005). She then uses intersectionality to refer to the conflict created by multiple competing identities. *Id.* at 303.

29. See, e.g., Adrienne Asch, *Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity*, 62 *OHIO ST. L. J.* 391 (2001). Perhaps even more surprising is the notion of using critical disability theory norms to inform CRT. Racial and gender differences have more in common with physical disability than scholars often like to acknowledge. See, e.g., Lolita Buckner Inness, *Critical Conditions: Bridging Critical Race Theory and Critical Disability Theory* (working paper) (on file with author); see also Elizabeth F. Emens, *Race as Disability*, Presentation at Pace Law School (Feb. 9, 2009).
30. NICHOLAS K. BLOMLEY, *LAW, SPACE, AND THE GEOGRAPHIES OF POWER* 8 (1994).
31. Paul Vidal de La Blanche, *PRINCIPES DE GÉOGRAPHIE HUMAINE* 3 (1921).

late it.”³² Human geography concerns the development of ideas resulting from geographical knowledge and not the pure material facts of geography.³³ This often means attention to the location, space and scale of social phenomena across scholarly diverse subject areas.

Contemporary work in human geography covers a wide array of disciplines such as sociology, politics, urban studies or anthropology. This is seen even in the spatial metaphors deployed across disciplines such as “public” and “private”, “high” and “low” culture, “subject position,” “frontier”, “border”, the “politics of location”, or “standpoint epistemology”. Moreover, many contemporary accounts in human geography address cultural concerns such as identity, language, and custom. Still others go beyond material concerns and look to theoretical issues.³⁴ There is, in addition, a distinct sub-field within human geography called “cultural geography” that addresses cultural products and norms and their variations within and across spaces and places as well as their relations to those spaces and places. Within this context there is a distinction to be made between place and space. “Place” may be understood as spaces that have been imbued with social or cultural values and distinct identities. “Space” is more neutral and less value-laden, but both place and space are part of a larger concept of term spatiality.

As one commentator writes, spatial theories are not limited to explicit, physical geography but instead move between social theories and other more abstract theories, and are “implicated in myriad topographies of power and knowledge.”³⁵ However, it is important to note that even when deployed in metaphoric terms, space is not a pure abstract. Rather, space is a socially constructed lived form, and “subsumes things produced and encompasses their interrelationships in their coexistence and simultaneity.”³⁶ Ideologies are often sustained via material manifestations of space.³⁷ Hence, many accounts of space begin by acknowledging a dialectical relationship between space and society.³⁸ One frequently

32. *Id.*

33. *Id.* at 4.

34. For a discussion of place versus space, see generally FEMINISMS IN GEOGRAPHY: RE-THINKING SPACE, PLACE, AND KNOWLEDGES (Pamela Moss & Karen Falconer Al-Hindi eds., 2008); YI-FU TUAN, SPACE AND PLACE: THE PERSPECTIVE OF EXPERIENCE (2001); DOREEN V. MASSEY, SPACE, PLACE AND GENDER (1994).

35. DEREK GREGORY, GEOGRAPHICAL IMAGINATIONS 11 (1994).

36. HENRI LEFEBVRE, THE PRODUCTION OF SPACE 73 (1991).

37. *Id.* at 44 (“What is an ideology without a space to which it refers, a space which it describes, whose vocabulary and kinks it makes use of, and whose code it embodies? . . . What would remain of the Church if there were no churches?”).

38. Much of such work builds upon the work of Henri Lefebvre. Lefebvre distinguishes between spatial practice (the ways in which a society deciphers its space in practice), representations of space (the dominant modality of space in most societies that arises from planners, and others) and representational spaces (associated images and symbols that are layered over physical space). *Id.* at 38–39. There are a number of scholars whose work follows on Lefebvre. See MANUEL CASTELLS, THE URBAN QUESTION (1979); DAVID HARVEY, SOCIAL JUSTICE AND THE CITY (1973); ROB SHIELDS, PLACES ON THE MARGIN (1991). Edward Soja’s work has been especially influential in theorizing the relationship between literal and figurative notions of space. Soja offered a theory of what he called “thirdspace” that he defined as “an-Other way of understanding and acting to change the spatiality of human life, a distinct mode of

cited aspect of the way that human geographers study phenomena is the exercise of mapping. Via mapping, geographers link place and space, and it is this focus that often adds a distinct geographical perspective. Geographic points of view have even been brought to a discipline that has sometimes been thought of as essentially impervious to such incursions—law.

IV. GEOGRAPHY AND THE LAW

Law has often been thought of as amenable to only to certain types of outside influences. Socio-legal scholars have long debated the extent to which law is its own autonomous discipline consisting of internally constructed norms, procedures, and justifications or instead a creature of outside social, political or economic forces. Ultimately, scholars have acknowledged the importance of social and political concerns to the structure of law. Indeed, it has been said that law and society are mutually constituting, with law creating society and society creating law.³⁹ There is also a clear acknowledgement of the role that history plays in shaping law.⁴⁰ However, there is a large and growing body of law and geography scholarship that goes beyond these accepted trans-disciplines with law, and increasingly scholars have adopted a geographical approach to law.⁴¹ Such spatial theories are, in large part, aimed at broadening the view of law as a historically instantiated social enterprise. Often the fundamental questions of legal geography concern themselves with the fact that in law, as in geography, “space” is sometimes contested, contingent, or otherwise at issue. In law, as in other disciplines, space has frequently meant attention to attachments to physical territory, but with added attention to spatial legal rules that mediate these attachments. Some examples are zoning and planning laws, the creation of urban or suburban areas, migration across national or sub-national political borders, or the environment. In the legal context geography is part of an interdisciplinary exchange that may involve jurists, politicians, city planners, sociologists and economists. There is a commensurately large amount of literature on

critical spatial awareness that is appropriate to the new scope and significance being brought about in the rebalanced trialectics of spatiality-historicity-sociality.” EDWARD SOJA, *THIRDSPACE* 10 (1996). For Soja, “thirdspace” was a space wherein “[e]verything comes together. . . subjectivity and objectivity, the abstract and the concrete, the real and the imagined, the knowable and the unimaginable, the repetitive and the differential, structure and agency, mind and body, consciousness and the unconscious, the disciplined and the transdisciplinary, everyday life and unending history.” *Id.* at 56–57.

