LAWYERS, LAW, AND SOCIAL CHANGE

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I
INTRODUCTION

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> That [Auschwitz] could happen in the midst of the traditions of philosophy, of art, and of the enlightening sciences says more than that these traditions and their spirit lacked the power to take hold of men and work a change in them. There is untruth in those fields themselves, in the autarky that is emphatically claimed for them. All

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> post-Auschwitz culture, including its urgent critique, is garbage. In restoring itself after the things that happened without resistance in its own countryside, culture has turned entirely into the ideology it had been potentially—had been ever since it presumed, in opposition to material existence, to inspire that existence with the light denied it by the separation of the mind from manual labor.[1]
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This article will investigate relations between lawyers, law, and social change. The question is of interest to lawyers who are concerned with whether or not their profession has any relation to the actual implementation of justice.[2] More importantly, though, the question is of critical interest to a broader audience of social activists. Its answer will inform fundamental approaches to strategies and tactics in the field of social change. If one desires social justice, should one bother with law and lawyers at all, and if so, to what extent and in what fashion?

In investigating these matters, I begin by setting out my own position on the issue. This includes an explication of what is desirable social change, how to achieve it, and what role law and lawyers might play in the process. An examination of the factors sustaining this position follows. This includes experiences in professional practice, theoretical vision, and conceptions of history. Having substantiated the position, I will turn to more specific elaborations of where lawyers and law fit into my vision. Practical activities which lawyers ought and ought not pursue will be noted. I then compare my position to those espoused by three alternative positions on the left side of the spectrum: the public interest/legal reform advocates; the "a-legal" leftists; and the group I identify as "fusionist" (many of whom explicitly identify themselves with the Critical Legal Studies movement). These comparisons should not only clarify my position , but also advance the debate in this area. After that I turn to a discussion of the implications that my position holds for a notion of law. I conclude by illustrating how practice can mesh with theory.

II
PROPOSED POSITION

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> "The final type . . . [of social interaction,] community, is least developed in modern sociological and political theory . . . ."[3]
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A social goal is not easy to articulate. Use of labels can easily confuse or

1. T. Adorno, Negative Dialectics 366-67 (E.B. Ashton trans. 1973).
2. See, e.g., Kennedy, Legal Education and Training for Hierarchy, and Rabinowitz, The Radical Tradition in Law, in The Politics of Law (D. Kairys ed. 1982); and Gabel & Harris, Building Power and Breaking Images, 11 N.Y.U. Rev. L. & Soc. Change 369 (1983).
3. F. Dallmayr, Twilight of Subjectivity 142 (1981).

mislead. Moreover, desired social futures must be created by actual and imperfect human endeavor, and cannot be thoroughly blueprinted by theory in the present.[4]

The most appropriate labels for my vision would be "communitarian," "social democratic," "democratic socialist," or "populist."[5] The vision would include at least the following characteristics: (1) a respect for personhood ("individuality");[6] (2) an appreciation of community;[7] (3) a commitment to democracy (social, economic, and political);[8] (4) realizability.[9] In one sense Fred Dallmayr has articulated these same concerns. Since he raises various issues which will arise later in this article, he is worth citing at length:

> In contrast to association, community does not imply a simple juxtaposition of supposedly independent agents . . . . As opposed to the homogeneity deliberately fostered in [the sphere of movements, or, fused groups], the communitarian mode deliberately cultivates diversity—but without encouraging willful segregation or the repressive preponderance of one of the social subsectors. . . . [T]he pervasive outlook or behavioral mode might be described as anticipative-emancipatory practice or as an attitude dedicated to letting others be—a distinctive and peculiar mode since it is lodged at the intersection of activity and passivity. As a corollary of this outlook, community may be the only form of social aggregation which reflects upon, and makes room for, otherness or the reverse side of subjectivity (and inter-subjectivity) and thus for the play of difference—the difference between ego and Other and between man and nature.

4. Cf. G. Lukacs, History and Class Consciousness (R. Livingstone trans. 1971). Cf. also the method acknowledged, described, and affirmed by Roberto Unger in The Critical Legal Studies Movement, 96 Harv. L. Rev. 561 (1983). For a critique of the latter, see Hutchinson & Monahan, The "Rights" Stuff: Roberto Unger and Beyond, 62 Tex. L. Rev. 1477 (1984).

5. This is possibly the most underappreciated term of the lot. It is cited in accord with the perception of populism as described by Lawrence Goodwyn, in Democratic Promise (1976), and The Populist Moment (1978).

6. "Individuality" is also a loaded term, given its potential for abuse by the Right. I understand it to involve a ratification of personhood, to be achieved through social experience. See L. Goodwyn, The Populist Moment, supra note 5, at 295-6: "the Populists believed they could work together to be free individually. In their institutions of self-help, Populists developed and acted upon a crucial democratic insight: to be encouraged to surmount rigid cultural inheritances and to act with autonomy and self-confidence, individual people need the psychological support of other people. The people need to 'see themselves' experimenting in new democratic forms." See also Unger, supra note 4 at 584; C. Lasch, The Minimal Self 32 (1984).

7. For various explications of "community" see, e.g., F. Dallmayr, supra note 3, at 140-42, and Unger, supra note 4, at 597.

8. See, e.g., Unger, supra note 4, at 586.

9. There are Left theoreticians who emphasize the need to cultivate utopian thought. See, e.g., F. Jameson, The Political Unconscious 285 (1981). Most useful is "a basic premise in Merleau-Ponty's political philosophy—that politics is an order of the real world and therefore that any theory that claims to be political philosophy must also provide for its own realization." J. Bien, in M. Merleau-Ponty, Adventures of the Dialectic xi (Bien trans. 1973). See also P. Clecak, Radical Paradoxes 27 (1973); and Bachmann & Weltchek, Book Review, 30 UCLA L. Rev. 1078, 1081, 1091 (1983).

> As the terms anticipative-emancipatory care and ontological anticipation indicate, the type envisaged here does not coincide with an empirically given or presently existing (or historically recorded) aggregate; nor, due to its concern with Being, can it be equated with a regulative principle or abstract utopia. On the level of political theory, anticipation points toward the end of politics in a dual sense: namely, the dismantling of political domination and the goal of politics, traditionally formulated as the good life.[10]

The preceding values will be implemented only by organized masses of people. The term "masses" is emphasized because, from a power perspective, "revolutionary reform" will be resisted by the "faction" that presently controls the American polity.[11] The term "organized" is stressed because only conscientious, coordinated efforts of masses of people will prove able to dislodge the faction and create revolutionary reform. Finally, mass effort is emphasized because of concern with the quality of "revolutionary" transformation. As historical experience warns us, democratic ends are difficult to secure without the implementation of democratic means.[12]

The character of law in this process is that of articulated value. The values which enjoy articulation as law depend upon the outcome of struggles between various social groups.

The role that lawyers play in the development and articulation of value and law in society is rather marginal. Organized masses of people, not lawyers, play the critical roles, and the significant victories (or losses) occur outside of the sphere of law. The more that lawyers try to implement social change directly, the more inimical their impact. In noting this point, I am not calling for the abolition of the legal profession. Lawyers do have a role to play in implementing social change, but it is a limited one.[13]

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10. The perspective of this piece and Dallmayr's point might be better appreciated if it is noted that Dallmayr is counterposing communitarian relations to three other types: that of "communalism" ("*gemeinshaft*," with its emphasis on organic and quasi-natural factors such as kinship, heredity, and ascribed status); that of "association" (reminiscent of the classical liberal view of the world, with its stress on volition and a sphere of pre-social autonomy); and that of "movement" which calls to mind Jean-Paul Sartre's "fused group," which "is defined by its undertaking and by the constant movement of integration which tends to turn into pure praxis while trying to eliminate all forms of inertia from it." See F. Dallmayr, supra note 3, at 140-42. The final quotation is his citation from Sartre. For more on Sartre's notion of the fused group, see his Critique of Dialectical Reason (1976); see also M. Poster, Existential Marxism in Postwar France: From Satre to Althusser chap. 7 (1975).

11. The rhetoric derives from Unger, supra note 4, at 588, 666.

12. See L. Goodwyn, The Populist Moment, supra note 5, at 291. Cf. the debates between Luxemburg and Lenin. N. Lenin, What Is To Be Done (1952); R. Luxemburg, Selected Political Writings (D. Howard ed. 1971).

13. For some, the existence of lawyers constitutes an expression of alienated social relationships. See, e.g., M. Foucault, Power/Knowledge: Selected Interviews and Other Writings (C. Gordon ed. 1980); Cf. Gabel & Kennedy, Roll Over Beethoven, 36 Stan. L. Rev. 1 (1984). For others, lawyers can be seen as playing a useful role as the society attempts to live up to its sense of justice. See Rabinowitz, supra note 2, and E.P. Thompson, Whigs and Hunters, The Origin of the Black Act 258-68 (1975). While the existence of law and lawyers might entail its

III
JUSTIFYING THE PROPOSED POSITION

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"We would fall into an error that we criticize in our adversaries if we imagined our conceptual activities as a substitute, even a substitute source of insight, for practical conflict and invention."[14]

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A. Practical Considerations: ACORN

The position I am espousing derives from my experiences in professional practice, theoretical conceptions, and perspectives from history.

My professional experience includes working in the law firm of Bachmann & Weltchek, which has served as general counsel to the Association of Community Organizations for Reform Now (ACORN) since 1976. ACORN is a non-profit corporation comprised of more than 50,000 low- and moderate-income families organized into neighborhood groups in over 40 cities across the United States. ACORN avoids advocating any particular ideological viewpoint,[15] but its social vision and its methods for accomplishing such visions are evident in its publications:

> You can win stop-lights from here to eternity, which is what many community organizations around the country have excelled at, but unless your organization addresses the question of who has the power to control what happens in a neighborhood, a city, a county, or a state—and who should have the power to control what happens in these areas—then all your organization will achieve is a proliferation of stop-lights in low to moderate income neighborhoods. Obviously, ACORN's goal is much more.[16]

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own problematic momentum, my own view is dialectical: systems involving statutes and a legal profession involve their positive and negative aspects. Ultimately their impact—and our evaluation—will depend more on what we see being practiced by living human beings.

14. Unger, supra note 4, at 667.

15. This approach can be explained from at least two perspectives: (1) philosophical humility, see T. Adorno, supra note 1, at 5 and M. Merleau-Ponty, Humanism and Terror xxxviii (O'Neill trans. 1969); and (2) historical expediency. When ACORN was founded in 1970, the New Left was dissolving through ideological fragmentation and intolerance. By narrowing the requirements for ideological unity, ACORN formed an operating entity which has lasted almost fifteen years.

16. Kest & Rathke, ACORN: An Overview of Its History, Structure, Methodology, Campaigns and Philosophy, in Community Organizing Handbook #2 2 (1978). See also The ACORN People's Platform, e.g.:

> Our riches shall be the blooming of our communities, the bounty of a sure livelihood, the beauty of homes for our families with sickness driven from the door, the benefit of our taxes, not their burden; and the best of our energy, land and natural resources for all people.
>
> Our freedom shall be based on the equality of the many, not the income of the

Such means and ends may be summarized as "participatory democracy."[17]

This perspective has definite implications for ACORN's conception of and approach to law and lawyers. (Indeed, it was ACORN's frustration with a lack of "organizing lawyers" that led it to help found the law firm that became Bachmann & Weltchek.) ACORN distinguishes between a "lawyer's perspective" and an "organizer's perspective." Lawyers and organizers tend to approach problems differently, with often marked implications. For example, consider an intersection where the lack of a stop sign is causing traffic hazards and threatening children. A lawyer would solve this problem by going to court to get the stop sign put into place. From this process people either do not know how the stop sign got there or learn that lawyers produce change. Both results aggravate people's perceptions of their powerlessness, which is disasterous from an organizer's perspective. In contrast to the lawyer, the organizer would knock on all the doors in the neighborhood, organize a meeting of interested people, and help them collectively deal with the problem. They would probably hold a mass demonstration, meet with a city official, and successfully pressure her to provide the stop sign. From this experience, people in the neighborhood would learn that they can have power if they organize, and coordinate their efforts. Because so many individuals participated in producing the sign, nearly everyone in the neighborhood would learn this lesson. Suddenly an aspect of the neighborhood is the product of the residents' personal actions. ACORN's preference for this kind of community participation colors its attitudes about litigation and leads it to avoid courts.

ACORN will generally go to court in only three situations. The first is when ACORN needs to affect the organizing environment. Many people only get involved in an organization if they believe governmental benefits will result. Securing such benefits frequently requires a lawsuit.[18] For example, my firm once aided an organizing drive among domestic workers by suing the U.S. Department of Labor to force it to respond to their demands. Such lawsuits may also affect the organizing environment by creating free advertising

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few. Our freedom is the force of democracy, not the farce of federal fat and personal profit. In our freedom, only the people shall rule.

Corporations shall have their role: producing jobs, providing products, paying taxes. No more. No less. They shall obey our wishes, respond to our needs, serve our communities. Our country shall be the citizens' wealth and our wealth shall build our country.

Government shall have its role: public servant to our good, fast follower to our sure steps. No more. No less. Our government shall shout with a public voice, and no longer jump to a private whisper. In our government, the common concerns shall be the collective cause.

ACORN MEMBERS HANDBOOK (1983) at 16-17. (The People's Platform was adopted at a national ACORN convention in 1979 by approximately 2000 delegates from across the country.)

17. The more ambitious may attribute additional labels.

18. See, e.g., the genesis of Goldberg v. Kelly, 397 U.S. 254 (1970), as discussed in Sparer, Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement, 36 Stan. L. Rev. 509, 562 (1984).

for the organizing effort. Potential recruits will then know that the organization is aggressively fighting for their rights by the time an organizer personally reaches them.

The second situation in which ACORN will resort to litigation is if it has no other choice, such as when it is sued, or on the infrequent occasions when people are arrested for participating in ACORN demonstrations. ACORN may also be forced to go to court when an attempt is made to legally prohibit ACORN from soliciting members, donations, or signatures from a neighborhood. Since such attempts cut to the heart of ACORN's organizing, any means must be used to uphold these quintessential first amendment rights. In other cases, however, a lawsuit involves a desperate attempt to regain initiative. In Springdale, Arkansas, for example, ACORN's efforts to bring Lifeline, a program of lowered utility rates for the elderly, was attacked by the mayor. He had the local paper publish a list of everyone who had signed a pro-Lifeline petition circulated by ACORN. This obvious hit list,[19] intimidated Springdale's residents. In response, ACORN sued the Mayor for a million dollars. He resigned from his office, and ACORN was able to continue its campaign.

Finally, ACORN will go to court when it needs an exit from an unproductive campaign. As noted, ACORN's purpose is less to win issues than to win power. Accordingly, a hopeless campaign is usually handed over to a lawyer, so that the members can redirect their efforts. The removal of members from the activity may work to ACORN's advantage. In Denver, ACORN struggled for months to force the city to provide better parking facilities for Broncos football games (fans were parking their cars in members' yards). ACORN pressure had produced some concessions, but not enough to satisfy the neighborhood residents. Unfortunately, the city refused to budge any further. At this point, the case was given to the lawyers. Happily, the resulting lawsuit helped pressure Denver into resuming negotiations with the ACORN members, and the controversy was ultimately settled to their satisfaction.

ACORN's limited reliance on lawyers derives primarily from its political and moral concerns about the kind of movement that lawyer-dominated processes might create. These concerns are less about what victories a lawyer might win than about what sort of groups might be created through social struggle. What is "won" is secondary, if not irrelevant.[20] The group that is developed is of primary concern.

B. Philosophical Considerations

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"The name of dialectics says no more, to begin with, than that objects do not go into their concepts without leaving a remainder, that

19. The tactic of publishing hit lists in newspapers is not new. See W. Hair, Bourbonism and Agrarian Protest 259 (1969).

