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Doing Environmental Justice in Appalachia: Lawyers at the Grassroots and the Aspiration of Social Change

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DOING ENVIRONMENTAL JUSTICE IN APPALACHIA: LAWYERS AT THE GRASSROOTS AND THE ASPIRATION OF SOCIAL CHANGE

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In the late 1960s and early 1970s, when progressive lawyers and communities first linked up in Appalachia, we didn't call it environmental justice. In representing citizens and their organizations (we always called them organizations, not groups—it sounded more official) in environmental cases in the mountains of Appalachia, the struggles had to do more with elemental precepts of power and self-determination than with the environment or justice.[1] The "petty disturbances" that these cases represented were anything but petty to the people involved.[2] Doing environmental justice in the coal fields brought lawyers, people, and organizations together in uncharted ways.

In 1972, I was a Regionald Heber Smith Community Lawyer Fellow (Reggie) working with the Appalachian Research and Defense Fund (Appalred), a then OEO-funded legal services program.[3] It didn't take much sensitivity on the part of community lawyers to see that poverty in the mountains was inextricably connected to exploitation of

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1. *See* JOHN GAVENTA, POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY (1980).

2. Professor Roberto Unger used the phrase "petty disturbances" to describe cases brought by people and communities against the prevailing order. *See* Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 667 (1983). The term is problematic because it can be read to diminish the importance of local struggles to the people who wage them.

3. The origins of Appalred are documented in MILNER S. BALL, THE WORD AND THE LAW 16-24 (1993).

the region's coal resources. But recognizing this underlying phenomenon and "lawing" against it were two different things.

We turned to the indigenous citizens organizations that were forming throughout the central coal fields—The Citizens League To Protect Surface Rights, The Appalachian Group To Save The Land And The People, Save Our Cumberland Mountains, Inc. (SOCM), and others—to chart our course.[4] Abolishing strip mining was a universal objective, and we channeled portions of our time toward this goal by contributing data and legal justifications to the handful of members of Congress who advocated legislation abolishing strip mining.[5]

On a less global level, we worked to ameliorate the polycentric impacts of coal mining on people, communities, and the environment. *Save Our Cumberland Mountains, Inc. v. Tennessee Valley Authority*[6] is a good illustration of these efforts. Having worked in the mountains of Tennessee as a law student with the Vanderbilt Student Health Coalition, soon after I arrived at Appalred in 1972 I reacquainted myself with the people in the coal fields of Northeast Tennessee who were struggling to improve their communities, including two community organizers and several citizen leaders who had just founded SOCM.[7] In our discussions, the SOCM leadership expressed hope that with lawyers working for them, the legal system might be used to vindicate the rights of citizens in confronting the pervasive harms of coal-mining.

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4. The groups and their strategies of protest against strip mining in the 1960s are recounted in Mary Beth Bingman, *Stopping the Bulldozers: What Difference Did It Make?*, *in* FIGHTING BACK IN APPALACHIA: TRADITIONS OF RESISTANCE AND CHANGE 17-30 (Stephen L. Fisher ed., 1993); *see also* David B. Brooks, *Strip Mining in East Kentucky*, *in* APPALACHIA IN THE SIXTIES: DECADE OF REAWAKENING (David S. Walls & John B. Stephenson eds., 1972).

5. *See* MARC KARNIS LANDY, THE POLITICS OF ENVIRONMENTAL REFORM: CONTROLLING KENTUCKY STRIP MINING (1976).

6. 374 F. Supp. 846 (E.D. Tenn. 1972), *aff'd*, 480 F.2d 926 (6th Cir. 1973), *cert. denied*, 415 U.S. 914 (1974).

7. For a panoramic history of SOCM, *see* Bill Allen, *Save Our Cumberland Mountains: Growth and Change Within a Grassroots Organization*, *in* FIGHTING BACK IN APPALACHIA, *supra* note 4, at 85-99.

