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The Paradoxes of Law Reform Litigation

Dean Rivkin

Counterpoint—

The Paradoxes Of Law Reform Litigation

Dean Hill Rivkin*

I. INTRODUCTION

In *Effective Litigation Strategies to Improve State Education and Social Service Systems* ("the Article"),[1] Professor Albert Kauffman recounted the multi-decade litigation originally styled *Lulac v. Clements*,[2] which centered on dismantling the resilient legacy of discrimination in higher education in the Texas-Mexico borderlands. The explicit goal of this suit was to improve higher education opportunities in this region. Professor Kauffman, a staff attorney with the Mexican American Legal Defense and Educational Fund ("MALDEF") at the time that the litigation began in 1987, was lead attorney for the coalition of organizations, public officials, college students, and others who brought the litigation. For Professor Kauffman, this litigation was "a ten-year labor of love."[3]

That Professor Kauffman is a brilliant, courageous, and experienced civil rights attorney and scholar is not doubted. His Article hit many of the right notes about (a) the role of litigation in generating social change; (b) the multifaceted roles that lawyers play in law reform campaigns; (c) the posture of courts in cases of this genre; and, of course, (d) the critical importance of access to higher education in promoting equality. The Article seeks to synthesize many features, both

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1. 45 J.L. & EDUC. 453 (2016).
2. Richards v. League of United Latin Am. Citizens (Lulac), 868 S.W.2d 306 (Tex. 1993).
3. Kauffman, *supra* note 2, at 453 n.1.

admirable and problematic, of modern law reform litigation.[4] It raises important issues about this type of litigation, which dates most prominently from the legal campaign that led to *Brown v. Board of Education*.[5] As Professor Kauffman noted in his introduction:

> For many years, legal scholars have been quibbling over the normative and legal dimensions of court involvement in "reforming" state social systems. Most of these analyses focus on either the role of individual federal judges or the U.S. Supreme Court in ongoing legal proceedings, or on seminal opinions and their legal offspring. Few analyses focus on the interrelationships among legal proceedings and the community, advocacy, legislative dimensions, and other scholarship that has led to the litigation.[6]

So far so good. Yet, as I describe below, the Article falls short on its promise. Several reasons account for this observation: (1) As I discuss below, a burgeoning literature on campaigns for legal reform has evolved. This literature seeks to capture the dynamics of cases like *Lulac* in more contextual ways than Professor Kauffman does in his article; (2) When lawyers write about their own cases, blind spots emerge. Serious self-reflection is not a habit for many lawyers or, for that matter, many scholars. Built-in ethical and relational obstacles also exist that thwart self-reflection by lawyers. Professor Kauffman pretermits serious discussion about these blind spots; and (3) The Article presents several paradoxes about the very nature of the public interest litigation enterprise and its democratic potential, which are issues that the piece alludes to, yet fails to capitalize on the opportunity to examine deeply.

II. THE *LULAC* CASE

Professor Kauffman made a convincing case that *Lulac* was a progeny of *Brown* and, in some respects, eclipsed *Brown* in its scope and ambition. In a fundamental sense, the *Lulac* litigation, like *Brown*,

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4. Law reform litigation has spawned a number of descriptive labels. These labels include impact litigation, institutional reform litigation, systemic reform litigation, social justice litigation, movement lawyering, cause lawyering, class action litigation, and more. All seek to promote equality and greater justice for usually marginalized groups.

5. 347 U.S. 483 (1954). The *Lulac* lawyers employed *Sweat v. Painter*, 339 U.S. 629 (1950) (successful challenge to *de jure* discrimination in law school admissions in Texas).

6. Kauffman, *supra* note 2, at 457.

was a case designed to dismantle entrenched historical discrimination. Professor Kauffman poignantly recognized: "Both the United States, in general, and Texas, in particular, have long and tragic histories of discrimination against persons of color in access to and equality in education."[7] He cited impressive supporting statistics. It may be too far afield from the focus of his Article, but even a footnote speculating why Texas has been the long-time ground zero of litigation over educational discrimination would have been welcome background.[8]

The MALDEF attorneys organized their case by the "3-D's:" Degrees, Distance, and Dollars. This method was a keen meme to organize the sprawling facts of this case. The ambitious initial goals of the case were two-fold: "(1) to obtain equitable financing for higher education in the border area compared to the rest of Texas, and (2) to achieve better educational access to higher education institutions throughout Texas for the Latino community in admissions, placement, graduate programs and employment."[9] These goals grew out of MALDEF's school finance case, which was "[b]uilt on [d]ecades of [s]truggle."[10] MALDEF pursued only the first goal in *Lulac*, an intended prelude to litigating the Texas-wide issues of discrimination.