20. See note 16 supra.

they come to contradict the traditional norm of adequacy."[21]

* * *

ACORN's societal ideals, and strategies for the implementation of those ideals, are consistent with the philosophical premises of dialectical materialism,[22] which as a paradigm[23] asserts the following:

1. A thing consists not only of the objective material, but also of the subjective mind that conceives of it.

2. Things are many sided, and perhaps infinitely so.

3. Things change (i.e., to understand something one must know its past and future as well as its present).

4. Consciousness derives from matter (whether matter be biochemicals, concentrated energy, or clay).

5. Thought is affected by material conditions, e.g., social, political, economic, and biological.[24]

The first three propositions relate to the "dialectical" side of the paradigm, the latter two propositions relate to the "materialist" side. In proposition 1, dialectical materialism does not degenerate into materialistic determinism because it acknowledges the role that thought plays in the constitution of reality. Through propositions 2, 3 and 5 dialectical materialism resists becoming dogma.

It is beyond the scope of this paper to prove that this perspective of dialectical materialism automatically leads to a communitarian vision. In one sense, that was Dallmayr's project, and the reader should consider his effort.[25] However, dialectical materialism, as defined here, is consistent with other social democratic visions.[26]

Yet for our purposes what is more important is the perspective which

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21. T. Adorno, supra note 1, at 5.

22. Like a number of the terms already cited, "dialectical materialism" is one that has suffered much abuse, and has come to mean a number of things to a number of people. For the purposes of this paper it will refer to the approaches embraced by philosophers like Adorno, Marcuse, Horkheimer, Enzensberger, and Merleau-Ponty, who trace their lineages back to Marx and Hegel. See, e.g., M. Merleau-Ponty, supra note 9; Adorno, supra note 1; Marcuse, Reason and Revolution (1941); M. Horkheimer, Eclipse of Reason (1974); H. Enzensberger, Critical Essays (1982).

23. "Paradigm" alludes to T. Kuhn, The Structure of Scientific Revolutions 10-22 (1970), where it is presented as a mode of approaching, interpreting, and changing reality. A paradigm holds "valid" for as long as it seems to interpret reality productively. The point here is to distinguish dialectical materialism from a dogma which asserts its enduring effectuality.

24. The role that biology plays in thought is an unresolved issue for dialectical materialists. See, e.g., A. Arato & E. Gebhart, The Essential Frankfurt School Reader 477-96 (1978); H. Marcuse, Eros and Civilization (1955); cf. T. Adorno, supra note 1, at 289 (reason's "prehistory" in "self-preservation").

25. See F. Dallmayr, supra note 3.

26. See, e.g., M. Konner, The Tangled Wing (1982); N. Chomsky, For Reasons of State (1973); and K. Marx, Capital 592 (S. Moore and E. Aveling trans. 1967): " . . . a higher form of society, a society in which the full and free development of every individual forms the ruling principle."

dialectical materialism assumes regarding the mechanisms of social change. Though it must acknowledge the importance of individual minds (because individual experience constitutes actual reality),[27] dialectical materialism tends to pose issues in terms of classes. Classes are a productive way of viewing social reality because in a class society individuals are subjected to varying social, economic and political experiences which society filters into class categories.[28] Objective class experiences lead to similar intellectual conclusions on the part of individuals, resulting in class consciousness and class struggle.

Marx formulated the process as a class-in-itself becoming a class-for-itself. The class-in-itself is simply a mass of people experiencing similar amounts of social, economic, and political power. The members are unorganized because they are barely conscious of their situations and their commonality. In contrast, the members of the class-for-itself are conscious of their mutual interests, so they unite, and organize to protect their concerns. They develop the machinery of an organization to assert their class interests, promoting their interests with regard to one another—as well as with regard to their class enemies.[29]

Marx believed that self-conscious organization was the key to becoming a class-for-itself. Indeed, Marx was reluctant to identify a "mass" as a "class" unless it created a class-conscious, class-based political party.[30] Factors that contributed to the metamorphosis of a class-in-itself into a class-for-itself included similar experiences of oppression (social, economic and political) and sufficient opportunities for mutual interaction (through work, through social media, and through self-developed associational activities).[31]

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27. See T. Adorno, supra note 1, at 276.

28. Cf. R. Unger, Knowledge and Politics 123 (1975) (alternate ways of conceiving social action).

29. "Economic conditions had first transformed the mass of the people of the country into workers. The domination of capital has created for this mass a common situation, common interests. This mass is thus already a class as against capital, *but not yet for itself.*" Class, Status, and Power Social Stratification in Comparative Perspective 9 (R. Bendix and S. Lipset eds. 1966), quoting K. Marx, The Poverty of Philosophy 145-46 (1963).

30. From the Communist Manifesto: "This organization of the proletarians into class, and consequently into a political party. . . ." K. Marx & F. Engels, Basic Writings 16 (D. Feuer ed. 1959).

31. The following remarks from The Eighteenth Brumaire of Louis Bonaparte afford a sense of Marx's criteria for determining the stage of a class's development:

> The small-holding peasants [of France] form a vast mass, the members of which live in similar conditions but without entering into manifold relations with one another. Their mode of production isolates them from one another instead of bringing them into mutual intercourse. The isolation is increased by France's bad means of communication and by the poverty of the peasants. Their field of production, the small holding, admits of no division of labor in its cultivation, no application of science, and therefore, no diversity of development, no variety of talent, no wealth of social relationships. Each individual peasant family is almost self-sufficient; it itself directly produces the major part of its consumption, and thus acquires its means of life more through exchange with nature than in intercourse with society. A small holding, a peasant and his family; alongside them another small holding, another peasant and another family. A few score of these make up a village, and a few score of villages

Marx's concept of class directly relates to his conception of what constitutes social transformation. The conversion of the proletariat into a class-for-itself provides not only the class's capacity to take power, but also provides the grounds for democratic socialism, and, ultimately, the accomplishment of the ideal state of communism. Theoretically, as class members become more conscious and learn to organize, they learn, appreciate, and practice democratic self-regulation. Democratic encounters during the phase of self-organization turns into democratic government when the democratic self-organizing creates sufficient power to challenge society's old ruling powers.

This was Marx's theory, and most subsequent left-wing theories of social transformation fit within this conceptual framework. These theories begin to elaborate on Marx and differ on: (1) the responses to a proletariat that does not expeditiously organize itself, and (2) the responses to a ruling class that suppresses proletarian self-organization. These differences have led to competing versions of Marxism such as Lenin's elite party,[32] Luxemburg's mass strikes,[33] Mao's cultural revolution,[34] and Sartre's "fused groups."[35]

Yet, whichever variation or combination of variations, the focus of left-wing theory remains on class and the ways in which class experiences are transformed. Any further revisions of Marxist theory, if any, would be these: (1) The paradigm need not restrict itself solely to "classes" per se. Other social groupings can be understood through this perspective, particularly those whose material situations subject them to experiences that differentiate them emphatically from other social groupings (e.g., American blacks). (2) Successful "revolutionary reform" requires something beyond the transformation of the class-in-itself into the class-for-itself. This additional pre-condition is some kind of rupture in the ruling class. As the Leninist challenge implies, ruling classes are loathe to allow the development of a "mass" into a "class." Even the conscientious Bolshevik tends to require a disruption of the ruling elite, such as war, or internal disagreement over means and ends if the class is to enjoy enough space to grow in puissance and ultimately seize power.

Once the paradigm is adjusted, the conception of social transformation still focuses on social relationships and the development of social forces. This analysis leads to the conclusion that the lawyer's role in social transformation

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make up a Department. In this way the great mass of the French nation is formed by simple addition of homologous magnitudes, much as potatoes in a sack form a sack of potatoes. In so far as millions of families live under economic conditions of existence that separate their mode of life, their interests, and their culture from those of the other classes and put them in hostile opposition to the latter, they form a class. In so far as there is merely a local interconnection among these small-holding peasants and the identity of their interests begets no community, no national bond, and no political organizations among them, they do not form a class.

Id. at 338-39.

32. N. Lenin, supra note 12.

33. R. Luxemburg, supra note 12.

34. See generally Chairman Mao Talks to the People (S. Schram ed. 1974).

35. See note 10 supra.

is limited to the point of being marginal. From this perspective, the ACORN approach is ratified by theory.

Of course, theory must ultimately prove faithful to history, and it is to history that the contending versions of Marxism appeal. It would appear that history generally supports the above version of social transformation. What the lawyers do is less important than whether and how various social groups organize themselves. Despite mythologies that have developed, the lawyerly approach did not implement, in any significant way, the meaningul social changes that have occurred in the United States during the twentieth century.

C. *Historical Considerations*

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". . . it is not with ideas that history is made to move forward, but with a material force, that of people reunited in the streets."[36]

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The two social upheavals which wrought major transformations in twentieth century American politics were the labor movement of the 1930's, and the civil rights movement of the 1960's. In both instances an oppressed group, which initially enjoyed only nominal rights of self-determination, won the acknowledgment that its members had a right to be respected as human beings. American workers won the right to collective bargaining, and American blacks ended institutionalized racism in the South. The achievements of both groups were due more to mass mobilization than to the work of lawyers. To establish this point, I will examine the experiences of both the American labor movement and American blacks.

1. Labor

The condition of American labor before 1930 was dismal. Historian Richard Hofstadter has written of the relationship between labor and capital in the United States:

> . . . I believe that no student of labor history is likely to quarrel with the judgment of Philip Taft and Robert Ross: "The United States has had the bloodiest and most violent labor history of any industrial nation in the world." Taft and Ross have identified over 160 instances in which state and federal troops have intervened in labor disputes, and have recorded over 700 deaths and several thousands of serious injuries in labor disputes, but one can only underline their warning that this incomplete tally "grossly understates the casualties . . . ." With a minimum of ideologically motivated class conflict, the United States has somehow had a maximum of industrial violence. And no doubt the answer to this must be sought more in

36. M. Foucault, supra note 13, at 24-25.

those of American capitalists than in that of the workers.[37]

A labor reformer who advised that labor turn to law would have been ridiculed in the late 1920's. Up to that period labor had been subjected to a number of attacks by the legal system such as: restrictions on picketing, profligate use of court injunctions, twisting of the antitrust laws, broadening the law of damages to include unincorporated labor organizations, criminal prosecutions, and record amounts of invalidated legislation.[38] This process culminated in the anti-labor policy of Chief Justice Taft, who delighted in the shooting of strikers,[39] and announced upon his accession to the bench that he had been chosen to "reverse a few decisions," and described labor as "that faction we have to hit every little while."[40]

Given the preceding, it is obvious that some kind of disruption in the balance of forces in society was required for a labor breakthrough. The Depression provided that disruption.[41] In 1932, Congress passed the National Industrial Recovery Act with its famous Section 7(a) which ostensibly gave workers the right to form unions.[42] Whether Section 7(a) gave anybody any-

37. R. Hofstadter & M. Wallace, American Violence 19-20 (1970).

38. I. Bernstein, The Lean Years ch. 4 (1960).

39. "When [in 1894] . . . the newspapers reported that federal troops had killed thirty Pullman strikers, [Taft] wrote cheerfully, 'Everybody hopes that it is true.' " Id. at 190.

40. Id. at 191

41. In his acclaimed book on Lyndon Johnson's early years, Robert Caro has evoked a sense of the nation in 1932-33:

> That was a winter of despair. When, on December 5, 1932, the lame-duck Congress reconvened, those of its members who had hoped that the tear-gassing of the veterans had frightened the jobless away from Washington received a surprise; crowded around the Capitol steps were more than 2,500 men, women and children chanting, "Feed the hungry! Tax the rich!" Police armed with tear gas and riot guns herded the "hunger marchers" into a 'detention camp' on New York Avenue, where, denied food or water, they spent a freezing night sleeping on the pavement, taunted by their guards. Thereafter, Congress met behind a double line of rifle-carrying police, who blocked the Capitol steps. . . .
>
> As the people saw that their government was going to give them no leadership, there began to be heard throughout America the sound of hungry men on the march. In Columbus, Ohio, 7,000 men in ranks tramped toward the Statehouse to "establish a workers' and farmers' republic." Four thousand men occupied the Lincoln, Nebraska, Statehouse; 5,000 took over the municipal building in Seattle; in Chicago, thousands of unpaid teachers stormed the city's banks. A Communist Party rally in New York's Union Square drew an audience of 35,000.
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> . . . In Iowa, a mob of farmers, flourishing a rope, threatened to hang a lawyer who was about to foreclose on a farm. In Kansas, the body of a lawyer who had just completed foreclosure proceedings was found lying in a field. In Nebraska, the leaders of 200,000 debt-ridden farmers announced that if they didn't get help from the Legislature, they would march on the Statehouse and raze it brick by brick. A judge who had signed mortgage foreclosures was dragged from his bench by black-shirted vigilantes, blindfolded, driven to a lonely crossroads, stripped and beaten. And in scores of county seats in America's farm belt, the same scene was repeated; when a foreclosed farm was to be auctioned, crowds of armed farmers would appear at the courthouse; prospective bidders would be jostled and shoved until they left. . . .

R. Caro, Lyndon Johnson, The Path to Power 248-49 (1982).

42. Section 7(a) read as follows:

thing is open to serious question, as historian Irving Bernstein queried:

> Section 7(a), a short and seemingly clear declaration of policy in a statute otherwise marked by complexity, lifted the lid off Pandora's box. The haste and inexperience from which it derived were breeding grounds of ambiguity; it raised more questions than it provided answers. Latent antagonism between unions and employers gained a point of focus . . . . Section 7(a) was enabling legislation and nothing more.[43]

Section 7(a) resulted from political horse trading by various interest groups during President Roosevelt's first attempts to cope with the Depression. It seems that Roosevelt's objective was the creation of a corporate state,[44] its various sectors controlled and operated by actors within the sectors using industrial codes. In return for its cooperation, labor extracted, among other things, Section 7(a). Industry accepted Section 7(a) as a trade-off for exemption from the antitrust law;[45] and as a preferable substitute for a thirty-hour work week bill proposed by Senator Black.[46] However, the precise meaning of Section 7(a) had yet to be determined, and various segments of industry and labor had their own ideas as to what it ought to mean. Labor would determine the scope of its rights through social struggle.

When Roosevelt signed the National Industrial Recovery Act he thought he had established the structure for a coordinated, cooperative, corporate economy. Instead, economic conflict and labor strife ensued. A number of

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> Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that all employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.

I. Bernstein, The Turbulent Years 34 (1979).

43. Id. at 35.

44. J. Handler, Social Movements and The Legal System 223 (1978), quoting P. Schmitter, Still the Century of Corporatism, Rev. Pol. 85, 112 (1974),the following definition of corporatism: "Corporatism can be defined as a system of interest representation in which the constituent units are organized into a limited number of singular, compulsory, non-competitive, hierarchically ordered and functionally differentiated categories, recognized or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports." The system that Roosevelt would have established through the NIRA approximated this definition rather closely. Schechter Poultry v. United States, 295 U.S. 495 (1935) prohibited the de jure establishment of corporatism, but it is not unproductive to view the United States as a de facto corporate order. Cf. W. Douglas, Go East Young Man 347 (1974) (characterizing the NIRA as a "structural change" towards "the corporate state").

45. I. Bernstein, supra note 42, at 34.

46. G. Kolko, Main Currents in Modern American History 125 (1984).

industrial concerns formed company unions and hired agencies that specialized in strikebreaking and industrial espionage.[47] Others simply ignored the National Labor Board altogether, and many refused to appear at its hearings.[48] In November of 1933, as the National Association of Manufacturers launched a public campaign against the Board, many thousands of workers across the country attempted to assert their Section 7 rights.[49] Bernstein records that "[m]an days lost due to strikes, which had not exceeded 603,000 in any month in the first half of 1933, spurted to 1,375,000 in July and to 2,378,000 in August."[50]

Section 7(a)'s ambiguity exacerbated the problem. The companies could claim that company unions and/or a system of proportional representation satisfied the requirements of the Section, although such co-opting and divide-and-conquer tactics actually undercut the effectiveness of any representation. The Board and labor advocated majority rule and exclusive representation, giving the bargaining rights of a unit to the agent that secured the votes of more than fifty percent of the unit's workers.

