BOOK REVIEW

THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?

By Gerald N. Rosenberg. Chicago and London: University of Chicago Press, 1991. Pp. xii, 425. $29.95.

BY STEVE BACHMANN*

As for public interest lawyers, perhaps they will all finally go into politics—where they belong.

—Charles Fried[1]

PREJUDICES

Since 1976 I have been working with the Association of Community Organizations for Reform Now (ACORN) and various allied organizations. These groups work to advance the interests of low and moderate income people, which certainly implies significant social change. ACORN is based on the idea that the interests of low and moderate income people are advanced through their direct empowerment; the ACORN perspective[2] firmly holds that litigating through the courts runs counter to this goal of direct empowerment.

Litigation validates the perception that ordinary people of low and moderate income have nothing to do with law reform and social change, and that such reform and change result only from the efforts of well-heeled attorneys and judges. Litigation perpetuates the notion that significant change occurs "by magic," because ordinary people of low and moderate income frequently do not know or care what happens in the court rooms. When ordinary people

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1. Charles Fried, *The Trouble With Lawyers*, N.Y. TIMES, Feb. 12, 1984, (Magazine), at 61. I would like to thank Charles Fried, my former torts professor, for helping me extract his quote from the archives of the NEW YORK TIMES. I assume that, as one of President Reagan's former U.S. Solicitor Generals, Professor Fried would appreciate a statement that certain political opinions expressed in this review are the author's and not his. In any case, as Nietzsche might say, a student repays his teacher poorly if he always remains a pupil.

2. For elaborations on the ACORN perspective, see Steve Bachmann, *Lawyers, Law, and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1, 5-7 [hereinafter Bachmann, *Lawyers*]; *see also* STEVE BACHMANN, NONPROFIT LITIGATION: A PRACTICAL GUIDE WITH FORMS AND CHECKLISTS 93-95 (1992) [hereinafter BACHMAN, NONPROFIT LITIGATION].

perceive that they can change nothing or that they have to rely on "experts" or "magic" to solve their problems, they come to believe they are powerless, they do less, and they grow more and more powerless; which is to say, their original condition of limited capability for societal change is only exacerbated. The deplorable conditions of the status quo are intensified, not ameliorated.

The ACORN perspective, of course, is not universally shared. The opposite perspective is that of Public Interest Through Litigation (PITL).[3] The PITL perspective holds that societal good can be accomplished through court-centered pursuits. Obviously, not all lawyers working in the public interest sector necessarily hold the PITL view. But most probably do believe that major reform can be accomplished through litigation, and some devote their lives to large so-called "public interest" litigation.[4] When adherents to PITL pay attention to the impact that such litigation has on ordinary citizens, they focus on the benefits that such litigation supposedly bestows on ordinary citizens, and downplay or deny the extent to which litigation makes ordinary people feel powerless or dependent.

My investment in the ACORN perspective over the PITL perspective involves more than mere philosophical disagreement. Fascination with the PITL perspective has cost myself and my clients access to a number of important resources over the years. We have lost access to attorneys, because they believe their time might be better spent accomplishing "real" change in exciting, "cutting edge" cases. We have lost the services of law students because they believe the same things that those attorneys believe. We have lost organizers because they believe that their energies would be better spent in law school classrooms rather than in the streets. We have lost money because some contributors have thought it was better to spend money on a court case instead of a mailing list or a phone bank or an organizer's salary.

After five years these costs proved so strenuous that I sat down to write an article to justify the ACORN perspective, entitled *Lawyers, Law, and Social Change*.[5] In that article, I advanced the various points concerning empowerment which ACORN espouses. To bolster the ACORN tenets, I cited historical facts, suggesting in effect that if the reader was not convinced by my political, philosophical, or ethical assertions, then she should at least acknowl-

3. For elaborations of this perspective, *see* Bachmann, *supra* note 2, at 29-33.

4. The term "public interest" is itself misleading. Who is the "public?" Who defines its "interests?" Many would argue, myself among them, that there can be no such thing as "public interest" — there are only various class interests. "Public interest" is a public relations coinage, crafted by a caucus of clever or naive individuals who would try to win other people to their cause by presenting a posture of content neutrality and scientific disinterest. Attempts to secure legitimacy through claims of universal validity for a particular political perspective is nothing new: during the French Revolution, the French bourgeoisie did it with their declarations of universal human rights (even though some of these "universally valid rights" had deleterious effects on humans who worked for wages). The free marketeers do it in contemporary America when they claim that an untrammeled market will benefit "everyone" — even though an untrammeled market clearly benefits the wealthy and disenfranchises those with less economic power.

5. Bachmann, *Lawyers, supra* note 2.

edge historical reality. My historical arguments spanned roughly ten pages and alluded to the civil rights struggles in the 1950s and 1960s, and the American labor wars in the 1930s.[6] Based on this historical data, I alleged that attempting to promote the public good through litigation is a waste of time at best; at worst it constitutes moral profligacy.