The facts of *Lulac*, presented through expert testimony and through the compelling testimony of students and administrators, portrayed the deep-seated nature of the discrimination faced by students and educational institutions in the border region of Texas. The facts bore out the plaintiffs' theory of the case about the disparities facing border students in Degrees, Distance, and Dollars. The state's defense was a classic invocation of formal equality. No discrimination occurred, the state argued, because state authorities had neutrally applied the state's funding formula, which happened to reward schools with Masters' and doctoral degree programs, and because border colleges and universities had not requested the same types and levels of funding as did other higher education institutions in the state.

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7. Kauffman, *supra* note 2, at 458.

8. *See, e.g.*, Fisher v. Univ. of Texas at Austin, 133 S. Ct. 2411, 579 U.S. __ (2016); Plyler v. Doe, 457 U.S. 202 (1982); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

9. Kauffman, *supra* note 2, at 473.

10. *Id.*

After winning class certification, and conducting extensive discovery, plaintiffs prevailed before a jury in a seven-week trial. The jury returned a split verdict, finding that the state's system of higher education discriminated against the border region, but rejecting claims that individual members of the Board of Regents or the Governor were individually liable for the discrimination. Meaningfully explaining this verdict to their clients must have required great skill by the MALDEF lawyers.

To force action, in January, 1992, the trial court issued a nuclear injunction halting the funding of the overall university system in Texas if the Legislature did not devise a nondiscriminatory funding plan by the end of the 1993 legislative session, a year-and-a-half after the issuance of the injunction. The MALDEF lawyers knew that the remedial stage of a case like *Lulac* was the most difficult and the most problematic. Because the trial court's injunction, following the model proposed by MALDEF, did not specify a funding plan, the plaintiffs, joined by other interested persons, launched a public campaign to develop a consensus remedial plan. Knowing that the State would ultimately appeal the trial court's judgment to the Texas Supreme Court, the plaintiffs were prudent in seeking to control their own destiny. Vindicating this decision, the Texas Supreme Court in 1993 reversed the judgment for the plaintiffs and resoundingly ruled for the State.[11]

Professor Kauffman harshly condemned the 1993 decision, saying, among other criticisms that the Texas Supreme Court "Purposely Misconstrued the Plaintiff[s'] Evidence About Discrimination Against Mexican Americans in the Border Area."[12] He also accused the Court of "locking in" past discrimination, citing the Court's characterization the system's use of "neutral" funding formulas an objective. This rationale by the Texas Supreme Court is the embodiment of formal equality, like forbidding the rich and poor from sleeping under the bridge. The Supreme Court also found that the issues in the case were ones of geographic discrimination, not racial inequality.

This Counterpoint is not the forum for analyzing the disastrous decision of the Texas Supreme Court in *Lulac* or for tracing the effects of that decision on future discrimination cases in Texas. Professor

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11. Richards v. League of United Latin Am. Citizens (Lulac), 868 S.W.2d 306 (Tex. 1993).
12. Kauffman, *supra* note 2, at 487.

Kauffman suspected that the Texas Supreme Court was 'gun-shy' in *Lulac* following its path-breaking decision in *Edgewood Independent School District v. Kirby*,[13] the successful school finance case brought by MALDEF that was decided in 1989. One lesson from *Edgewood* stuck with the MALDEF lawyers—devising a remedy was of paramount importance, and this work needed to start promptly after the successful judgment in the trial court.

This lesson led the MALDEF lawyers to shift their emphasis from litigation to community education and organizing. Reconciling the competing interests of the involved parties was a time-consuming enterprise for the lawyers, much like juggling a Rubik's Cube. As stated in the Article:

> The task of the MALDEF lawyers and their associates was to devise plans [that] met the needs of the local cities, universities and communities. At the same time, the organizers of the plan realized it was necessary to put limitations on the overall plan in order to design a border wide plan that was both comprehensive and reasonable.[14]

After many meetings throughout the border region, the Border Region University Plan emerged. This plan was a remarkable achievement, and it would have added tremendous value to the Article if Professor Kauffman had provided a thicker description of the competing interests, exactly how MALDEF reconciled them, and the challenges faced by the MALDEF lawyers as counsel for the competing plaintiffs. They projected the total cost of the Plan to be over two billion dollars that would be added over several years to the budgets of the involved border universities.