This belief in lawyers was curious. Lawyers had long been used to oppress citizens in Appalachia.[8] But this experience seemed to impress people with the power of the legal system. Consequently, when lawyers presented themselves to work on behalf of citizens organizations, there was an abiding hope that the legal system could be deployed on the people's behalf.

A problem that emerged as important to the people of SOCM was the harm caused by overweight coal trucks. In the coal fields of Tennessee, these trucks carried coal over local highways to one major source—the Tennessee Valley Authority's (TVA) Kingston Steam Plant, located on the Clinch River. Like the roads of Italy leading to Rome, the roads in East Tennessee seemed to lead to Kingston. A steady stream of coal trucks exceeding the state-prescribed weight and axle limits traversed these mostly two-lane highways.[9] Overweight, these trucks left dangerously damaged roads, huge lumps of coal, and significant costs to each county for highway repair and maintenance.

SOCM wanted to litigate these overweight coal trucks out of existence. As lawyers, we were operating in *terra incognita.* I will never forget attending a Reggie training meeting in 1972 in which all new Reggies recounted their legal work for the benefit of the group. Welfare, consumer issues, and housing were the staple caseloads of most Reggies. Overweight coal trucks stuck out like a sore thumb.

In close consultation with our SOCM clients, a consensus was reached that we would file a federal action, not against the multiple firms that actually carried the coal, but against TVA. From a practical standpoint, TVA was a logical target. It was the cynosure of coal activity in east Tennessee.[10]

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8. The broadform mineral deed is a notorious example. *See* RONALD D. ELLER, MINERS, MILLHANDS, AND MOUNTAINEERS: INDUSTRIALIZATION OF THE APPALACHIAN SOUTH, 1880-1930 44-85 (1982); Dean Hill Rivkin, *Lawyering, Power, and Reform: Litigating Against the Broadform Mineral Deed in Kentucky* (forthcoming).

9. The governing limits were set out in TENN. CODE ANN. §§ 59-1109 and 59-1112 (1972) (current version at §§ 55-7-203 and 55-7-206).

10. *See* Dean Hill Rivkin, *TVA, The Courts, and the Public Interest, in* TVA: FIFTY YEARS OF GRASSROOTS BUREAUCRACY (Paul Conkin & Erwin Hargrove eds., 1983).

Collecting data for the case was not a daunting task. Our clients helped us obtain TVA weigh records, which documented the extent and nature of the problem. Our clients also produced a video (a relatively new strategy in 1972) graphically showing the procession of overweight coal trucks that entered the Kingston Steam Plant, where each truck was immediately weighed by TVA on exceptionally precise scales. At the scales, on an intermittent basis, TVA also probed the loaded coal for quality. Our clients were certain that coal operators were selling poor quality coal to TVA, a practice that was going undetected. We did not include this issue in the litigation, primarily because we did not have solid data or theories on which to proceed.

The lawsuit was filed in the United States District Court for the Eastern District of Tennessee in Knoxville, home of TVA's headquarters. At the time, our two main legal theories were creative to say the least. In one, we argued that TVA's acceptance of overweight coal trucks at its steam plant violated a fundamental principle of federalism; namely, that a federal agency should not encourage the systematic violation of state law. To support this contention, we cited a 1958 case decided by the United States Supreme Court, *Tank Truck Rentals, Inc. v. the Commissioner of Internal Revenue*,[11] in which the Court upheld the disallowance of deductions claimed by taxpayers, who owed a fleet of motor carriers, for fines and penalties imposed on them for willful violation of Pennsylvania statutes governing the maximum weight limit for trucks operated on Pennsylvania's highways. In *Tank Truck Rentals*, the plaintiff acknowledged that it was taking the calculated risk of escaping the notice of state's enforcement officials and admitted that its trucking operations were so hindered by the maximum weight limitations that it could not operate profitably and also observe Pennsylvania law. The Court rejected these contentions by underscoring the implicitly unequivocal congressional intent not to allow the income tax laws, as administered and interpreted by the IRS, to be used in a way that might encourage violation of declared public policy. The rationale of the Court in *Tank Truck Rentals*, was directly applicable to our case:

11. 356 U.S. 30 (1958).

