Winter 1999

Lawyering, Power, and Reform: The Legal Campaign to Abolish the Broad form Mineral Deed

Dean Rivkin

LAWYERING, POWER, AND REFORM: THE LEGAL CAMPAIGN TO ABOLISH THE BROAD FORM MINERAL DEED

DEAN HILL RIVKIN*

I. PROLOGUE

I first drafted this essay in 1984. My long-time friend and colleague, John Gaventa, the author of *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley*,[1] gave my name to Professor Dennis Brion of Washington & Lee University Law School, who was searching for participants for a Francis Lewis Center Colloquium. John told Dennis that, as a law professor and lawyer with experience in Appalachia, I was likely to have ideas on translating the framework in Gaventa's book into a legal setting. When Dennis and I spoke, I immediately thought of the legal campaign to abrogate the broad form mineral deed in Kentucky. This was a project that had occupied me since 1970, when, as a law student, I first did legal work in Appalachia under the auspices of the Vanderbilt University Student Health Coalition, then a coalition of health and legal workers who devoted summers responding to the needs of selected communities in remote corners of Tennessee and Kentucky.

When I joined Appalachian Research and Defense Fund (APPALRED) in 1972 as a Reginald Heber Smith Community Lawyer Fellow, the issue of the broad form mineral deed, and its role in authorizing the widespread damage caused by strip-mining throughout eastern Kentucky, was prominent among residents of the coal fields. Working with individual and organizational clients, APPALRED carried on the legal campaign that had first been seriously mounted in the late 1960s.

---

* Professor of Law, University of Tennessee College of Law. Many people have contributed to the evolution of my thinking about the role of lawyers in social reform litigation. John Rosenberg, Director of Appalachian Research and Defense Fund of Kentucky, Inc., and Brenda McGee deserve special recognition for assisting me throughout this piece. Neither agrees with all I say here, but their inspiration infuses this work. I served as counsel or advisor in many of the cases discussed in this piece. It is intended as a personal account, nothing more.

1. JOHN GAVENTA, POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY (1980). Since the publication of Gaventa's book, a healthy literature on the nature and meaning of power and resistance has emerged, some of it critical of Gaventa's framework. *See, e.g.*, TORBEN BECH DYRBERG, THE CIRCULAR STRUCTURE OF POWER: POLITICS, IDENTITY, COMMUNITY 63-70 (1997); JAMES C. SCOTT, DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS 70-107 (1990).

When I joined the faculty at the University of Tennessee College of Law, I continued work on broad form deed issues. I primarily consulted with John Rosenberg, the director of the Appalachian Research and Defense Fund of Kentucky, and other Kentucky-based lawyers. In addition, I represented Save Our Cumberland Mountains (SOCM), a Tennessee citizens' organization, and its members, first in its successful legislative effort to nullify the broad form deed in Tennessee and then to defend the legislation in the courts.[2]

I was working as a clinical teacher in 1984 when I agreed to prepare this paper for the colloquium at Washington & Lee University School of Law. I had only intimations of the embryonic movement to reappraise lawyering from a present standpoint, best known today by the works of Professor Gerry López,[3] Professor Lucie White,[4] Professor Louise Trubek,[5]

---

2. *See* Doochin v. Rackley, 610 S.W.2d 715 (Tenn. 1981); *see also infra* notes 122-29.

3. *See, e.g.*, GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992); Gerald P. López, *An Aversion To Clients: Loving Humanity and Hating Human Beings*, 31 HARV. C.R.-C.L. L. REV. 315 (1996); Gerald P. López, *Economic Development in the "Murder Capital of the Nation,"* 60 TENN. L. REV. 685 (1993); Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984); Gerald P. López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989); Gerald P. López, *The Work We Know So Little About*, 42 STAN. L. REV. 1 (1989).

4. *See, e.g.*, Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157 (1994) (drawing on the model of power first elaborated by Steven Lukes in POWER: A RADICAL VIEW (1974)); Lucie E. White, Goldberg v. Kelly *on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 861-62 (1990); Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987-88); Lucie E. White, *No Exit: Rethinking "Welfare Dependency" from a Different Ground*, 81 GEO. L.J. 1961 (1993); Lucie E. White, *On the "Consensus" to End Welfare: Where Are the Women's Voices?*, 26 CONN. L. REV. 843 (1994); Lucie White, *Paradox, Piece-Work, and Patience*, 43 HASTINGS L.J. 853 (1992); Lucie White, *Representing 'The Real Deal,"* 45 U. MIAMI L. REV. 271 (1990-1991); Lucie White, *Searching for the Logic Behind Welfare Reform*, 6 UCLA WOMEN'S L.J. 427 (1996); Lucie E. White, *Seeking ". . . The Faces of Otherness . . .": A Response to Professors Sarat, Felstiner, and Cahn*, 77 CORNELL L. REV. 1499 (1992); Lucie E. White, *To Learn and Teach: Lessons From Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699 [hereinafter *To Learn and Teach*]; Lucie White, *"Why Do You Treat Us So Badly?" On Loss, Remembrance, and Responsibility*, 26 CUMB. L. REV. 809 (1996).

5. *See, e.g.*, Louise G. Trubek, *Critical Lawyering: Toward a New Public Interest Practice*, 1 B.U. PUB. INT. L.J. 49 (1991); Louise G. Trubek, *Embedded Practices: Lawyers, Clients, and Social Change*, 31 HARV. C.R.-C.L. L. REV. 415 (1996); Louise G. Trubek, *Introduction to the Symposium on New Approaches to Poverty Law, Teaching, and Practice*, 4 B.U. PUB. INT. L.J. 235 (1995); Louise G. Trubek, *Making Managed Competition a Social Arena: Strategies for Action*, 60 BROOK. L. REV. 275 (1994).

Professor Tony Alfieri,[6] and a growing number of clinicians and practitioners.[7] I presented the paper at the Washington & Lee colloquium and benefited from the exchanges of the invited respondents, including members of the Washington & Lee law faculty and Professor Mark Tushnet. I later presented a revised version of the paper in 1986 at a clinical legal theory workshop at Columbia University School of Law, organized by Professor Steve Ellmann. After the Columbia presentation, the paper hibernated for years as I continued my consulting role with APPALRED in its representation of the Kentucky Fair Tax Coalition, now known as Kentuckians for the Commonwealth, an emergent citizens' organization. In the 1980s, Kentuckians for the Commonwealth organized a broad-based political campaign against the broad form deed and, as my epilogue explains, succeeded in gaining the passage of an amendment to the Kentucky

---

6. *See, e.g.*, Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1987-88); Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995); Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769 (1992); Anthony V. Alfieri, *Impoverished Practices*, 81 GEO. L.J. 2567 (1993); Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063 (1997); Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 HARV. C.R.-C.L. L. REV. 325 (1996); Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747 (1994) (book review); Anthony V. Alfieri, *Race-ing Legal Ethics*, 96 COLUM. L. REV. 800 (1996); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991).

7. *See, e.g.*, Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992) (providing an account of cases heard in Baltimore's rent court and focusing on the injustices suffered by the tenants, comprised mainly of poor black women); Susan Bryant & Maria Arias, *A Battered Women's Rights Clinic: Designing a Clinical Program Which Encourages a Problem-Solving Vision of Lawyering That Empowers Clients and Community*, 42 WASH. U. J. URB. & CONTEMP. L. 207 (1992) (providing a case study of how the curriculum at the City University of New York's Law School at Queens College succeeds in teaching students to represent battered women); Naomi R. Cahn, *Inconsistent Stories*, 81 GEO. L.J. 2475 (1993) (discussing the reasons for and the dilemmas presented by conflicting stories told by litigants within the legal system); Luke W. Cole, *The Struggle of Kettleman City: Lessons for the Movement*, 5 MD. J. CONTEMP. LEGAL ISSUES 67 (1993-1994) (providing an account of community efforts which prevented a toxic waste incinerator from being built in Kettleman City, a tiny community comprised mainly of Latino farm workers); Peter Margulies, *Political Lawyering, One Person at a Time: The Challenge of Legal Work Against Domestic Violence for the Impact Litigation/Client Service Debate*, 3 MICH. J. GENDER & L. 493 (1996) (discussing political lawyering and advocating a more engaged, less bureaucratic, public interest law); Paul R. Tremblay, *A Tragic View of Poverty Law Practice*, 1 D.C. L. REV. 123 (1992) (suggesting that poverty lawyers may allow their clients to choose between short-term gain and long-term strategy, thereby empowering their clients without compromising the interests of the poor as a class).

Constitution abrogating the deed.[8] Predictably, this provision was challenged by the coal industry on federal constitutional grounds, and the case did not conclude until 1994.[9] APPALRED represented the landowner in the targeted case, and John Rosenberg, along with the Attorney General of Kentucky, argued the high-profile case for the Tennessee surface owners before the Kentucky Supreme Court.

Over the years, many people encouraged me to publish my account. Wary of providing any shred of impetus to the opposing side, I felt uncomfortable revisiting the paper for publication while the legal struggle still persisted. I also felt pre-empted by Lucie White's moving article, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*,[10] which employed the framework of Gaventa's *Power and Powerlessness*[11] in the setting of South Africa, where political, economic, and social oppression stood in the sharpest relief.[12]

It has also taken me quite some time to consume the new critical literature on lawyering in settings of stark differential power.[13] I have called this practice "lawyering from below." Although I have been convinced since at least the 1980s that the conceptual underpinning of public interest and poverty law needed fundamental retuning—in academic parlance, a shift in the paradigm—for a long time I had difficulty discerning the broader outlines of this transformation.[14] In my lawyering during these years, I struggled to effectuate a different vision of lawyering, but I confess that much of my legal work even now is permeated by the rights-oriented and structural strategies of the past. The work that is necessary to be a critical

---

8. KY. CONST. § 19(2).

9. Ward v. Harding, 860 S.W.2d 280 (Ky. 1993).

10. *To Learn and Teach*, *supra* note 4.

