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Reflections on Lawyering for Reform: Is the Highway Alive Tonight

Dean Rivkin

REFLECTIONS ON LAWYERING FOR REFORM: IS THE HIGHWAY ALIVE TONIGHT?

DEAN HILL RIVKIN*

There is a kaleidoscope of images about the roles that lawyers have played over the years in social reform litigation.[1] I think of civil rights lawyers, ACLU lawyers, poverty lawyers—those who practiced in an era not too long ago when these terms and the vocations they described were not contested. It was not that there was no room at the time for serious critique, but there seemed to be an unproblematic understanding of mission and purpose. Not only were there accepted assumptions about strategies and tactics, but also there were unspoken understandings about the way those who practiced in these fields would evolve. Thus, Arthur Kinoy's "people's lawyer,"[2] "movement" lawyers, and law collectives gave way—though not in any linear sense—to public interest lawyers,[3] to Lucie White's third dimensional lawyers,[4] to Louise Trubeck's critical lawyers,[5] and to Gerald

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* Professor of Law, University of Tennessee; B.A. 1968, Hamilton College; J.D. 1971, Vanderbilt Law School. This essay, with subsequent minor revisions, was presented at the 1996 Annual Meeting of the Association of American Law Schools at the program of the Section of Litigation entitled "Litigation and Law Reform: Inclusion and Education." I thank Tucker Carrington and Hope Shoulders, students at the University of Tennessee College of Law, for their persistent help in researching this piece. I also thank my colleagues in the University of Tennessee Legal Clinic and my many friends in the legal services, public interest law, and clinical communities for their abiding inspiration.

1. Martha Minow deconstructs the concepts of "law," "social," and "change" in Martha Minow, *Law and Social Change*, 62 UMKC L. REV. 171 (1993).

2. ARTHUR KINOY, RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE'S LAWYER (1983).

3. Arthur Kinoy believes that the term "public interest lawyer" is too diffuse and passionately prefers "people's lawyer," a phrase he first heard from Fannie Lou Hamer in Mississippi in 1964. Arthur Kinoy, *The Role of the People's Lawyer in the 1990's*, 2 TEMP. POL'Y & CIV. RTS. L. REV. 209, 209-10 (1993).

4. *See* Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157, 157 & n.2 (1994) (drawing on the model of power first elaborated by Steven Lukes in STEVEN LUKES, POWER: A RADICAL VIEW (1974)).

5. *See* Louise G. Trubek, *Critical Lawyering: Toward a New Public Interest Practice*, 1 B.U. PUB. INT. L.J. 49, 50-56 (1991). For Louise Trubek's ambitious attempt to operationalize what lawyering for subordinated people means, see generally Louise G. Trubek, *Embedded Practices: Lawyers, Clients, and Social Change*, 31 HARV. C.R.-C.L. L. REV. 415 (1996).

Lopez's rebellious collaborative lawyers.[6] A clinical colleague from Pakistan calls such lawyers "saint lawyers."

These lawyers engaged in law reform litigation, political lawyering, grassroots advocacy, case aggregation strategies, anti-regnant lawyering, focused case representation, and even "petty disturbances," to borrow Roberto Unger's desiccated phrase.[7] Using well-accepted rhetoric these lawyers—and I include myself among them—lawyered to vindicate rights, to empower people, to change institutions (remember structural litigation?), and to achieve social change and social justice. We were accused by many of trying to save the world, of being lawyers for causes, not clients.

We strove to write elegant complaints and briefs that told compelling stories, believing that a good story, told with passion, could liberate its subject.[8] We used discovery to bring CEOs to the table. We tried to use legal rules expressively. We were share-bargaining negotiators, furious advocates for our causes and, usually, for our clients.[9] We became players in events that we thought we could (and sometimes did) control. In the office, we worked to be anti-hierarchical, reflective, consensus builders, people who valued community. Our values shaped our aspirations, which in turn shaped our values.

Where are we today? The first observation to make is that there may not be a "we." By this I do not mean to say that we do not exist, or that the survival of activist lawyers depends on government funding, which is in jeopardy in insidious ways.[10] What I mean when I question the cohesive-

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6. GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 81 (1994). For a review of Lopez's book that echoes the themes in this essay, see Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747 (1994).

7. Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 667 (1983).

8. For a compelling piece about "voice" in pleadings, see generally Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763 (1995).

9. I say "usually" to acknowledge wholeheartedly the reality that lawyers in reform cases, particularly class actions, must struggle to assure that their representation accords with the often elusive interests of the class. *See, e.g.*, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471-72 (1976); Martha Matthews, *Ten Thousand Tiny Clients: The Ethical Duty of Representation in Children's Class-Action Cases*, 64 FORDHAM L. REV. 1435, 1437 (1996).