MALDEF succeeded in having the Plan introduced in the Texas Legislature, which it ultimately passed as the South Texas Initiative. This initiative provided substantially more funding to the border universities. The Texas Supreme Court was not unaware of the Legislature's actions, citing in its subsequent opinion the "good faith" of the Legislature.[15] Through data, Kauffman shows how this increased funding improved higher education opportunities in the border region,

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13. 777 S.W.2d 391 (Tex. 1989).
14. Kauffman, *supra* note 2, at 490.
15. *Lulac*, 868 S.W.2d at 324 n.10.

thereby creating "a seismic shift in the structure of Texas higher education."[16]

III. SHORTCOMINGS AND PARADOXES

A. Litigation as Politics

Politics infused the *Lulac* litigation. In a raw sense, the case was more about getting the State to send more dollars to the border region for higher education than it was a pure case of discrimination, if such a thing exists. Redistributing money is the classic definition of a political problem. For sure, the plaintiffs had to fit the underlying facts into a discrimination framework before they could get to a viable remedy, and the MALDEF lawyers performed this task with skill. In their grounded work in the remedial phase, though, they surely resembled politicians more than litigators.

Although Professor Kauffman recounted the outer process of collaboration that led to the Joint Border Region University Plan, the Article gives short shrift to the inner workings of the collaboration. How did the conflicts among the plaintiffs and other stakeholders get resolved—behind closed doors or in the open meetings? What role did the real politicians play in forging a resolution?

Professor Kauffman would have made a real contribution to a better understanding of public interest lawyering by describing in detail the skills that were required to hold the diverse collection of *Lulac* constituents together. He cited the path-breaking book by Jay Heubert, *Law and School Reform: Six Strategies for Promoting Educational Equity*, and correctly affirmed this observation of Heubert's:

> Heubert predicts that lawyers will need to pay close attention to political climates, as coalitions have proved to be important in achieving victory. Lawyers will also need to develop several non-litigation skills such as practicing preventative law, mediating, and lobbying government branches.[17]

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16. Kauffman, *supra* note 2, at 503.
17. Kauffman, *supra* note 2, at 510.

Moreover, how did the MALDEF lawyers switch gears from fiercely adversarial litigation to softer collaborative public interaction? What were the relationships with the Tomas Rivera Center and Texas Rural Legal Aid, the organizations that aided MALDEF in its public outreach? Were there thoughtful, charismatic leaders in the communities who helped break deadlocks regarding the distribution of the funding and overcoming the problem of the "*huesitos*," or "the little bones?"[18] Compromises often founder over these "little bones."

Finally, though briefly mentioned, MALDEF's media strategy in "selling" its remedy seemed pivotal to the success of the plaintiffs.[19] This aspect of public interest litigation is as political as it gets, yet is often obscured by a focus on legal and judicial strategies. Was there a coherent media strategy in *Lulac*? What role did the lawyers, who are prone to want to control every facet of the litigation, play in its development and implementation?

B. Litigation as Campaigns for Social Justice

Professor Kauffman noted at the beginning of the Article that "[f]ew analyses focus on the interrelationship among legal proceedings and the community, advocacy, legislative dimensions, and other scholarship that has led to the litigation."[20] However, he failed to draw on a growing literature that sheds healthy light on the adaptable nature of public interest litigation and advocacy and the many nuanced roles that lawyers play in community campaigns for institutional reform. Are all social justice campaigns, as Professor Kauffman phrases it, "*sui generis?*"[21] Perhaps.

A burst of articles by academics and lawyers have usefully unpacked the "inner" story of reform campaigns and cases. To name a few, articles by Professor Anthony V. Alfieri,[22] Professor Sameer M. Ashar,[23] Professor Alexi Nunn Freeman and community lawyer Jim

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18. Kauffman, *supra* note 2, at 518.
19. Kauffman, *supra* note 2, at 520-23.
20. Kauffman, *supra* note 2, at 457.
21. Kauffman, *supra* note 2, at 532.
22. *Inner-City Poverty Campaigns*, 64 UCLA L. REV. 414 (2017).
23. *Deep Critique and Democratic Lawyering in Clinical Practice*, 104 CALIF. L. REV. 201 (2016).