11. GAVENTA, *supra* note 1.

12. Others have alluded to Gaventa's concepts in analyzing critical lawyering. *See, e.g.*, Richard F. Klawiter, *¡La Tierra es Nuestra! The Campesino Struggle in El Salvador and a Vision of Community-Based Lawyering*, 42 STAN. L. REV. 1625 (1990) (providing an account of land disputes between rural peasants and wealthy landowners in El Salvador and presenting the peasants' movement as an example for U.S. reform advocates to follow).

13. *See supra* notes 1-7.

14. The search for a more contemporary model of public interest law advocacy has been guided by thoughtful scholars. *See* JOEL F. HANDLER, LAW AND THE SEARCH FOR COMMUNITY (1990); Gary Bellow & Jeanne Charne, *Paths Not Yet Taken: Some Comments on Feldman's Critique of Legal Services Practice*, 83 GEO. L.J. 1633 (1995); Ruth Margaret Buchanan, *Context, Continuity, and Difference in Poverty Law Scholarship*, 48 U. MIAMI L. REV. 999 (1994); Lois H. Johnson, *The New Public Interest Law: From Old Theories to a New Agenda*, 1 B.U. PUB. INT. L.J. 169 (1991); William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099 (1994). *See generally* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat & Stuart Scheingold eds., 1998).

or collaborative lawyer does not come easily, nor does shining the beam of penetrating self-criticism. Often feeling suspended in this shifting paradigm—between new theory and old practice—I hesitated to complete this piece.

But I persisted when, even after these many years, I did not register much dissonance upon re-reading this essay. Some of the functional ideas seem terribly thin, but I wanted this piece to be included as an early specimen of a growing genre of lawyering theory. If nowhere else, perhaps property teachers can use this account (with some industrial-strength doctrinal embellishment) to show property law at its most repressive.[15] I trust that the brief intellectual history of this article helps to place it in its rightful perspective. There is a much larger work embodied in this story, and I am committed to telling it in fuller fashion in the future.

II. INTRODUCTION

In recent debates about legal theory and its relationship to social reform, scholars have propounded different conceptions of the role of power in shaping legal doctrine and relationships. At the risk of oversimplification, the debate has pitted commentators who view law as a mask for the exercise of raw class, economic, or political power[16] against those who seek to justify the neutral legitimacy of legal institutions and rules in a complex society.[17] Consistently interwoven in these often acrimonious interchanges are theories about the nature, function, and purpose of the encompassing dynamic of power.

The abstract dialogue among academic theoreticians has all too frequently neglected the "view from below" in formulating theories of power and change.[18] Such neglect is understandable. It is conceptually and epistemologically difficult to uncover the often subjective nature of professional experience in other than highly personalized accounts. While I am wary of this methodological dilemma, in this article I nevertheless join

---

15. In his property casebook, Richard Chused devotes a portion of a chapter, *State and Federal Constitutional Limitations on Public Land Use Controls*, to the broad form deed cases in Kentucky. RICHARD H. CHUSED, CASES, MATERIALS AND PROBLEMS IN PROPERTY 1136 (1988).

16. *See, e.g.*, Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983) (criticizing legal theories that purport to empower clients and suggesting that the critical legal studies movement has been largely self-defeating).

17. *See, e.g.*, Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984) (suggesting that law teachers with a "nihilist" attitude—that politics matters more than principle in determining a legal outcome—should discontinue teaching altogether).

18. The notion of a "view from below" is derived from the efforts of clinical legal educators to expose the "real" dynamics of lawyering and litigation and to incorporate these insights into the traditional law school curriculum. The phrase also connotes the subordinated existence of clients, and often lawyers, in the hierarchy of the legal profession.

the formative struggle to tap the experience of lawyers concerned about social justice and reform in ways that might invigorate current theories which unfortunately seem to inform much of the practice of lawyers who share a commitment to social justice. This piece is premised on an accessible model of power and its impact on people involved in social and legal reform efforts. These efforts involve citizens in small scale movements of resistance against government and corporations over issues such as toxic waste dumps, property tax reform, highway siting, community redevelopment, "right to know" issues, access to health care, and utility rate cases, to name a few arenas of contemporary struggle. In practically all of these "petty disturbances,"[19] the affected community or group has at some point called on the services of lawyers.

This article will sketch a rough framework for lawyers involved in these local oppositional disputes. The framework is premised on loose principles of lawyer interaction and judgment and the effectiveness of lawyer decision-making in empowering people embroiled in struggles of resistance. This article seeks to demonstrate that lawyers do have limited roles in such disputes, but such roles must be based on a self-reflective and heuristic view of professional practice.[20]

Part III will set out the essential elements of a model of power that illuminates the repressive features of control and manipulation that often characterize citizen struggles. This model is drawn from Steven Lukes's *Power: A Radical View*[21] and John Gaventa's *Power and Powerlessness*.[22] Part IV of this article will recount a campaign of reform in Appalachia that failed for decades in part because lawyers came to dominate the reform effort. This long-standing dispute, which centered on the broad form mineral deed in Kentucky, serves as an example of the strong tendencies of law reform toward what I deem "legitimation,"[23] or of how well-intentioned reform, which does not heed the lessons of power, can turn to illusion. Part V of the article will conclude with generalizations sketching the contours of a lawyer's role premised on reflective and heuristic lawyering. This image, I hope, can be feasibly implemented in a manner consistent with a broader

---

19. Roberto Unger used this expressive term:

> For us, law practice should be, and to some extent always is, the legal defense of individual or group interests by methods that reveal the specificity of the underlying institutional and imaginative order, that subject it to a series of petty disturbances capable of escalating at any moment, and that suggest alternative ways of defining collective interests, collective identities, and assumptions about the possible.

Unger, *supra* note 16, at 667.

20. The image of a reflective practitioner was compellingly created in DONALD A. SCHÖN, THE REFLECTIVE PRACTITIONER (1983).

21. STEVEN LUKES, POWER: A RADICAL VIEW (1974).

22. GAVENTA, *supra* note 1.

23. For brilliant analysis of the concept of legitimacy, see Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379.

vision of social justice and the roles that lawyers actually play in efforts to achieve democratic reform at the grassroots level.

III. POWER AND SOCIAL CONTROL

> The rhetoric and the rules of a society are something a great deal more than sham. In the same moment they may modify, in profound ways, the behaviour of the powerful, and mystify the powerless. They may disguise the true realities of power, but, at the same time, they may curb that power and check its intrusions. And it is often from within that very rhetoric that a radical critique of the practice of the society is developed . . . .[24]

Social theorists have long grappled with the concept of power and its impact on both citizen action and inaction. An essential question in these theories persistently emerges: what prompts citizens, who have been adversely affected by government or corporate action, to mobilize opposition? Phrased differently, what processes empower people to resist government or corporate decisions that harm their perceived or inchoate interests? Modern scholars concerned about issues of social injustice have extended the traditional analyses of power. In their books, John Gaventa and Stephen Lukes have formulated dimensions of power that explore the mechanisms of control inherent in situations of conflict.[25] For lawyers representing citizens in these episodes, the model of power developed by Lukes and Gaventa supplies needed guidance and suggests the limits and possibilities of legal assistance in these local struggles.

According to Lukes and Gaventa, power can be understood in three dimensions.[26] In the one-dimensional approach to understanding power, power is analyzed in classically pluralist terms.[27] Citizens perceive their interests, understand the harm that a particular action will entail upon their interests, work through the recognized channels of political and legal redress, and ultimately, achieve their predetermined ends.[28] Because the arenas of redress are thought to be open to any organized faction, passivity or non-participation is viewed as irrational or inefficient behavior.[29] As Gaventa writes, "[t]he empirical relationship of low socio-economic status to low participation gets explained away [by the pluralists] as the apathy,

---

24. E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 265 (1975).

25. *See* GAVENTA, *supra* note 1; LUKES, *supra* note 21.

26. GAVENTA, *supra* note 1, at 4; LUKES, *supra* note 21, at 10.

27. GAVENTA, *supra* note 1, at 5; LUKES, *supra* note 21, at 10.

28. GAVENTA, *supra* note 1, at 5-6.

29. *Id.* at 7.

political inefficacy, cynicism or alienation of the impoverished."[30] In this first approach, conflict is visible and outcomes are determined by bargaining among political actors; votes, jobs, and influence are the grist of power.[31]

Within this analytical construct, lawyers play traditional roles. They are thought of as brokers of community power who wield their specialized influence on behalf of any faction that hires them. Here, lawyers assume the initiative in gathering information, formulating strategies, and articulating grievances. A typical example is the lawyer for an upper-middle class neighborhood group opposing a zoning change.

Relying on the pioneering work of E.E. Schattschneider,[32] Peter Bachrach,[33] and Morton Baratz,[34] Lukes and Gaventa describe the two-dimensional concept of power in which the apparatus of power excludes issues and groups from participation in the political process. In this realm, elite organizations develop a "mobilization of bias,"[35] exploiting certain kinds of conflict and suppressing others.[36] According to Schattschneider, "[s]ome issues are organized into politics while others are organized out."[37]

Actors in control exercise power by predetermining those issues that are appropriate for public debate.[38] Should such issues reach the decision-making arena, groups in control influence not only the outcome but also the ultimate implementation of the decision to their benefit.[39] The focus of a two-dimensional approach remains on observable processes, even though the processes may involve less visible "non-decisions" and "non-actions."[40] In this scheme deprived parties do not participate in public issues, for a variety of reasons; force, threat of sanctions, co-optation, or manipulation of a rule, norm, or precedent all pose serious barriers to participation by powerless groups who, anticipating defeat, may never act.[41]

The theories of Bachrach and Baratz, particularly those expressed in their book, *Power and Poverty*,[42] informed the modern public interest law movement. Lawyers in this movement viewed themselves as surrogate

---

30. *Id.*

31. *Id.* at 13-14.