As conflict between labor and capital intensified, a major question developed over which side the Roosevelt administration would take. The first answer came on March 25, 1934, when Roosevelt facilitated a settlement in the auto industry that basically ratified the anti-union principle of proportional representation.[51] Bernstein writes that after March 25, 1934:

> . . . determined unionists in the unorganized industries recognized that they would win bargaining rights not by invoking law but by showing their own strength. The automobile settlement was to be a major cause of the great wave of strikes that engulfed the nation in

47. I. Bernstein, supra note 42, at 39. See also Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941, 62 Minn. L. Rev. 265, 287 n.68 (1978).

48. I. Bernstein, supra note 42 at 177, 322.

49. . . . Within two months, UMW membership jumped from 60,000 to 300,000, and paid-up memberships reached 528,685 in July 1934; the International Ladies Garment Workers Union quadrupled its membership, reaching 200,000 in 1934; the Amalgamated Clothing Workers, which had reported 7,000 dues-paying members at its low in 1932, added 125,000 new members. And the Oil Field, Gas Well and Refinery Workers Union, which in 1933 claimed only 300 members in an industry employing 275,000, established 125 new locals by May 1934.

In nonunionized industries "there was a virtual uprising of workers for union membership," the executive council of the AFL reported to its 1934 convention; "workers held mass meetings and sent word they wanted to be organized." The result was that almost two hundred local unions with 100,000 members sprang up in the automobile industry; about 70,000 joined unions in the Akron rubber plants; about 300,000 textile workers joined the United Textile Workers of America; and an estimated 50,000 clamored to join the steel union.

F. Piven & R. Cloward, Poor People's Movements 114 (1977). The extent to which my argument follows those advanced by Piven & Cloward should be acknowledged. I will elaborate on our differences below, which concur with the criticism articulated by J. Handler, supra note 44, at 232 n.71: "They never deal explicitly with the problem of translating gains derived from direct action into long-term gains."

50. I. Bernstein, supra note 42, at 172-73.

51. Id. at 184-85.

> the spring and summer of 1934 . . . . In 1934 labor erupted. There were 1,856 work stoppages involving 1,470,000 workers, by far the highest count in both categories in many years. A number of these strikes were of unusual importance . . . . Four were social upheavals—those of auto parts workers at the Electric Auto-Lite Company in Toledo, of truck drivers in Minneapolis, of longshoremen and then virtually the whole labor movement on the shores of San Francisco Bay, and of cotton-textile workers in New England and the South.[52]

The social upheavals to which Bernstein refers involved, among other things, general strikes, martial law, court injunctions (obeyed and ignored), and the killing and wounding of a number of people. "All in all, a minimum of fifteen strikers were killed in 1933, and at least forty more were killed in 1934. In a period of eighteen months, troops had been called out in sixteen states."[53]

On May 27, 1935, the Supreme Court invalidated Section 7(a) along with the rest of the National Industrial Recovery Act,[54] but by then the Section had become substantially irrelevant. Senator Wagner had already been pushing for passage of a new National Labor Relations Act since February (it was finally signed into law July 5, 1935), and the massive movements of 1935 were about to come under the conscientious organizing efforts of the Congress of Industrial Organizations. In late 1935 John L. Lewis and other industrial unionists walked out of the American Federation of Labor, and in 1936, the initiation of massive organizing efforts in a number of industries began.

Legally, labor's right to organize into unions was "won" on April 12, 1937, when the Supreme Court declared the National Labor Relations Act constitutional.[55] But, as Karl Klare has pointed out, by April 1937, labor had all but mooted the issue.[56] In Februrary 1937, C.I.O. organizing had already forced settlements from General Motors, Chyrsler, General Electric, and U.S. Steel.[57] The leaders of the nation's leading industries had accepted the principle of collective bargaining without waiting for the Supreme Court.

It is possible to speculate about the chain of cause and effect that precipitated the historical April 12 ruling. Roosevelt had first announced his court-packing scheme on February 5, 1937.[58] The initial Supreme Court "shift" had occurred on March 29, 1937,[59] and Justice Douglas has claimed that *West*

52. Id. at 185, 217.

53. F. Piven & R. Cloward, supra note 49, at 126, citing E. Levinson, Labor on the March (1938).

54. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

55. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

56. Klare, supra note 47, at 226 n.7.

57. I. Bernstein, supra note 42, at 541.

58. Id. at 640-41.

59. West Coast Hotel Co. v. Parish, 300 U.S. 379 (1937). This case reversed Adkins v. Children's Hospital, 261 U.S. 525 (1923), which disallowed state establishment of minimum

Coast Hotel had been decided as early as December of 1936.[60] Whether the series of company/union settlements that occurred between the oral argument on February 9 and April 12 affected the Court directly is open to dispute, but two things are not open to dispute: first, the settlements had occurred, and the Supreme Court's ruling would not affect them;[61] second, Justice Roberts, the major swing vote that precipitated the shift in the *West Coast Hotel* and *Jones* cases, confirmed that he felt that the Supreme Court must shift—or else risk irrelevancy as a factor in U.S. life. He later admitted:

> Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country—and for what in effect was a unified economy . . . . An insistence by the Court on holding federal power to what seemed its appropriate orbit when the constitution was adopted might have resulted in even more radical changes in our dual structure than those which have been gradually accomplished through the extension of the limited jurisdiction conferred on the federal government.[62]

Labor, of course, won no absolute victory in April or February, 1937. In May of 1937, for example, the Memorial Day Massacre occurred;[63] in 1939 the Supreme Court declared labor's highly effective "sit-in" tactic illegal;[64]

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wage laws. Only a year before, the Supreme Court had invalidated another minimum wage law in Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936). Justice Roberts voted to invalidate the minimum wage law in *Morehead*, and "swung" in *West Coast Hotel*. W. Douglas, supra note 44, at 324-26.

60. W. Douglas, supra note 44, at 324-26.

61. It should be acknowledged that the Supreme Court decision did appear to affect the rubber industry, I. Bernstein, supra note 42, at 600.

62. A. Mason, The Supreme Court, From Taft to Burger 122 (1979).

63. As to the Memorial Day Massacre, David Milton in The Politics of U.S. Labor 108 (1982) writes:

> On May 30 the Steel Workers Organizing Committee (SWOC) called a mass meeting to protest police restrictions on picketing. Some 2,500 strikers and their supporters, including women and children, assembled to listen to speeches by strike leaders in front of the strike headquarters, a few blocks from the Republic mill. . . . At the end of the meeting, the crowd marched behind U.S. flags up to the gates of the plant in an attempt to form a mass picket line. The rest of the story has been recorded in history texts, on newsreel film, at Senate hearings, and in fiction. The Chicago police fired point-blank into the crowd, continued firing at the backs of those who fled, beat the wounded who had fallen, dragged those who were shot to waiting police vans, and refused first aid to the victims. As the LaFollette Committee, after the investigation of the Memorial Day massacre, commented, "Wounded prisoners of war might have expected and received greater solicitude." Despite national outrage, the police were never prosecuted and Republic Steel continued strikebreaking.

64. NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939). Of this decision Klare, supra note 47, at 324 writes:

> The best that can be said for Hughes' decision is that it blatantly ignored historical and social reality. The Court ignored the fact that the sit-down strikes were essentially a reaction to the widespread and often violent refusal by employers to obey the law between 1935 and 1940. The historical record is clear that the sit-down strikes were an indispensable weapon with which workers stemmed the tide of employer resistance to unions and to the law; inferentially, they thereby helped create the polit-

and in 1948 Congress passed the Taft-Hartley Act which further restrained the array of legal tactics to which labor might resort.[65] Since World War II labor's stance has changed from aggressiveness to accommodation. While in 1945 35.5% of the labor force was unionized, by 1983 this figure had dwindled to 17%.[66]

1937 did mark a social shift in the United States. Prior to 1937, the workers' right to organize was tenuous, while subsequent to 1937 the three branches of the federal government acknowledged that the policy of the United States was to "encourage the practice and procedure of collective bargaining."[67] A substantial number of important employers also accepted the practice and procedure of collective bargaining. Three main factors facilitated labor's victory: (1) labor militancy; (2) increased industrialization in the American economy;[68] and (3) the social and political dislocations precipitated by the trauma of the Depression. The work of lawyers was incidental to these primary causes.

2. Civil Rights

* * *

> You see, what the [Montgomery] bus thing did was simply more than withholding patronage from the bus; it was restoring a sense of dignity to the patrons, as best expressed by an oft-quoted black woman in Montgomery who said, "Since I been walking, my feet are tired, but my soul's rested." So that it was also, at the same time and a part of that, the beginning of self-determination. See, self-determination's some new phraseology, but, prior to the bus boycotts, the determination of our freedom rested with the court. With the bus boycott, WE determined it. It didn't make any difference what the court said. The court could say what it liked, we weren't gon' ride—in the back of the bus. We'd walk.[69]

* * *

Just as the victory of the U.S. labor movement involved more than collec-

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ical conditions for the court's leftward shift in West Coast Hotel Co. v. Parrish and NLRB v. Jones & Laughlin Steel Corp. Sit-down strikes contributed rather than detracted from whatever law and order existed in industrial life when Hughes delivered *Fansteel.* Moreover, in sharp contrast to contemporary but traditionally conducted strikes, the sit-downs in 1936-1938 caused no deaths and little property damage.

65. See, e.g., D. Guerin, 100 Years of Labor in the U.S.A. 162 (A. Adler trans. 1979).

66. D. Milton, supra note 63, at 165.

67. 29 U.S.C. § 151.

68. The point here is that industrialization brought large numbers of workers together, which allowed for mass organizing drives, and ultimately massive agglomerations of worker power. In addition, the industrialization encouraged some captains of industry to prefer to deal with workers through large industrial unions. I. Bernstein, supra note 42, at 19. For a more dour view of union's stabilizing functions, see G. Kolko, supra note 46, at ch. 5.

69. Joseph Lowry, quoted in H. Raines, My Soul is Rested 70 (1983).

tive bargaining, the issue of *Brown v. Board of Education*[70] was more than just a lawsuit about school desegregation. At bottom both movements involved changes that were subtle and humble, yet fundamental. The "victory" of the labor movement was that after 1937, a significant portion of the U.S. power elite was no longer prepared to attack unions with troops.[71] The "victory" of the civil rights movement was that some time during the 1960's the caste system in the South fell, as a significant portion of the U.S. power elite was no longer prepared to sanction institutionalized racism. As labor and minorities are only less victimized than they have been in the past, their victories are negative. The essence of their victories is that labor and minorities finally achieved the right to be respected as something more than cattle by the people with the guns.[72]

The turning point for the civil rights movement occurred between 1962 and 1966. Until 1962, the Southern caste system remained intact, the black masses had not yet been mobilized, and the Bourbon faction of the white power elite continued to enjoy its dictatorial powers. Moreover, the federal government's efforts on behalf of oppressed blacks were sporadic and ineffective. By 1966, however, the shift had essentially occurred. The Southern caste system had been declared illegal, and the federal government and black masses had moved to ensure that the southern system of institutionalized racism would yield to "mere" discrimination, if not ultimately equality.

The factors that forced this shift included: (1) the mobilization of the black masses into the streets and into the registrar's offices, and (2) the willingness of the federal government to respond to the outrages perpetrated by the Bourbon racists after black mobilization.

The story of the 1950's is one of limited black mobilization, and massive white reaction. The statistics concerning school desegregation reveal the limited effects of *Brown*,[73] and the Montgomery boycott (1955-1956), though initially successful, ultimately witnessed a lapse into the segregated custom of blacks sitting in the back of the bus—the Supreme Court notwithstanding.[74]

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70. Brown v. Board of Education, 347 U.S. 483 (1954).

71. The major exceptions to this initial trend were Little Steel and Ford Motor Company, which finally recognized unionization in 1938, and 1940, respectively. I. Bernstein, supra note 42, at 727, 734-35.

72. Another way to interpret the "victories" of labor and minorities is from the corporatist paradigm, see note 44 supra. That is, before their victories, labor and minorities were not even acknowledged as interest groups by the American system. Afterwards, they were allowed circumscribed participation in the American system, as long as they did not attempt to breach certain "conditions." Labor's conditions are set out in the National Labor Relations Act, 29 U.S.C. § 151-68. The minorities' struggles are still being settled around issues of school desegregation, affirmative action, political power, etc. See A. Freeman, Anti-Discrimination Law: A Critical Review, in The Politics of Law (D. Kairys ed. 1982).

73. During *Brown*'s first four years, some 750 school districts underwent at least token desegregation. During the last three years of the Eisenhower administration, a total of 49 more school districts were desegregated. R. Kluger, Simple Justice 754 (1976). See also A. Lewis, Portrait of a Decade 119 (1964).

74. J. Handler, supra note 44, at 108; Owen v. Browder, 352 U.S. 903 (1956) (per curiam).

The outrages at Little Rock produced some response from the Eisenhower administration, but the caste system survived. Following 1955, southern states passed a number of laws designed to reinforce institutionalized racism.[75] As the experiences of the Freedom Riders indicate, the laws of the Supreme Court were consistently, blatantly, and violently ignored.[76]

The 1960 Greensboro sit-ins signaled the beginning of various protests against the caste system across the South. However, it was not until the 1962 Albany demonstrations that these protests moved from the efforts of students and intellectuals to include masses of black people.[77] In fact, some argue that the National Association for the Advancement of Colored People (NAACP) made but limited progress in the area of school desegregation because it was not an issue which mobilized lower-class blacks.[78] Others note that, unlike the Student Nonviolent Coordinating Committee (SNCC), they relied too much on lawyers;[79] and, unlike SNCC, they did not concentrate on sending organizers into the field to mobilize people.[80]

The experiences of the Albany campaign encouraged civil rights activists to pursue a series of mass confrontations in Birmingham, Alabama. Kennedy's hand was forced,[81] and in June of 1963 he submitted a sweeping civil rights bill to Congress. After a similar summer of mobilization in Mississippi, Lyndon Johnson induced the Congress to pass the Civil Rights Act of 1964,

> [the] most penetrating civil rights legislation in the country's history
>
> . . . .
>
> The new act outlawed the exclusion of blacks from restaurants, hotels, theatres, and other public accommodation; empowered the Justice Department to bring school desegregation suits; denied federal aid to any program or service which practiced racial discrimination; and forbade racial bias in employment and union membership policies.[82]

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75. R. Bardolph, The Civil Rights Record 373 (1970); see also F. Wilhoit, The Politics of Massive Resistance (1973).

76. H. Raines, supra note 69, at 109.

77. F. Piven & R. Cloward, supra note 49, at 256.

78. J. Handler, supra note 44, at 109.

79. H. Raines, supra note 69, at 234-36; but see id. at 30.

80. Id. at 234-37.

81. As James Farmer aptly said, "It is clear that . . . the President intended to drop civil rights legislation from the agenda of urgent business in order to safeguard other parts of his legislative program. But he had not reckoned on Birmingham."

By June, however, Kennedy admitted to civil rights leaders privately "that the demonstrations in the streets had brought results, they had made the executive branch act faster and were now forcing Congress to entertain legislation which a few weeks ago would have had no chance." Mass protest had forced federal action. It was a point the attorney general also conceded: "The Administration's Civil Rights Bill . . . is designed to alleviate some of the principal causes of the serious and unsettling racial unrest now prevailing in many of the states."

F. Piven & R. Cloward, supra note 49, at 244.

82. R. Bardolph, supra note 75, at 405-06.

The year 1964 also saw the adoption of the 24th Amendment to the Constitution which outlawed the poll tax.