39. BLOMLEY, *supra* note 30, at 12 (citing David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 3 *STAN. L. REV.* 575, 609 (1984)).

40. *Id.* at 14–18.

41. For a general discussion of legal geography, see generally Steven M. Graves & Christopher L. Peterson, *Predatory Lending and the Military: The Law and Geography of “Payday” Loans in Military Towns*, 66 *OHIO ST. L.J.* 653, 695 n.268 (2005) (citing Nicholas K. Blomley & Joel C. Bakan, *Spacing Out: Towards a Critical Geography of Law*, 30 *OSGOODE HALL L.J.* 661, 664 (1992)); Jane Holder & Carolyn Harrison, *Connecting Law and Geography*, in *LAW & GEOGRAPHY* 2 (Jane Holder & Carolyn Harrison eds., 2002); David Delaney et al., *Preface: Where is Law?*, in *THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE* xiii (Nicholas K. Blomley et al. eds., 2001).

these more literal aspects of legal geography. There is, however, a clear critical trajectory in the works of some legal scholars who utilize spatial analysis to expose the ideological structures and distributive effects of legal rules related to material spaces.⁴² Relatively few scholars interrogate the deeper meanings of the legal geographical entities or consider the figurative dimensions of legal geography and the way in which it shapes socio-legal formations in legal or quasi-legal regimes.

In the exploration of the link between law, space and society, many complexities are best addressed by accounts that understand “space” as both material and metaphoric. Such methods look beyond the material aspects of the way in which physical space impacts law.⁴³ For the last few decades, there has been a flourishing of research dedicated to the more abstract interplay between law and space.⁴⁴ Some of these works examine governance and social justice issues with regard to relationships of power, inclusion and exclusion, citizenship, and rights and freedoms, among other things.⁴⁵ This is seen, for instance, in a discussion of ostensibly rational and objective transit planning processes that provide the same (or more) public transit service for the rich as for the poor, hence

42. See, e.g., Mark Kessler, *Free Speech Doctrine in American Political Culture: A Critical Legal Geography of Cultural Politics*, 6 CONN. PUB. INT. L.J. 205, 208 (2007) (“[I]ncreasingly, scholars of culture focus on the geographic dimensions of cultural representations. Influenced by Foucault and work in human geography, this work examines the historical processes producing spatial representations of social and political life and assesses the political implications of such geographical symbolism.”). See also Richard Thompson Ford, *The Boundaries Of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843, 1863 (1994) (discussing a hybrid of three disciplinary regimes, legal political geography, which is described as consisting of “three primary elements: first, the jurisdictional boundaries that define a government or entity; second, the power and/or rights of the entity vis-à-vis land and individuals within its boundaries; and third, the system of internal governance or administration of the government or entity.”).

43. See, e.g., EDWARD SOJA, *POSTMODERN GEOGRAPHICS* 25 (1989) (describing how space can obscure structures and consequences from us, and “how relationships of power and discipline are inscribed into the apparently innocent spatiality of social life, how human geographies are filled with power and ideology.”). See also Ron Levi, *Gated Communities in Law’s Gaze: Material Forms and the Production of a Social Body in Legal Adjudication*, 4 LAW & SOC. INQUIRY 635, 637 (2009) (“[C]ourts are resisting their spatial claims and that in their place courts are articulating a social imaginary in which the geographic landscape flows uninterrupted by the exclusionary presence of gates.”).

44. Other scholars have discussed the extent to which the law in general makes spatial claims and the specifics of law’s geography in Foucauldian spatial terms. See, e.g., Russell Hogg, *Law’s Other Spaces*, 6 LTC 29, 33–34 (2002) (“Courtrooms are perhaps an obvious and important example of a ‘heterotopia’: places that are in a sense, ‘outside of all places’ and yet in which all other socially ‘real’ sites are represented, they help foster the illusion of law’s spatial neutrality and universality, its very placelessness. To be sure, certain effects (including spatial effects), of legitimation and social control, are produced by and from within these legal places, but it is important to remember that these are nevertheless limited, particular and contingent.”).

45. See, e.g., EDWARD SOJA, *SEEKING SPATIAL JUSTICE* xv (2010) (suggesting that understanding interactions between space and societies is essential to exposing and addressing social injustices and to reflecting on planning policies that aims at reducing them).

framing transit equity territorially without considering the uneven transit needs of people in various neighborhood.⁴⁶ Such examinations are aimed at exploring the influence of legal rules on the construction of material, social and mental spaces, exposing the impact that these spaces have on the creation and interpretation of legal principles and doctrines, and the political implications of such interpretations.⁴⁷ Some of the work of Foucault is especially useful for understanding the way in which “political geographies” are constructed.⁴⁸

V. THE GEOGRAPHIES OF LAW, FOUCAULT, AND “OTHER SPACES”

Several key figures have theorized about some of the more abstract, ideological aspects of space.⁴⁹ Noteworthy among these theorists is Michel Foucault, who described how space reflects power structures in societies and states. Across numerous works, Foucault evidences a preoccupation with “space” in both abstract and material senses. Foucault suggests that a key to power is space.⁵⁰ Law, as an instrument of power, resistance or change, is constitutive of social and relational identities. Partly as a result of the way in which law shapes identities, legal discourse has a tendency to characterize, specify, differentiate, or particularize definitions of applicable fields of juridical norms. These delimiters have led to the development of an abstract geography of law that aids in building a link between the analysis of representations of cultural models and the action of interrogating the relationship between space and the production of the social link. It is this social geographical link that Foucault addresses.

46. *Id.* at xii–iv.

47. See, e.g., Alexandre Kedar, *On the Legal Geography of Ethnocratic Settler States: Notes Towards a Research Agenda*, in *LAW AND GEOGRAPHY* 401 (2003). Kedar explains the way in which legal systems, particularly the Supreme Court, play a crucial role in maintaining “geographies of power” by empowering the state in its land disputes cases. See also Jeremy Forman, *A Tale of Two Regions: Diffusion of the Israeli ‘50 Percent Rule’ from the Galilee to the Occupied West Bank*, 34 *LAW & SOC. INQUIRY* 671 (2009) (discussing the way in which the movement of law between the local, regional, and national levels of the legal system also facilitates the movement of law from place to place).