32. E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA (Dryden Press 1975) (1960).

33. PETER BACHRACH, THE THEORY OF DEMOCRATIC ELITISM: A CRITIQUE (1967).

34. PETER BACHRACH & MORTON S. BARATZ, POWER AND POVERTY: THEORY AND PRACTICE (1970).

35. GAVENTA, *supra* note 1, at 9; LUKES, *supra* note 21, at 16. Both authors quote SCHATTSCHNEIDER, *supra* note 32, at 69.

36. *See* sources cited *supra* note 35.

37. *See id.*

38. *See id.*

39. *See* GAVENTA, *supra* note 1, at 11-12.

40. *Id.* at 14-15.

41. *Id.* at 16-17.

42. BACHRACH & BARATZ, *supra* note 34.

representatives of under-represented people. Overcoming the barriers to participation in decision-making channels that were the exclusive province of strong, organized corporate interests, public interest lawyers sought to combine the second face of power with the first face, creating an expanded, two-dimensional view of power.[43] They believed that such a structural transformation would breathe life into the rhetoric of the traditional pluralists.

The three-dimensional view of power transcends structure and strictly observable processes and dwells more on the consciousness of the disenfranchised.[44] A three-dimensional view of power sees elite groups exercising power over the disenfranchised, shaping the very notion of what is and is not an issue.[45] Visible conflict does not necessarily exist in this dimension.[46] Instead, there is latent conflict "in a contradiction between the interests of those exercising power and the real interests of those they exclude."[47] Rather than concentrating on individuals' actions, this approach attempts to identify the subjective effects of power:

> Their identification, one suspects, involves specifying the means through which power influences, shapes, or determines conceptions of the necessities, possibilities and strategies of challenge in situations of latent conflict. This may include the study of social myths, language, and symbols, and how they are shaped or manipulated in power processes. It may involve the study of communication of information—both of what is communicated and how it is done. It may involve a focus upon the means by which social legitimations are developed around the dominant, and instilled as beliefs or roles in the dominated. It may involve, in short, locating the power processes behind the social construction of meanings and patterns that serve to get B to act and believe in a manner in which B otherwise might not, to A's benefit and B's detriment.[48]

At bottom, the three-dimensional view of power calls for a multi-faceted, contextualized approach to the understanding of social control and conflict. It seeks "local knowledge," to use anthropologist Clifford Geertz's concept,[49] to illuminate mechanisms that are often only dimly perceived yet manifestly shape the ability of non-elites to participate in social, economic, or political conflict.

---

43. For a discussion of the "two faces" of power, see *id.* at 3-16.

44. GAVENTA, *supra* note 1, at 15-16.

45. *Id.* at 12; LUKES, *supra* note 21, at 24.

46. GAVENTA *supra* note 1, at 12; LUKES, *supra* note 21, at 24.

47. LUKES, *supra* note 21, at 24-25 (emphasis omitted).

48. GAVENTA, *supra* note 1, at 15-16 (footnotes omitted).

49. CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY (1983).

In *Power and Powerlessness*, Gaventa traces a tentative connection between the three dimensions of power.[50] Through a study of the profound structure of inequality existing in Appalachia, he concludes that the three dimensions reverberate among themselves to create more power in the controlling classes and more powerlessness in the non-elite groups: "Power serves to create power. Powerlessness serves to re-enforce powerlessness. Power relationships, once established, are self-sustaining."[51] To break this cycle, Gaventa prescribes "a process of issue and action formulation"[52] in which the powerless share grievances among themselves and construct their own ranking of interests.[53] Next, using resources within their control, the powerless must take action to create their own agenda and to challenge the barriers to participation in decision-making that will affect these issues.[54] In this process of reallocation, the powerless must constantly be vigilant, for, until the mechanisms of power are altered, the power holders—whether on a national or local level—possess the potential to erect new and more insidious barriers to participation and challenge.

The third dimension of power is relatively unexplored terrain for lawyers. The intuitive, ephemeral characteristics involved in representing powerless groups often are subordinated to the more concrete, lasting nature of legal strategies. A reflective approach to issues of power, hierarchy, domination, manipulation, and expertise is rare. Because technique often dominates legal practice, the odds are stacked against a more phenomenological approach to legal representation. In this post-modern world, however, progressive practitioners are beginning to detail an image of law practice faithful to the assumptions underlying the third dimension of power.

The account in the next section detailing the early legal campaign to abolish the broad form mineral deed in Kentucky represents a preliminary attempt to examine critically the influences of power in a legal reform effort. Undoubtedly, the account suffers from a paucity of detail about some of the critical events and from the personalized nature of the story as told by a participant, now observer. Despite these obvious shortcomings, recounting the broad form deed campaign seems a worthwhile stab at a more self-conscious phenomenology of practice that is at the brink of emerging.

---

50. *See* GAVENTA, *supra* note 1.
51. *Id.* at 256.
52. *Id.* at 257.
53. *Id.*
54. *Id.* at 257-58.

II. LAWYERING FOR PEOPLE IN APPALACHIA: THE CAMPAIGN TO ABOLISH THE BROAD FORM MINERAL DEED

> Sir Henry Maine has made it fashionable to connect the archaic notion of property with prescription. But the connection is further back than the first recorded history. It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.[55]

> Eastern Kentucky is a colony owned and managed by absentee landlords. When the mineral deeds were signed, sovereignty passed to a class of wealthy, distant, and aloof people. They have demonstrated a chilling unconcern for the region during the eighty years since a colonial status was imposed on an ignorant and gullible population. Today's mineral landlords, like their predecessors, provide no leadership in solving the state's problems. Instead, they so burden and oppress beautiful, resource-rich Kentucky that it is backward and impoverished . . . .[56]

A. The Political Economy of Central Appalachia

Central Appalachia is an area of dramatic paradoxes. It is a region incredibly rich in natural resources—coal, oil, and gas—yet incredibly poor on any conventional scale; a region with abundant environmental resources, whose waters are fouled, forests clear-cut, mountains leveled, and species destroyed; and a region with a heritage of individual and family autonomy, a collective union identity, and yet, a heavily bureaucratized governmental infrastructure.

These paradoxes have bred inequality, domination, and much-documented suffering. As John Gaventa has shown in his book, *Power and Powerlessness*, the political economy of Central Appalachia is difficult to justify under traditional democratic theory.[57] The contradictions that mark the region create a web of potential grievances that would appear to demand grassroots redress.

Yet the deep-seated injustices that characterize the fiber of life in the mountains have been peculiarly immune to citizen action. Gaventa supplies part of the reason why the wide social and economic disparities in Appalachia have remained virtually unassailable. Under the third face of

---

55. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

56. HARRY M. CAUDILL, THEIRS BE THE POWER: THE MOGULS OF EASTERN KENTUCKY 151 (1983) (footnotes omitted).

57. GAVENTA, *supra* note 1.

power, citizens do not act upon seemingly obvious grievances because they are not recognized as problems, much less correctable ones.[58] The institutional structures that are intended to serve the region's people, moreover, have shown themselves to be part of the "mobilization of bias" characteristic of the second face of power.[59] Far from promoting reform, these economic, legal, and political bodies have suppressed nascent change.

In this setting, law as a tool of reform has proven woefully inadequate. Widespread social and economic phenomena—such as the entrenched poverty of the region—have overwhelmed the capacity of law and lawyers to affect the problems. In Appalachia, the impenetrability and the unity of the legal system play significant roles in maintaining quiescence in the face of glaring inequalities of wealth and resources. Compounding the situation, on one level the people of Appalachia are keenly aware of their daily problems; lack of decent housing, inadequate health care, hunger, and the inability to influence existing institutions of redress are well known to all. On this level, law and lawyers have played a marginally ameliorative role. Much like Sisyphus, the king in Greek mythology who laboriously rolled a stone up a mountain only to see it roll down again, federally funded legal services programs have striven to provide individual and group legal services on a range of discrete issues. In the context of the third face of power, the elite dominate the disenfranchised, and many grievances and suggested paths for solutions have not been considered appropriate subjects for entry into the legal arena, even assuming its availability and fairness.

Ownership and control of land in Appalachia represent issues mired in power relationships. Land ownership, where it can be traced, is heavily concentrated in the hands of corporations, many of them energy conglomerates based outside the region. Only recently has the extent of outside ownership been documented in *Who Owns Appalachia?: Landownership and Its Impact*.[60] The Appalachian Land Ownership Task Force, a grassroots citizen project, documented land holding patterns and their impact on issues such as property taxation, economic development, housing, and the environment.[61] Unique because the prodigious archival research was conducted almost exclusively by "lay citizens,"[62] the study traced the extent of corporate and absentee ownership of surface and mineral rights in eighty Appalachian counties in six states.[63] The results confirmed the perceived understanding of the problems. "Of the 13 million acres of surface sampled,

---

58. *See, e.g., id.* at 19-20.

59. *See, e.g., id.* at 9.

60. APPALACHIAN LAND OWNERSHIP TASK FORCE, WHO OWNS APPALACHIA?: LANDOWNERSHIP AND ITS IMPACT (1983).

61. *See* Charles C. Geisler, *Introduction* to APPALACHIAN LAND OWNERSHIP TASK FORCE, WHO OWNS APPALACHIA?: LANDOWNERSHIP AND ITS IMPACT, at xxviii-xxix (1983).