From a review of the bibliography of *The Hollow Hope*, it seems likely that Gerald Rosenberg has never read my ten pages. Nor does he seem to have read various ACORN related literature which also pertains to issues of social reform.[7] The most striking aspect about Rosenberg's book for people who share the ACORN perspective, however, is how magnificently the work independently substantiates the historical basis of the ACORN argument.

Entering into this old debate about the efficacy of using lawsuits to prompt significant societal changes, Gerald Rosenberg, an assistant professor of political science at the University of Chicago, examines the role that courts have played in bringing about "significant social reform."[8] Courts certainly can effect change for individual litigants, and Rosenberg is quick to point out that he is addressing a much more profound subject. He focuses on litigation in the areas of "civil rights, women's rights, and the like"[9] that aims to produce "policy changes with nationwide impact."[10] Rosenberg assembles and analyzes the available empirical data to assess what role courts have played in the momentous social changes that the country went through over the last couple of decades. Yet, he does not attempt to explain fully the causes of the social reform or to suggest what role courts ought to have.[11]

As a means of exploring the courts' role in social reform without offering a full causal theory about social change, Rosenberg asks: "When and under what conditions will U.S. courts be effective producers of significant social reform? When does it make sense for individuals and groups pressing for such change to litigate?"[12] Rosenberg acknowledges that the influence court decisions have on society may take many forms and identifies two general kinds. First, court decisions may effect societal changes through a "*judicial* path that relies on the authority of the court."[13] That is, institutional social change might be court-ordered. The effectiveness of this type of court influence is measured by whether the change required by the court was actually made. The second kind of influence occurs along an "*extra-judicial* path that invokes the court powers of persuasion, legitimacy, and the ability to give sali-

6. Bachmann, *Lawyers*, *supra* note 2, at 11-21.

7. *See, e.g.*, MADELEINE ADAMSON & SETH BORGOS, THIS MIGHTY DREAM (1984); GARY DELGADO, ORGANIZING THE MOVEMENT (1986).

8. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 4 (1991).

9. *Id.* at 5.

10. *Id.* at 4.

11. *Id.* at xi.

12. *Id.* at 9.

13. *Id.* at 7.

ence to issues."[14] This more subtle and complex notion of the causal effects of court decisions is harder to detect. Court decisions could play a significant role in bringing about social change if the decisions affect the opinions and behavior of other political actors, the intellectual climate, or even the opinions and perceptions of the general populace.

To frame the evidence, Rosenberg notes a tension in the way Americans view the role of courts in social change. Citizens of our society generally demand that courts "defer to elected officials," while expecting the "courts to protect minorities and defend liberties."[15] We want both a "robust political life" and a just society.[16] Rosenberg describes the two poles of this tension as loosely corresponding to the "Constrained Court view" and the "Dynamic Court view."[17]

The Constrained Court view regards courts as generally powerless in affecting broad national policies or institutions. The theoretical underpinnings of the role of the judiciary in our society and the structure of the judiciary itself provide some support for the Constrained Court view. The judiciary is, on the whole, a conservative institution, because legal rights cannot drop from thin air and have to be teased out from existing precedent.[18] Courts cannot diverge too far from the mainstream given the extent to which the legislative and executive branches appoint their members and define their jurisdictions.[19] Courts have little practical power to effectuate their decisions because they lack the "sword" and "purse," and they do not have the capacity to launch legions of enforcers who might move a recalcitrant populace or bureaucracy.[20]

The Dynamic Court view, on the other hand, depicts courts as powerful sources for significant social reform. From this perspective courts supposedly enjoy an independence which allows them to stand apart from the smelly fray of politics and inspire the hoi polloi with carefully cultivated articulations of reason and justice. This view is skeptical about the political process and political institutions. In contrast, courts, free from the electoral influences and the proclivity for entrenchment that plagues the other branches of government, can act in favor of unpopular causes, even when faced with strident opposition by a majority of the public. Since courts must provide written opinions for their decisions, they cannot easily avoid the difficult and sometimes unpleasant issues which politicians are notoriously skillful at ducking. Also, being independent, courts can dislodge self-entrenched governmental actors and ferret out corruption in the electoral branches. Most importantly, according to this view, the independence of the judiciary enables courts to provide a forum for

14. *Id.*
15. *Id.* at 3.
16. *Id.* at 4.
17. *Id.* at 2-3.
18. *Id.* at 10-13.
19. *Id.* at 13-15.
20. *Id.* at 15-21.

the "poor, powerless, and unorganized groups, those most often seeking significant social reform."[21]