In 1963, the Voting Rights project had been instituted, with the federal government and private foundations providing support, and SNCC, the Congress of Racial Equality (CORE), and the NAACP doing the legwork.[83] In 1965, the confrontation moved to Selma, Alabama, and Congress passed the Voting Rights Act during the same period that two hundred and fifty thousand people converged on Washington, D.C., for the passage of civil rights measures. Results began to appear in 1966:

> . . . [T]he black vote accounted for the winning margin for a United States Senator in South Carolina, a governor in Arkansas, and two members of the House of Representatives. Project records show that in Arkansas approximately 85,000 of a total 115,000 to 120,000 registered blacks voted in the November 1966 elections; in South Carolina, 100,000 of 191,000 and in Georgia, 150,000 of 300,000.[84]

Though civil rights battles have been no more successful than those of labor, like labor in the 1930's, the civil rights activists did achieve a new level of social participation through their struggles.

Similar to the labor struggles, the role of the legal process in the civil rights movement was marginal. Even the highly celebrated *Brown* decision was rendered more with an eye to political than legal matters.[85] Subsequent to *Brown*, nothing substantial happened until masses of black people forced the executive branch to move. As the labor reforms were a political response to an economic depression, here the primary factors related to internal and external political considerations. Internally the black voters were beginning to make differences in traditional Democratic strongholds in major urban centers. Democrats had to choose between the Dixiecrats in the South, and the moderates in the North. Kennedy, perhaps brought to power through the black vote,[86] chose the North. Externally, during the 1950's, and especially the

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83. See J. Handler, supra note 44, at 121-22; Lewis, supra note 73, at 126; H. Raines, supra note 69, at 227.

84. See J. Handler, supra note 44, at 126.

85. A number of the Justices were concerned with the politics of implementing a reversal of Plessy v. Ferguson, 163 U.S. 567 (1896):

> As the days passed, Warren's position immensely impressed Frankfurter. The essence of Frankfurter's position seemed to be that if a practical politician like Warren, who had been governor of California for eleven years, thought we should overrule the 1896 opinion, why should a professor object? The fact that a worldly and wise man like Warren would stake his reputation on this issue not only impressed Frankfurter but seemed to have a like influence on Reed and Clark.

W. Douglas, The Court Years 114-15 (1980). I would like to thank Seth Borgos for calling this source to my attention.

86. One cannot identify in the narrowness of American voting of 1960 any one particular episode or decision as being more important than any other in the final tallies: yet when one reflects that Illinois was carried by only 9,000 votes and that 250,000 Negroes are estimated to have voted for Kennedy; that Michigan was carried by 67,000 votes and that an estimated 250,000 Negroes voted for Kennedy; that South Carolina

1960's, Third World political power grew in world affairs. In the ideological war against communism, an America that practiced institutionalized racism stood at a disadvantage to Soviet Russia[87] in competing for the affiliation of the Third World countries.

IV
THE LAWYER'S ROLE

* * *

> The ultimate test of the appropriateness of a given legal strategy could not be solely the likelihood of success within the court structure. The wisdom of bringing a lawsuit, of opening up a certain line of legal strategy, had to be judged in a wholly different way. The crucial question was what role it would play at that moment in protecting or advancing the people's struggle. If it helped the fight, then it was done, even if the chances of immediate legal success were virtually nonexistent.[88]

* * *

The primary motor of social change is social struggle, not legal struggle. The question thus becomes: to what extent can lawyers and the law have an impact in this "extra-legal" area? The answer is that lawyers can play meaningful roles in actual social struggles, though their role relates more to the preconditions for social mobilization than to substantive issues. The lawyer's role is more the oiler of the social change machine than its motor; the motor of the machine remains masses of people. From a democratic perspective, this is how it should be, and from an historical perspective, the only way it can be.

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was carried by 10,000 votes and that an estimated 40,000 Negroes there voted for Kennedy, the candidates' instinctive decision must be ranked among the most crucial of the last few weeks.

T. White, The Making of the President, 1960 322-23 (1961). White here is referring to Kennedy's phone call to Corretta Scott King shortly after her husband had been jailed. The call moved King's father to change his endorsement from Nixon to Kennedy, and the incident was publicized in a million JFK pamphlets circulated in black churches across the country the Sunday before the election. See also F. Piven & R. Cloward, supra note 49, at 225-28.

87. In Kennedy's message to Congress (February 28, 1963), he noted that race discrimination "hampers our world leadership by contradicting at home the message we preach abroad." The more practical effects of Kennedy's civil rights position was noted by A. Schlesinger, A Thousand Days 948 (1965):

> . . . [P]resident Kennedy's action [concerning James Meredith] had a profound effect around the world, most of all in Africa. As the delegate from Upper Volta put it in the U.N. General Assembly, segregation unquestionably existed in the United States, but "what is important is that the Government of the United States did not make an institution of this. It does not praise the policy. On the contrary, it energetically fights it. For one small Negro to go to school, it threatens governors and judges with prison . . . it sends troops to occupy the University of Mississippi." Three weeks after Oxford [the location of the University of Mississippi], Sekou Toure and Ben Bella were prepared to deny refueling facilities to Soviet planes bound for Cuba during the missile crisis.

88. A. Kinoy, Rights on Trial 71 (1983).

The lawyer's facilitative role is most obvious and significant in three substantive areas of law: the first amendment, corporations and taxes, and criminal law. Additionally, to be effective, a progressive lawyer should be aware of the rules of civil procedure and ethics.

A. First Amendment

If a lawyer's role is facilitating mobilization, then a primary focus should be placed on first amendment law concerning the right to demonstrate, the right to organize and associate in groups, the right to petition and confront government officials, the right to proselytize, argue, and convince, and the right to secure members and to raise funds. In order to facilitate mobilizations, social reformers must reach their fellow citizens wherever they may be. They need access to public forums like streets, sidewalks, parks, shopping centers, mailboxes, and the mass media, to places where people live and play, and where people work.

The rights of American citizens today falls short of the needs enumerated above. Though Americans do have the right to solicit funds,[89] to handbill,[90] to speak in public,[91] and so on, the right of access to shopping malls,[92] mailboxes,[93] newspapers,[94] and to the electronic media could be improved.[95]

The social change attorney must be prepared to protect and sustain the rights that have so far been secured, and see if they can be extended.[96] Ultimately her goal is to realize the ideal expressed by John Hart Ely, that of a

89. Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 629 (1980).

90. See, e.g., Lovell v. City of Griffin, 303 U.S. 444, 451-52 (1938).

91. Hague v. CIO, 307 U.S. 496, 512 (1939).

92. While the U.S. Supreme Court has stated that access to shopping malls is not a right secured by the first amendment, Lloyd Corp. v. Tanner, 407 U.S. 551, 561-70 (1972), it is a right which may be secured by state constitutions, Pruneyard Shopping Center v. Robins, 447 U.S. 74, 80-88 (1980). At this point one may be suprised that a shopping mall does not qualify as a "public forum" along the lines elucidated in Marsh v. Alabama, 326 U.S. 501, 507-08 (1946), given that "shopping malls . . . are now the third most frequented space in our lives, following home and workplace." J. Naisbitt, Megatrends 45 (1982). However, the Court has not been that solicitous to insure access to home and workplace. It is almost as if the court ensured access to spaces only when history made them marginal: access to the streets and other "public places" was vindicated only after mass media had begun to make them obsolete. Contrast Davis v. Massachusetts, 167 U.S. 43 (1897) to Hague v. CIO, 307 U.S. 496 (1939). Alternatively, though, we might note that this expansion of the first amendment was secured in a context of labor militance. See D. Kairys, Freedom of Speech, in The Politics of Law, supra note 2, at 156-59.

93. U.S. Postal Service v. Council of Greenburgh Civil Associations, 453 U.S. 114, 126-31 (1981). Unfortunately, in rendering this decision the Supreme Court outlawed one means by which Mr. Smith's Boy Rangers attempted to communicate to his constituents when Mr. Smith went to Washington. (Mr. Smith's opponents, alas, controlled most of the media in Mr. Smith's state.)

94. See, e.g., Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 254-58 (1974).

95. FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978); FCC v. Midwest Video Corp., 440 U.S. 689, 708-09 (1979).

96. See, e.g., ACORN v. Golden, 744 F.2d 739 (10th Cir. 1984); ACORN v. City of Frontenac, 714 F.2d 813 (8th Cir. 1983); Dallas ACORN v. Dallas Co. Hosp. Dist., 670 F.2d 628 (5th Cir.), cert. denied, 103 S.Ct. 471 (1982); Urevich v. Woodward, 667 P.2d 760 (Colo. 1983).

society wherein the political process (where values are identified, weighed, and accommodated) "is open to those of all viewpoints on something approaching an equal basis."[97]

Promulgating Ely's vision is not necessarily a droll enterprise. Though it might appear that with a few adjustments the viability of the free marketplace of ideas is secured, it could be read to call for a fundamental transformation of society. If all individuals in society are to enjoy an equal opportunity to affect their society, then all must have rights of access to social resources and liberation from various social constraints. Access to various resources, such as wealth, information, and education, would require drastic revision. In a fundamental sense, then, Ely's vision dovetails with the vision espoused by the social reformer.[98]

B. Corporations and Taxes

Mobilization is facilitated best by people organized into groups, and the importance of the right of association is now accepted.[99] The various forms of association in American law, however, present numerous advantages and disadvantages most familiar to attorneys. For example, an incorporated organization enjoys limited liability and clearly defined channels of authority but must fulfill various formal obligations to the state before it can enjoy such benefits. The lawyer must be able to advise her client appreciating her client's practical situations. In addition, the lawyer should know that an organization enjoying 501(c)(3) status from the IRS can improve its fundraising program because contributions could be deducted on the contributor's income taxes,[100] while realizing that IRS tax-exempt status can limit the sort of activities in which the organization might engage (e.g., lobbying, social action, etc.).[101] The lawyer must, again, be able to evaluate her clients' situations and present them with alternatives that will respond to their needs. The organizational structure that social mobilization adopts can significantly affect it, and so the attorney can perform valuable services for social reform groups in these areas of the law.

C. Criminal Law

Though the relation of the criminal law to mobilization facilitation is obvious (people in jail cannot mobilize), our perception of the role of the criminal law in social change must be elucidated to contrast it to the "traditional" notion of the radical lawyer and the criminal law. The traditional notion fo-

97. J. Ely, Democracy and Distrust 84 (1980).

98. Cf. Unger, supra note 4, at 599-600 (new rights required for social transformation).

99. NAACP v. Alabama, 357 U.S. 449, 461 (1958). Cf. notes 29-31 and accompanying text supra (significance of organization for political effect).

100. I.R.C. § 501 (c) (3) (1984) (list of organizations which qualify for tax exemption).

101. I.R.C. Reg. § 1.501(c)(3)-1(c)(3).

cuses on criminal trials, usually political show trials such as the Panther 21 and the Chicago Eight.

I do not wish to denigrate the significance and courage of those defendants and attorneys who have experienced the snake pit of the American political trial. However, I am less concerned with criminal trials, in part because of the decline in the number of such trials that punctuated the 1965-1975 period. Moreover, my diminished concern results from alternative foci: first, I tend to focus on events prior to the "circus" of the trial; second, I question whether the outcome of the trial really makes that much difference.

There are two central points concerning pre-trial activity. First, there is the issue of the client's situation: is she in or out of jail? Since out of jail she can more effectively mobilize,[102] it is crucial for progressive attorneys to master the laws dealing with arrest and bail. Law schools teach much about definitions of murder and the prerequisites of due process, but not about how quickly you can expect to get a client back onto the streets after an arrest, how to bargain with an arresting officer, or where to get the money for bail. The attorney must know the pre-conditions for release on one's own recognizance and other ways of securing a client's release, such as contacting a locally elected official who might have the authority to release a person without a bond requirement. These questions are critically important in the contexts of demonstrations and organizing drives, as demonstrations often involve ordinary citizens who would be less likely to mobilize after a long stay in jail,[103] professional agitators who would be reluctant to participate if their jobs involve jail time, and others who would be unable to serve their movement while incarcerated. In short, a lawyer associated with social change must be adept at keeping people out of jail as much as possible.

Since social change cases normally involve minor "crimes" which seldom precipitate jail terms, the most critical period will usually involve the period between arrest and bail. My experience indicates that the most frequent result is either a fine or successful bargaining with officials to drop the charges.[104] Thus, the primary opportunity for jailing occurs during the arrest phase and its immediate aftermath, and it is then that the lawyer's criminal law expertise is most needed.

The other question relating to pre-trial events concerns the focus of activity of the social reform movement. Agitating for social change is more important than the prison-term fates of particular individuals. Setting up criminal defense committees for particular groups of people, especially the leaders, diverts energies from the central struggle. History suggests that energies of all

102. Of course there are exceptions to this "rule." For example, the publicity generated by Angela Davis's imprisonment might have done more for the Communist cause than any public speeches she would otherwise have been able to give.

103. There are exceptions to this rule, too. Cf. the "fill the jails" strategies of some civil rights activists. H. Raines, supra note 69, at 105, 109, 126, 141, 148.

104. Frequently, the bargaining chip used is a 42 U.S.C. § 1983 suit, which requires the lawyer to brush up on her first amendment law.

concerned, including the lawyers, should focus on the task of political mobilization, not criminal defense work. Martin Luther King's release from jail resulted from the upsurge of activities on the part of his peers in the streets rather than from trial motions. When the Chicago Eight, who enjoyed limited mass support, had to rely on lawyers, the state had, in a sense, already won.

This realization leads directly to the question of whether or not the outcome of the criminal trial ultimately makes that much difference. If the state can force the movement to divert its resources to questions of criminal prosecution as opposed to political mobilization, then it has achieved its primary purpose. Whether the individual defendants go to jail or not, the movement has been quelled.

A witness for this position is Hosea Williams, once a director of the Southern Christian Leadership Conference (SCLC) field staff, and later elected to the Georgia House of Representatives. After being jailed when organizing a march of young people in Savannah, he encouraged his supporters to continue demonstrating instead of helping him make bond and setting up a defense committee.

> [T]hem kids marched every night. They burnt Sears and Roebuck down. They burnt Firestone. Savannah was really in trouble. [In jail he received a call from Savannah's leading white citizen, Mills B. Lane, who said:] I wanna make a deal with you. Savannah is my home and I don't want to see that city burned down. They say you are running that movement from the jailhouse. I want you to stop those demonstrations, and if you stop those demonstrations, I'll make it possible for you to get out.[105]

The judge had set bond for Williams beyond $100,000, and Lane put up his own property. In the end, Williams moved his "class," and Lane moved his.[106]

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105. H. Raines, supra note 69, at 441-42.

106. So Mills B. Lane said he would make it possible for me to get outa jail, if I'd call off all the demonstrations, and I never will forget that. That was probably one of the great moments of my life, when I said, "Mr. Lane—" cause God knows nobody knows how bad I wanted to get out that jailhouse—I said, "Mr. Lane, if you get me out today, and those lunch counters and restaurants and things are just as segregated, y'all are going to have to put me back in here tomorrow 'cause I'm gonna lead another march." [laughs] I don't believe I would have if he' da got me out, but I told him that. He said, "Well, uh, we gonna take care of that, too." He sent his lawyer over. The C&S lawyer came over to my cell and we sat down and we drew this thing up, the desegregation plan, and I got outa jail. The way they did it in Savannah, they formed the Committee of 100, who were the richest and most influential white men and women in that town, this Committee of 100, and they would take blacks and go to the lunch counters to eat. I remember one night they [the Klan] was picketing a theater, and we went to the theater with the head of the Union Bag, that's the largest plant there . . . . And the Ku Klux Klan was picketing the filling station, but they worked out at Union Bag, and they saw this man's car and recognized him and *ran*, took the picket signs and ran. [laughs] Dr. King spoke in Savannah, Georgia, in 1963, and Dr. King said "Savannah Georgia is the most integrated city south of the Mason-Dixon line." So I saw some ready results from my works.