10. The funding crisis in legal services programs for the poor, and the restrictions that Congress has placed on these programs, have led to the departure of a number of leading legal services lawyers, several leaving for private nonprofit legal centers. *See* Martin Gottlieb, *Tennessee Portrait: A Lawyer for the People Plans to Fight on His Own*, N.Y. TIMES, Jan. 28, 1996, § 1, at 12. Even prior to the imposition of the debilitating restrictions on client representation, experienced commentators questioned whether the national program of legal services for the poor was an effective force for long-term social, economic, and

ness of today's reform lawyers is that the concept often does not capture in a meaningful way the diversity that is slowly evolving in the settings where lawyering for reform must take place today—in communities, in neighborhoods, or in familiar institutions, such as schools. Today, there are a set of interlocking themes about lawyering for reform that remain in deep tension, but whose resolution is central if lawyers who care about social change are to transform themselves to adapt to the complex needs of clients, communities, and democracy.

Let me discuss what I perceive to be some of the most important unresolved themes. First, the heightened struggle over our relationships with our clients is a perplexing theme.[11] In days past, reform lawyers genuinely believed that, by virtue of the lawyer-client relationship, they were entitled to be their client's voice.[12] James Agee, in *Let Us Now Praise Famous Men*,[13] captured this belief in ultimate empathy when he wrote about a poor sharecropper family from Alabama who were then his hosts. Agee wrote:

> But it is not only their bodies but their postures that I know, and their weight in the bed or on the floor, so that I lie down inside each one as if exhausted on a bed, and I become not my own shape and weight and self, but that of each of them, the whole of it, sunken in sleep like stones; so that I know almost the dreams they will not remember . . . as if they were music I were hearing, each voice in relation to all the others, and all audible, singly, and as one organism, and a music that cannot be communicated . . . .[14]

Today, we question anyone's right to make such an attempt to speak for those who have not spoken for themselves. Nonetheless, in spite of our sensitivity, we find it enormously hard not to silence and disable clients through our empathy and compassion, much less our distance and, yes, despair.[15] There are theories of empowerment, strategies for dealing with

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political change. *See* Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529 (1995).

11. *See* Nancy D. Polikoff, *Am I My Client?: The Role Confusion of a Lawyer Activist*, 31 HARV. C.R.-C.L. L. REV. 443, 446-47 (1996).

12. *See* Lucie E. White, Goldberg v. Kelly *on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 861-62 (1990).

13. JAMES AGEE & WALKER EVANS, LET US NOW PRAISE FAMOUS MEN (1980).

14. *Id.* at 58. For a classic analysis of the legitimacy of representing others in need, see MICHAEL IGNATIEFF, THE NEEDS OF STRANGERS (1984).

15. *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, 691-92 (1987-1988); Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1299-1300 (1992); Christopher P. Gilkerson, *Theoretics of Practice: The Integration of Progressive Thought and Action—Poverty Law Narrative: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 864 (1992); Binny Miller, *Give Them Back Their Lives: Recognizing*

differences, empathy training—they help—but the tensions in the lawyer-client relationship in reform litigation—whether in a class action or an individual case—persist.[16]

Second, rights-based litigation strategies to achieve reform, at least in the academy, have achieved the status of a dysfunctional family member, but one who often speaks the truth.[17] We have absorbed the critique of rights, how the assertion of rights alienates, polarizes, and, in the end, creates a backlash that nullifies the gains that the litigation achieved.[18] Painfully, we see years of work in prisoners' rights litigation, for example, dissipate in the face of escalating rates of incarceration, disproportionately for African-American youth and men,[19] prison construction programs that are

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Client Narrative in Case Theory, 93 MICH. L. REV. 485, 576 (1994). For a story of the angst and despair of a lawyer facing a new era of legal activism, see Thomas Geoghegan, *Warren Court Children*, THE NEW REPUBLIC, May 19, 1986, at 17.

16. For a critique of various theories aimed at remedying the problems of the client's muted voice, see generally the authorities cited *supra* note 15.

17. For a critique of rights-based litigation, see generally, e.g., MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 5 (1991) (from the right); ARYEH NEIER, ONLY JUDGMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE 226 (1982) (from the left).