> Here we are concerned with the policy of several states 'evidenced' by penal statutes enacted to protect their highways from damage and to insure the safety of all persons using them . . . . It is clear that assessment of the fines was punitive action and not a mere toll for the use of the highways: the fines occurred only in the exceptional instance when the overweight run was detected by the police. Petitioner's failure to comply with the state laws obviously was based on a balancing of the cost of compliance against the chance of detection. Such a course cannot be sanctioned, for judicial deference to the state action requires, whenever possible, that a State not be thwarted in its policy. We will not presume that the Congress, in allowing deductions for income tax purposes, intended to encourage a business enterprise to violate the declared policy of a State. To allow the deduction sought here would but encourage continued violations of state law by increasing the odds in favor of noncompliance. This could only tend to destroy the effectiveness of the State's maximum weight laws.[12]

The jurisprudence of *Tank Truck Rentals* seemed to apply directly to TVA's complicity in the systematic violation of Tennessee's weight and axle limits.

Our next claim was also ahead of the curve. We contended that TVA's superficial "final Environmental Impact Statement, Policies Relating To Sources Of Coal Used By Tennessee Valley Authority For Electric Power Generation," a skimpy, twelve-page document marked by superficial discussions of TVA's coal purchasing and use practices, violated the National Environmental Policy Act (NEPA). We requested that TVA be ordered to prepare an Environmental Impact Statement (EIS) that complied with what we urged NEPA meant.

Our main aim was to enjoin TVA from accepting overweight coal trucks at its plant. If TVA turned these trucks away, presumably the trucking companies would not exceed the limits of the law, although there was some concern that the companies would continue to truck the coal to a dumping point near the plant, and then carry the coal into the plant in legal trucks. Regardless, TVA had the means by which to stop the damage.

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12. *Id.* at 34-35.

At a hearing on TVA's motion to dismiss, SOCM members were well represented in the courtroom. So was TVA's legal staff. Despite our contention that the hearing was also on our motion for a preliminary injunction, we were not permitted to show the video tape or put on any evidence. The Judge simply heard oral arguments, and, as was his custom, read his decision from the bench at the conclusion of the hearing. His order was succinct:

> Plaintiffs seek declaratory and injunctive relief prohibiting the Tennessee Valley Authority (T.V.A.) from accepting delivery of coal from private contractors when tendered in trucks that are overloaded in violation of the Tennessee weight limitation statute. (citation omited). T.V.A. denies that it has police or regulatory power over private parties to enforce state statutes. It contends that it would breach its contract with its term contractors, if it rejected a tender of delivery on the ground that the delivery truck was overloaded.
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> The facts are essentially undisputed. T.V.A. is a wholly-owned corporation of the United States authorized to generate electric power. It contracts with private mine operators for the purchase of coal, f.o.b. Kingston Steam Plant, in order to generate electric power at that Plant. It weighs the delivery trucks before and after unloading, and it acknowledges that a "substantial number" exceed the gross maximum weight permitted under Tennessee law. None of these term contracts grant T.V.A. an option to reject delivery in overloaded trucks. It has notified the Governor of Tennessee of these violations of state law.
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> Plaintiff, J. W. Bradley, lives on Highway 116 over which said trucks transport coal to the Kingston Steam Plant. He deposes that around one hundred such trucks pass his house each day "practically all" of which are overloaded. He further deposes that overloading damages the state and county roads, resulting in extraordinary wear and tear on private vehicles, including his own, and creating a safety hazard to local drivers.
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> The T.V.A.'s motion to dismiss must be sustained. The gravamen of the complaint is the failure of T.V.A. to enforce a state statute against a nonparty to this action. The facts alleged do not remotely suggest that T.V.A. is violating any federal right or immunity. (citation omitted). The state statute creates both penal and injunctive sanctions to prepenal and injunctive sanctions to prevent overloading. The Governor of Tennessee is charged with the responsibility for enforcing state laws, not the T.V.A.[13]