Id. at 442-43

There is one other area of criminal law relevant to the social change attorney. This is the situation of criminal investigations, particularly grand jury investigations, when the state has not yet jailed the clients, but intends to do so. The grand jury, originally instituted as a tool of liberty,[107] has long been abused. Courts have only recently begun to employ sanctions against abusive use of grand juries.[108] Whether the criminal investigation is conducted by the local police, the F.B.I., or a grand jury, the social change attorney must be able to judge whether or not her clients are being investigated for reasonable and legitimate purposes, and advise her clients accordingly.[109]

D. Procedure

The social change lawyer must also consider how procedural elements of the case can be used to magnify its impact. For example, since legal documents are public, one could duplicate the complaint and use it with a leaflet.[110] Additionally, the press frequently quotes from complaints, and so attorneys must ensure their accuracy. Social change lawyers can also use the discovery process to their advantage by publicizing facts and conducting public depositions of adversaries.[111]

E. Ethics

The progressive lawyer must be familiar with professional rules of ethics as they have conscientiously been used by elite groups to crush progressive movements.[112] From 1963 to 1978, the Supreme Court provided guidance in

107. W. Douglas, supra note 44, at 303. A. Kinoy, supra note 88, at 102. See also National Lawyers Guild, Representation of Witnesses before Grand Juries 1 (1974).

108. See, e.g., United States v. Samango, 450 F. Supp. 1097 (D. Hawaii 1978), *aff'd* 607 F.2d 877 (9th Cir. 1979); United States v. Basurto, 497 F.2d 781 (9th Cir. 1974); United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979); United States v. Phillips Petroleum Co., 435 F. Supp. 610 (N.D. Okla. 1977); United States v. Braniff Airways, Inc., 428 F. Supp. 579 (W.D. Tex. 1977); Johnson v. Superior Ct., 15 Cal. 3d. 248, 539 P.2d 792, 124 Cal. Rptr. 32; Arenella, Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication, 78 Mich. L. Rev. 463, 539-75 (1980).

109. See National Lawyers Guild, supra note 107. See also S. Bachmann, Defenses Against Fishing Expeditions 12-14 (1981).

110. A. Kinoy, supra note 88, at 70.

111. Id. at 252. See also Bellow, interviewed in Comment, The New Public Interest Lawyers, 79 Yale L.J. 1069, 1087-88 (1970).

112. During the early part of this century, contingent fee arrangements were carefully scrutinized because of a fear that they would motivate attacks upon a corporation's profits. Later, the ethical canons were used to attack the NAACP and various unions. The Association of American Railroads spent $325,000 annually to finance offices in New York, Atlanta, St. Louis, Chicago, and Los Angeles to look for possible ethical violations on the part of lawyers retained by union members for workmen compensation claims. As a result, over 1500 investigations were instituted, some of which provided the basis for Bar Association proceedings against union counsel in Iowa, Nebraska, Oklahoma, Montana, Michigan, Ohio, and Virginia. Nascent Office of Equal Opportunity offices were greeted with various lawsuits challenging their legitimacy on "ethical" grounds. J. Auerbach, Unequal Justice 45-48, 270-71 (1976). See Bodle, Group Legal Services—the Case for BRT, 12 UCLA L. Rev. 306, 318 (1965); Schuchman,

distinguishing legitimate first amendment recourse to the courts[113] from champerty.[114] History suggests that the social change attorney note these differences closely.[115]

Among the standards that the attorney should remember is that she may not represent parties with potentially conflicting interests unless all clients have been adequately advised of the situation.[116] The social change lawyer should pay attention to this rule when she is asked to represent a number of clients to prevent potential conflicts that might arise later. For example, in a case in which I participated, when our discovery motions produced an order from the court requiring the defendants to release the name of a police informant, our clients were offered a settlement involving thousands of dollars. Some clients wanted to settle while others wanted the name of the agent. In the end, the minority acceded to the majority. The progressive lawyer facing such a situation may wish to establish a system (in writing) for settling potential differences before the suit is filed.

Disciplinary Rules 2-109[117] and 7-102(A)[118] prohibit the attorney from pursuing legal actions in bad faith. Whether these rules will directly affect the social change attorney more often than her more establishmentarian peer is open to doubt, but the line may be too close when the suit is being filed for one or more of the ACORN reasons noted above, rather than based on its actual potential for success. Disciplinary Rules 7-106(C)(5), (6), and (7)[119] prevent the attorney from deliberately offending tribunals. This rule should be given additional consideration by any attorney considering adopting the postures of political defendants who would make a mockery of the courts.

Disciplinary Rule 7-106[120] prohibits the attorney from disregarding, or advising his client to disregard, a standing rule of a tribunal. The question here is what the lawyer is to do in advising her clients who wish to engage in civil disobedience. The rule suggests that she can play no role in aiding civil disobedience strategies. However, this undercuts the lawyer's capacity to assist her clients in an important mode of social change. At least one Supreme Court Justice has written:

Ethics and Legal Ethics, 37 Geo. Wash. L. Rev. 244 (1968); Zimroth, Group Legal Services and the Constitution, 76 Yale L.J. 966 (1967).

113. In re Primus, 436 U.S. 412 (1977). See also Brotherhood of R.R. Trainmen v. Virginia Bar, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963).

114. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

115. See I. Auerbach, supra note 112 at 193-95, 294. See also Hildebrand v. State Bar of California, 36 Cal. 2d 504, 225 P.2d 508, 516, 521 (1950) (Carter, J. and Traynor, J., dissenting).

116. Model Rules of Professional Conduct Rule 1.7 (1983); Model Code of Professional Responsibility DR 5-105 (1981).

117. Model Code of Professional Responsibility DR 2-109 (1981). See also Model Rules of Professional Conduct Rule 3.1 (1983).

118. Model Code of Professional Responsibility DR 7-102 (A) (1981).

119. Id. at DR 7-106 (C)(5),(6), and (7). See also Model Rules of Professional Conduct Rule 3.4(c) (1983).

120. Model Code of Professional Responsibility DR 7-106 (1981).

> In my judgment civil disobedience—the deliberate violation of the law—is never justified in our nation where the law being violated is not itself the focus or target of the protest. So long as our governments obey the mandate of the Constitution and assure facilities and protection for the powerful expression of individual and mass dissent, the disobedience of laws which are not themselves the target of the protest—the violation of law merely as a technique of demonstration—constitutes an act of rebellion, not merely dissent.
>
> . . . .
>
> At the beginning of this discussion, I presented the dilemma of obedience to law and the need that sometimes may arise to disobey profoundly immoral or unconstitutional laws. This is another kind of civil disobedience, and the only kind that, in my view, is ever truly defensible as a matter of social morality.[121]

Whether Justice Fortas adequately cared for this issue is doubtful. His distinction between the two types of civil disobedience is next to worthless once one starts questioning the real openness of the political processes in this country.[122] On the other hand, however, once one argues that civil disobedience does entail a moral basis, the remaining question is the extent to which the lawyer, as an officer of the court, as a citizen, or as a human being, has the right to associate himself with civil disobedience. Perhaps one is restricted to the role played by the lawyer of Martin Luther King. King had been enjoined from marching in Birmingham, and he knew that "if we obey this order we are out of business."

> The lawyer said, "Well, now I couldn't tell you to march, I couldn't tell you not to march, because as a lawyer that would be a conflict of interests and my license would be taken away from me. The only thing I can say in regard to the injunction, you can't beat it. . . . Now, if you are willing to pay the fine and whatever is involved, then that's up to you all."[123]

King violated the injunction, went to jail, became "once and for all" committed "to the philosophy that one had a positive moral duty to violate unjust laws," and wrote the famous "Letter from the Birmingham Jail." The Supreme Court sided with the Alabama judge.[124]

Disciplinary Rule 7-107[125] deals with trial publicity, and constitutes one of the more problematic rules for the social change attorney. On the one hand, one might view it as a helpful rule, in that it may be cited to the press to force them to speak not with elitist lawyers but with litigants trying to bring a

121. A. Fortas, Concerning Dissent and Civil Disobedience 63 (1968).

122. See notes 92-95 and accompanying text supra.

123. H. Raines, supra note 69, at 143-44.

124. Id. at 143 n.*

125. Model Code of Professional Responsibility DR 7-107 (1981). See also Model Rules of Professional Conduct Rule 3.6 (1983).

specific issue before the public.[126] On the other hand, it is often true that if her lawyer cannot speak for a litigant, no one will. This is especially likely if the lawyer is representing an amorphous or inarticulate group. If cases are used to generate publicity and raise consciousness, then it seems that this rule has a repressive effect on those who use the courts to promulgate their concerns. At the very least, it raises significant questions about the first amendment rights of the individual attorney.

Hence my prescriptions for what the lawyer who would align herself with social change movements should do. Some critics might argue that I accord the lawyer too much of a role, while others might say I accord her too little. I now turn to some of those alternative perspectives.

V
ALTERNATIVE POSITION AND CRITIQUE

* * *

> Chief Justice Warren Burger attacked the "young people who go into the law primarily on the theory that they can change the world by litigation in the courts."[127]

* * *

A. Public Interest

From the public interest perspective one might argue that my vision unduly ignores the efficacy of the legal process and profession. The public interest profession's view of society is based on a judicial model,[128] hence public-interest advocate Charles Halpern can write that "public-interest law rests on the conviction that the public interest is more likely to emerge, and the legal

126. In one sense there is a very important political issue here: Who will choose a movement's leaders, the press or the movement? The press's capacity to misconstrue a movement to the public should not be underestimated. Accordingly, ACORN is very conscientious about insuring that its members, not its staff, speak to the press. By the same token it prefers that its lawyers also stay in the background when the press appears.

127. D. Broder, Changing of the Guard: Power and Leadership in America 235 (1980).

128. [The public-interest movement's] vision of the good society is defined less by what that society decides than by how it decides. Public-interest activists are fundamentally engaged in that most American of occupations, namely, constitution making and revising. . . . The attraction the courts hold for the public-interest movement—aside from the obvious fact that its ranks are disproportionately populated by lawyers—is the opportunity they provide for citizens to redress directly their grievances. The judicial system represents the public interest movement's version of direct democracy; it enables individuals and organizations to take the enforcement of the law into their own hands. The movement's emphasis on the courts is not simply a short-term political tactic; rather, the judicial system is its model of democracy in action. Public-interest activists not only want to subject virtually all agency decisions to judicial review; they want agencies themselves to make decisions according to a judicial model. Their goal is to make administrative law a surrogate political process designed to ensure the fair representation of a wide range of affected interests in the process of administrative decisions.

Vogel, The Public Interest Movement and the America Reform Tradition, 95 Pol. Sci. Q. 607, 617 (1980-81) (footnotes omitted).

process to function more effectively, if all sides to a dispute are represented."[129] The public interest movement defines litigating as the processes appropriate for attaining its goals. The nature and scope of the role of law and lawyers in such a vision is obvious, while the shortcomings of such a vision are equally apparent.

To begin with, the value of the goal is open to dispute. The end seems to be a polity where the primary political acting is done by judges, lawyers, and bureaucrats who, like Platonic philosopher kings, create justice from whatever esoteric processes they employ.[130] While this may be satisfying for frustrated upper-middle-class lawyers who want to enjoy the powers of real citizenship, it does little for the rest of the body politic, whose role seems to be one of funding and applauding genteel champions.[131]

Even if the public interest vision is accepted, a more primary question remains: Are the public interest advocates employing means that will in fact accomplish their ends? From both the short- and long-term perspective, this is doubtful.

From the short-term perspective, the courts seldom produce much. One public interest lawyer has conceded that "[w]hen you're talking about major social change . . . there are obvious limitations [to public interest litigation.]"[132] This observation has been empirically sustained by the work of Joel Handler.[133]

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129. D. Broder, supra note 127, at 235.

130. In The Republic, Plato envisioned a state governed by a committee of wise men. Unfortunately, it is questionable whether the public interest advocates would act in such a happily concerted fashion:

> One of them has observed that "[m]ost of the people in the public-interest law movement tend to be real egomaniacs . . . which is why the public-interest-law movement is not a movement. We do not have a bar association, or meetings, or conventions; we do not get together and periodically discuss policy. Everything is done on an ad hoc basis, because there is not one of us who is ready to submerge our thoughts to the group."

Broder, supra note 127, at 230.

131. Vogel has noted the upper middle class orientation of public interest advocates and has observed its susceptibility to accusations of elitism. Vogel, supra note 128, at 627. For his part, Broder has noted the reluctance of public interest advocates to engage in the messiness of "nitty-gritty politics." D. Broder, supra note 127, at 238.

132. D. Broder, supra note 127, at 236.

133. In Social Movements and the Legal System, Handler studied 35 different cases taken from four major social change areas. He summarized his conclusions as follows:

> [B]y turning to the legal system, social reform groups have appealed to traditional institutions, and their claims for social justice have been based on traditional American constitutional values. It should come as no surprise, then, that law-reform activity by social reform groups will not result in any great transformation of American society. Instead, it is, at its most successful level, incremental, gradualist, and moderate. It will not disturb the basic political and economic organization of modern American society.

J. Handler, supra note 44, at 232-33. See also D. Broder, supra note 127, at 240 (quoting Nader associate Mark Green):

> [U]nless you're dealing with a Brown v. Board of Education case, which is rare, the amount of time spent in getting a particular decision in the courts can have a bad cost-

Cases like *Brown* helped to inspire many well-meaning lawyers to attempt public interest litigation,[134] yet, as noted, the accomplishments of *Brown* were delivered more through political action than judicial pronouncements. Even more significant is that focus on such cases involves an appalling lack of a sense of history. Since 1789, decisions of socially progressive impact have not consistently emanated from the Supreme Court. In many cases the decisions were of limited relevance,[135] and in others the decisions were positively reactionary.[136] The recent period of success has resulted from the contingencies of political struggle rather than from the nature of the court itself.[137] Recent pronouncements from the Burger court suggest that the aforementioned historical epoch of progressive decisions is coming to an end.[138]

Yet, if these short-term objections are not enough, there remains the more fundamental point that public interest litigation defeats itself in the long term.[139] Public interest lawyering takes power from people and gives it to attorneys.[140] It increases the sense of helplessness and frustration on the part of the many,[141] and disguises realities of political struggle and creates false

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benefit ratio in terms of social change. There are a few exceptions, but I find I have more influence as a lobbyist than I did as a litigator.

134. J. Handler, supra note 44, at 26-27.

135. E.g., Brown v. Board of Education, 347 U.S. 483 (1954); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

136. E.g., Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936); Coppage v. Kansas, 236 U.S. 1 (1915); Lochner v. New York, 198 U.S. 45 (1905); Plessy v. Ferguson, 163 U.S. 537 (1896); Callan v. Wilson, 127 U.S. 540 (1888); Dred Scott v. Sandford, 60 U.S. 393 (1856).

137. See note 92 and accompanying text supra.

138. See, e.g., Conservatives on Supreme Court Dominated Rulings of Latest Term, N.Y. Times, July 8, 1984, at 1, col. 1.

139. [J]ust as bourgeois ideology assumed that everyone was, or could be, a property owner, so does the ideology of the public-interest movement assume that everyone is, or could be, a politically committed citizen. But both views are false and for the same reason: they fail to recognize the extent to which life in a market economy may undermine the ideals of liberal democracy. They mistake the rhetoric of liberal democracy for the reality of capitalism. . . . In sum, the more successful the public-interest movement has been in accomplishing and realizing both its substantive and procedural demands, the more powerful and pervasive has become the role of government. But the greater the intervention of government in American society, the more the exercise of governmental authority is perceived by the citizenry as an illegitimate interference with their lives. Thus while the public-interest movement promises increased public participation, what it actually delivers to most institutions and individuals is increased regulation. It promises to make public bureaucracies more accountable, but what it has actually done is to increase their number and size. As a result, increased citizen participation has failed to accomplish one of its most important stated objectives, namely, that of increasing the legitimacy of government regulation of business.

Vogel, supra note 128, at 626-27.

140. Cf. Foucault: "Now my hypothesis is not so much that the court is the natural expression of popular justice, but rather that its historical function is to ensnare it, control it and to strangle it, by re-inscribing it within institutions which are typical of a state apparatus." M. Foucault, supra note 13, at 1.