62. *Id.* at x-xi.

63. *Id.* at 14-15.

72 percent . . . were owned by absentee owners; 47 percent [of the 72 percent] by out-of-state owners; and . . . [the rest] by owners residing out of the county of their holdings."[64] Eighty percent of the mineral rights were in the hands of absentee owners.[65] "Almost 40 percent of the land in the [survey], and 70 percent of the mineral rights, [were] corporately held, . . . [by] some of the largest corporations in the country."[66]

As observed by the Appalachian Land Ownership Task Force, the issue of land ownership is complicated by the formidable system (or nonsystem) of land titles that exists in county seat courthouses throughout the mountains.[67] Land titles are often impossible to trace. When a presumptively accurate chain of title is found, it often conflicts with the local understanding of ownership. Suits to quiet title—often pitting absentee corporate owners against indigenous landowners—are a staple of the mountain courts.

At the apex of the issue of landownership is the broad form mineral deed. This instrument, which severs minerals in land from the surface, is extremely common in central Appalachia. This genre of deed, drafted in the late 1800s and early 1900s by coal and land companies, almost completely subordinates the surface estate in land to the mineral estate. The broad form mineral deed is also called the long form deed, because of its length and complexity, or the Mayo deed, after John C.C. Mayo, who purchased prodigious tracts of mineral rights for coal companies around 1900. The deed purported to confer on the holder of the mineral estate the right to use the surface estate in any way necessary or convenient for the recovery of minerals.[68] However, the right to recover minerals by strip-mining—with its consequent damage to the surface estate—was not expressly contained in the typical broad form mineral deed, nor could it have been in light of the coal extraction technology in use during that time.

Although the broad form mineral deed, in various guises, existed throughout the states comprising the eastern coalfields, the story of the reform effort to abolish the deed is most sharply highlighted in Kentucky, the East's major coal state. Longer than any of their neighbors, the people of Kentucky have endured the consequences of the broad form deed and have engaged in identifiable campaigns against the deed.

---

64. *Id.* at 15.

65. *Id.*

66. *Id.*

67. *Id.* at 136-37.

68. For a discussion and history of the deed, see RONALD D. ELLER, MINERS, MILLHANDS, AND MOUNTAINEERS: INDUSTRIALIZATION OF THE APPALACHIAN SOUTH, 1880-1930 (1982); John E. Bailey, *Disruptions to Peaceful Coexistence of Surface Owner and Mineral Lessee*, 2 NAT. RESOURCES LAW. 154 (1969); Robert M. Pfeiffer, *Kentucky's New Broad Form Deed Law—Is It Constitutional?*, 1 J. MIN. L. & POL'Y 57 (1985); Michael V. Withrow, Comment, *Broad-Form Deed—Obstacle to Peaceful Co-existence Between Mineral and Surface Owners*, 60 KY. L.J. 742 (1972).

I have been part of that effort, directly or indirectly, since 1970. Distancing myself from this issue and my role as advocate is, I concede, impossible. But, with Frank Munger and Carroll Seron, I believe:

> The principal question in research is thus how one overcomes one's own historical blinders so that the product of one's work does not reflect only the limited perspective of group ideology. The researcher must be involved in a process of self-criticism, i.e, a process of reflection about one's own basic predispositions and assumptions. The scholar is not an outsider to social activities.[69]

The following account aspires to capture this methodological tension.

B. "Lawing" Against the Broad Form Deed in Kentucky[70]

In the late 1800s, the mountains of Eastern Kentucky were invaded by land agents seeking to acquire the mineral rights to the millions of acres of coal-rich land that existed throughout the eastern coal counties. These agents, often representing landholding companies located in eastern financial centers, transacted business with small landowners who devoted most of their property to farming and other nonexploitive uses. The broad form deed was the centerpiece of the thousands of small transactions that were recorded in county courthouses.[71]

As early as 1892, Kentucky courts acknowledged the gross disparity in bargaining power embodied in the typical broad form deed deal.[72] As recounted in one case:

> In August, 1887, the appellant, John Wollums, was living upon his mountain farm of about 200 acres in Bell county. He was then about 60 years old, uneducated, afflicted with disease disabling him from work, owned no other land, and but very little personal property. He knew but little of what was going on in the business world, owing to his situation and circumstances in life. He moved in a small circle. At this time the appellee, W. J. Horsley, who was then a man of large and varied experience in business, who was then buying mineral rights in that locality by the thousands of acres, and who was evidently familiar with all that was then going on and near at hand in the way of business and development in that

---

69. Frank Munger & Carroll Seron, *Critical Legal Studies Versus Critical Legal Theory: A Comment on Method*, 6 LAW & POL'Y 257, 276 (1984).

70. The use of "law" as a verb is common in Appalachian parlance. It signifies going to court to resolve a dispute.

71. *See* ELLER, *supra* note 68, at 39-57.

72. *See, e.g.*, Wollums v. Horsley, 20 S.W. 781 (Ky. 1892).

> section, through his agent entered into a contract with the appellant, which was signed by the latter only, by which he sold to Horsley all the oils, gases, and minerals in his land, with customary mining privileges, for 40 cents per acre . . . .
>
> . . . The appellee [mineral buyer] shows pretty plainly by his own testimony that when the contract was made he was advised of the probability of the building of a railroad in that locality in the near future. His agent, when the trade was made, assured the appellant that he would never be bothered by the contract during his lifetime. He was lulled in the belief that the Rip Van Winkle sleep of that locality in former days was to continue, and the grossly inadequate price of this purchase can only be accounted for upon the ground that the appellant was misled and acted under gross misapprehension.[73]

The agents for the land and coal companies did their jobs well. It is my recollection that title to the minerals underlying some ninety percent of the land in the Kentucky counties of Bell, Harlan, Letcher, Perry, Knott, Pike, and Floyd was severed from the surface by broad form deeds.

With the rise of the coal industry in Kentucky at the beginning of the twentieth century, the firms that had purchased minerals under broad form deeds leased these rights to a multitude of coal operators—some local, but many from companies outside the region.[74] At the time that the vast majority of broad form deeds were executed, the grantor-surface owners could not have anticipated the technological revolution that would take place in coal mining over the years. In the early years, coal was removed mostly through underground shafts and tunnels. Disturbances to the surface were relatively minor.[75]

As technology evolved, the strip-mining industry became mechanized.[76] Giant bulldozers, high lifts, trucks, and powerful explosives transformed the industry, allowing more efficient recovery of seams of coal. The impact of strip-mining activities on the environment of Eastern Kentucky was severe. The once pristine mountains were marred, streams and rivers were degraded,

---

73. *Id.* at 781, 782. For a classic description of the broad form deed transaction, see Watson v. Kenlick Coal Co., 422 U.S. 1012, 1014 n.3 (1975) (Douglas, J., dissenting) (dissenting from a denial of certiorari and quoting HARRY M. CAUDILL, NIGHT COMES TO THE CUMBERLANDS: A BIOGRAPHY OF A DEPRESSED AREA 72-74 (1963)). For an illuminating depiction of the injustices suffered by Kentucky surface owners because of the broad form deed and their struggle to protect their land and their livelihood, see ON OUR OWN LAND (Appalshop Film & Video 1988) (on file with author).

74. *See id.* at 20-22.

75. DUANE LOCKARD, COAL: A MEMOIR AND CRITIQUE 36-50 (1998).

76. For an excellent account of the evolution of strip-mining in Kentucky, see MARC KARNIS LANDY, THE POLITICS OF ENVIRONMENTAL REFORM: CONTROLLING KENTUCKY STRIP MINING (1976).

soil was indiscriminately removed and never replaced, mountains were shaved off at the top, trees and vegetation were ruined, and wildlife was harmed.[77] But perhaps the most telling legacy of the strip-mining industry was the consequence to mountain residents.

As the strip-mining industry grew and its effects on the land and the overall environment became more pronounced, conflicts between surface owners and mineral owners became increasingly prevalent. Since the beginning of the twentieth century, surface owners have intermittently resorted to the courts in actions sounding in nuisance, trespass, and contract. In these early cases, the landowners were almost uniformly rebuffed by the courts. Justice William O. Douglas, in a dissent from denial of certiorari in a Kentucky broad form deed case in 1975,[78] captured the attitude of the local courts:

> With the advance of technology, however, the stakes increased; each successive innovation was visited upon the mountaineers with the approval of the courts, which found these new and unforeseen techniques to fall within the scope of the aged and yellowing deeds. Judicial decisions gave virtually untrammeled powers to the coal companies, so long as they acted without malice . . . .[79]

The watershed case validating the broad form deed was *Buchanan v. Watson*,[80] decided by the then Kentucky Court of Appeals in 1956.[81] On its face, *Buchanan* held that, despite the trial court's finding of fact that the parties to the deed did not contemplate strip-mining, "[t]o deny the right to remove [the coal] by the only feasible process is to defeat the principal purpose of the deed."[82] The mining company would not be liable for damages to the surface owner unless it performed work in an arbitrary, wanton, or malicious manner.[83] The court closed with a classic embodiment of judicial abdication:

> The rule has become so firmly established that it is a rule of property law governing the rights under many mineral deeds covering much acreage in Eastern Kentucky. To disturb this rule now would create great confusion and much hardship in a segment of an industry that can ill-afford such a blow. It is especially desirable that the law of property rights

77. *See* APPALACHIAN LAND OWNERSHIP TASK FORCE, *supra* note 60, at 121-25.
78. Watson v. Kenlick Coal Co., 422 U.S. 1012 (1975).
79. *Id.* at 1015.
80. 290 S.W.2d 40 (Ky. 1956).
81. *Id.* Prior to 1976, the Court of Appeals was the highest state court in Kentucky.
82. *Id.* at 42.
83. *Id.* at 43.