Freeman,[24] Professor Michael A. Olivas,[25] public lawyers Nisha Agarwal and Jocelyn Simonson,[26] and legal services lawyer Michael Grinthal[27] show how modern theory and practice combine to generate social change. In these pieces, courts are not the cynosure of where the action is. The strategic uses of courts to create spaces for direct action and other forms of political action are part of the repertoire of this new wave of lawyers and academics, but they are extremely cognizant of not putting most of their eggs in the judicial basket. The burden would have been heavy, but Professor Kauffman's article would have benefited from these newer perspectives.

C. Paradoxes in Litigation Post-Mortems by Lawyers

Writing reflectively about one's own case is treacherous. Even in long-ended litigation, like *Lulac*, a tendency to pretermit hard issues, downplay disappointments, and exaggerate successes often exists. To his credit, Professor Kauffman acknowledged several of these issues.

Professor Kauffman noted the dilemma, for example, that public interest lawyers face in developing the facts and strategies essential to winning their public law cases. On the one hand, lawyers in large public law class action cases like *Lulac* want to be as transparent as possible in explaining the case to the "people." Yet, the risks of disclosing information often provided to them confidentially, and previewing analyses of facts developed for the litigation, perversely gives the opposing side the ability to use this information for its side, or at least to be prepared to counter it, as happened in *Lulac*. Professor Kauffman candidly acknowledged that, at one public meeting where he discussed aspects of the case, the State lawyers used this intelligence to bolster their defense.[28] Other lawyers in public interest cases would have found value in reading Professor Kauffman's thoughts on how to reconcile this tension.

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24. *It's About Power, Not Policy: Movement Lawyering for Large-Scale Social Change*, 23 CLIN. L. REV. 147 (2016).

25. *Who Gets To Control Civil Rights Case Management? An Essay on Purposive Organizations and Litigation Agenda-Building*, 2015 MICH. ST. L. REV. 1617 (2016).

26. *Thinking Like a Public Interest Lawyer, Theory, Practice, and Pedagogy*, 34 N.Y.U. REV. L. & SOC. CHANGE, 455 (2010).

27. *Power With: Practice Models for Social Justice Lawyering*, 15 U. PA. J.L. & SOC. CHANGE 25 (2011-2012).

28. Kauffman, *supra* note 2, at 519 n.250.

The Article also would have benefited from Professor Kauffman's thoughtful assessment of the deeper meaning – both to him personally and to the causes that he cares passionately about – of the loss in the Texas Supreme Court. Winning by losing is a time-honored public interest litigation strategy. Professor Jules Lobel's book, *Success Without Victory: Lost Legal Battles and the Long Road to Justice in America*, is a classic account of how litigation is often brought to further broader goals than just narrowly winning the "case." These goals include aiding political movements, educating the public about injustice, and challenging entrenched discrimination. These goals certainly animated the work of the MALDEF lawyers, but did they contemplate the devastating loss of the case in the Texas Supreme Court and its potential doctrinal impacts on future mass discrimination cases? Did they bring the case with a healthy understanding that they had a much better chance of convincing a "local" jury of the correctness of their cause, which they effectively did, than in persuading the Texas high court of the legal underpinnings of their case? What impact did the fall-out from *Edgewood I*[29] have on MALDEF's calculus of winning two major lawsuits in a row? Professor Kauffman is understandably outraged by the result in the Texas Supreme Court. An in-depth discussion of this denouement of the case would have been illuminating.

D. Public Interest Lawyers and Class Action Plaintiffs with Diverse Interests

The late Professor Derrick A. Bell, Jr., wrote a classic piece in 1976 titled *Serving Two Masters: Integration Ideals and Client Interest in School Desegregation Litigation*.[30] In this canonical article, Professor Bell drew on his own career as a civil rights lawyer to surface the largely opaque proposition that the interests of clients in civil rights cases might diverge from the goals of their lawyers. As Professor Bell showed, the interests of parents in desegregation cases in achieving the best possible educational results for their children often conflicted with the post-*Brown* ends sought by public interest lawyers in achieving desegregated school systems. Community and pupil dislocations often

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29. *See supra* note 14.
30. 85 YALE L.J. 470 (1976).

resulted from the firm insistence of the lawyers to press the bedrock remedy of creating desegregated school systems.