48. BLOMLEY, *supra* note 30, at 43. Blomley writes that Foucault’s account of power “eschews a Leviathan-like top-down account of sovereignty for a profoundly localized account of the capillary and relational aspects of power as a strategic relation.” *Id.*

49. See, e.g., Henri Lefebvre, *Reflections on the Politics of Space*, 8 *ANTIPODE* 30, 31 (1979) (“Space is not a scientific object removed from ideology or politics; it has always been political and strategic. [. . .] Space has been shaped and molded from historical and natural elements, but this has been a political process. Space is political and ideological. It is a product literally filled with ideologies.”).

50. See, e.g., Michel Foucault, *Questions on Geography*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977*, 63 (Colin Gordon ed., Colin Gordon et al. trans., 1980); Michel Foucault, *The Eye of Power*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977* 149 (“A whole history remains to be written of spaces—which would at the same time be the history of powers . . . from the great strategies of geo-politics to the little tactics of the habitat, institutional architecture from the classroom to the design of hospitals, passing via economic and political installations. [. . .] Anchorage in a space is an economico-political form which needs to be studied in detail.”).

In his essay “Des Espaces Autres” (Other Spaces), Foucault offers a diagram of space that merges the material and metaphoric. In this work Foucault indicates that society is comprised of three distinct spaces: the real world, utopia, and heterotopia.⁵¹ These spaces exist in a particularized relation to each other and to the social structures of power.⁵² The first such space, real space, typically describes the world that most of us inhabit, the normative, day-to-day life. The second space, utopia, is an idealized site which exists in no actual place though it may be assigned to an actual place. In utopia, society is presented in a perfected form, or, in an entirely imperfect, dystopic form, but in either case, according to Foucault, what occurs in utopia is unreal. Utopias are crafted in order to model the way in which we ought (or ought not) to live and think when in real spaces, and are maintained by real space elites. Examples of utopias are expressions of religious or moral belief systems. Perhaps modern examples of utopia are the carefully constructed virtual worlds that inhabit cyberspace such as fantasy sports leagues and the virtual reality game *Second Life*.⁵³ Finally, there is heterotopia, as space where all other real spaces are simultaneously represented, contested and inverted.⁵⁴ Heterotopias exist in most cultures and societies as counter-sites to real spaces and utopias, and their explicit role is to contest and to question the other spaces. Heterotopias are in many ways the most diffuse of Foucault’s spatial geography.

Because of their role in contesting other spaces, some scholars have construed heterotopias as being strictly liminal in nature with no actual attributes of their own.⁵⁵ While this is often true, heterotopias are, first and foremost, sources of alternate interpretations and visions of real life. This means that they sometimes provide permanent refuge for outsiders. At other times heterotopias help their outsider or insider inhabitants to refresh their spirits or to reconcile differences so that they may rejoin the real world and properly value utopian ideals. Examples of modern heter-

51. Michel Foucault, *Of Other Spaces*, 16 *DIACRITICS* 22, 24 (Jay Miskowiec trans., 1986). For a general discussion of Foucault’s concept of heterotopia, see Bruno Genocchi, *Discourse, Discontinuity, Difference: The Question Of “Other” Spaces*, in *POSTMODERN CITIES AND SPACES* 37 (Sophie Watson & Katherine Gibson eds., 1995) (“ . . . Foucault’s discussion of heterotopia centres upon a discursive/linguistic site in contrast to . . . an examination of actual . . . locations [in *Of Other Spaces*] . . . In each case the distinguishing feature of the heterotopia is [that it enables] . . . a form of [discontinuity] . . . a status which, in turn, gives each the ability to transgress, undermine and question the alleged coherence or totality of self-contained orders and systems.”). For another discussion of heterotopia, see Julie E. Cohen, *Cyberspace and Space*, 107 *COLUM. L. REV.* 210 (2007).

52. See Foucault, *Of Other Spaces*, *supra* note 51, at 24.

53. Perhaps modern examples of utopia are the carefully constructed virtual worlds that inhabit cyberspace such as fantasy sports leagues and the virtual reality game *Second Life*. See, e.g., Joshua A.T. Fairfield, *The God Paradox*, 89 *B.U. L. REV.* 1017, 1018–21 (2009) (arguing that despite the premise of irreality in such games, there is a clear hierarchy evident wherein creators of the games are self-designated “gods” who maintain control over virtual environments and virtual inhabitants).

54. See Foucault, *Of Other Spaces*, *supra* note 51, at 24.

55. Cohen, *supra* note 51, at 215 (citing KEVIN HETHERINGTON, *THE BADLANDS OF MODERNITY: HETEROTOPIA AND SOCIAL ORDERING* 20–38 (1997)); ROB SHIELDS, *PLACES ON THE MARGIN: ALTERNATIVE GEOGRAPHIES OF MODERNITY* 260–65 (1991).

otopias are diffuse and many: mental hospitals, prisons, museums and vacation homes are just a few. Foucault, while positing many varied forms of heterotopias, suggests that they exist in two general forms.⁵⁶

The first type of heterotopia is the crisis heterotopia. These are places that are “privileged or sacred or forbidden places, reserved for individuals who are, in relation to society and to the human environment in which they live, in a state of crisis.”⁵⁷ Foucault offers places of refuge for adolescents or the elderly, such as boarding schools or nursing homes.⁵⁸ It may be asserted that universities themselves, and perhaps most particularly law schools, are of the crisis heterotopia variety, serving as they do as places where mostly young adults go to both mature and gain advanced knowledge.⁵⁹ Universities, like other crisis heterotopias, exert a type of vigilance over potentially anti-hegemonic, liminal forces by shaping and guiding study into specific streams. While universities are sources for promoting upward mobility and class change, they are also mechanisms for re-inscribing existing class norms. It is perhaps no accident that many of the less “elite” educational institutions often define their missions as inculcating practical training for careers, and providing opportunities for non-traditional students or serving regional needs, whereas more “elite” institutions frequently offer liberal arts or scientific education suited to no career in particular.⁶⁰ In much the same way, many elite law schools, while offering both classical legal education and less-traditional fare, rarely directly address the need for specific vocational training. In contrast, some less-elite law schools have a heavy focus on bar preparation, “skills-training” or clinical work for students. Accordingly, within the legal academy, elite schools become themselves discrete spaces (one might posit them as utopias) within the heterotopia that is legal education. Following on this, within specific law schools themselves, courses outside of the core curriculum are themselves discrete spaces. One might describe certain of these courses as crisis heterotopias.