> should remain stable after it has been settled. The doctrine of stare decisis requires that we do not depart from the established rule.[84]

By the 1960s, the spread of strip-mining, the increasing public awareness of its harms, and the intransigence of the courts and legislature on issues affecting the coal industry led individuals to undertake direct action. Protests by surface owners proliferated.[85] Some protested strip-mining by blocking the entrance to their properties.[86] Landowners waged near-guerilla warfare with strip-mine operators.[87] Through the aggregation of individual acts of defiance in county after county, a movement began.

To contain these protests, the Kentucky General Assembly enacted the first purportedly comprehensive bill to regulate the environmental effects of strip-mining in 1965.[88] The law established a crude regulatory apparatus that never worked, in large part because the standards contained in the law were too cosmetic, the regulatory agency with the responsibility for enforcing the law was immediately "captured," and the coal industry, undoubtedly knowing the law had more rhetoric than bite, engaged in massive resistance to the scheme's requirements.[89] Although the bill barely dented the external costs associated with strip-mining, public officials seized on its passage as evidence of progress. Collectively, the people in the mountains knew otherwise.

Spurred by continuing reports of landslides, water pollution, erosion, and the acts of resistance that dramatized the problem, an all-out effort was launched in the late 1960s to obtain judicial nullification of the broad form deed. This was the first organized effort to strike at the deed. A coalition of organizations, including the Appalachian Group to Save the Land and People, the Sierra Club, and even the Kentucky Civil Liberties Union, challenged the broad form deed on a variety of contractual theories ranging from standard judicial construction of deeds to contracts of adhesion to estoppel.[90] This unusual coalition, employing the public interest strategies of civil rights and civil liberties organizations, chose a single case on which to hinge its challenge.[91]

---

84. *Id.* at 43-44 (citation omitted). In *Buchanan*, the court of appeals took the extraordinary step of reversing itself on the strength of a petition for rehearing filed by the coal industry. *Id.* at 40.

85. *See generally* HARRY M. CAUDILL, MY LAND IS DYING (1971) (providing an account of surface owners' efforts to curb strip-mining).

86. *Id.* at 80.

87. *See, e.g.*, Peter Milius, *Kentuckians Risk Lives in War on Strip-Mining*, WASH. POST, Jan. 31, 1972, at A1, A6.

88. *E.g.*, LANDY, *supra* note 76, at 39-40.

89. *Id.* at 194-203.

90. Martin v. Kentucky Oak Mining Co., 429 S.W.2d 395 (Ky. 1968).

91. *Id.*

The time seemed right. The abuses of strip-mining continued unabated despite the existence of the Kentucky regulatory scheme. Individual protests continued, with violence occasionally erupting between surface owners and strip-miners, and the problem was discovered by the national media.[92] Technological advances in mining equipment allowed the industry to mine ever-deeper seams in more remote locations.[93] The frontal attack on the broad form deed in the courts seemed like a logical step to defuse the mounting problems.

In 1968, however, this broad-based coalition suffered a major defeat. In *Martin v. Kentucky Oak Mining Co.*,[94] the Kentucky Court of Appeals rebuffed every argument presented by the groups involved in the litigation.[95] First, the court rationalized that conservation was *not* at issue because a decision abrogating the broad form deed would not *pro tanto* halt strip-mining.[96] In rejecting the validity of the environmental arguments raised by the challengers, the court failed to recognize that thousands of acres would be withdrawn from strip-mining because surface owners would regain possession of the bundle of property rights encompassing this technique of mineral removal. The court appeared almost to tease the groups, suggesting that the outright abolition of strip-mining was the only environmentally sound solution.

Second, the court redefined the basic property/contractual issue in the case: "Whether or not the parties actually contemplated or envisioned strip or auger mining is not important—the question is whether they intended that the mineral owner's rights to use the surface in removal of the minerals would be superior to any competing right of the surface owner."[97] This startling reasoning, rejecting the proposition that the intention of the parties to a contract should prevail, flew in the face of decisions by every other coal-state court that had decided the issue up to that time.[98]

Finally, the court adduced a variety of allegedly historical reasons—including the low value of the land and the lack of productive agricultural acreage in the mountains—to support its dubious conclusion that the original land owners, by obtaining "full value" for their land, deceived the land companies, not that the land companies had deceived the original land owners. The court stated:

---

92. *See* Mary Beth Bingham, *Stopping the Bulldozers: What Difference Did it Make?*, *in* FIGHTING BACK IN APPALACHIA: TRADITIONS OF RESISTANCE AND CHANGE 17, 21 (Stephen L. Fisher ed., 1993).

93. *See* LOCKARD, *supra* note 75, at 45.

94. 429 S.W.2d 395 (Ky. 1968).

95. *Id.* at 397-99.

96. *Id.* at 397.

97. *Id.*

98. *See, e.g.*, Franklin v. Callicoat, 119 N.E.2d 688 (Ohio 1954); West Va.-Pittsburgh Coal Co. v. Strong, 42 S.E.2d 46 (W. Va. 1947).

> If, as appears well may have been the case, the landowners who executed the broad form mineral deeds at the turn of the century were paid prices which substantially or in large part equaled the full value of the land (at least of the hillside land) we see nothing unfair, unjust or inequitable in construing the deeds in favor of the grantees. Certainly the fact that the surface of the land is worth much more today than it was in 1905 is not a valid reason for saying that the landowners should be paid again.[99]

Justice Edward P. Hill, who hailed from the heart of Eastern Kentucky, vigorously dissented.[100] Citing the court's perversion of the proper rule of deed construction[101] and the role of stare decisis, the treatment of broad form deeds in other coal states, the "catastrophe" of strip-mining,[102] and the historical errors in the majority opinion—*e.g.*, the fact that property values in Kentucky were only assessed for tax purposes at ten to fifteen percent of their value[103]—Justice Hill concluded:

> I am shocked and appalled that the court of last resort in the beautiful state of Kentucky would ignore the logic and reasoning of the great majority of other states and lend its approval and encouragement to the diabolical devastation and destruction of a large part of the surface of this fair state without compensation to the owners thereof.[104]

One cannot read the *Martin* case without being struck by its truculent defense of the interests of the coal industry and by its primitive marshalling of legal concepts to support what seemed to be a predetermined conclusion.

When I arrived in the mountains, first as a law student in 1970 and then as a legal services lawyer with the Appalachian Research and Defense Fund in 1972, *Martin* loomed as an enormous obstacle to meaningful reform of the broad form deed and strip-mining. Much local energy, through groups such as the Letcher County Citizens League to Protect Surface Rights and the Appalachian Group to Save the Land and the People, was devoted to discussions with legal services and other sympathetic lawyers about continuing legal challenges to the deep-seated problem. There was little explicit recognition in the years following *Martin* that the legal confrontation over the broad form deed, as well as the strenuous efforts on behalf of citizens in the enactment of the Kentucky strip-mining law, deflected the

---

99. *Martin*, 429 S.W.2d at 398.
100. *Id.* at 400-03 (Hill, J., dissenting).
101. *Id.* at 401 (Hill, J., dissenting).
102. *Id.* at 402 (Hill, J., dissenting).
103. *Id.* at 403 (Hill, J., dissenting).
104. *Id.* at 402 (Hill, J., dissenting).

course of citizen self-help into arenas that were dominated by the very interests whose power was at stake. Frankfort, the state capital, was viewed as the crucible where change might occur. Very little attention was paid to actions, such as zoning or land use schemes, that might be taken on a city or county level.[105]

Through the early 1970s, the movement to negate the broad form deed continued almost with a momentum of its own. It was as if the rhetoric that was always employed in discussions about this issue, centering on concepts such as empowerment, self-determination, and justice, demanded some type of concrete action. The groups and individuals for which we worked never flagged in their zeal to find solutions to the problem. But with the legal course already charted, fresh alternatives failed to materialize. Strong believers in traditional democracy, the challengers, having lost in court, turned to the Kentucky legislature.

In the legislative forum, our clients believed that it would be more difficult for individual legislators to mask their interests behind what passed for neutral principles in adjudication. The rightness of the cause, moreover, would sway at least those legislators who had no direct interest in coal. Accordingly, a lobbying campaign was mounted. Mountain citizens came to Frankfort to deliver eloquent testimony about the hardships that flowed from the broad form deed. They tried to convince legislators that the Kentucky high court had placed this entire problem in the lap of the legislature and that this body could act to overturn the *Buchanan* and *Martin* decisions.

As thorough tactitioners, we appealed on every front. For example, we argued that, no matter where the initial entitlement to the minerals was placed, in most instances bargaining between the surface owner and mineral owner was inevitable. This bargaining, it was reasoned, would ultimately lead to efficient market outcomes because it would allow the surface owner to value the full external costs of strip-mining. Strip-mined coal, therefore, would be priced at its full market value, shorn of externalities. Not surprisingly, efficient market outcomes were not the first priority of most legislators.