18. The Prison Litigation Reform Act (PLRA), 18 U.S.C. § 3626 (1997), for example, dramatically restricts litigation by inmate plaintiffs against state and federal penal institutions. Among the PLRA's provisions are those that make it more difficult for inmates to proceed *in forma pauperis*, set a cap on federal court consent decrees, and reduce the availability of attorneys' fees. *Id.* Alvin Bronstein, the long-time Director of the ACLU's National Prison Project, has keenly wrestled with the dialectics of rights-based litigation approaches:

> For years we have wrestled with the question of whether our [attempts and successes at] improving prisons [are] really part of the problem. They're so awful, they lock so many people up. By making [prisons] better, are we really insulating them from a more important policy review?
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> My response to some of my radical friends who want us not to bring these lawsuits, to let the prisons riot and burn down so that . . . we'll abolish prisons, is that I don't believe prisons will be abolished in my lifetime or the lifetime of my children or probably even my grandchildren.
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> But I can do something to improve the quality of life for prisoners tomorrow, which is what prisoners want. [Prisoners] don't want to hear about abolition 50 or 100 years from now. . . . They want a change of sheets and access to a doctor or dentist next week. And we made those changes. We have abolished 19th century dungeons in this country.
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> At the same time, the last few years have been very depressing for me, because I see us going back 25 years, if not more.

Harvey Berkman, *Proud and Wary, Prison Project Director Bows Out*, NAT'L L.J., Jan. 8, 1996, at A12 (alteration in original); *see also* LARRY W. YACKLE, REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM v-vi (1989).

19. Pierre Thomas, *Black Imprisonment Impairs Political Clout*, COM. APPEAL (Memphis), Feb. 2, 1997, at A11 (33% of African-American males in their twenties are either

the centerpiece of the new New Deal,[20] and a deluge of punitive criminal and juvenile legislation (how about the Violent and Hard-Core Juvenile Offender Act of 1995, which was never enacted?) that mock notions of change that informed the agenda supporting prisoners' rights. In field after field—mental health, death penalty defense, welfare—the paradigms of reform that we thought we had constructed have crumbled.

But for litigators who have real clients with immediate issues, abandoning rights-based strategies just is not acceptable in the short run. Rights still possess strong symbolic meaning for people who are in trouble, and, frankly, the denigration of lawyers who assert rights in litigation often comes across as a bit elitist.[21] This is an area where we need much more collaboration among academic theorists, lawyers on the front line, and, yes, clients and communities.

Finally, there is a growing feeling that the reform lawyering of the past should be supplanted by a versatile, multi-layered advocacy more characterized by community, compromise, and conversation; that the ethic of resistance that characterized reform litigation in the past should be replaced by an ethic of connections—one of building alliances and creating alternative institutions, not engaging in guerrilla warfare.[22]

Economic development is emerging once again as a favored speciality —this time putting local development in a global context.[23] Human rights is replacing individual rights or even civil rights as the appropriate watchword. Goals have been scaled back. Striking down nationwide or statewide policies is giving way to more targeted, broader-based advocacy efforts directed at a particular school,[24] public housing project, or even neighbor-

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incarcerated or on some form of probation or parole).

20. Roberto Suro, *More Is Spent On New Prisons Than Colleges; Institute Urges Changes in Funding Priorities*, WASH. POST, Feb. 24, 1997, at A12.

21. *See generally* Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509 (1984) (advocating a proactive approach to civil rights reform and responding to various critics of such an approach).

22. *See generally, e.g.*, Louise G. Trubek, *Introduction to the Symposium on New Approaches to Poverty Law, Teaching, and Practice*, 4 B.U. PUB. INT. L.J. 235, 240 (1995) (commenting on the benefit of "peer exchanges," discussion groups comprised of poverty law reform advocates).

23. *E.g.*, Fran Ansley, *Standing Rusty and Rolling Empty: Law, Poverty, and America's Eroding Industrial Base*, 81 GEO. L.J. 1757, 1761-62 (1993); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 445-46 (1995); *see also* Gerald P. Lopez, *Economic Development in the "Murder Capital of the Nation,"* 60 TENN. L. REV. 685 (1993).

24. *See, e.g.*, Leigh Goodmark, *Can Poverty Lawyers Play Well with Others? Including Legal Services in Integrated, School-Based Service Delivery Programs*, 4 GEO. J. ON FIGHTING POVERTY 243 (1997).

hood, as in the eviction-free zone project of Harvard's Legal Services Center, where an aggregation of individual cases serves as a foundation for a reconfiguration of the dynamics of a housing market.[25]

These directions need nurturing and support from those of us who participated in the public interest law movements of the past. What is needed today most of all—at least at first—is talk, talk, talk—lots of discourse—among lawyers, clients, and others with an interest in making sense of our past efforts in reform litigation and charting new transformative strategies. I am currently involved in a project that aspires to begin this discussion around issues in community environmental justice litigation.[26] This is a species of reform lawyering that deserves appraisal because many of its impulses and methods defy some of the received traditions of public interest environmental litigation. The project is rooted in my now sixteen-year representation—in a variety of roles and capacities—of the Yellow Creek Concerned Citizens, a citizens' organization (not group!) in far southeast Kentucky (near the Cumberland Gap), that formed in 1980 to halt toxic pollution from the Middlesboro Tanning Company of Delaware plant.[27] The Yellow Creek community is located in the area analyzed in John Gaventa's illuminating book, *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley*.[28]

The project is a collaboration of the legal team, as we're called, and leaders of the Yellow Creek Concerned Citizens, two of whom serve as staff members of the Highlander Research and Education Center, a venerable center of progressive, popular education for people involved in labor, civil

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25. Gary Bellow, a professor at the Harvard Law School and a brilliant theorist and tactician of political lawyering, helped develop the eviction-free zone concept. Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.R. L. REV. 297, 299 (1996); *see also* Lawrence K. Kolodney, *Eviction Free Zones: The Economics of Legal Bricolage in the Fight Against Displacement*, 18 FORDHAM URB. L.J. 507, 507 (1991).