Foucault notes that heterotopias of crisis are fast disappearing and that they are being replaced by what he calls “heterotopias of deviation.”⁶¹ These are places where individuals whose behavior is deviant in relation to the required mean or norm are located.⁶² Even places such as vacation spots may be characterized as heterotopias of deviance. Though engaging in leisure is a well-founded and accepted part of real-world behavior, existing in a state of regularized, long-term idleness may be considered deviant given the continued ideological if not material adherence

56. See Foucault, *Of Other Spaces*, *supra* note 51, at 24.

57. *Id.*

58. *Id.*

59. Erik Blair, *A Further Education College as Heterotopia*, 14 RES. IN POST-COMPULSORY EDUC. 93 (2009) (focusing on advanced educational attainment such as at graduate school).

60. See TERRY CAESAR, TRAVELING THROUGH THE BOONDOCKS: IN AND OUT OF ACADEMIC HIERARCHY 24–26 (2000). See also Terry Caesar, *On Teaching at a Second-Rate University*, 90 S. ATLANTIC Q. 449 (1991).

61. Foucault, *Of Other Spaces*, *supra* note 51, at 25.

62. *Id.*

to the Protestant work ethic in the United States.⁶³ The Protestant work ethic influenced large numbers of people to engage in work in the secular world, developing their own business enterprises and engaging in trade and the accumulation of for investment. Moreover, the Protestant work ethic views constant work as being both the norm and normative. Some places, as Foucault notes, have attributes of both crisis and deviation, such as nursing homes or prisons. In this regard, one might equally as well argue that universities are heterotopias of both crisis and deviation, since being an unlearned youth (or existing in a state of being of so untutored as to make one akin to a youth) is both a crisis and a deviation from proliferating norms that establish a college education as a marker of middle class success.

Foucault further suggests that there is a fourth space that fuses the norms of utopian, real and heterotopian spaces, which he calls the mirror.⁶⁴ The mirror is the portal, a placeless place, an intermediate space that gives evidence of various versions of the real world depending on what is placed before it (real world or heterotopia) and of what seemingly lies within the mirror, beyond the immediate reflection (the utopia).⁶⁵ All of Foucault's spaces can be posited in legal pedagogy.

VI. SPATIALITY IN THE LAW SCHOOL AND THE ROLE OF CRT

Within the field of education there are clear themes and concepts concerning the production, maintenance, consumption and governance of educational spaces at different scales and in different cultural contexts. As a result, there have been a number of writings that address the ways in which space has been instantiated in educational life, and especially the differentiating effects of unequal educational provision.⁶⁶ Such work often addresses the extent to which the spatiality of the academy and educational institutions both produce and reproduce social hierarchy.⁶⁷ There is also literature concerning the spatial nature of educational policy changes concerning identity and race.⁶⁸ Space has been offered as a basis

63. *Id.* For a discussion of the nature of the Protestant work ethic, see MAX WEBER, *THE PROTESTANT WORK ETHIC AND THE SPIRIT OF CAPITALISM* (1904), in which Weber describes how capitalism evolved when the Protestant ethic (specifically Calvinist-influenced) spurred the growth of rational capitalism, which then helped to create the industrial revolution and the spread of capitalism as the preeminent universal economic system.

64. Foucault, *Of Other Spaces*, *supra* note 51, at 24.

65. *Id.*

66. See, e.g., Kalervo N. Gulson & Colin Symes, *Knowing One's Place: Educational Theory, Policy and the Spatial Turn*, in *SPATIAL THEORIES OF EDUCATION, POLICY AND GEOGRAPHY 1* (Kalervo N. Gulson & Colin Symes eds., 2007).

67. See, e.g., Karen M. Morin & Tamar Y. Rothenberg, *Our Theories, Ourselves: Hierarchies of Place and Status in the U.S. Academy*, 10 *ACME: AN INT'L E-JOURNAL FOR CRITICAL GEOGRAPHIES* 58, 59 (2011) (considering the reputational hierarchies of higher education, and those hierarchies' "tendency to reproduce deeply problematic elitisms and to reinforce damaging cultural politics of academic knowledge production and practices that go along with them").

68. See KALERVO N. GULSON, *EDUCATION POLICY, SPACE AND THE CITY: MARKETS AND THE (IN)VISIBILITY OF RACE* (2010); *SPATIAL THEORIES OF EDUCATION: POLICY AND GEOGRAPHY MATTERS*, *supra* note 66.

for discussions of curriculum⁶⁹ and critical pedagogy.⁷⁰ There are numerous different sites of education and learning which are accessed at different stages of life.⁷¹ Even within the various contexts and scales of education, there are, permeating each one, socio-spatial concerns. As one scholar has noted, spatialized social status arrangements are not only common to most academic structures, but necessary for such structures to exist.⁷² This is in large measure related to the way in which schools exercise a clear role in shaping society. Foucault, in writing generally of the disciplinary nature of certain societal institutions, described school as a “pedagogical machine,” that is framed to train students for “individualization” and subordination.⁷³ Law schools, it has been suggested, are particular sites of spatial production of social norms.⁷⁴

Much attention has been given to scholarly discussion of hierarchy and identity in the context of law schools. Previous research in this field has often focused on classroom method, substantive law and “legal reasoning.” Some studies have focused on the effects that legal training has on the way that students think.⁷⁵ Other work has addressed the way that