The upshot of the citizen-led, lawyer-informed efforts was the passage of a bill by the 1974 Kentucky General Assembly requiring the written consent of the surface owner as a precondition to the issuance of a strip-

---

105. On behalf of citizens in one Eastern Kentucky county, I recall researching the legitimacy of county land use controls to protect surface owners from strip-mining on their property. Because meaningful local controls seemed to conflict with the state's strip-mining control law, we had serious concerns about the viability of a meaningful county-level scheme. The Kentucky River Area Development District, an entity created at the behest of the Appalachian Regional Commission, acknowledged the impossibility of engaging in planning for land use or economic development as long as the broad form deed governed land-holding patterns in Eastern Kentucky.

mining permit.[106] Although the bill had been tinkered with in committee, we believed that the consent mechanism was constitutionally appropriate. The expected coal industry challenge would have to surmount the strong justifications for this bill, which ranged from environmental, to planning, to public safety considerations. In the end, the legislation passed overwhelmingly, a signal to some that trouble lay ahead.

Within months after the effective date of the legislation, the coal industry's legal challenge was mounted. It was led by a Louisville lawyer named Bert Combs, a named partner in one of Kentucky's largest firms, a former governor of Kentucky, a former judge of the United States Court of Appeals, and a former justice of the Kentucky Supreme Court. Along with lawyers from the State Attorney General's office, we labored to defend the legislation.

Our defense of the law was premised on the legislature's unquestioned power to alleviate the demonstrably harmful consequences that the broad form deed embodied. Relying on this power, we sought to show that the industry's challenge, based as it was on the contracts clauses of both the state and federal constitutions, could be punctured by the legitimate exercise of legislative authority that undergirded the broad form deed bill. We argued that, if the Minnesota legislature could enact a mortgage moratorium in 1936,[107] surely the Kentucky legislature could modify the broad form mineral deed. We also carefully rebuffed the "taking" argument made by the industry. In so doing, we exercised pains to distinguish *Pennsylvania Coal Co. v. Mahon*,[108] a 1922 United States Supreme Court case that invalidated a statute forbidding the mining of coal by methods that would cause substantive damage to homes.[109] After full briefing before the lower court, we felt confident that our doctrinal arguments were sound and that, unlike in *Martin*, we had the force of the state behind us.

---

106. KY. REV. STAT. ANN. § 350.060(8) (overturned by Department for Natural Resources & Envtl. Protection v. No. 8 Ltd. of Va., 528 S.W.2d 684 (Ky. 1975)). The statute read as follows:

> Each application [for a strip-mining permit] shall . . . be accompanied by a statement of consent to have strip mining conducted upon the area of land described in the application for a permit. The statement of consent shall be signed by each holder of a freehold interest in such land. Each signature shall be notarized. No permit shall be issued if the application therefor is not accompanied by the statement of consent.

Id.

107. *See generally* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 437-38 (1934) (holding that the constitutional prohibition against impairment of obligation of contracts is not absolute and may give way to a state's legitimate exercise of its police power).

108. 260 U.S. 393 (1922). We distinguished *Pennsylvania Coal* by emphasizing the total destruction to surface property caused by strip-mining.

109. *Id.*

Following oral argument, in which Bert Combs stressed the havoc this bill would wreak on the ailing Kentucky coal industry, the lower court invalidated the bill on constitutional grounds.[110] Short on reasoning and documentation, the lower court decision, reciting the various bare provisions of the federal and state constitutions, simply declared that the broad form deed bill was unconstitutional.[111] When we received word of the decision, we immediately conferred with our clients in the mountains. For a few moments, we felt that we were the only people in Kentucky who did not realize that the process of enacting this legislation may have been a charade. The more conspiratorial among us felt that the bill was passed on the tacit assurance that it would be invalidated in court.

This real exercise of power by the coal industry did not deter us from appealing the case to the Kentucky Court of Appeals, which was then Kentucky's high court. In 1975, the court of appeals affirmed the lower court decision in *Department for Natural Resources and Environmental Protection v. No. 8 Ltd. of Virginia*.[112] After reciting the malleable generalities about the limits of the police power,[113] the court found that subsection 8 failed to further *any* public purpose.[114] "In order to be justified," the court stated, "it must stand as an evironmental [sic] conservation measure."[115] Under *Martin*, this purpose, of course, did not exist.[116] The court concluded, therefore, that subsection 8 was really only a Robin Hood measure that took from the rich to give to the poor, an obviously illegitimate state purpose:

> Subsection 8 delegates to countless private individuals who own interests in surface estates from which the mineral has been severed the right to undo whatever environmental conservation purpose the legislation may have by granting their consent, for a consideration, to surface mining on their land. It is beyond cavil that the primary purpose and effect of subsection 8 is to change the relative legal rights and economic bargaining positions of many private parties under their contracts rather than achieve any public purpose. It is, therefore, axiomatic that subsection 8 is unconstitutional.[117]

---

110. Department for Natural Resources & Envtl. Protection v. No. 8 Ltd. of Va., 528 S.W.2d 684, 685 (Ky. 1975).

111. *Id.* at 685-86.

112. 528 S.W.2d 684 (Ky 1975).

113. *Id.* at 686.

114. *Id.* at 686-87.

115. *Id.* at 686.

116. *See supra* text accompanying note 96.

117. *No. 8 Ltd. of Virginia*, 528 S.W.2d at 686-87.

The decision in *No. 8 Ltd. of Virginia* represented the second major setback in seven years. In strategy sessions following the court's decision, our clients questioned whether any legal avenues remained to pierce the court's reasoning. As good lawyers, true to our craft, we held out hope. We concluded that, in the 1976 Kentucky legislature, legislation should be drafted prescribing a rule of construction for the courts to use in interpreting broad form mineral deeds. The legislation should simply state that the intention of the parties to the deed when the surface and mineral rights were severed should control. If strip-mining were intended, the broad form deed would encompass the right to recover coal by this method. If, by resort to the language of the deed or to extrinsic evidence, strip-mining was not or could not have been intended, the holder of the mineral rights would be prohibited from recovering coal through this method.

By 1976, the momentum on the broad form deed had flagged. Developments in Washington toward the passage of a federal strip-mining law, however, kept up our hope that the broad form deed problem could be solved. With the assistance of lobbyists from the Environmental Policy Institute, a national environmental organization, key individuals long active in the Kentucky campaign sought to insert a provision in the federal legislation that would effectively require the consent of the surface owner prior to the issuance of a strip-mining permit.

This initiative was narrowly rejected in the bargaining over the federal bill, but in 1977 the Surface Mining Control and Reclamation Act (SMCRA)[118] was enacted. SMCRA created a comprehensive regulatory scheme that, for the first time, promised to curb the patent abuses of strip-mining in the mountains. It also contained a variety of unprecedented provisions allowing citizen involvement in the permitting and enforcement phases of the new administrative process.[119]

The passage of SMCRA was met with cautious optimism by anti-strip-mining activists in the mountains. Despite the legislation's detailed specifications of permissible mining practices, the vigilant enforcement of such specific regulatory requirements in an industry noted for numerous, small, and geographically widespread operators was crucial to the law's objective of internalizing the impacts associated with strip-mining. Of even greater concern was SMCRA's failure to address the broad form deed issue, which many continued to believe was the chief obstacle to local land reform and economic self-determination in the mountains. While activity in Kentucky remained largely dormant following the decision in *No. 8 Ltd. of Virginia*, a coalfield organization based in Tennessee—Save Our Cumberland Mountains (SOCM)—launched a campaign to abolish the broad form deed in Tennessee. Learning from the Kentucky experience, SOCM drafted a bill that embodied the rule of deed construction that appeared to

118. 30 U.S.C. §§ 1201-1328 (1994).

119. *See generally id.*

be the only course left after *No. 8 Ltd. of Virginia.* Responding to an effective grass-roots lobbying strategy, the Tennessee legislature enacted the Tennessee Surface Owner Protection Act in 1977.[120] The Act established a rebuttable presumption declaring that, in interpreting broad form deeds that do not expressly specify strip-mining as a method of mineral extraction, it shall be presumed that the method of extraction that was intended by the parties was the method prevailing at the time the parties originally entered into the deed.[121] As in Kentucky, the law was promptly challenged by strip-mining interests, who claimed that it violated the contracts, taking, and equal protection clauses of the United States and Tennessee Constitutions and contravened the principle of separation of powers.[122]

In 1981, the Tennessee Supreme Court in *Doochin v. Rackley*[123] unanimously upheld the Act.[124] In contrast to Kentucky, the Court premised its ruling on the environmental harms caused by strip-mining: "Strip mining can be hazardous to the environment, to agriculture, and even to human safety. . . . Strip mining temporarily or permanently destroys the surface of the land, depending on the success of reclamation efforts. Thus, strip mining is incompatible with the surface owner's enjoyment of his estate."[125] Recognizing that strip-mining was unknown in the locale when the severance of minerals from the surface occurred during the 1920s and 1930s under the deeds at issue in the case, the court had little difficulty holding that the Act did not impair the contractual rights of the mineral holder.[126] The mineral holder, the court reasoned, did not possess the right to strip-mine unless this method was expressly contained in the deed.[127]

The *Doochin* decision sparked renewed efforts in Kentucky. Led by the incipient Kentucky Fair Tax Coalition, a membership-based organization of citizens throughout the coalfields dedicated to local control of issues affecting economic development and the environment, the proponents of legislation included greater emphasis in their advocacy on the broad form deed's adverse impact on economic development. A bill based on the Tennessee Act was introduced in the Kentucky General Assembly in 1980 and fell one vote shy of passing. The grass-roots campaign persisted, and finally in 1984, a new Kentucky broad form deed law was enacted.[128]

---

120. TENN. CODE ANN. § 66-5-102 (1993).

121. *Id.* § 66-5-102(a).

122. *See* Doochin v. Rackley, 610 S.W.2d 715 (Tenn. 1981).

123. *Id.*

124. *Id.* at 719.

125. *Id.* at 717.

126. *Id.* at 719.