26. Scholarship about the environmental justice movement has burgeoned in recent years. Luke Cole, of the California Rural Legal Assistance Foundation, is one seminal writer and practitioner. *See generally, e.g.*, Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 621 (1992) (discussing "'environmental poverty law' in the context of lawyering for social change and social justice"). For a discussion of alliances with clients in an early environmental justice campaign, see generally Dean Hill Rivkin, *Doing Environmental Justice in Appalachia: Lawyers at the Grassroots and the Aspiration of Social Change*, 96 W. VA. L. REV. 1109 (1994) (discussing environmental poverty law and the relationship between lawyers and coal mining communities in Appalachia).

27. For an early account of the Yellow Creek Concerned Citizens, see Sherry Cable & Edward Walsh, The Emergence of Environmental Protest: Yellow Creek and TMI Compared (August 1988) (unpublished manuscript, on file with author).

28. JOHN GAVENTA, POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY 33-34 (1980).

rights, economic justice, and community environmental struggles.[29] The Yellow Creek people on the Highlander staff have spent years facilitating Stop The Poisoning (STP) workshops within communities and bringing together people from diverse areas who are involved in similar environmental causes. Our project stems from the interest expressed by grassroots community leaders in many of the STP workshops to make sense of the role that lawyers and the legal system play in the work of their nascent organizations.

The goal of our project is to produce materials better explicating the diverse roles that lawyers can and do play in community reform litigation and to use these materials in sessions with communities contemplating litigation. The structure that we have chosen will be parallel narratives recording the history of the Yellow Creek advocacy campaign from the perspectives of the lawyers and clients involved. This will compel each group to reconcile its actions, decisions, attitudes, and feelings before we share our work with each other. This is the type of intensive discourse that I alluded to before. I suspect that, just as we did during the peaks of litigation, many voices will be raised and much coffee will be consumed. We want to provide the kind of thick context about lawyer-client relationships that Jonathan Harr's *A Civil Action*[30] did not in its account of the toxic tort litigation in Woburn, Massachusetts.

Some of the issues and dynamics that we plan to explore are:

1. The initial interactions between the lawyers and the group. What motivated the group to contact lawyers? What motivated the lawyers to represent the group? What parameters govern the relationships?
2. The collaborative development of the initial legal strategies. The drafting of the initial pleadings.
3. The decision-making apparatus in the case. Who made decisions and how? The complex conversations about decision-making that took place—e.g., the role of money.
4. The generation of data and material for the case. Who had the knowledge? How was this vital process controlled?
5. The funding of the case.
6. The identification of and relationship to "experts."
7. The evolving legal, administrative, and political strategies.
8. The interpersonal relationships that developed.
9. The evaluation mechanisms we built into the effort.

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29. *See* FRANK ADAMS & MILES HORTON, UNEARTHING SEEDS OF FIRE: THE IDEA OF HIGHLANDER 188-89 (1975).

30. JONATHAN HARR, A CIVIL ACTION (1995).

We are committed to openness, frankness, and reflection. None of us want a romanticized version of the events. We are determined to allow all voices to participate. We also want to produce a product that will educate and guide lawyers, advocates, and clients in the future.

Through this project, we want to develop grounded insights into the possibilities and limitations of reform litigation; to reinvigorate discussions among public interest lawyers and clients about future directions; and to suggest paths that lawyers and clients might take to meet the telling criticisms of public interest and poverty practice that infuse our current predicament. For me, I eagerly await sharing this project with my students, building an environmental justice seminar around it, holding project discussions in our classes, and allowing students to see the value of critical discourse as a prelude to action.

In living with these issues, I am keenly aware that, as in Bruce Springsteen's chorus in *The Ghost of Tom Joad*: "The highway is alive tonight, but nobody's kidding nobody about where it goes."[31] Charting a new course down the highway, and always questioning whether the road needs to be built and how, are the challenges.

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31. BRUCE SPRINGSTEEN, THE GHOST OF TOM JOAD (Columbia Records 1995). *See also* Nicholas Dawidoff, *The Pop Populist*, N.Y. TIMES MAGAZINE, Jan. 26, 1997, at 27.