141. [U]sing the legal system itself may exact a high price. The lawyers, with the leaders, often assume a dominant position with regard to tactics and strategy once the group goes the legal route. The membership is confronted with a mysterious procedure and trade language; the specialists take over. There is a danger that the nonlegal activity of the group will languish pending the outcome of the litigation. There will be

consciousness. Postulating their work as "public interest" work, these attorneys imply that there is but one public interest which everyone should support.[142] This is a dubious proposition, because one's own perspective is frequently colored by one's class position, one's present situation with regard to the society's resources and power. As demonstrated, social change has historically resulted from shifts in balances of power in society rather than from persuasive arguing,[143] and so the belief that silver tongued oration alone will implement social change is wrong. Public interest law should be seen for what it is: the expression of political[144] interests which will go nowhere without substantial backing that thrives outside the chambers of the courts.

At this point it might be fair to ask if any good at all can come from recourse to the courts for the sake of social change. Handler has observed:

> Most law-reform activity serves multiple purposes. Even if the social-reform groups and the law reformers are counting on direct tangible benefits from litigation, the litigation usually will help publicize the organization and the law reformers, legitimize values and goals, stimulate purposive incentives, and hopefully result in obtaining outside resources from elites, foundations, other organizations (for example, labor unions), and public agencies.[145]

Handler notes three major areas of indirect benefits: "(a) Where litigation is used to clear the underbrush (subsidiary to nonlitigation strategies); (b) for leverage to enable the group to mobilize resources and increase the potency of its other tactics; and (c) for publicity, fund raising, mobilizing outside resources, consciousness raising, and legitimacy."[146]

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the inevitable delays that can sap the enthusiasm of the membership. Using the courts might mean framing the issues that, while legally sound, lose political and purposive appeal. And then, there is the risk of losing.

J. Handler, supra note 44, at 33.

142. But see C. Halpern: "The term public-interest law . . . does not imply a claim that the side represented by the public interest lawyer is always right as a matter of law, policy or morality." D. Broder, supra note 127, at 235. See also Vogel, supra note 128, at 625:

> Public-interest advocates take considerable pains to emphasize that the preferences of the interests they represent are not themselves identical with the public interest. Instead, advocates tend to define the public interest in procedural terms, arguing that public policies are capable only to the extent that all affected parties participate in the policies' formulation. (footnote omitted).

Vogel himself does not accept this procedural notion of the public interest, but feels that the "emphasis on procedural rights is essentially a tactic designed to advance . . . substantive goals." Id. at 626; see note 144 infra.

143. See text accompanying notes 36-87 supra.

144. Cf. Vogel, supra note 128, at 626:

> Public-interest groups do not want participation for its own sake; they want it for the sake of the concrete victories over business that it promises to bring. They do not really want to participate; what they actually want is to win. . . . In fact, neither business nor the public-interest movement actually favors genuine pluralism: instead both believe that the particular interests they represent are themselves the public interest.

145. J. Handler, supra note 44, at 209.

146. Id. at 210.

But what Handler notes is no different from the points made above. Participation in the legal system does have its role to play in meaningful social change, but it is a subordinate role. Elevating it to a premier role creates problematic if not disastrous consequences.

B. A-Legal

* * *

> [T]here is a difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which may be concealed beneath this law. But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seem to me to be an unqualified human good. To deny or belittle this good is, in this dangerous century when the resources and pretentions of power continue to enlarge, a desperate error of intellectual abstraction.[147]

* * *

This section critiques what I have chosen to call an "a-legal" perspective of social change.[148] Perhaps the most obvious proponents of this view are the "crude Marxists" who might assert something like the following: law is merely the reflection of the needs and desires of a given society's ruling class. It is created by the elite as a tool to maintain its domination over other social groups. Recourse to law is thus counter-productive for the conscientious revolutionary reformer, except, perhaps, to expose the scandalous contempt for justice held by hirelings participating in the judicial system where outcomes are pre-determined.[149]

The "crude Marxists," or "instrumentalist" point of view, which has continued to be attacked[150] since Engels' criticisms of the late nineteenth century,[151] should be evaluated lest it be dismissed too easily.

First, the ostensibly cynical view of the "crude Marxist" is not always totally wrong, as the instumentalist employment of the canons of ethics, and the frank hostility of Chief Justice Taft towards organized labor demonstrates. Part of the "massive resistance" employed by Southern racists during the 1950's and 1960's included straightforward instrumentalist use of the law.[152] On a more abstract level, Professor Morton Horwitz has established that, during the first century of American jurisprudence, law was used openly to promote economic growth and entrepreneurial capitalism. Though such

147. E. P. Thompson, Whigs and Hunters, supra note 13, at 266 (emphasis in original).

148. "A-legal," as opposed to "illegal," suggests a sense of the total irrelevance of law, as opposed to a sense that anti-legal activity must be pursued.

149. Cf. A. Vyshinsky, The Law of the Soviet State 13 (H. Babb trans. 1948) (law as "superstructure," "merely the will of the dominant class elaborated into a statute").

150. See, e.g., Gabel & Harris, supra note 2, at 369 n.1.

151. K. Marx & F. Engels, supra note 30, at 397.

152. See F. Wilhoit, supra note 75, at 34, 47.

instrumentalism is less blatant than the squelching of a dissident, it does sustain a particular social order, to the benefit of specific social groups.[153] Thus law's role in social conflict is not consistently subtle.

Second, some cynicism concerning western "rule of law" is in fact well-founded considering the historical contingencies and conscientious terror/violence upon which "rule of law" thrived in particular and privileged corners of the world.[154] Merleau-Ponty's points concerning this matter may lead us to consider the ideals we are advocating, and how we intend to effectively implement them.

These two points lead to a consideration of a third: the extent to which the ruling orders dispense with the rule of law altogether, and rely on sheer terror. Potential social changers must, in fact, be prepared to face raw force with no pretense to legal forms. Concerning the history of American violence in general, Richard Hofstadter has written:

> [O]ne is impressed that most American violence—and this also illuminates its relationship to state power—has been initiated with a "conservative" bias. It has been unleashed against abolitionists, Catholics, radicals, workers and labor organizers, Negroes, Orientals, and other ethnic or racial or ideological minorities, and has been used ostensibly to protect the American, the Southern, the white Protestant, or simply the established middle class way of life and morals. A high proportion of our violent actions has thus come from the top dogs or the middle dogs. Such has been the character of most mob and vigilante movements. This may help to explain why so little of it has been used against state authority, and why in turn it has been so easily and indulgently forgotten.[155]

Fourth, Piven and Cloward, after close scrutiny of the labor, civil rights, and welfare movements suggest:

> Whatever influence lower-class groups occasionally exert in American politics does not result from organization, but from mass protest

153. Horwitz, The Transformation of American Law, 1780-1860 313 n.18 *passim* (1977).

154. The material and moral culture of England presupposes the exploitation of the colonies. The purity of principles not only tolerates but even requires violence. . . . In refusing to judge liberalism in terms of the ideas it espouses and inscribes in constitutions and in demanding that these ideas be compared with the prevailing relations between men in a liberal state, Marx is . . . providing a formula for the concrete study of society which cannot be refuted by idealist arguments. . . . It is not just a question of knowing what the liberals have in mind but what in reality is done by the liberal state within and beyond its frontiers . . . . An aggressive liberalism exists which is a dogma and already an ideology of war. It can be recognized by its love of the empyrean of principles, its failure ever to mention the geographical and historical circumstances to which it owes its birth, and its abstract judgments of political systems without regard for the specific conditions under which they develop. Its nature is violent, nor does it hesitate to impose itself through violence.

M. Merleau-Ponty, supra note 15, at xiii, xiv, xxiv.

155. R. Hofstadter & M. Wallace, supra note 37, at 11. Readers are referred to Hofstadter and Wallace for a convenient compilation of establishmentarian terror.

> and the disruptive consequences of protest. . . . The wiser course is to understand [the limitations imposed by historical considerations and social institutions], and to exploit whatever latitude remains to enlarge the potential influence of the lower class. And if our conclusions are correct, what this means is that strategies must be pursued that escalate the momentum and impact of disruptive protest at each stage in its emergence and evolution.[156]

In effect, Piven and Cloward maintain that social progress results from disrupting the system. Their perspective suggests that the role of law and lawyers is even more marginal than that suggested by my analysis, which centers on the importance of the transformation of the class-in-itself into the class-for-itself. Piven and Cloward shift the focus to questions of disruptions within the prevailing system as the critical and primary motors of social change.[157]

Some instrumentalism inheres in the a-legal perspective as it views law as a consequence, if not of conscientious socio-economic policy, then of conscientious political compromise. Legal processes tend to be viewed as effects rather than causes, and so activity in the legal field appears eminently marginal.

There is a certain appeal to the humility evidenced in a perspective like that of Piven and Cloward. Too frequently left-wing thinkers dispute the details of utopia without considering how to initiate a challenge to oppression.[158] By contrast, the humbler point of view seems to concentrate on what concessions might be extracted from a tragic and uncooperative process of history.[159]

Ultimately, however, both the tragic and the utopian a-legal visions question the role that law plays in social relations. The utopian is likely to say, smash the ruling class and its instrumental laws, and the subsequent social relations will care for themselves. The problem here is that social relations do not always care for themselves. Smashing often continues far beyond what anyone may have anticipated originally. Thus E.P. Thompson has noted the need for an appreciation of rules, and the systems and circumstances by which people relate to one another.[160] The lawyer involved in social change must therefore watch the processes by which the class-in-itself becomes a class-for-itself. Will it be an authoritarian or democratic process? The lawyer, with her training in matters of justice, fairness, and procedures for implementing them, may have a contribution to make beyond diminishing lawyerly elitism.

The same considerations hold true for the humbler approach suggested by Piven and Cloward. If history teaches us that we must expand disruption,

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156. F. Piven & R. Cloward, supra note 49, at 36-37.

157. It should be noted here that Piven and Cloward do not focus on issues of law, nor do they employ the Marxist perspective that focuses on masses becoming classes-in-themselves. I am merely extrapolating positions suggested by their work. They might or might not agree with similar extrapolations. However, the two do express doubts about the efficacy of organization in social movements; see, e.g., id. at xv-xvi.

158. See P. Clecak, supra note 9.

159. For an even humbler perspective, see Gabel & Kennedy supra note 13 at 53-54.

160. See E.P. Thompson, Whigs and Hunters, supra note 13, at 264-66.

what happens when and if we finally "escalate" its "momentum and impact" to a point where we have to worry about the responsibilities of taking and exercising power? Sometimes ruling elites bend, sometimes they break. At such junctures the "lower" class movement will have need for some experience in modes of structuring social relationships beyond the mere ability to riot. At such a point, experiences similar to those cultivated by ACORN would be necessary. People must experience making decisions and exercising power collectively. They have to appreciate the complexities of democracy: where manipulation begins, and how to implement respect for personhood. Again, these insights derive from conscientious practices sustained before the "final" victory is won.[161] They do not drop from the skies. They do not result from dreaming about them as the utopian might. They do not result from a focus that concentrates exclusively on riot.

Thus, the a-legal perspective correctly points out that legal procedures are subject to instrumental abuse. However, as E.P. Thompson has suggested, law is as important a bourgeois contribution to human civilization as industrial production. The respect for individuals that law implies must be an integral component of any movement for social change, or real social change will never occur. The lawyer thus has a role to play in assuring the maintenance of a system of respect and fairness, by struggling against lawyerly elitism and by sustaining the rule of law. In trying to hold power accountable she sustains the heritage won by our revolutionary predecessors.[162]

C. Fusionist

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> The attractive power of mass consumption is based not on the dictates of false needs, but on the falsification and exploitation of quite real and legitimate ones without which the parasitic process of advertising would be ineffective. A socialist movement ought not to denounce these needs, but take them seriously, investigate them, and made them politically productive.[163]

* * *

In a sense, my objections to the public interest advocates and a-legal partisans are Aristotelian. Each was too extreme in its position: the former relying too much on law and lawyers to better social conditions, and the latter ignoring them too thoroughly. There is a third perspective on the role of law

161. It should also be noted that conscientious practices also play a role in conscientious disruption. The labor upheavals owed much to communist and C.I.O. agitators. D. Milton, supra note 63, at 108. The civil rights movement began moving when NAACP reforming was replaced by aggressive organizing on the part of SCLC and SNCC. See text accompanying notes 79 and 80 supra.

162. Cf. E.P. Thompson, The Poverty of Theory and Other Essays 42 (1978) (History as a process of affirming and transmitting past values).

163. H. Enzensburger, supra note 22, at 60.

and lawyers which is presently enjoying some currency.[164] I have chosen to label this perspective "fusionist," for reasons explicated below.

The fusionists espouse a more optimistic approach to radical law, claiming that "the very public and political character of the legal arena gives lawyers, acting together with clients and fellow legal workers, an important opportunity to reshape the way that people understand the existing social order and their place within it."[165] They argue for going "beyond rights-consciousness [to focus] upon expanding political consciousness through using the legal system to increase people's sense of personal and political power."[166] Gabel and Harris illustrate the means of achieving these various strategic goals, including: telling an aggrieved tenant what she might do for herself first,[167] standing by a prisoner in the prisoner's dock,[168] requesting that "standing rules" against children in the courtroom be waived while a client is being sentenced,[169] politicizing ostensibly neutral legal processes, citing sexual oppression to bolster a self-defense defense of a woman indicted for murdering a man who raped her, and transforming a police harassment prosecution into first amendment terms.[170]

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164. To an extent this position might be identified with the Critical Legal Studies Conference and the National Lawyers Guild Theoretical Studies Committee. While it would be a mistake to cite fusionism as a "party line" for either body, nevertheless, leading figures in both organizations provide the source for this partially articulated point of view. See, e.g., D. Kairys, Freedom of Speech and Gordon, New Developments in Legal Theory, in The Politics of Law note 2 supra; Gabel & Harris, supra note 2. This discussion will focus particularly on the latter article, because it is one piece which explicitly claims that it:

> [I]s a first attempt to link the theoretical advances made by the Conference with the accumulated practice of creative Guild attorneys, and in so doing to outline a new theory of practice that can be of value to lawyers who often lack the time or opportunity to situate their work within a broad political context.

Gabel & Harris, supra note 2, at 370-71.

165. Gabel & Harris, supra note 2, at 369-70.

166. Id. at 376. The positions the fusionists espouse might be garnered from the following remarks:

> Hierarchical social relations are fashioned and reproduced principally through cultural conditioning rather than through the direct use of force. One element of this conditioning process is the creation of legal concepts and doctrines to establish the political legitimacy of the existing order . . . . The function of law is thus not so much to "enforce" existing social relations as to legitimize them . . . the legal system is an important public area through which the State attempts—through manipulations of symbols, images, and ideas—to legitimize a social order that most people find alienating and inhumane . . . . The principal role of the legal system . . . is to create a political culture that can persuade people to accept both the legitimacy and the apparent inevitability of the existing hierarchical arrangement . . . . "Democratic consent" to an inhumane social order can be fashioned only by finding ways to keep people in a state of passive compliance with the status quo, and this requires both the pacification of conflict and the provision of fantasy images of community that can compensate for the lack of real community that people experience in their everyday lives.

Id. at 369-70 n.1, 370, 372.

167. Id. at 408.

168. Id. at 399-400.

169. Id. at 400.

170. Id. at 379-84, 389-94.

I agree with much of this approach. Their focus on the way human beings relate to each other to create law, politics, and reality, is excellent. Particularly commendable are the instances where the authors advocate organizing approaches.[171] My objection to the fusionists may be more of emphasis than of kind. However, the objection is ultimately rooted in differing conceptions of social goals, and how to achieve them.