The conflicting interests of the class members in *Lulac* surely were more than straightforward disputes about how to divide up the expanded monetary pie that the litigation created. For example, did subgroups of the class believe that their political representatives, who were also plaintiffs, failed to represent them forcefully and effectively in the Texas Legislature? Did various border-region college and university faculties, students, and administrators envision the ultimate outcome of the case differently? Other than citing the many meetings that they held, how did the MALDEF lawyers so effectively resolve the differences among many masters in the case?

E. Can Public Interest Litigation Be "Modeled?"

Reviewing a slice of the literature on law reform advocacy in child welfare litigation and citing litigation involving the exclusion or segregation of children with disabilities, Professor Kauffman sees an "organized structure" and "clarity" in these cases.[31] His critique of the literature is that "they are not dynamic and synergistic enough to model the effects of a lawsuit on a legislature or the community at large."[32] He proposes a "model that better reflects the realities of working on litigation involving state systems."[33]

Professor Kauffman should be applauded for his attempt to deconstruct systemic public interest litigation. In the end, however, it is nearly impossible to develop a generalizable model for this genre of litigation. Each law reform case reflects the particular context of its time, the unique circumstances of the plaintiffs, the lawyers for the parties–of both sides, the courts, the media, the political climate, local, state, and federal dynamics, and other factors that are impossible to fit into a "model." Several brief examples illustrate this proposition.

First, in New York, litigation over school finance and school adequacy has spanned decades. The Campaign for Fiscal Equity, a nonprofit advocacy organization dedicated to remedying the disparities in resources available to students in the New York City public schools,

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31. Kauffman, *supra* note 2, at 515.
32. *Id.*
33. *Id.*

led this litigation. In this interminable litigation, New York's highest court held that the state was obligated to provide the opportunity for a "meaningful high school education" under the state constitution, but had failed to do so in New York City, the country's largest school district with over 1.2 million students.[34] The court gave the State Legislature until July 30, 2004, to remedy the situation, declaring that the state should first determine what an "adequate" education costs and should then provide for the necessary funding. The case went on and on after this ruling, with politics inextricably intertwined with the constitutional dictates of the court. The vicissitudes of the New York litigation are hard to catalogue, even in a model like Professor Kauffman's, which purports to capture the essential dynamism of cases like this one.

The same is certainly true in other multi-decade and multi-year cases. The many diverse examples include (1) the acrimonious Kansas school finance litigation;[35] (2) the special education litigation in the District of Columbia that ordered the school system to remedy years of failing to provide remedies to students who had prevailed in due process cases under the Individuals with Disabilities Education Act[36]; and, in the child welfare context, the *Brian A.* case in Tennessee,[37] a case virtually identical to the *B.H.* case that the Article discussed.[38] *Brian A.* challenged conditions in Tennessee foster care system. After seventeen years of court oversight, substantial improvements ensued thanks to greater expenditures by the State. The story, however, is complex and hard to fit into Professor Kauffman's model.

This contextual dynamic in virtually all large-scale social justice litigation is critical to understanding the very questions that Professor Kauffman seeks to answer in his article. These questions go to the heart of the democratic "legitimacy" of litigation like *Lulac.* Without the benefit of an independent historical retrospective on law reform litigation,[39] it may be impossible to write a thick description and analysis of cases in this genre.

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34. Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326 (N.Y. 2003).
35. Gannon v. State, 390 P.3d 461 (Kan. 2017).
36. Blackman v. District of Columbia, 328 F. Supp. 36 (D.D.C. 2004).
37. Brian A. v. Haslam, Civ. Act. No. 3:00-0445 (M.D. Tenn. 2011).
38. Kauffman, *supra* note 2, at 510-14.
39. *See, e.g.*, Heather Ann Thompson, *Blood in the Water: The Attica Prison Uprising of 1971 and Its Legacy* (2016).

IV. CONCLUSION

Professor Kauffman has given us flashes of brilliant insights while reconstructing his role in the *Lulac* case. Rather than burying these understandings of the nature of lawyers and the legal and political system in complex cases seeking institutional reform, he could have built on his experiences and injected into his article a more "post-modern," for lack of a better term, sensibility. For those who care deeply about combatting discrimination and advancing equality, like Professor Kauffman, there is urgent need in these times for fresh approaches. Professor Kauffman is a scholar and lawyer who certainly will be able to provide these new lenses in his future scholarship.