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69. Jan Nespov, *Undergraduate Curricula as Networks and Trajectories*, in RICHARD EDWARDS & ROBIN USHER, *SPACE, CURRICULUM AND LEARNING* 93 (2000). Nespov writes that curricula “organize educational landscape.” *Id.* at 98. The meaning of instructional events cannot be inferred simply from the course artifacts or the instructors stated intentions. Rather, “the spatial networks that contextualize such artifacts, actors, and events constitute them, and they emerge over variable but sometimes extended periods of time.” *Id.* at 104.
70. See, e.g., *PEDAGOGY OF PLACE: SEEING SPACE AS CULTURAL EDUCATION* 15–16 (David M. Callejo Perez et al. eds., 2004).
71. See, e.g., John Morgan, *Critical Pedagogy: The Spaces that Make the Difference*, 8 *PEDAGOGY, CULTURE AND SOC.* 273, 276 (2000).
72. TERRY CAESAR, *TRAVELING THROUGH THE BOONDOCKS: IN AND OUT OF ACADEMIC HIERARCHY*, *supra* note 60, at 2. In his analysis of the hierarchical American academic system, Caesar refers to the decision to work at a particular school as locating ambition. He suggests that this locating of ambition is both a physical-spatial process and a reputational-relational process.
73. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 172 (1977).
74. See, e.g., Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in A Culture of Competition and Conformity*, 60 *VANDERBILT L. REV.* 515, 525 (2007) (using the term “matrix” to describe “the complex web of rituals, habits, and shared assumptions that create a culture of legal education resistant to change.”). They point to the multiple meanings of matrix, noting that “these meanings fit under the larger idea of looking at parts of a whole, of examining the spaces between things and not just the things themselves; of seeing things as they are arrayed in more than one dimension; of looking at the larger environment through smaller samples.” *Id.* See also WENDY LEO MOORE, *REPRODUCING RACISM: WHITE SPACE, ELITE LAW SCHOOLS, AND RACIAL INEQUALITY* 174 (2008) (arguing that law schools are “totalizing invocations of white space” wherein the concerns of students of color are marginalized as ethical, non-neutral, and ultimately non-legal concerns). See also DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM, A CRITICAL EDITION* 88 (2004) (describing the micro-society of American law schools and arguing that the micro-society’s patterns of hierarchy reproduce, and thus reinforce, similarly structured patterns of hierarchy in other social “cells”). See also Sarah Buhler, *Journeys to 20th Street: the Inner City as Critical Pedagogical Space for Legal Education*, 32 *DALHOUSIE L. J.* 381 (2009).
75. See, e.g., LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* (1997).

law schools shape goals and ideals of students.⁷⁶ Still others have argued that even ostensibly informal spaces in law schools are sites of hierarchy.⁷⁷ Implicitly or explicitly, the law school experience derives from spatial norms. The crucial learning spaces of legal education are, despite the march of modernity and constant mediation for change, essentially closed structures. For instance, although numerous pedagogical models are employed in law schools today, the administrative structure of law schools and some of the core curriculum offered in many law schools are based on the policies that Christopher Columbus Langdell developed over a hundred years ago.⁷⁸ The Socratic,⁷⁹ “Professor Kingsfield”⁸⁰ style of pedagogy that requires students to “perform” legal preparedness inside the traditional law school classroom is still coin of the realm in teaching methodology.⁸¹

The traditional legal method may even in some respects be posited as a Foucauldian utopia, given the norms that require suspension of “real life” concerns and intuition⁸² and the invocation of the “artificial reasoning” of the law.⁸³ Such reasoning, delivered via traditional methodolo-

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76. See, e.g., Robert Granfield & Thomas Koenig, *The Fate of Elite Idealism: Accommodation and Ideological Work at Harvard Law School*, in SOC. PROBS. 315, 316, 320 (1992) (describing the way that elite professional schools effectively shape students’ career desires and expectations).
77. See, e.g., Desmond Manderson & Sarah Turner, *Coffee House: Habitus and Performance Among Law Students*, 31 LAW & SOC. INQUIRY 649 (2006); Nicholas K. Blomley, *From “What” to “So What”: Law and Geography in Retrospect*, in LAW AND GEOGRAPHY 17 (Jane Holder & Carolyn Harrison eds., 2003).
78. See BRUCE A. KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION*, C.C. LANGDELL 1826-1906 (2009). As a leading figure in legal education, Langdell instituted the case method of instruction, and the curriculum he developed for first year students—torts, contracts, property, criminal law, and civil procedure—is still largely the standard in most United States law schools. *Id.* at 7-9, 130-132. Langdell’s administrative policies were based on what he believed to be ideals of merit, and in pursuit of this he instituted a career track for law school faculty, required a bachelor’s degree for admission to law school, created a three-year curriculum, and instituted required examinations for students. *Id.* at 219-21.
79. This method is also known as catechetical, eristic, or just “question and answer.” See MILNER S. BALL, *CALLED BY STORIES: BIBLICAL SAGAS AND THEIR CHALLENGE FOR LAW* 59 (2000).
80. Professor Kingsfield is a character from the film *THE PAPER CHASE*. *THE PAPER CHASE* (20th Century Fox 1973). With his white hair, bow ties, patrician accent and weapon-like use of the Socratic method in his legal classroom, he is an icon in legal lore. See generally Martha Chamallas, *The Shadow of Professor Kingsfield: Contemporary Dilemmas Facing Women Law Professors*, 11 WM. & MARY J. WOMEN & L. 195, 198 (2005); David Ray Papke, *Crusading Hero, Devoted Teacher, and Sympathetic Failure: The Self-Image of the Law Professor in Hollywood Cinema and in Real Life, Too*, 28 VT. L. REV. 957, 966-67 (2004).
81. See Elizabeth Mertz, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* 26 (2007) (“...[C]ommentators continue to speak of ‘Socratic Teaching’ as the signal approach to law school pedagogy.”).
82. Sturm & Guinier, *supra* note 74, at 521-22 (claiming that the law school experience “is intentionally destabilizing: it invites students to suspend judgment, to question their intuitions, to read structurally, to learn a new language, and to ask different questions”).
83. The phrase “artificial reasoning” is meant to evoke Sir Edward Coke’s assertion that the common law represented “an artificial perfection of reason”. ALLEN D. BOYER, *SIR EDWARD COKE AND THE ELIZABETHAN AGE* 83 (2003). Artificial reason is not nat-

gies may make the law school experience terroristic and infantilizing at the same time for many students.⁸⁴ The CRT classroom is often represented as an oasis within or respite from the traditional law school classroom.

CRT classes are often conceived of as “safe spaces” for students of color or other socially-subordinated groups in the legal academy, places where such students can take refuge from the cool rationalism, empiricism, and universalism on display in many standard law school courses.⁸⁵ In CRT courses, students can offer counter-discourses to challenge mainstream classroom dogma, giving voice to their anxious, race-lensed and sometimes emotion-laden analyses that all too often are devalued in the mainstream legal classroom. In such classes some students lament, for example, that their experiences as “summers” at “Big Law”⁸⁶ firms are sometimes disappointing and frequently characterized by social and professional exclusion. Big Law” is a popular designation for large, mainstream law firms. Such firms frequently have summer employment programs for law students that are explicitly designated as the route to full time, post law school employment. Black lawyers often face particular difficulties in these elite firms.⁸⁷

It is important to note that the “safe space” phenomenon of the CRT classroom relates not just to students of color and/or to progressive stu-

ural reason or native intelligence, but rather skill is to be acquired by those steeped in lawyerly conventions. *Id.* at 84. See also Steven D. Smith, *Believing Like A Lawyer*, 40 B. C. L. REV. 1041, 1051 (1999) (citing Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35 (1981)).