We appealed the case to the Sixth Circuit. We argued both the federalism and NEPA claims. The Sixth Circuit affirmed in a brief *per*

13. 374 F. Supp. at 847.

curiam decision. As a symbolic gesture, our clients requested that we file a petition for a writ of certiorari to the United States Supreme Court. As expected, it was denied.

Following *SOCM v. TVA*, several years elapsed before the organization felt ready to use the legal system again to tackle the issue of overweight coal trucks. Losing a case has consequences for citizen organizations—not always adverse. Here, SOCM used the visibility that it gained in challenging TVA to build its grassroots membership and to focus on other issues involving strip mining and communities. Finally, in 1977, with representation from lawyers from the East Tennessee Research Corporation, a small Ford Foundation-funded public interest law firm (and my continued involvement as a member of the faculty of the U.T. Legal Clinic), SOCM filed suit under state law seeking to enjoin several of the largest trucking companies from continuing to haul coal in illegally overweight trucks.

Remarkably, the Chancellor who heard the case on our motion for a temporary injunction, whose judicial district was slightly outside the heart of the coalfields, granted our request. At the same time, the new leadership at TVA stated it would halt the flow of overweight trucks into the Kingston Steam Plant. In short order, the issue was resolved, and SOCM had a victory to bring to its membership. Even more powerful was SOCM's successful effort to defend barratry charges brought by the trucking companies—an early SLAPP suit. In *American Civil Liberties Union of Tennessee v. Tennessee*,[14] SOCM joined the ACLU in a successful challenge to the constitutionality of Tennessee's antiquated barratry statute.

The lessons that lurk in this early tale of environmental justice raise the same hard questions that the movement is confronting today. A few deserve mention—their full dimensions are beyond the scope of this essay. First, there were very few people of color involved with SOCM in its early years. Demographics and racism ensured that such was the case. Class and poverty played a powerful role in this Appalachian struggle.

14. 496 F. Supp. 218 (M.D. Tenn. 1980).

Linking people from Appalachia with their counterparts in communities of color is critically important to the future of the environmental justice movement. Organizations such as the Highlander Research and Education Center, through its STP (Stop the Pollution) Workshops, seek to bring together diverse communities to share their knowledge about the inner dynamics of environmental justice issues. Through such interchange, people in Appalachia are able to convey their rich history with others.

Second, the lawyering that we did in *SOCM v. TVA* was tangibly different from the public interest environmental lawyering of its time.[15] We keenly believed that, as lawyers, we had to be connected to a strong local effort—with local leaders, spokespersons, and membership. This was hard work. It involved interminable meetings, explanations, and compromises. The work of lawyers in the environmental justice movement is only beginning to be explicated.[16] We need more textured accounts of the roles that lawyers can and should play in this movement.

Finally, the limits of litigation and law in community environmental struggles needs a stronger theoretical base.[17] Through the self-reflection of lawyers *and* clients in the movement, sound theory should evolve. Accounts such as this one—in much more expanded form—should add to the calculus of judgments that lawyers and communities will make in the future.

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15. For a history of the litigation conducted by the early public interest environmental law firms, *see* Samuel P. Hays, *Environmental Litigation in Historical Perspective*, 19 U. MICH. J.L. REF. 969 (1986); PHILIP SHABECOFF, A FIERCE GREEN FIRE: THE AMERICAN ENVIRONMENTAL MOVEMENT (1993).

16. *See, e.g.*, Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619 (1992).

17. *See* Luke W. Cole, *Remedies for Environmental Racism: A View from the Field*, 90 MICH. L. REV. 1991 (1992).