Gabel and Harris, for example, speak in terms of "the overcoming of alienation [as] a central political objective," and "the primacy of liberating human desire as the foundation of radical political theory."[172] They imply that part of their objection to a "rights-oriented" approach to legal practice is its implications concerning "the necessity of social antagonism (since rights are normally asserted against others)."[173] They call this "way of thinking about people":

> [A] bizarre abstracting away from one's true experience of others as here with us existing in the world. An alternative approach to politics based on resolving differences through compassion and empathy would presuppose that people can engage in political discussion and action, founded upon a felt recognition of one another as human beings, instead of conceiving of the political realm as a context where one abstract 'legal subject' confronts another."[174]

Such remarks display an optimistic perspective on the capacities of human beings to cooperate with and love one another. Human desire is viewed almost innocently, as if the human body is filled only with love. The fusionists imply that if people would only sit down together and talk, social antagonism would end.[175] The role of force in human affairs is viewed almost as an accident.[176]

The Gabel and Harris perspective becomes more comprehensible within the perspective of fusionism. Dallmayr introduced the fusionist perspective as a mode of being, explicated by Sartre.[177] For Sartre the group in fusion was a way of living to be contrasted to "seriality," where people encounter one an-

171. E.g., id. at 394 n.40, 408.

172. Id. at 371, 372 n.6.

173. Id. at 376 n.13.

174. Id. at 376-77 n.13. Gabel elsewhere emphasized the disparity between people's "real lives" and the "imaginary political community" which people project. See Gabel & Kennedy, supra note 13, at 28-29. In response to these points I would observe that in the real world unreal abstract groups do have their impact. The Swedish Catholics and American Baptists have lived at least two different experiences which will not only obstruct their capacities to relate to one another. They will also make it easier for them to relate to fellows from their own groups. At some levels, then, human beings do relate abstractly, and that is a function of their lived conditions, not of alienation. Indeed, it might be observed that for the abstraction of legal personage (i.e., one is treated with a certain regard) Gabel is substituting another abstraction (the human being).

175. For a more critical evaluation of love, see J. Tweedie, In the Name of Love 71-81 (1979).

176. Gabel & Harris, supra note 2, at 370 n.1.

177. See note 10 and accompanying text supra.

other as strangers, as "others," and as a "plurality of isolations."[178] By contrast, the group in fusion involved a way of relating when individuals shared common projects, and could see themselves in others. This concept is important for a number of reasons. First, it implies a view of the nature of humanity: alienation is aberration,[179] fusion is normal. Second, it implies an alternative to Lenin's elite party as the appropriate vehicle for revolutionary change.[180] Third, the fusion concept implies that Marx's ideal state of communism might be achieved. The informing assumption is that humanity "naturally" unites, and all that it needs is appropriate stimulation to do so.[181] Given this explication of Sartre,[182] the remarks of Gabel and Harris, as explicators of a fusionist perspective, take on additional meaning.

The question at this point becomes the extent to which the fusionist perspective can be reconciled with my communitarian perspective. It is not clear to me that they can, because they entertain alternative conceptions of value and human nature.[183]

The value of community embraces the value of social interaction (which fusionists espouse) while nevertheless arguing for the sustenance of potentially antagonistic individualism. Fusionism is likely to view such individualism, and its attendant separations and alienation, as an aberration which ought to be transcended once the appropriate social conditions are implemented.[184] My

178. J. Sartre uses the bus line to illustrate this phenomenon. Sartre, supra note 10, at 256-570.

179. Cf. J. Sartre, supra note 10, at 306-07 n.89 (speculations as to the possibility of "elimination of *all* forms of alienation).

180. "In short, the democratic group in fusion, not the elite Leninist party, was the proper revolutionary organization." M. Poster, supra note 10, at 220. Sartre cited situations from the French Revolution in 1789 to establish his point, although many people saw a re-confirmation of his views in the May days in France in 1968. The point, however, is that "*social transformation in advanced society must concentrate on the immediate creation of new relations of reciprocity* rather than *concentrate* on overthrowing the enemy." Id. at 395.

181. See note 179 and accompanying text supra.

182. Gabel and Harris cite Sartre as an informing mentor, along with Marcuse. Gabel & Harris, supra note 2, at 371 n.5.

183. Value and human nature involve two sides of the same coin, for one's values develop from a sense of what is possible and desirable in human experience. Discussions of "human nature" are frequently identified with Rightist discourse because of its potential for justifying the status quo. Nevertheless, the Left must confront these issues because, as Noam Chomsky has observed,

> a vision of a future social order is . . . based on a concept of human nature. If in fact man is an indefinitely malleable, completely plastic being, with no innate structures of mind and no intrinsic needs of a cultural or social character, then he is a fit subject for the "shaping of behavior" by the state authority, the corporate manager, the technocrat, or the central committee. Those with some confidence in the human species will hope that this is not so and will try to determine the intrinsic characteristics that provide the framework for intellectual development, the growth of moral consciousness, cultural achievement, and participation in a free community.

N. Chomsky, supra note 26, at 404. See also M. Konner, supra note 26; P. Clecak, supra note 9, at 124; and Hutchinson & Monahan, Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought, 36 Stan. L. Rev. 199, 240 (1984). Contrast Gabel & Kennedy, supra note 13, at 14-15.

184. It might be acknowledged that Gabel "claims separateness." Gabel & Kennedy,

version of community finds this hard to accept. That people differ is not necessarily bad, and experiences of solitude can entail their own rewards. More importantly, though, we may have no choice but to embrace our individual situations. The matter that produces individual consciousnesses is going to continually produce disparate aggregates of matter and consequently disparate consciousnesses.[185] Though these disparate bodies and minds may find it possible and rewarding to get along with, if not love, one another, still they will differ from one another. The potential for contradiction, antagonism, and aberrations—as well as diversity and stimulation and letting-be[186]— will remain.[187]

These differing perspectives on human diversity lead to a different perspective on law. While the ways in which law legitimates and masks alienation and hierarchy constitute a major contribution of recent critical legal thought, the issue does not end there. Fusionist thought has a tendency to view law as an unfortunate aberration. Law is viewed as a function of alientation, existing as an artificial barrier keeping people from natural harmony. This conception is sensible if one believes that the state of natural harmony is attainable. However, if one believes that some aspects of "antagonistic" individualism are likely to remain in an ideal society, then one is likely to view law in a positive, as well as a negative, light. Law not only obfuscates community by promulgating perverse social relations, it also intimates community by postulating an ideal of social relations where every person is respected and empowered. Many times the practical implementation of the law makes a mockery of this ideal. But as E.P. Thompson suggests, it is as revolutionary as the Christian

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supra note 13, at 3. However, it is not clear that his values allow for anything beyond "unalienated relatedness." Id. Separateness is claimed, but only because it constitutes a component of ideal intersubjectivity.

185. Biologically, every creature is unique, to the extent that some geographic extremes of the same species finally prove unable to reproduce together. (The grass frog, *Rana pipiens*, affords an example of this. W. Johnson, L. Delanney, E. Williams & T. Cole, Principles of Zoology 324 (1969)). At this point it is appropriate to note that my difference with fusionism may be philosophical. I am clearly relying on the fundamental postulate of dialectical materialism which looks to material as the grounds for consciousness. A major reservation I have concerning the phenomenological/existentialist inspired wing of Marxism is the extent to which it ignores the social, economic, and biological groundings of thought. N. Chomsky, supra note 26, at 404, for example, explains the biolgoical postulates which support his social vision. But what, if any such postulates are entertained by fusionists? Cf. J. Sartre, supra note 10, at 524.

186. See note 10 and accompanying text supra.

187. Thus, unlike Sartre, I do not look for a thorough abolition of alienation. Gabel might call this a "paranoid" abstraction from contemporary conditions, Gabel & Kennedy, supra note 13 at 15. My responses are: (1) his is an unrealistic psychoanalytic denial, see C. Lasch, supra note 6, at 20; (2) his is an unjustified abstraction derived from the abstractions of existential phenomenology (again the quarrel with dialectical materialism. Cf. T. Adorno, The Jargon of Authenticity (1973)); and (3) just because you are paranoid does not mean they are not out to get you. I do not know why we should sacrifice a qualified, but hopeful vision for an even more optimistic (utopian?) vision that entails enormous historical risks of repression (for the sake of some ideal "group"). See Sparer, supra note 18, at 514, 530-31; P. Clecak, supra note 9, at 27; E.P. Thompson, Whigs and Hunters, supra note 13, at 258-269; M. Horkheimer, Critique of Instrumental Reason 66-68 (1974).

notion that every person, slave or emperor, has a soul.[188] Law is certainly a social practice, but in addition to conditioning us for hierarchy, it also rehearses us for liberation.[189]

My conception of law vitiates my appreciation of the points that Gabel and Harris make concerning symbolic conduct in the courtroom. To begin with, from the mundane perspective of my professional practice, I would simply observe that not all of my clients are totally taken in by courtroom folderol. It is not as if real human beings are passive targets of ruling class hokus pocus.[190] They do have a sense of hokum.[191] The problem, however, is not only one of inadequately appreciating real people. It is also one of being insufficiently dialectical. Though real human beings do not necessarily buy in totally to law's symbolic conduct, to an extent they do buy in. Now their buying in might frequently involve a capitulation to authoritarian forms of social conduct. But as we indicated earlier, the symbolic behavior involves a rehearsal for liberation as well as capitulation to authoritarianism. Though persons in the courtroom are on the one hand participating in a community of domination and hierarchy, they are at the same time participating in a community where every person is equally entitled to respect.[192]

Additionally, one might intuitively conclude that minor disruptions of symbolic conduct are simply not going to make that much difference in the real world of social struggle. It is all too easy to view them as frustrated substitutes for meaningful social action.[193]

At this level, my differences with the fusionist perspective turns to the issue of means for accomplishing social good. Since my ultimate values possi-

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188. The rhetoric and the rules of society are something a great deal more than sham. In the same moment they may modify, in profound ways, the behavior of the powerful, and mystify the powerless. They may disguise the true realities of power, 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 . . . .

E.P. Thompson, supra note 13, at 265.

189. At this point, the fusionists are being insufficiently dialectical. Nothing is simply good or bad, there are many sides to one phenomenon. Law, as a practice, implements values that a society of contending groups have temporarily agreed upon. If the values that are being implemented are not all good, that is more the problem of history and those of us who participate in making it, less of law.

190. With its roots in French thought, fusionism may have an overweening appreciation for French structuralism, and its proclivity for passive historical agents. Cf. E.P. Thompson, The Poverty of Theory, supra note 162, at 147.

191. E.g., Professor Trubek has cited empirical studies which cast doubt on the extent to which working people passively accept dominating images of society. Trubek, Where the Action Is: Critical Legal Studies and Empiricism, 36 Stan. L. Rev. 575, 613-15 (1984).

192. The undialectical approach resembles ostensibly socialist condemnations of the popular television program, The A-Team. While its militarism and violence are apparent, this program nevertheless also intimates relationships of community where individual characteristics are respected in a context of loyalty and common endeavor. Popularity, like hegemony, is a complicated, dialectical matter. See H. Enzensberger, supra note 22, at 60.

193. Dialectically, one might note that the little pranks lawyers get away with only serve to emphasize all the more poignantly one's powerlessness. In the courtroom one works on the turf of the rulers. As ACORN and Foucault maintain, the sooner one returns to one's own turf—the communities and streets—the more effective one is.

bly differ more in degree than in kind from those of the fusionists, questions of degree also affect conceptions of implementation of social change. For example, although I agree with the fusionist emphasis on developing decent human relations before the revolution, I disagree that nice approaches to other human beings will suffice to bring about social transformation. Fusionism tends to argue that the revolution will come when growing experiences of fusion overwhelm the ruling order. This position is not sensitive to the role that force plays in history. Ruling class violence has frequently been employed in history[194] against groups that might fuse,[195] and so the disenfranchised must be prepared to use force as a shield, if not as a sword.[196] Cultivating a class-in-itself should thus prove more effective than planting fusionary seeds throughout society in hopes that they will grow, spread, and by their own inertia prevail.

This point, though, must be qualified in two ways. First, the cultivation of decent human encounters is important in the context of the transformation of the class-in-itself into the class-for-itself. The appropriate revolutionary vehicle is not a contingent fusing group or a Leninist elite party, but rather a class or a group resembling a class. The emphasis such writers as Sparer[197] and Goodwyn[198] place on conscientious institutional cultivation is correct.

Secondly, I acknowledge the horrendous nature and complexity of the problem. It is the problem of terror, and of the ways in which means may corrupt ends, or become ends in themselves. As Merleau-Ponty has posed the question, "[I]s the violence [of communism] revolutionary and capable of creating human relations between men[?]"[199] One appeal of the fusionist theory is that it suggests an end to terror, and Poster has provided us with some tantalizing arguments to justify this conclusion.[200] Merleau-Ponty, however, entertains a more tragic perspective:

> [I]n advocating nonviolence one reinforces established violence, or a system of production which makes misery and war inevitable . . . . Political action is of its nature impure, because it is the action of one person upon another and because it is collective action . . . . To govern, it has been said, is to foresee, and the politician cannot excuse himself for what he has not foreseen. Yet there is always the unforseeable. There is the tragedy . . . . [Our critics] are trying to

194. See text accompanying notes 37-40 supra.

195. The army and rightist goon squads crushed Sartre's fusing groups of the French Revolutions of 1789 and 1968. P. Gay & R. Webb, Modern Europe 497 (1973); Reflections on the Revolution in France: 1968 95-107 (C. Posner ed. 1970).

196. While Marx believed that socialism might be established by election, he had no illusions that classes will accept elections: "as soon as [the English middle class] finds itself outvoted on what it considers vital questions we shall see here a new slave-owners' war [referring to the United States in 1861]." K. Marx, The First International and After 400 (1974).

197. See Sparer, supra note 18, at 569.

198. See L. Goodwyn, The Populist Moment, supra note 5, at 300.

199. M. Merleau-Ponty, supra note 15, at xviii.

200. See M. Poster, supra note 10, at 394.

> forget a problem which has troubled Europe since the Greeks, namely, that the human condition may be such that it has no happy solution.[201]

Perhaps the differences of opinions hinge upon an optimistic or pessimistic conception of human nature and history. Although we hope that Poster and his version of Sartre is correct, we may better hedge our historical bets by cultivating groups in fusion in the context of transforming the class-in-itself.

The rest of my disagreements with the fusionist prescriptions tie into factors already noted. We should worry more about force than we do about hegenomic practices.[202] I find the differentiation between empowerment and rights consciousness rather scholastic.[203] While politicizing defense in the courtroom may be preferred from a personal and professional standpoint, it seldom effectuates much meaningful social change. As in the Savannah experience,[204] what happens in the streets is more important than what happens in the courtroom. Reversing priorities can be positively retrograde, as in the situation of the Chicago Eight, where the courtroom behavior was perceived as unacceptable and immature, and produced insignificant mass mobilization.

A dialectical materialist might observe that the fusionist perspective grows out of the material conditions of academics, intellectuals, and lawyers who look to justify their societal practices.[205] While I do not deny that such work has significance in implementing social change, I think it is a mistake to overplay it, to the extent that one simply misunderstands how social change is accomplished. Perhaps the problem is clarified by reference to my other profession: painting.[206] There are a number of arguments one can cite to justify the production of art. For example, it constitutes a protest against the given,[207] its very "uselessness" constitutes a revolutionary rebuff to the utilitarian ethos which dominates capitalist (and bureaucratic socialist) social relationships.[208] As comforting as these arguments might be to the frustrated painter, it is hard to believe that any radical lawyer would agree that a bunch of paintings are going to create the revolution. The same is true for lawyering. The simple fact is that as a lawyer or a painter the individual can play but a limited role in implementing social change. Those who believe otherwise are

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201. M. Merleau-Ponty, supra note 15, at xviii, xxxii, xxxiii, xxxviii.

202. Gabel & Harris, supra note 2, at 370 n.1. For one perspective on the role of force in social control, see G. Kolko, supra note 46, at 174-76. See also R. Hofstadter & M. Wallace, supra note 37, at 11, 19-20.

203. Gabel & Harris, supra note 2, at 376-77. See Sparer, supra note 18, at 529. See also Lynd, Communal Rights, 62 Tex. L. Rev. 1417 (1984).