84. See Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 230, 237 (Robert L. Nelson et al. eds., 1992) (“Even liberalized contemporary versions of this pedagogy remain at best passive and at worst infantilizing.”). The traditional law school teaching methods have been subject to numerous critiques, among them that such teaching fails to impart moral values or imparts the wrong moral values, causes unnecessary and damaging stress, and favors white male students. *Id.* at 237. It has, nonetheless, “outlasted its theoretical rationale.” MERTZ, *supra* note 81, at 264. For further discussion of the way in which the use of the Socratic method may disadvantage some students, see GUINIER ET AL., *supra* note 75; Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. OF LEGAL EDUC. 137 (1988).
85. There is a growing scholarship discussing, for example, the fact the women and persons with working or lower-class backgrounds may feel alienated by the traditional law school experience. See e.g., Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155 (2008). One scholar has suggested that the interests of nontraditional law students—such as returning students, women, or students of color—are being sacrificed to interests of mainstream students in legal education. Rhonda V. Magee, *Legal Education and the Formation of Professional Identity: A Critical Spirituo-Humanistic – ‘Humanity Consciousness’ – Perspective*, 31 N.Y.U. REV. L. & SOC. CHANGE 467 (2007).
86. For a discussion of the role of Big Law firms in shaping the law school experience and subsequent employment, see Tom Ginsburg & Jeffrey A. Wolf, *The Market for Elite Law Firm Associates*, 31 FLA. ST. U. L. REV. 909 (2004).
87. This is perhaps most emblematic of the difficulties facing blacks in elite firms. For discussion of the relative paucity of black lawyers in elite law firms, see David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493 (1996).

dents. Indeed, students of various races and of varying ideologies are increasingly present in the CRT classroom. This is crucial, because CRT courses are most vital when there is philosophical and social diversity exists. Discussions that query the merits of CRT may add to what one scholar has described as “strong democratic talk:”⁸⁸ conversations that guide us “to discover[ing] common bonds, moving beyond merely creating shared understandings.”⁸⁹ In promoting such talk there is, not surprisingly perhaps, often a goal of mutually reformulating understandings.⁹⁰ However, the possibility of such democratic talk and any resultant mutual reformulation of ideas depends heavily on the clear articulation of rational, ethical, principled points of view. One growing and important dynamic of CRT classrooms, especially as some United States law schools grow whiter after a period of growing racial integration,⁹¹ is that more and more students are there to question what they see as an undue focus on racially related topics and proliferating norms of “political correctness”. Such norms, assert some students, require them to understand racism as a contemporary problem to be reckoned with in law and society.⁹² These students may sometimes offer counter-testimony that in substance denies the impact of racism. It is, nonetheless, important to allow for the testimony on all points of view in the CRT classroom.

While testimony and sharing are still important aspects of CRT courses, the focus on such courses as safe spaces within the law school may obscure their broader function, and may even harm course participants. The tradition of multicultural and anti-racist teaching that occurs in many Western classroom settings is not *sui generis*. Instead, it locates from and is embedded in mainstream cultural narratives of history, gene-

88. John O. Calmore, *Close Encounters of the Racial Kind: Pedagogical Reflections and Seminar Conversations*, 31 U.S.F. L. REV. 903, 905-06 (1997) (citing BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 178, 185-186 (1984)).

89. *Id.*

90. *Id.*

91. After first achieving gains under affirmative action policies developed beginning in the 1970's, students of color have made up of fewer and fewer United States law students over the past several years. This is often as a result of changes in the way that affirmative actions norms have been deployed. The absence of students of color may change law school classroom dynamics greatly. ANDREA GUERERO, *SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION* 163-165 (2002). Students of color are all too often the minority even in CRT classrooms. See e.g., Judith A.M. Scully, *Seeing Color, Seeing Whiteness, Making Change: One Woman's Journey in Teaching Race and American Law*, 39 U. TOL. L. REV. 59 (2007).

92. For instance, one scholar writes of having taught a course on race and the constitution in which one white student critiqued the professor's historical examination of slavery. The student wrote:

[I] would like for this course to be a short history lesson and then get on to issues that are facing us today. I think that slavery was an atrocity that should not be repeated and I agree that we must know the past to understand the present and protect the future, however, I have had this history in high school classes, undergraduate history, Legal Process I, and I understand that it will be covered extensively in Constitutional Law, so I am getting somewhat bored.

Francis Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CALIF. L. REV. 1512, 1563 (1991).

alogy, and “roots”.⁹³ Such accounts may hinder rather than facilitate the social inclusion of racial, religious or ethnic outsiders. This is because human emotions work by binding certain types of subjects together, regardless of the overall extent of their similarity. This process creates a “slide of metonymy” in which, for instance, Islam is equated with “international terrorist” or immigrant is equated with “bogus asylum seeker.”⁹⁴ In like fashion, the “differentness” that is emphasized in CRT may itself become a rather dubious and singular end, rather than one of many means to achieve a larger scholarly or pedagogical goal. In order to more fully appreciate the potential of CRT courses, and of the discipline itself, it is useful to consider CRT pedagogy in light of human geography norms, and especially in light of the work of philosopher and social theorist Michel Foucault’s essay “Des Espaces Autres” (“Of Other Spaces”).⁹⁵

VII. CRT AS OTHER SPACE IN THE LAW SCHOOL

Before looking at the world within the law school, it is perhaps worth briefly mentioning the Foucauldian spatial relationship between law school and the rest of the society. In so doing, one would likely have to assign the law school to a role outside of the real world, and that role would be either heterotopia or utopia, depending on one’s notion of the law school. Foucault accounts for the possibility that within a heterotopia there may be several sub-sites or microcosms, and these may or may not be compatible with each other.⁹⁶ One might therefore envision an endless “matrioshka effect,” or *mise-en-abîme* of social strata, with each world being comprised of endless other worlds.⁹⁷ Hence, a heterotopia (or utopia) such as the law school may be constituted by its own real spaces, utopias and heterotopias. Applying Foucault’s ideas to the world within the law school, traditional courses are at times real spaces and at other times utopias, offering hypotheticals and counter-hypotheticals, legal reasoning and rules of law, all with the goal of helping students to learn to “think like lawyers.” In this context, it may be argued that courses such as CRT, as they were originally designed, existed as a particular type of heterotopian space, intended as spaces for Outsiders and Outsider ideas.