Rosenberg recognizes that both views are too extreme: the Constrained Court view understates court effectiveness while the Dynamic Court view overstates court effectiveness.[22] Rosenberg reconciles the two views by positing types of social conditions under which the constraints of the Constrained Court view may be overcome, to enable the courts to be effective in bringing about social change in the way predicted by the Dynamic Court view. By reconciling the two diametrically opposed views, Rosenberg generates a hypothesis that guides his analysis of the empirical evidence. However, given the necessity of certain social conditions for court effectiveness, Rosenberg posits that the Constrained Court view "more closely approximates the role of the courts in the American political system."[23] While acknowledging that under certain conditions the courts can be effective in furthering significant social reform, Rosenberg argues that court effectiveness "occurs only when a great deal of change has already been made."[24]

FACTS

> *One's task is not to turn the world upside-down, but to do what is necessary at the given place and with a due consideration of reality. At the same time one must ask what are the actual possibilities; it is not always feasible to take the final step at once. Responsible action must not try to be blind.*
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> —Dietrich Bonhoeffer[25]

Since both the Constrained Court view and the Dynamic Court view entail some logic, the only way to test Rosenberg's hypothesis that the Constrained Court view is more accurate is to turn to evidence. Accordingly, Rosenberg moves to the most important part of his study: an examination of the historical record.

In the field of civil rights Rosenberg establishes that by any honest empirical measure, the highly touted *Brown v. Board of Education*[26] accomplished nothing:

> [A] closer examination reveals that before Congress and the executive branch acted, courts had virtually *no direct effect* on ending discrimination in the key fields of education, voting, transportation,

21. *Id.* at 24.
22. *Id.* at 30.
23. *Id.* at 35.
24. *Id.*
25. DIETRICH BONHOEFFER, ETHICS 233-234 (E. Bethge ed. & N. H. Smith trans., 1965).
26. 347 U.S. 483 (1954).

> accommodations and public places, and housing. Courageous and praiseworthy decisions were rendered, and nothing changed.[27]

Rosenberg argues that the watershed years were 1964 and 1965, during which were passed the Civil Rights Act of 1964 and the Voting Rights Act. Rosenberg's empirical findings substantiate this assertion. In education:

> The statistics from the Southern states are truly amazing. For ten years, 1954-1964, virtually *nothing happened*. Ten years after *Brown* only 1.2 percent of black school children in the South attended school with whites. Excluding Texas and Tennessee, the percent drops to less than one-half of one percent (.48 percent). Despite the unanimity and forcefulness of the *Brown* opinion, the Supreme Court's reiteration of its position, and its steadfast refusal to yield, its decree was flagrantly disobeyed. After ten years of Court-ordered desegregation, barely 1 out of every 100 black children attended school with whites. The Court ordered an end to segregation and segregation was not ended. . . . The numbers show that the Supreme Court contributed virtually *nothing* to ending segregation of the public schools in the Southern states in the decade following *Brown*.
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> The entrance of Congress and the executive branch into the battle changed this. . . . [D]esegregation took off after 1964, reaching 91.3 percent in 1972. . . . In the first year of the [civil rights] act, 1964-65, nearly as much desegregation was achieved as during all the preceding years of Supreme Court action."[28]

Similarly, in the field of voting:

> [S]triking is the large jump in the number and percentage of blacks registered to vote from just prior to the passage of the 1965 Act to just after it. . . . Prior to 1957, when only the Court acted, only 1 out of every 4 blacks was registered to vote in the South where nearly 3 out of every 4 whites were. Nearly three-quarters as many blacks registered to vote merely in the two years after the passage of the [1965 Voting Rights Act] as had been registered in all the years prior to 1957.[29]

In 1961 segregation still existed in transportation,[30] and in that same year the FDIC still supported racist lending practices.[31] Rosenberg justifiably concludes that "[i]n terms of judicial effects, then, *Brown* and its progeny stand

27. Rosenberg, *supra* note 8, at 70-71.

28. *Id.* at 52.

29. *Id.* at 60-61. Rosenberg provides numerous and easily decipherable tables and graphs depicting his factual findings. The clarity of his presentation of the wealth of factual evidence is a remarkable strength of the book. One table shows a Black voter registration rate at 20% in 1952, reaching to 28% in 1960 and 29.4% in 1962. In 1964 the rate jumps to 40%, and by 1970 the figure is 66.9%, a percentage which begins to approximate the white registration rate.

30. *Id.* at 65.