127. *Id.*

128. KY. REV. STAT. ANN. § 381.930-.945 (Banks-Baldwin Supp. 1998) (KY. REV. STAT. ANN. section 381.940 was declared unconstitutional in *Akers v. Baldwin*, 736 S.W.2d 294 (Ky. 1987)).

Predictably, the law was challenged by the coal industry which claimed that the legislation circumvented the court's rulings in *Buchanan*, *Martin*, and *No. 8 Ltd. of Virginia*.[129] History was about to repeat itself.[130]

C. *The Broad Form Deed Campaign and the Dynamics of Power*

In the years following *Buchanan*, the legal campaign to abolish the broad form deed was an unqualified failure in the courts. For almost thirty years, the issue largely remained in the hands of the lawyers and organizers. Predictably, these strategists turned to the courts to promote change. This forum was stubbornly resistant to the citizens' efforts.

By concentrating the broad form deed campaign in this arena, the reformers lost control of the issue. They allowed the courts, for example, to define the issue in a manner completely inconsistent with the people's experiences with the deed. To claim, as the court did in *No. 8 Ltd. of Virginia*, that the broad form deed issue did not implicate environmental concerns shifted the debate away from the central issues of land ownership. The responsibility for this litigation strategy lay largely with the lawyers (myself included), who advised the citizen groups over the years. There was insufficient emphasis on the need to build a political base of citizen support to complement, supplement, and eventually supplant the legal strategy. Eventually, such a movement emerged, but late in the day.

Why did the broad form deed issue not generate more broad-based conflict in the 1960s and 1970s? Why did the affected citizens rely so heavily on lawyers and courts? Were alternative avenues of protest and action available? In their model of power, Lukes and Gaventa provide perspectives on these questions.

First, the "legalization" of the broad form deed issue ensured that the controversy would remain in the very arena—the courts—that, in *Buchanan* and *Martin*, had perverted the definition of the issue in the first place. Even with the most conscientious counsel—and we were—citizens confronted real barriers to full participation in the judicial forum. In Kentucky, judges are elected, and the coal industry contributes heavily to their re-election. The economics of practice, moreover, assure that the coal industry employs a sizable number of lawyers, including many prominent members of the bar. The choice of Bert Combs to represent the industry in *No. 8 Ltd. of Virginia* was not an accident.

Also, the explicit invocation of concern for the economic health of the coal industry in *Buchanan* contrasted sharply with the absence of similar solicitude for the problems of surface owners. The judicial arena, by constricting the scope of the debate, erected obstacles to a full airing of the

---

129. *See Akers*, 736 S.W.2d at 294.

130. My original paper ended here in approximately 1985. The epilogue below traces the subsequent history of the 1984 legislation.

issues. In this setting, even the best Brandeis brief would have been fruitless. These features of the controversy combined to block meaningful participation by citizens in the judicial evolution of the campaign. The mobilization of bias that inheres in the second dimension of power was manifest throughout the campaign.

Second, the over-reliance on lawyers in the movement itself constituted a different form of the mobilization of bias. Despite the best of intentions, we continued to hold out hope that the issue could be resolved in yet another case. The rhetoric of rights in the face of this massive injustice infected our advice to clients and our own perspectives on their concerns.

Defeat inexorably led to another creative rights-based strategy, while the consequences of the delay in implementing another new strategy were never fully considered. Tackling the broad form deed challenged our craft, and we took refuge in what became a false intellectual duel. Each time we received a report of yet another incident of abuse of the broad form deed, our energies were renewed—but in the same grooves. We too fell prey to the legal system's ability to co-op the bursts of momentum that spontaneously erupted over this issue, and we naively celebrated when seeming advances—*e.g.*, SMCRA—occurred.

Third, as noted by Gaventa, "the second dimension of power serves to enhance and re-enforce the third-dimensional power relationship."[131] It is within the third dimension of power that the futility of the legal campaign to abrogate the broad form deed became more fully exposed. By shaping the definition of the issue, the courts and lawyers for both sides subtly influenced the perceptions of people involved in the dispute. More importantly, many of the numerous small landowners affected by the broad form deed, undoubtedly sensing the prospect of defeat or the pretextuality of apparent victory, never became involved in the overall campaign. The ability of the powerful to obscure the central issues of absentee, unequal land ownership and taxation patterns diverted citizen attention away from the core concerns for years. The 1983 study by the Appalachian Landownership Task Force was the first systematic attempt to gather regional data on a multitude of issues of which the broad form deed was only a symbol.

Under Gaventa's scheme, the narrowly-defined broad form deed issue "emerged," only to be blocked in the second dimension of power. The reverberations from these defeats infiltrated the ability of affected persons to act on issues that, in the long run, more directly affected their welfare. Here, the experience in Tennessee has been illustrative.

Despite the passage of the 1977 Surface Owner Protection Act,[132] small landowners in Tennessee have been plagued by the brooding cloud on their title flowing from the broad form deed severance itself. Many are uncertain as to whether their title is bona fide, are unable to acquire financing to make

131. GAVENTA, *supra* note 1, at 255.

132. TENN. CODE ANN. § 66-5-102 (1993).

improvements to their property, and are generally helpless to influence the course of mineral development in their communities. Organized by SOCM, these land owners were forced to devise strategies to combat these deep-seated inequities. Having "succeeded" in 1980, they formulated legislation to create a mechanism where, under specified conditions, the surface and mineral estates to land would be reunited.[133]

Faithful to the third dimension of power, even this strategy failed to confront the fundamental issue of outside corporate ownership of minerals in depressed areas such as Central Appalachia. By concentrating on the broad form mineral deed, strategists suppressed more far-reaching political strategies rooted in local communities. Although the campaign to abolish the broad form deed helped generate information for citizens to use, the legal effort retarded more innovative approaches to pressing problems and inhibited more direct expressions of people's grievances. These grievances will continue to linger until the relationships of power described by Gaventa are better understood. The concluding section of this article will sketch the role lawyers might play in such a transformation.

V. TOWARD AN IMAGE OF PROGRESSIVE LAWYERING

The model of power relationships proposed by Gaventa, combined with the lessons from the broad form deed controversy, suggests tentative paths to guide lawyers in reform representation. In such local protests, there is genuine potential for the realization of democratic participation among heterogeneous people united in opposition to oppressive state or corporate action. The frequent involvement of lawyers in these disputes, however, is a cause for caution. Often inadvertently, as in the broad form deed campaign, lawyers' advice becomes reified without critical analysis of the underlying causes of the disturbance that mobilized people in the first place. Such advice, and the manner in which it is given, can seriously misdirect a citizen-initiated campaign of reform. Assuming the continued involvement of lawyers in these efforts, what are the implications of a power-sensitive role?

First, lawyers must pay careful attention to the information that is generated in the dispute and, most importantly, to the process by which such information is gathered. To the extent possible, citizens must ensure that they do not give control of the effort to the "expert" advice of a lawyer. One characteristic of citizen disturbances is the extent to which data influence the controversy and mold people's perceptions of appropriate strategies. Information generated by the participants themselves serves as a vital check on expert dominance.

---

133. *See id.* § 66-5-108 (providing for the preservation, or extinguishment and reversion, of mineral interests). This section was enacted in 1987.

The Appalachian Landownership Task Force study is a prime example of the kind of citizen-guided effort that should have complemented the broad form deed campaign from the beginning. By removing the generation of expertise from the lawyer, citizens gained valuable experience in one of the crucial mechanisms of control. The importance of this experience is heightened in controversies permeated by risk, such as in the environmental arena, where judgments are best made by affected parties.

In the context of litigation, this approach would translate into assurances that clients meaningfully participate in all phases of investigation and discovery. Seemingly routine functions, such as the scheduling of depositions, must allow for full client involvement. If a case demands the collection and dissemination of substantial data, the computer program containing this information should be in the hands of the group. This experience—participatory research of issues by people affected—is itself empowering.

Second, lawyers in these struggles often will be in positions to affect the processes of decision-making employed by an active group. The opportunities to suggest different models of governance allow the lawyer to draw not only on restricted notions of procedural forms but also on more participatory approaches. The politics of consensus building, strategy formulation, and implementation within the group deserves the sensitive attention of the lawyer. Time spent on "group processing" often will yield better informed and better accepted decisions.

Third, lawyers committed to changing power relationships must strive for creative formulations of issues in concert with organized movements. Staughton Lynd's concept of communal rights, for example, transcends the jejune categories of legal understanding that often control the outcomes of disputes.[134] In the broad form deed campaign, the propagation of more explicit strategies to counter the impact of absentee corporate control of land would have focused the movement on a more substantive agenda than the environmentally oriented one that dominated.

Finally, lawyers must assume a more heuristic role, unencumbered by the rules, roles, and relationships that more traditional images of law practice—even prevailing progressive practices—convey. Educating groups embroiled in resistance requires an approach to professional practice that seeks out thoughts and feelings, acknowledges uncertainties and contradictions, and links knowledge with ideology. Such a role should plunge lawyers into continual self-reflection and should ensure that they construct new visions for embedded problems.

This article has proceeded on the notion that resistance taps into a community's deepest values and creates alternative agendas often unknown to the participants themselves. It has assumed that lawyers will continue to play roles in these disturbances and has outlined an image of practice that

---

134. *See* Staughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417 (1984).

deserves greater elaboration. Puzzling over issues of power, particularly the control exercised by power's third dimension, is an endeavor that might help foster relationships that mirror our aspirations for equality, community, and justice. Re-examining our role in disputes, such as the broad form deed campaign, gives more contextualized meaning to our ideas about social, political, and economic reform.