204. See notes 105-06 and accompanying text supra.

205. This indeed is one of the espoused purposes of the Gabel and Harris article. See Gabel & Harris, supra note 2, at 369-70. Of course it is also fair to observe that this article grows out of the praxis of lawyers who work with organizers.

206. See note "*" and accompanying text supra.

207. H. Marcuse, Soviet Marxism 117 (1961).

208. See A. Arato & E. Gebhardt, supra note 24, at 188, 220, and T. Adorno, Aesthetic Theory 321, 329 (C. Lenhardt trans. 1984).

falling into the error of "Auschwitz culture,"[209] that is, they accord primacy to occupations where one does not have to engage in boring, alienating, hands-dirtying work. The solution for the conscientious lawyer is the solution for the conscientious artist: both must attempt to integrate their work in insurgent cultures,[210] and energize those cultures.[211] If those cultures do not exist, or have been destroyed, then they must do what they can, like Milton.[212] But they must try to relate their work to past and future insurgency, and let their work inspire correct apprehensions of value and value implementation.[213] They must not mislead themselves or others by misstating the dynamics of social change.

In the end I am reluctant to say that the fusionists are misleading. Though their points of emphasis are problematic, in this time of social reaction, we not only share a common project. We also share a number of areas of agreement in pursuing that project.

VI
THE NATURE OF LAW

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> I found that law did not keep politely to a "level" but was at every bloody level; it was imbricated within the mode of production and productive relations themselves (as property-rights, definitions of agrarian practice) and it was simultaneously present in the philosophy of Locke; it intruded brusquely within alien categories, re-appearing bewigged and gowned in the guise of ideology; it danced a cotillion with religion, moralising over the theatre of Tyburn; it was an arm of politics and politics was one of its arms; it was an academic discipline, subjected to the rigour of its own autonomous logic; it contributed to the definition of the self-identity both of rulers and of ruled; above all, it afforded an arena for class struggle, within which alternative notions of law were fought out.[214]

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This discussion should be closed by elaborating on my conception of the nature of law. I agree with the fusionists that it has to be understood as a praxis that implements authoritarian obfuscation. Yet it also intimates some values worthy of espousal: for example, that power should not be the final

209. T. Adorno, supra note 1, and T. Adorno, supra note 208, at 321, 329, 333.

210. See Sparer supra note 18, at 569; L. Goodwyn, supra note 5, at 300.

211. For instance where art played such a role see generally J. Willett, Art & Politics in the Weimar Period (1978).

212. John Milton sacrificed poetry and his eyesight for the English revolutionary government. After the Restoration, barely escaping execution, he concentrated on his major poems, although he did take advantage of occasional relaxation of the censorship laws. C. Hill, Milton and The English Revolution *passim* (1977). W. Haller, The Rise of Puritanism *passim* (1938).

213. E.P. Thompson, The Poverty of Theory and Other Essays, supra note 162, at 42.

214. Id. at 96.

arbiter in human affairs and that every human being is entitled to respect. By its allusions to these better notions, law enjoys its legitimacy. Though legal discourse often attempts to pervert notions of legitimacy, when law deviates from the valid ideals that it intimates, it undermines itself, and lays the groundwork for its eventual transformation.[215]

Fundamentally, law involves human behavior and values. It implements notions concerning appropriate roles for violence, the importance of free expression, and the particulars of freedom of travel and safety. At an abstract level, law involves conceptions of human values, how a human being should ultimately be treated. Law is by no means an insignificant aspect of human affairs.

Since law is so important, we must know how to change its form to meet our goals, and the insight that law concerns value proves helpful. Laws reflect the struggles over values by individuals and groups within society and are the truces that varying factions and classes adopt. They constitute temporary compromises while one group tries to assert power over others. Examples of this are found in the struggle between capital and labor,[216] and further examples are provided concerning the roles that lawyers and pharmacists play within society.[217] Thus, society's laws can be viewed as reflecting various societal balances of power at various junctures through history.

Since law is the end result of struggles over value, any assertion of value affects the final form a law assumes, with the extreme being the application of force. Though revolutionary violence or white terror asserts certain values through coercion and intimidation, there are other levels at which the struggle over values expresses itself, with an impact on the ultimate form that law assumes. Hierarchical, alienating, social relationships practiced within the legal profession, and in society in general, promote values involving hierarchy and alienation. When a working class student attending law school learns he is a clod because he lets his T-shirt show underneath a polyester shirt, a whole value system is subtly enforced where working people are inferior because they are unaware or incapable of fulfilling certain ideals.[218] Law is, thus, not simply what goes into the statute books or the West Reporter system, but rather a result of a whole social context created by the minute practices of every man, woman and child, every day of every year.[219]

The preceding observations lead to conclusions concerning what must be

215. Here we might postulate a portion of "human nature" which has an innate sense of fairness and survives and observes despite all "hegenomic" practices. See, e.g., H. Raines, supra note 69, at 172.

216. Id.

217. See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (first amendment protects pharmacists' rights to advertise drug prices); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (first amendment protects lawyers' rights to advertise services at reasonable fees).

218. See Kennedy in The Politics of Law, supra note 2, at 57-58.

219. Cf. Simon, Visions of Practice in Legal Thought, 36 Stan. L. Rev. 469 (1984) (The relation of extra-legal considerations to "pure" lawyerly activity).

done to change law and implement the values espoused. The legalistic approach of the public interest people should not be ignored, because it can affect the writings of judges and legislators. Nor can the mundane approach of the fusionists be ignored, because the values implemented in day-to-day interpersonal relationships create the social norms and expectations influencing legislators and judges. Self-assertion and conscientious political development are also relevant because they defend and create good human relationships and confront the legal elitists with political force that the elitists ignore at their peril. There is, of course, no simple answer, as each position holds merit, but certain approaches are more productive. History will suggest which emphasis is most effective.

A final concern is that the "crude Marxist" differentiation between structure and superstructure should be adjusted, if not superceded. According to this paradigm, economic matters are the key to understanding everything, while fields of human endeavor like law, art, religion and philosophy are "superstructural" reflections of the economic system.[220]

In our understanding, rather than being a reflection of the economic system, law is a practice between individuals and groups in society. Though it is a collection of words which distill the truces between factions and classes in society at any given time, it also involves people's reactions to these articulated norms. The relationship between the factory worker and her foreman is a good example. The worker receives an order, and considers whether to obey it. Though society's norms as presently articulated in law say that she should obey the order, the worker might wonder whether she should have a say in the operation of the plant. She may think the law is unfair and think nothing of disobeying the foreman, or accept things as they are. Whatever her reaction, it will have an impact on the previously articulated norms. If she and her co-workers believe in the norms or acquiesce in them, she will reinforce them. If, however, she and her co-workers reject and resist them, they will also affect the norms. The point is that law is words sustained or undermined by attitudes and actions adopted by everyone in society, as well as the institutions and cultures created through self-conscious organizing by contending social groups.

The relationship between law and production is more of core/periphery than of structure/superstructure. While the latter model emphasizes that a superstructure is a mere reflection on the structure, the core/periphery model emphasizes that there can be interplay between the two spheres. However, core concerns tend to be more influential. In the end, the core/periphery perspective may be the correct version of the structure/superstructure theory.[221] Note, however that when the vision developed in this article addresses core concern "models of production and reproduction," it refers to the politics of human relationships sustaining the model and how to organize those politics,

220. K. Marx & F. Engels, supra note 30, at 397-98.
221. See id.

rather than to the technology underlying the model.[222]

Whether or not this conception of law fits the structure/superstructure model is academic because my concern here is how lawyers and law relate to social justice. Ultimately, lawyers, judges, and lawmakers play only a marginal role in social transformation. To affect law directly, one should become a politician in the broadest sense and deal with the way people relate to one another in every arena of the social drama. The attorney should realize that she does have a role to play in social transformation, but she should appreciate the extents and limits of this role.

VII
THE NATURE OF PRACTICE

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"The philosophers have only *interpreted* the world, in various ways; the point, however, is to change it."[223]

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The theory presented above must be proven by actual experience. While experience usually provides its lessons in fragmentary pieces, perhaps one personal experience will explicate, substantiate, and provide grounds for the notion that the theory can productively inform practice. Residue from the experience is provided in *Redfield Telephone v. Arkansas Public Service Commission*,[224] which involved the revocation of the franchise of a public utility.[225]

In 1975, popular frustration with state regulation of public utilities in Arkansas was growing. Advocacy before the Arkansas Public Service Commission (P.S.C.) had brought only limited results. In 1976, ACORN helped organize in six different cities initiative campaigns for the authority to regulate electric rates within their jurisdictions. (The legal grounds were in a turn-of-the-century statute.) Litigation took our initiative propositions off the ballot in four cities. Though election results led to victory in Little Rock and defeat in Pine Bluff, the Little Rock initiative was ultimately overturned in court by a judge from outside of the city. Two judges in Little Rock had disqualified themselves, causing some observers to wonder whether or not they were avoiding the political heat of the wealthy utilities on one side, while not alienating the popular vote on the other side.

With this turn of events, ACORN became convinced that, if at all possi-

222. At this point one can debate over where Marxism falls. One can cite a barrage of quotations to prove that Marx looked to technology or political will as the chief historical determinator. See, e.g., Vyshinsky, supra note 149, at 13-14; K. Marx & F. Engels, supra note 30; K. Marx & F. Engels, The German Ideology 42, 50, 60, 116 (1972).

223. K. Marx & F. Engles, supra note 30, at 245.

224. 273 Ark. 498, 621 S.W.2d 470 (1981).

225. The primary source for the narrative are my own recollections and that of my partner Andrew Weltchek, who assumed primary responsibility for the case when I began concentrating on New Orleans cases.

ble, the courts as well as the P.S.C. would have to be bypassed in the rate setting process. Accordingly, ACORN began looking for alternatives. Direct bargaining with the utility was chosen. If enough consumers would withhold payments from the utility if it did not bargain, then perhaps a decent settlement could be reached. Thus in early 1977, ACORN's lawyer began searching for what rights consumers might have in a strike context. In the meantime, the ACORN organizing staff spent significant amounts of time among the constitutents serviced by the Redfield Telephone Company (R.T.C.). R.T.C. was a small utility in the counties southeast of Little Rock, and had been chosen as the experiment for ACORN's collective bargaining notion in part because its customer base, a couple thousand, was small enough to organize. Additionally, ACORN had been receiving calls asking it to react to the company and its President Stancil Glasgow. People complained that not only was his service horrible, he was insensitive to the point of being rude, if not racist, to many of his customers.

One of the first mass meetings that ACORN held was a rally in an auto racing field near Redfield. We filled a small van with law books and a lawyer (myself) to bring a "people's law office" to the rally. Some who attended the rally were reassured to have an attorney tell them that they did indeed have certain rights.

While ACORN organized Redfield, the P.S.C. also sent personnel down to the area to investigate complaints they had been receiving concerning Glasgow's service. The agitation stimulated by ACORN may have played a role in the P.S.C.'s decision to assume jurisdiction over the situation and hold hearings on whether to rescind the franchise of the R.T.C. Since the purpose of the enterprise was to set rates without the P.S.C., the P.S.C.'s move ended the reason for ACORN's organizing efforts. Yet, the energy aroused by our efforts was too great to abandon. Moreover, something had to be done about Glasgow. Accordingly, ACORN intervened in the P.S.C. hearing as representative of a number of ACORN members in the Redfield jurisdiction.

This gave me, the lawyer, a greater role in the campaign. In addition to preparing pleadings, I made trips to Redfield to interview prospective witnesses for the P.S.C. hearing. Helping them prepare their testimony, we concentrated not only on what would help to build the record, but also on what would help them articulate their rage, and galvanize their determination to see the issue through. These objectives complimented one another.

One incident at the hearing illustrated how effective lawyering can also produce positive organizational repercussions. In a sense, the hearing was a trial of Stancil Glasgow. His obnoxious arrogance had offended not only his customers, but also the P.S.C. He had various character witnesses appear on his behalf, including the wife of an Arkansas Supreme Court Justice. When his turn came to testify there was a sense that this was the heart of the hearing: the "Baron of Redfield" coming to account for himself. On his first day of testimony, Glasgow made statements which involved some potentially embar-

rassing contradictions. The following morning he read a statement attempting to retract some of them. During my cross examination, I began to press him on the contradictions, and under the pressures of the hearing, he broke into sobs. That incident made the headlines of that afternoon's statewide daily newspaper, and as a result, a number of ACORN members began calling into our ACORN office. It meant much to these callers that ACORN could bring a phone company president to account for his policies and actions. A campaign which had become circumscribed because of the courtly forum of the P.S.C. now reached a new level of energy.

After the hearing more traditional lawyering processes began. ACORN submitted the only brief to the P.S.C. calling for the revocation of R.T.C.'s franchise. While the P.S.C. deliberated over the decision, ACORN members sustained public pressure through public demonstrations.

The most militant demonstration occurred the following January when the P.S.C. held public hearings to determine whether or not it should develop a consumer's bill of rights. Given the P.S.C.'s apparent lack of solicitude for victims of the R.T.C., such concern on the part of the P.S.C. was anomalous. ACORN was determined to bring these issues up at the P.S.C. public hearings and brought more than two hundred members, many of them from Redfield, to voice their opinions. The P.S.C. hearing room holds only about 100 people, and by the time ACORN people arrived, over half the hearing room had already been filled with various spokespersons for the public utilities who believed that customers had enough rights. As the ACORN members began to crowd into the room, their lawyer, Andrew Weltchek, began to speak on their behalf. He had not been able to shave that morning because a freeze in Little Rock had broken his pipes. As he apologized for his appearance, he made a quip about the efficiency of local utilites. The joke precipitated a fair amount of laughter.

The tone had thus been set for a hearing unconstrained by traditional notions of tribunal decorum. ACORN members who could not fit into the hearing room chanted outside. In the afternoon, the P.S.C. moved the hearing to the more spacious Arkansas Supreme Court hearing room, and the ACORN members had their say.

The militance of the ACORN members helped raise the controversy over the extent to which the P.S.C. was protecting the rights of the Arkansas consumer. Though no one is privy to the Commissioners' deliberations, ACORN believed that public pressure as well as lawyerly disquisition ultimately led the P.S.C. to revoke the franchise of the R.T.C. The R.T.C. subsequently appealed the P.S.C. decision. While ACORN members demonstrated and pursued other issues, ACORN lawyers intervened on behalf of the P.S.C. Ultimately, the Arkansas Supreme Court upheld the P.S.C. decision, and the first franchise in the history of Arkansas had been revoked.

This experience illustrates many of the points in this essay, particularly the point concerning the many-faceted (dialectical) nature of law. Law both

abetted and frustrated people's aspirations. People accepted and repudiated legal processes. Law was developed inside and outside the tribunal sites. People consciously organized and played significant roles to affect their situations. The lawyers played a variety of roles in this process. The "peoples law office" in the racing field helped to reassure the uncertain that there was some legal support for their position, and that a lawyer could help them. As lawyers, both Weltchek and I demystified the legal process to the community and made sure that the appropriate legal arguments were made before the commission. Our aggressive insistence that the drastic alternative of revocation was appropriate must have had some impact.

In the end, of course, one might question what was gained. A small businessman was replaced by AT&T. Is that progress? For ACORN it was progress because the issue was not simply whether a decision by the P.S.C. should be sustained or whether people could bargain collectively with their utilities. Rather the issue was the sort of power which people could exercise over their own lives, and how they could do it. ACORN helped those people organize. Through their own efforts, they did redress grievances they had against their phone company. This is more than most readers of this article will ever be able to say—unfortunately. Yet the point to note too is that the people of Redfield, as well as the people of Arkansas, saw that people can change their lives through self-organization. This has led ACORN people to try for more than stop signs (and franchise revocations) in Arkansas and elsewhere. ACORN has worked for city-wide housing programs, revision of the Democratic Party's delegation rules (four years before Jesse Jackson), people's radio stations, employment programs, and more. The organization continues to win and lose. People continue to struggle.