31. *Id.* at 69.

for the proposition that courts are impotent to produce significant social reform."[32]

Rosenberg arrives at similar conclusions in the field of women's rights. However, in contrast with the courts' role in the area of civil rights, the courts initiated very little in the field of women's rights. Rather, they participated in societal trends that had been developing since the 1960s and before. For example, in the controversial field of abortion:

> [T]he data . . . show that the largest numerical increases in legal abortions occurred in the years prior to initial Supreme Court action .... There was no steep or unusual increase in the number of legal abortions following *Roe*. While the increases were large and steady, they were smaller than those of previous years.[33]

Part of this was due to the fact that the federal and state governments had been increasingly liberalizing abortion laws prior to 1973, the year in which *Roe v. Wade*[34] was decided.[35]

The Supreme Court began to act in the area of women's rights around the same time Congress and the executive branch began to attack sexist practices.[36] While in the 1970s the Supreme Court struck down a number of gender-based discrimination statutes,[37] Rosenberg argues that no significant change resulted from these decisions.[38] One need not be a radical feminist to observe that the women's revolution remains incomplete — access to abortion remains limited,[39] and women still experience more violence, less leisure time, and less economic and employment opportunity than men.[40] The courts have proven ineffective in bringing about significant change in this area. Notwithstanding the Supreme Court's strong decisions in holding gender discrimination unconstitutional, "court-ordered change in women's rights has changed little."[41] The courts would not and could not effect greater change than that made by the Congress and the executive branch. Hence, almost immediately after *Roe v. Wade*, the Supreme Court began circumscribing women's access to abortion.[42] In the heady years of the early 1970s, the Court toyed with the notion of making gender classifications in legislation "inherently suspect" and therefore subject to "strict judicial scrutiny," just like race classifications; but that jurisprudential watershed never transpired.[43] The adage one learns in

32. *Id.* at 71.
33. *Id.* at 179.
34. 410 U.S. 113 (1973).
35. Rosenberg, *supra* note 8, at 183.
36. *Id.* at 205.
37. *Id.* at 203-04.
38. *Id.* at 205-12.
39. *Id.* at 185-201.
40. *Id.* at 214-19.
41. *Id.* at 227.
42. *Id.* at 200.
43. *Id.* at 203-05 & nn.3 & 9.

high school history class would seem to apply: the courts follow the polls, not vice versa.

Some proponents of the PITL perspective might argue that their position is not dependent on a belief that the courts resemble faucets, which, once they are opened, will automatically splash forth social change. The PITL advocate might offer a more sophisticated model, suggesting that litigation proves productive through more indirect means, such as educating social elites or inspiring the dormant masses. The Dynamic Court view elaborated by Rosenberg provides one such model. This view holds that courts have important indirect effects in furtherance of social reform, insofar as courts educate Americans, "dramatiz[e] issues," and provoke organized action by "invigorat[ing] and encourag[ing] groups to mobilize and take political action."[44] And, indirect causation is not necessarily insignificant causation.

Rosenberg deals with this version of the argument, too, with evidence that is equally thorough. He presents graphs and tables of compiled data to demonstrate that media coverage concerning civil rights issues increased, not after *Brown*, but rather after the demonstrations of the 1960s.[45] What moved the political elites to productive civil rights action was not *Brown*: "[T]he point is that civil rights action, especially in the 1960s, was based in large part on the elite belief that, unless there was federal action on civil rights, mass bloodshed would occur."[46] Regarding the issue of consciousness raising, Rosenberg observes that:

> In general, surveys have shown that only about 40 percent of the American public, at best, follows Supreme Court actions . . . . [I]n 1966, despite important Supreme Court decisions on race, religion, criminal justice, and voting rights, 46 percent of a nationwide sample could not recall *anything at all* that the Court had recently done . . . .
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> Among Americans who have some awareness of what the Court does, there is little evidence that Court decisions legitimate action. That is, people aware of what the Court does may disagree with it. In fact, the more knowledgeable a person is about the Supreme Court, the more likely he or she is to disagree with it.[47]

These points were borne out for both white and black Americans during the civil rights period. For whites, awareness of civil rights issues seems to have come primarily "from the mass media's portrayal of the violence unleashed against peaceful protesters."[48] As for blacks, Rosenberg points out that "knowledge of, and support for, *Brown* do not appear to have been high."[49]

44. *Id.* at 25-26.
45. *Id.* at 112-16.
46. *Id.* at 123.
47. *Id.* at 126.
48. *Id.* at 130.
49. *Id.* at 132.

Brown did not inspire the Montgomery bus boycott.[50] Moreover, the pivotal demonstrations of the 1960s were inspired by Montgomery,[51] the Freedom Rides,[52] African nationalism,[53] and the leadership of Dr. Martin Luther King, Jr., who seems to have had little use for litigation-based strategies for social change:

> Was King motivated to act by the Court? From an examination of King's thinking, the answer appears to be no. King rooted his beliefs in Christian theology and Ghandian non-violence, not constitutional doctrine. His attitude to the Court, far from a source of inspiration, was one of strategic disfavor. "Whenever it is possible," he told reporters in early 1957, "we want to avoid court cases in this integration struggle." He rejected litigation as a major tool of struggle for a number of reasons. He wrote of blacks' lack of faith in it, of its "unsuitability" to the civil rights struggle, and of its "hampering progress to this day." Further, he complained that to "accumulate resources for legal actions imposes intolerable hardships on the already overburdened." In addition to its expense, King saw the legal process as slow. Blacks, he warned, "must not get involved in legalism [and] needless fights in lower courts" because that is "exactly what the white man wants the Negro to do. Then he can draw out the fight." Perhaps most importantly, King believed that litigation was an elite strategy for change that did not involve ordinary people. He believed that when the NAACP was the principal civil rights organization, and court cases were relied on, "the ordinary Negro was involved [only] as a passive spectator" and "his energies were unemployed." Montgomery was particularly poignant, he told the 1957 NAACP annual convention, because, in Garrow's paraphrase, it demonstrated that "rank-and-file blacks themselves could act to advance the race's goals, rather than relying exclusively on lawyers and litigation to win incremental gains." And, as he told the NAACP Convention on July 5, 1962, "only when the people themselves begin to act are rights on paper given life blood."[54]

As *Brown* did little to "inspire" anyone in the field of civil rights, so too did the Supreme Court do little to "inspire" anyone in the field of women's rights. The reality, as Rosenberg demonstrates, is that the "tide" of the women's movement was already in motion before the Court first acted. Press coverage of women's issues jumped "in the years 1970 and 1971, before Court action."[55] As for the consciousness and actions of the political elite:

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50. *Id.* at 134.
51. *Id.* at 140-41.
52. *Id.* at 145.
53. *Id.*
54. *Id.* at 139-40.
55. *Id.* at 229-30.

> [A] massive increase in the passage of women's rights legislation did take place in Congress but it was in the Ninety-second Congress, 1971-72, before the major Court cases. The Equal Rights Amendment was sponsored by 81 Senators and 273 members of the House, a majority in both bodies, in the Ninety-first Congress in 1970. It was passed in 1972."[56]

The greatest change in the public's attitude about abortion laws occurred before 1970.[57] And the groundswell of public support for women's rights in general "occurred in the late 1960s and early 1970s, before Court action."[58]

Perhaps most importantly, women themselves did not wait for the nine men then sitting on the Supreme Court to tell them when and how to act. Several groups were formed: the National Organization for Women (NOW), in 1966; the National Association for Repeal of Abortion Laws, in 1969; and the National Women's Political Caucus, in 1971, along with the Women's Rights Project and NOW's Legal Defense and Education Fund.[59] As early as 1968, women were engaged in militant and visible demonstrations.[60]

In sum, if Rosenberg's exhaustive analyses of the civil rights and women's movements have any message, it is that courts have little impact, directly or indirectly, on the progress of significant social change. In shorter surveys of change in the areas of the environment, reapportionment, and criminal law, Rosenberg unearths similar information and reaches similar conclusions.[61] If Rosenberg has not utterly refuted the arguments on behalf of a Dynamic Court view, he has, at the very least, shifted the burden of proof to the votaries of the PITL perspective.

WHAT IS TO BE DONE?

> *Someone once described characters in Hemingway's novels as people to whom things happen. In studying the American past, historians of the left in academia today tend to depict workers and even slaves as people who make things happen; not passive objects but active subjects engaged in organizing an industrial strike or forming a community dedicated to "moral economy." Yet when the current academic left studies the present rather than the past, an entirely different picture emerges, one in which nearly all possibility of human freedom and morality is gone.*
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> —J. P. Diggins[62]

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56. *Id.* at 235.
57. *Id.* at 237.
58. *Id.* at 239.
59. *Id.* at 242.
60. *Id.* at 257.
61. *Id.* at 269-335.
62. John Patrick Diggins, *Power, Freedom and the Failure of Theory*, HARPER'S, Jan. 1992, at 15.

The Hollow Hope demolishes the Dynamic Court view. While I happily recommend this book to anyone who believes that lawyers can effect social change without the participation of the communities to be affected, I still note that it has two significant weaknesses. First, the book lacks an analysis of the sources of the PITL perspective and the resistance to accepting the ACORN perspective — at least among lawyers and their academic colleagues. To this query Rosenberg might reply that an answer requires a separate and involved empirical study. Nevertheless, we should not view the conflict between the ACORN and PITL perspectives as nothing more than a disinterested academic debate; the PITL perspective is rife with potential for intellectual laziness and self-centered thinking.

Intellectual laziness lurks in the PITL perspective because of the ease with which an historian can look at social change, match it against a chronology of Supreme Court decisions, and decide that a causal relationship exists. An interpretive analysis of the activities of masses of people who do not leave their histories behind in conveniently bound leather volumes is a more difficult undertaking.