93. Heather Piper & Dean Garratt, *Identity and Citizenship: Some Contradictions in Practice*, 52 BRITISH JOURNAL OF EDUCATIONAL STUDIES 276, 278-279 (Sep. 2004).

94. *Id.*

95. Foucault, *Of Other Spaces*, *supra* note 51.

96. Foucault, *Of Other Spaces*, *supra* note 51, at 25-26.

97. A matrioshka is a Russian doll wherein one doll rests inside another, inside another. The term “matrioshka effect” has been used to describe this “world within a world” phenomenon. See e.g., Dominique Turpin, *La Constitutionnalisation Du Droit et de la Justice*, 42 CAHIERS DE DROIT 619, 625 (2001) (author discusses the “matrioshka effect” of certain French constitutional provisions that are replicated in various sub-provisions of the French Constitution). *Mise-en-abîme* occurs when there is a duplication of images or concepts referring to the structural whole in smaller parts of the whole. See e.g., Lucien Dällenbach, *THE MIRROR IN THE TEXT* 7-8, 12-13 (1989) (discussing the literary and artistic literary device of *mise-en-abîme* and describing it as the use of an element within a work which mirrors the work as a whole, such as reproductions of the entire image of a heraldic shield within smaller frames of the shield or the “play within a play” in *Hamlet*).

However, while CRT courses may contest what goes on in the real space or the utopia of the main classroom or in the wider real world, the CRT heterotopia may in many cases be a means of legitimizing the homogenizing norms of the mainstream classroom, whether those norms are legal, social, racial or pedagogical. Indeed, one scholar has suggested that heterotopian spaces may themselves be sources of utopian strivings.⁹⁸ Regardless of the particular form of the CRT heterotopia, a more meaningful goal of CRT courses is to become Foucault's mirror, the unifying space in the law school experience. This would mean, for example, that when students read *Johnson v. M'Intosh*⁹⁹ in property and learn about "Indian Title", if CRT norms were included, all beginning property students would also more closely reflect on the ways in which the outcome in that case is indicative of the social, political, and above all, racial norms that existed when the case was decided.

While the inclusion of CRT into the broader law school curriculum seems an attainable goal, there are some clear obstacles to such inclusion. One obstacle is the resistance of mainstream educators who may view its inclusion as a corruption of traditional law school dogma. There is a substantial and well-known literature that considers the extent to which CRT, especially its methodology of storytelling, is not viewed as a well-grounded form of scholarly endeavor.¹⁰⁰ There are, however, other possible sites of resistance to the broader adoption of CRT into the law school curriculum that are less obvious but potentially more significant sources

98. Cohen, *supra* note 51 (citing KEVIN HETHERINGTON, *THE BADLANDS OF MODERNITY: HETEROTOPIA AND SOCIAL ORDERING* 20-38 (1997)).

99. 21 U.S. 543 (1823). *Johnson v. M'Intosh* was a case in which competing parties claimed the same land. One party obtained the land directly from conquered Native Americans. The Supreme Court held that the party taking from the conquered tribe had only limited "Indian Title" which was inferior to the title held by the competing party. In our seminar we read the case, the second time for most students, as it is a staple of first year Property classes. We spent much time assessing the Court's finding that the Aboriginal people in question used the land "differently" than Europeans and did not make "full" claims to land as did Europeans under Western legal systems. That difference was everything—Aboriginal land use, because it was shared and or transitory, could not be viewed as encompassing the same rights as common law land ownership. Some students remarked on the fact that when they had read the case as first year students, their professors had studiously avoided a discussion of race and the role that it played in the outcome. This despite assertions by the Court that the Aboriginals in *Johnson v. M'Intosh* were "in a state of nature," "savages," and had never been "admitted to the great society of nations." *Id.* at 567. For a full discussion of the Native American claims in *Johnson v. M'Intosh* and the nature of those claims, see Lolita Buckner Inniss, *Toward a Sui Generis View of Black Rights in Canada? Overcoming the Difference Denial Model of Countering Anti-Black Racism*, 9 BERKELEY J. AFR.AM. L. & POL'Y 32 (2007).

100. See, e.g., Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 808 (1993) (considering the "appropriate role" of the narrative form in legal scholarship); Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CALIF. L. REV. 889, 940-941 (1992) (concerning the need to develop a theory for evaluating works that feature norms and methodologies different from those of the evaluator, the paradigmatic situation being one where the evaluator accepts the norms and methodology of standard legal scholarship, but the work being evaluated begins from different ones, such as critical legal studies, feminist theory, or critical race theory).

of opposition. One is the opposition of ostensibly progressive educators who may fear that broader incorporation of CRT norms in the law school curriculum threatens the carefully crafted, race-neutral scholarly programming within law schools. For such persons, including “the racial view” in courses that are not specifically about race seemingly requires them to acknowledge the import of matters whose existence they have very carefully sought to avoid.¹⁰¹

VIII. INCORPORATING CRT INTO MAINSTREAM LEGAL PEDAGOGY

Foucault suggests that heterotopias, by their nature, presuppose a system of opening and closing that both isolates them and makes them penetrable.¹⁰² However, he notes, for the most part a heterotopic site is not freely accessible like a public place.¹⁰³ Entry to such places may be compulsory, as would be the case in a prison or mental institution wherein there is forcible commitment. Entry to certain types of heterotopias may also be gained through submission to “rites and purifications”.¹⁰⁴ To enter these sites one must have “a certain permission and make certain gestures.”¹⁰⁵ The job of insightful CRT scholars is to make such permissions possible, bringing CRT to both the real space and the utopia of legal pedagogy. CRT is a discipline that gained recognition, in significant part, because it dared to take on privilege in all of its forms. CRT insiders should look from the inside out, embracing an ethic of inclusion that dismantles privilege in all of its forms. This means opening the door to scholars dwelling in disciplinary heterotopias, as well as incorporating CRT norms in the law school curriculum and in the wider academy. Non-CRT scholars who inhabit the real space and utopia of the law school must, for their part, also help to re-map established legal pedagogical geographies.