VI. POSTSCRIPT

This article covers a time span of approximately seventeen years, from 1968 to 1985. The 1984 legislation in Kentucky was invalidated in 1987 in *Akers v. Baldwin*.[135] In *Akers*, the Kentucky Supreme Court held that the legislature violated the doctrine of separation of powers by enacting a rule of interpretation governing broad form mineral deeds that honored the original intent of the parties.[136] The court also intimated that the statute unconstitutionally impaired the obligation of contract.[137] The court thus rebutted the arguments of the surface owners that the central holding in *Buchanan* should be overruled.[138]

Nonetheless, the court made a significant concession to the citizens. All the justices agreed that the parties to the broad form deeds could not have intended the destruction of the surface.[139] The justices stated, "The obliteration of the surface would never have been anticipated by the grantor of the mineral estate."[140] Consequently, the court in *Akers* modified *Buchanan* to authorize the payment of damages to the surface owner for surface destruction in the limited situation when the broad form deed transfer or lease was pre-*Buchanan* or post-*Akers*.[141] The court noted that

---

135. 736 S.W.2d 294 (Ky. 1987). The underlying facts in *Akers* underscore in microcosm the continuing nature of the problem that has motivated the struggle to abolish the broad form deed. In *Akers*, Elizabeth Wooten, one of the plaintiffs, was the owner of a small tract of land on Jones Farm of Lot's Creek in Perry County, Eastern Kentucky. Ms. Wooten was sued by a strip-mine operator after she refused to permit mining on her property. *Id.* at 296.

Elizabeth Wooten and her husband Bill bought the property in 1949. The surface had been severed from the mineral estate under a broad form deed in 1910. *Id.* Bill Wooten was buried on the Wooten's hillside property on the contour of the 5-A coal seam. *See* Brief for Appellee at app. B ¶¶ 6, 9, Akers v. Baldwin, 736 S.W.2d 294 (Ky. 1987) (No. 84-88). This seam was mined on property adjacent to the Wooten tract. *Id.* ¶ 11. She testified that, while strip-mining the adjacent land, the coal company degraded her sole source of water. *Id.* ¶ 12.

136. *Id.* at 308-09.

137. *Id.* at 310.

138. *Id.* at 304-05.

139. *Id.* at 307.

140. *Id.*

141. *Id.*

Kentucky stood "naked and alone" among mining states in its decision in *Buchanan*.[142]

In 1988, led by the multi-textured organizing efforts of Kentuckians for the Commonwealth, a citizens social justice group, the people of Kentucky amended the state constitution as follows:

> In any instrument heretofore or hereafter executed purporting to sever the surface and mineral estates or to grant a mineral estate or to grant a right to extract minerals, which fails to state or describe in express and specific terms the method of coal extraction to be employed, or where said instrument contains language subordinating the surface estate to the mineral estate, it shall be held, in the absence of clear and convincing evidence to the contrary, that the intention of the parties to the instrument was that the coal be extracted only by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed, and that the mineral estate be dominant to the surface estate for the purposes of coal extraction by only the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed.[143]

This approach to the abolition of the broad form deed tracked the early effort in Tennessee and the approach taken in the 1984 legislation that was overturned in *Akers*. The story of this effective grassroots campaign holds lessons that are beyond the scope of this article but are worthy of intense critical analysis and understanding.[144]

The coal industry did not abandon its legal fight. In 1988, when the constitutional amendment was enacted, a pivotal case was pending in the lower courts. *Ward v. Harding*[145] was a quiet title action brought by mineral holders and a lessee coal company against the surface owners, Eugene and Garnett Ward, to prevent them from interfering with surface mining on their property and to quiet the title of the mineral interests. Lawyers from APPALRED represented the Wards and asked the court to apply the new constitutional amendment.[146] The Kentucky Supreme Court did apply the

---

142. *Id.* at 306.

143. KY. CONST. § 19(2) (amended 1988).

144. Joe Szakos, the staff coordinator for Kentuckians for the Commonwealth, has written an insightful account of citizen advocacy and the constitutional campaign to end the broad form deed. *See* Joe Szakos, *Practical Lessons in Community Organizing in Appalachia: What We've Learned at Kentuckians for the Commonwealth*, *in* FIGHTING BACK IN APPALACHIA: TRADITIONS OF RESISTANCE AND CHANGE 101 (Stephen L. Fisher ed., 1993).

145. 860 S.W.2d 280 (Ky. 1993).

146. *Id.* at 281.

new constitutional rule and reversed the "broad form deed law" of thirty-seven years that had permitted coal companies to extract coal by surface mining methods without the landowner's consent.[147] This decision finally overruled the holding in *Buchanan v. Watson* that broad form mineral deeds authorized strip-mining even though the modern methods of surface mining, with its consequent destruction, could not have been contemplated by the parties to the original deed.[148]

The court also upheld the Broad Form Deed Constitutional Amendment against a federal constitutional challenge under the "impairment of contract" and "takings" clauses.[149] The court held that the there was no violation of the contract clause because the grantor had not conveyed the right to strip-mine.[150] Further, there was no violation of the takings clause because the mineral owners had, throughout the years, reaped an unforeseen advantage that was not protected by the takings clause.[151] The United States Supreme Court denied the industry's petition for a writ of certiorari.[152]

John Rosenberg, the director of APPALRED and the lawyer who spanned the legal campaign the longest, has argued that our early legal efforts, though unsuccessful in the courts, paved the way for the growth of Kentuckians for the Commonwealth and helped crystallize the issue in the public mind.[153] Under this interpretation, the string of major court defeats in the late 1960s and 1970s so incensed coalfield citizens—who easily saw through the courts' opaque rationales—that the conditions were ripe for Kentuckians for the Commonwealth to organize around the broad form deed issue and to achieve success. In a perverse way, our clients may have known better than we that going to court, win or lose, would have beneficial consequences—although in the long run—for abolishing the deed. In a sense, the court decisions in *Martin* and *No. 8 Ltd. of Virginia* forced the high court to confront the broad form deed issue in a very public way. As a result, the groups and individuals represented had their consciousness and

147. *Id.* at 287.

148. *Id.*

149. *Id.* at 288-89.

150. *Id.* at 288.

151. *Id.* at 289. For an analysis of *Ward*, see Leah A. Gatch, Note, Ward v. Harding: *Kentucky Strips Miners of Dominate Rights, Burying a Century of Litigation*, 21 N. KY. L. REV. 649 (1994). *See also* Owen L. Anderson, *Broad-Form Mineral Deeds Upheld by Kentucky Supreme Court*, NAT. RESOURCES & ENV'T, Summer 1994, at 33, 34 ("The case is best explained by recognizing that the Kentucky courts made a mistake when they initially held that mineral owners had the right to destroy the surface when claiming under a broad-form severance instrument executed at a time when the parties could not have contemplated today's surface mining technology.").

152. *See* Ward v. Harding, 510 U.S. 1177 (1994).

153. Letter from John Rosenberg to Dean Hill Rivkin (Feb. 18, 1988) (on file with author).

resolve affected in ways that would have been impossible without the litigation (the third face of power rears its head), and mobilization ensued.

The court decisions gave citizens a concrete wrong to overturn, and through Kentuckians for the Commonwealth, they took it all the way to a constitutional amendment. In Rosenberg's view, the litigation did not have a negative effect of suppressing citizen resistance; he believes that the citizens would have wanted the litigation to proceed as it did.[154]

Rosenberg's deep faith in the wisdom of our clients is one I share. I have less faith, however, in the law as "a vital and beneficent social institution."[155] The danger of using the law to challenge unjust social and economic arrangements and of ending up legitimating a great injustice is well illustrated by the pre-constitutional amendment broad form deed cases.[156] *Buchanan* represented so corrupt an interpretation of the broad form deed and so naked a grab of power for the coal industry, that it is difficult to fathom how surface owners turned again to the courts in *Martin* to rectify this wrong.

The dance with the legislature was more understandable, although I still suspect that legislators voted for the 1974 and 1984 legislation because they were confident that the courts would undo the legislation. In the end, a constitutional amendment—a groundswell from the citizenry—could not be ignored by the courts almost forty years after *Buchanan*. Did our legal advocacy stifle such a groundswell from erupting much earlier?

Eastern Kentucky still remains hostage to the vicissitudes of the coal industry.[157] Local resistance to environmental harms persists.[158] Except for cleaning up problems in individual cases, lawyers and clients have looked beyond the relic of the broad form deed. I will always wonder if the early broad form deed legal campaign was a diversion from more sustainable efforts to revitalize grassroots democracy in Appalachia.

---

154. *Id.*

155. Stuart Scheingold, *The Contradictions of Radical Law Practice*, *in* LAWYERS IN A POSTMODERN WORLD: TRANSLATION AND TRANSGRESSION 265, 265 (Maureen Cain & Christine B. Harrington eds., 1994). Scheingold argues that this tenet of conventional professionalism inhibits more "radical alternatives," *id.*, to progressive law practice and the promotion of an interactive relationship between political objectives and legal rights. For further discussion of this issue, see generally DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (1997).

156. Steve Ellmann has written penetratingly about this phenomenon. *See, e.g.*, Stephen Ellmann, *Struggle and Legitimation*, 20 L. & SOC. INQUIRY 339 (1995).

157. *See* Fenton Johnson, *In the Fields of King Coal*, N.Y. TIMES MAGAZINE, Nov. 22, 1992, sec. 6, at 30. *See generally* LOCKARD, *supra* note 75.

158. *See* Sherry Cable, *From Fussin' to Organizing: Individual and Collective Resistance at Yellow Creek*, *in* FIGHTING BACK IN APPALACHIA: TRADITIONS OF RESISTANCE AND CHANGE 69 (Stephen L. Fisher ed., 1993).