Self-centered thinking may also tend to support the PITL perspective within the legal community. Like most people, lawyers believe that what they do is important. Given the money and time invested in their careers, it is not surprising that they want to believe that their investments pay off, not only in terms of money and prestige, but also in terms of historical significance. In lawyers, the human tendency to view one's own work as being of vital importance leads to a belief that the profession is the source of grand historical movement. Rosenberg does acknowledge that this tendency toward self-importance may lend unwarranted credence to the Dynamic Court view. The notion that courts play a central role in monumental and crucial social reform may be supported "because it offers psychological payoffs to key actors by confirming self-images, not because it is correct."[63]

Most importantly, however, the valorization of the PITL perspective may reflect a more fundamental and insidious tendency of Western culture itself: a tendency to set up hierarchies of human beings and their work so that some people (the bulk of us) are deemed to be less worthy, less valuable, than the rest (the elite few). Theodor Adorno has written of this horrible proclivity of Western society:

> 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 post-Auschwitz culture, including its urgent critique, is garbage. In restoring itself after things that happened without resistance in its

63. Rosenberg, *supra* note 8, at 3.

> 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.[64]

"Auschwitz culture elitism" is manifest in the celebration of the primacy of theoretical work over practical labor (whether it be in the factories, the fields, or the streets). For Adorno, those who celebrate the ranking of human beings and human work, have no right to criticize Auschwitz; their emphasis on theory over practice diverts resources from the kind of practical struggles which could have prevented the occurrence of Auschwitz;[65] and worse, such people contribute to the maintenance of a hierarchy of human beings. Once a ranking of human beings is considered palatable, the road to Auschwitz has been paved.[66] If thinkers can be ranked over laborers, why cannot thinkers employ workers as objects, or Germans treat Jews as things to be used and eliminated at their pleasure? Once we value one kind of human being, one kind of human labor, over another kind, we accept and perpetuate the most basic conditions for oppression; we set up the possibility that one kind of human being may be acceptably sacrificed for the sake of the other. The human stupidity of hatred and destruction aimed at entire groups of people is rampant in our society and throughout our history. Only by recognizing the savagery inherent in very basic structures of our "civilization" will we begin to reduce the potential for massive human oppression and slaughter.

Certainly, the PITL perspective is by no means solely responsible for such a fundamental flaw in Western society; nor does the PITL perspective alone stand accused of perpetuating the ominous characteristics of Western thought and society. Adorno meant to condemn all of the academic disciplines and the traditional social institutions in the perpetuation of oppressive conditions through self-aggrandizement. However, the PITL perspective is a prominent and stark example of this seemingly benign yet oppressive nature of human beings. Surely the simple irony makes the PITL perspective worth singling out: under the mantle of "public interest," the disciples of the PITL view may in reality be keeping the society, the "public," on its certain path toward large-scale manifest oppression.

It is understandable, given the broad and unpleasant implications of this kind of critique, that Rosenberg would not pursue these issues in his study. Exploring such morally charged and delicate topics is difficult, to say the least. Further, Rosenberg could have been dissuaded from drawing these kinds of

64. THEODOR ADORNO, NEGATIVE DIALECTICS 366-67 (E.B. Ashton trans., 1973).

65. Compare King's point that those who do not resist evil participate in it: "We must come to see that human progress never rolls in on wheels of inevitability. It comes through the tireless efforts and persistent work of [people] willing to be co-workers with God, and without this hard work time itself becomes an ally of the forces of social stagnation." Martin Luther King, Jr., *Letter from Birmingham City Jail, in* THE WORLD TREASURY OF MODERN RELIGIOUS THOUGHT 614 (Jaroslav Pelikan ed., 1990).

66. *Cf.* GLENN E. TINDER, THE POLITICAL MEANING OF CHRISTIANITY 48 (1991).

conclusions from his work because of a moral reticence: that is, because any moral decision is potentially morally defective, it is hard to stand in judgment of others.[67] The moral complexity of the topic and the sheer magnitude of the issues involved are sufficient reasons not to pursue them tangentially. However, for these very same reasons, the issues demand mention. For, insofar as Adorno's radical assertion has merit, the reader must confront in her own soul the urgent issues it raises.

My second "complaint" concerning *The Hollow Hope* is that there is insufficient analysis of how one actually effectuates worthwhile social change. Perhaps it is unfair to press Rosenberg too vigorously on this second point. After all, the principal object of his book was to discern what role courts play in social reform, not to establish a new theory of social change. However, the question of causation cannot be totally avoided in a study like Rosenberg's. To some extent, Rosenberg recognizes this point. He does offer some analysis of other potential sources for massive social reforms. But he insists that, "strictly speaking," the question of the courts' influence on social reform "does not depend on developing a full-blown theory of change."[68] Yet, despite a claim that a particular change did not occur because of cause "A," the phenomenon of change remains. At that point, one must acknowledge either that the change is inexplicable, or that other causes hold better explanatory power than cause "A."