The irony of the continued separation of courses like CRT from the mainstream law school canon is that many CRT students entering law schools have often done so in order effectuate change in mainstream society. Such students understand, or come to quickly understand, that choosing law as the vehicle for change is necessarily fraught with ideo-

101. This is not to suggest that that all progressive professors who choose not to teach classes on race or who oppose incorporating such topics into mainstream legal disciplines do so for unprincipled reasons. There is such a thing as simple lack of interest. Moreover, while scholars of color (or any scholars) have a right to undertake CRT as their principal area of endeavor, this does not mean that they have a duty to do so. This raises the notion posited by Professor Kenji Yoshino of “reverse covering”, performing ones identity in a way that is stereotypical in response to social pressures. See Kenji Yoshino, *Covering*, 111 YALE L. J. 769, 906 (2002). Some scholars have avoided being the “race person” on a faculty where that status is marginalized. This is especially true for newer scholars of color. One scholar, for instance, has written of wondering whether choosing to teach a race class might be tantamount to “racial suicide.” Judith A.M. Scully, *Seeing Color, Seeing Whiteness, Making Change: One Woman’s Journey in Teaching Race and American Law*, 39 U. TOL. L. REV. 59, 62 (2007).

102. Foucault, *Of Other Spaces*, *supra* note 51, at 26.

103. *Id.*

104. *Id.*

105. *Id.*

logical contradictions.¹⁰⁶ These students further understand that resolving such contradictions will not be an easy task. Hence, these students are primed for exposure to the plural norms that may be required to reconcile divergent ideologies. Having courses explicitly designated as CRT in the law school curriculum is one tool for accomplishing this task. However, though such courses are more frequently present at law schools in recent years, the norms of CRT, when segregated from the mainstream curriculum, reach relatively few students.¹⁰⁷ This is an era when the discourse of racial inclusion in higher education has been not so subtly altered to focus on the benefits of such inclusion to white mainstream students and not for the racial minority students who seek inclusion.¹⁰⁸ But, as one scholar has suggested, even given a climate in which diversity is promoted as a mainstream virtue in law schools, the question still arises: are law schools “working diversity”?¹⁰⁹ Are they, in other words, “using the diversity in their student body to actually break down racial stereotypes and promote cross-racial understanding, thereby improving the law school environment for all of their students?”¹¹⁰

To take racial inclusion and the norms of CRT seriously, law schools must work to incorporate such norms throughout the curriculum in order to eliminate racial barriers to understanding.¹¹¹ This inclusion could be achieved in various forms. Scholars working within the discipline must work to foster this opening of curricular doors and the opening of doors to CRT. Opening the doors may help to prevent CRT from becoming so yet another “empire” of the law,¹¹² thus undermining undermine the legal pedagogical program.

106. Margaret Russell, *Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice*, 43 HASTINGS L. J. 749-50 (1992).

107. Francisco Valdes, *Barely at the Margins: Race and Ethnicity in Legal Education - A Curricular Study with LatCritical Commentary*, 13 LA RAZA L.J. 119, 137 (2002); see also Kim Forde-Mazrui, *Learning Law Through The Lens of Race*, 21 J.L. & POL. 1, 2 n.5 (2005) (“The Committee on Curriculum and Research of the Association of American Law Schools found that a majority of schools responding to their survey had in recent years added at least one course on ‘populations historically differentially affected by the law,’ including Race/Ethnicity and the Law, American Indian/Native American Law, and Critical Race Theory.”) (footnotes omitted).

108. See e.g., Jeffrey S. Lehman, *The Evolving Language of Diversity and Integration in Discussions of Affirmative Action from Bakke to Grutter*, in DEFENDING DIVERSITY: AFFIRMATIVE ACTION AT THE UNIVERSITY OF MICHIGAN 61 (Patricia Guinn et al. eds., 2004).

109. Dorothy A. Brown, *The Tenth Annual Frankel Lecture: Address: Taking Grutter Seriously: Getting Beyond the Numbers*, in 43 Hous. L. REV. 1, 3 (2006).

110. *Id.*

111. For a general discussion of the way in which teaching about race can benefit all students, see Rhonda V. Magee, *Toward an Integral Critical Approach to Thinking, Talking, Writing and Teaching About Race*, 42 U.S.F. L. REV. 259 (2008). See also Angela Mae Kupenda, *Making Traditional Courses More Inclusive: Confessions of an African American Female Professor Who Attempted to Crash All the Barriers at Once* (1998), available at <http://digitalcommons.unl.edu/pocpwi3/7>.

112. RONALD DWORKIN, *LAW’S EMPIRE* vii (1986). Dworkin, a prominent CLS adherent, wrote, “We are subjects of law’s empire, liegemen to its methods and ideals, bound in spirit while we debate what we must therefore do.”

IX. CONCLUSION

While arguing for this inclusion, there is the concern that incorporating CRT as part of the broader program in legal education could mean its absorption and ultimate disappearance.¹¹³ There are no doubt “translational risks”¹¹⁴ in incorporating CRT norms—risks of muddying its focus with ideas from “alien, imported, or borrowed disciplines and their accompanying traditions.”¹¹⁵ Nonetheless, the survival of CRT depends upon broader recognition of the specific character of CRT—both its richness and its limitations.¹¹⁶ The richness must be nurtured. The limitations must be honestly addressed with a goal of sharpening the criticality of the genre. Both CRT adherents and the broader institution of legal pedagogy must undertake such actions where they propound their doctrines. Hence, the coda on which this essay ends involves a larger hope that Critical Race Theory norms will one day become Foucault’s mirror, permeating the boundaries of the segregated spaces they inhabit and becoming incorporated into the mainstream legal pedagogical canon.

113. Peter Goodrich, *Sleeping With The Enemy: An Essay on the Politics of Critical Legal Studies in America*, 68 N.Y.U. L. REV. 389, 390-391 (1993) (discussing the way in which CLS has become diffuse and been absorbed into the broader university).

114. *Id.* at 391.

115. *Id.* at 391-92.

116. *Id.* at 392.