Rosenberg's investigation of alternative sources of change in the areas of civil rights and women's rights consists of a discussion of the socio-political and economic forces which may have precipitated the social institutional changes in these areas. In the civil rights field, he points to direct action,[69] the adverse impact that segregation was having on the American economy,[70] the growing strength of black voting blocs in pivotal states,[71] and the adverse impact that segregation had for the United States in the context of the Cold War.[72] In the area of women's rights, Rosenberg cites several factors that possibly explain transitions in women's status: women's employment during World War Two,[73] decreasing birth rates,[74] women's rising educational achievements,[75] and the growth of various women's organizations which these trends and the civil rights movement spawned.[76]

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67. *See* BONHOEFFER, *supra* note 25, at 30-31 (exploring the significance of Matthew's exhortation to "Judge not, that ye shall not be judged").

68. Rosenberg, *supra* note 8, at 8.

69. *Id.* at 155-56.

70. *Id.* at 159.

71. *Id.* at 160.

72. *Id.* at 162.

73. *Id.* at 247-49. Rosenberg acknowledges that many women voluntarily or involuntarily left the workplace after the war. However, he points out that the percentage of women in the workplace did not decrease to its pre-war level.

74. *Id.* at 250.

75. *Id.* at 251.

76. *Id.* at 252.

Thus Rosenberg does offer some explanation for the success of the civil rights and women's movements. However, it is not clear what, if anything, a human being might contribute to these or other movements in the future. Should she wait for "structural changes" to develop? Watch the election returns? Vote? Join an organization? March in the streets? Go to law school?

Presumably many of the people who read *The Hollow Hope* are interested in how social reform might best be effectuated, and in how they might make some minor contributions to bringing about change;[77] Rosenberg at least acknowledges the importance of these questions. He identifies the strategic concerns with which I started this Review: "strategic choices have costs, and a strategy that produces little or no change drains resources that could be more effectively employed in other strategies"; litigation "steer[s] activists to an institution that is constrained from helping them, . . . [and] siphons off crucial resources and talent, . . . run[ning] the risk of weakening political efforts."[78]

To return, then, to the ACORN perspective, fueled and strengthened by Rosenberg's study: Social change occurs through the direct actions of ordinary people. Rosenberg's book establishes not only that lawyers and judges do *not* make history, but also strongly suggests that "ordinary" people can contribute substantially to the making of their own history. This point gets obfuscated by Rosenberg's emphasis on structure. Undue attention to "structural" concerns can devolve into an excuse for historical inaction and moral default. Humans must always take existential leaps into historical action, for a number of practical and ethical reasons. First, existential leaps are an unavoidable feature of human life: One always makes choices, even when one chooses to abstain from choosing. Second, even when structural factors appear discouraging, moral acts are needed to inspire those who might follow and take advantage of favorable structural conditions in the future. Finally, evaluating structural conditions is an uncertain, imprecise exercise; thus, the "cash value" of any moral act can never be fully evaluated until after the act.[79] Therefore, in making decisions to act morally, ordinary people should not give unwarranted consideration to structural conditions.[80] A wise and judicious analyst of structural conditions would have characterized as pathetic the ef-

77. This is a question which engages "liberals," "conservatives," and "disinterested" political theorists. The liberals premise their PITL perspective upon a certain conception of historical change. The conservatives adopt the same conception when they fulminate over the pernicious abuses perpetrated by an "activist" judiciary — unless, of course, they are only trying to manufacture political discontent among an irritated electorate. The "disinterested" political theorists might claim they stand beyond the din of contemporary politics and wish only to learn how to design a reasonable polity. Yet questions concerning the practical and theoretical power that one gives to the judicial branch are premised on certain conceptions of societal change. One would not pose the question if one did not have some concern with its impact on history.

78. *Id.* at 339.

79. The lot of humanity is epistemological uncertainty. *See, e.g.*, Bachmann, *Lawyers*, *supra* note 2, at 7-8, n.21.

80. "We must use time creatively, and forever realize that the time is always ripe to do right." Martin Luther King, Jr., *supra* note 65, at 614.

forts of a slave leader (e.g., Moses) to goad a gaggle of Semitic tribes to secede from the mighty Egyptian empire around 1500 B.C. A wise and judicious analyst of structural conditions would have characterized as contemptible the efforts of a hillbilly preacher (e.g., Jesus) to talk ethics on the peripheries of the Roman Empire around 30 A.D.[81] A wise and judicious analyst of structural conditions would have characterized as futile the efforts of some scribbler (e.g., Diderot) to advocate rationality in the middle of eighteenth century France. A wise and judicious analyst of structural conditions would have characterized as untimely the efforts of some "Negro" seamstress (e.g., Rosa Parks) to get a decent seat on a bus in Montgomery, Alabama, in the middle of the "Leave It To Beaver" years. A wise and judicious analyst of structural conditions — possibly a contemporary of Professor Rosenberg at the University of Chicago or Paris — would have characterized as irresponsible the efforts of some hippie-sympathizing playwright (e.g., Vaclav Havel) to secure freedom of expression rights for some second-rate rock group in Czechoslovakia in 1976.

From the ACORN perspective what is important is not only that people make history instead of judges and lawyers, but that *organized* people make history. This claim is supported by Rosenberg's work at a number of junctures. Rosenberg points to the Montgomery boycott (1956) and the demonstrations in Birmingham (1963) and Selma (1965) as critical events in the civil rights movement in that they mobilized blacks, moved white public opinion, and pressured the legislative and executive branches to accommodate the demands of the movement. Montgomery, Birmingham, and Selma were all products of conscientious organizing efforts, specifically on the part of Martin Luther King, Jr., who had little respect for the PITL sentiment.

The women's movement teaches similar lessons. Rosenberg discusses the founding of a number of self-consciously organized women's groups and the important demonstrations by these groups in the late 1960s and early 1970s.[82] Some of the results of this organizing include the impressive array of women's rights legislation passed by the Ninety-second Congress in 1971 and 1972, the passage of the Equal Rights Amendment by Congress in 1972,[83] and possibly, the Supreme Court decision in *Roe v. Wade* in 1973. Rosenberg also observes in the area of compensation in the workplace, that aggressive organizing, not court action, has brought results: "Despite litigation, where comparable worth policies have been instituted, they have been the result of collective bargaining and state government action, not litigation."[84]

Thus well-organized collective action helps to precipitate social change. Of course, the victories of the civil rights and the women's movements have

81. Bonhoeffer inspired my use of these Biblical examples. *See* BONHOEFFER, *supra* note 25.

82. Rosenberg, *supra* note 8, at 242, 252-53.

83. *Id.* at 235.

84. *Id.* at 208.

not been total. Given the evidence, one might conclude that this is because these movements have limited their efforts to organize ordinary people, and have turned instead to litigation.

The final question to address is what an "activist" attorney or law student should do when faced with these findings. If the ACORN perspective is true, should she ditch her law degree and go organizing? In many cases the answer should be "yes." However, I would observe that some people — like myself, though I am not necessarily proud of this — make better lawyers than organizers. Moreover, lawyers do have a role to play in advancing social change organizations that attempt to survive and thrive in a complicated post-industrial society like these United States. But lawyers cannot and do not help social change by trying to accomplish it through a litigation-based approach. Their most meaningful contributions are to aid organizing efforts. Effective legal assistance may include corporate or tax work. It may involve First Amendment litigation and criminal defense work. Even the work of lawyers who participate in *Brown*-type cases can be justified, sometimes. For example, David Garrow reports that near the end of the Montgomery bus boycott, the viability of the Montgomery Improvement Association's car pool was threatened with an injunction on the theory that the blacks' car pool system constituted an infringement on the segregationist bus company's franchise. A Supreme Court ruling which invalidated Montgomery's segregationist transportation system[85] helped block the injunction and contributed to the victory of King's group.[86]

Yet, in citing the Montgomery experience, we must remember that the effectiveness of court action remains limited. Within a few days after the Montgomery victory, racist snipers shot at King's home and at black riders.[87] A few years later, most blacks in Montgomery were still sitting in the back of Alabama buses.[88] Montgomery's ultimate meaning was realized by the efforts of those who found inspiration in its militant precedent, not in the jurisprudence which it generated. Montgomery helped to inspire the sit-in activists of the 1960s, who in turn inspired more social activists. Those civil rights activists — and the lawyers who helped keep them in the streets,[89] secured their treasuries' tax exempt status,[90] and made no more noise than necessary when

85. Gayle v. Browder, 352 U.S. 903 (1956).

86. DAVID J. GARROW, BEARING THE CROSS 80-82 (1986).

87. *Id.* at 83.

88. JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 108 (1978).

89. For example, lawyers had to help defend Martin Luther King, Jr. from perjury charges relating to a tax case. King, not to mention his supporters, was also cited as a defendant in the landmark case of New York Times v. Sullivan, 376 U.S. 254 (1964). TAYLOR BRANCH, PARTING THE WATERS 308, 312 (1988). It should be acknowledged though, that on occasion, some civil rights leaders abjured the use of the law altogether when it came to dealing with prison bars. Hosea Williams relied on mass, militant, and nightly demonstrations. HOWELL RAINES, MY SOUL IS RESTED 439-43 (1977). *See also* BACHMANN, NONPROFIT LITIGATION, *supra* note 2, at 25.

90. GARROW, *supra* note 86, at 451.

their clients were determined to flaunt the courts[91] — contributed to social change and made history.

91. RAINES, *supra* note 89, at 143-44.