
LAW AND COURTS

Newsletter of the Law and Courts Section of
the American Political Science Association

Summer 1996

In this Issue

From the Section Chair

Samuel Krislov,
University of Minnesota

As we announce later in the Newsletter (see page 28), Herb Jacob has informed us that for health reasons, he must withdraw as Editor of the *Law and Politics Book Review*. Herb's contributions to the profession and section have been enormous. We will be honoring him at Law and Courts Section reception, Friday, August 30, 6:30 p.m., Union Square Room #12 and I hope you all will join us for a well-deserved tribute.

In my final column I won't resist the impulse to comment on the last session of the Supreme Court, particularly the conservative drift of the last few years.

At the end of the Burger years commentators wrote of the "counter revolution that wasn't" noting that the Burger Court's modest conservative moves--for example, the localization of pornography standards--were counter-balanced by a belated emphasis on gender equality. The verdict on the Rehnquist years is one of creeping counter revolution, also balanced by expansion of Warren Court themes like commercial speech.

Regardless of one's views of the individual decisions and the conservative trend, the Court has been giving us a textbook lesson in gradual and careful change. This is a product both of the close division within the Court and the personalities of the key conservative justices. The typical 5-4 over 6-3 vote on basic issues and its corrosive effect on any notion of judicial objectivity must, however, be considered a negative.

The glacial pace of counter revolution began with the Burger Court's "good faith exception" triumph, but it has not been followed by thermidorean reaction or wholesale abandonment of judicial restraints on police zealots. Quiet and modest, but surgically decisive, curtailment has also been the pattern in

other areas. As applied throughout the judicial system, the changes have had recognizable but not earth-shaking consequences.

The principle that legal stability is essential is at the heart of the Court's decision in *Planned Parenthood v Casey*. It is also at the core of a more conservative strand of the Court's decisions, the effort to annul the constitutional provisions on capital punishment in the face of overwhelming support by the public.

The Rehnquist Court has been corrigible and pragmatic in a number of ways. Rehnquist's coup-like revival of Tenth Amendment jurisprudence in *National League of Cities v Usury* has not been revived in full force: rather he has used smaller strokes to invalidate federal activity on vaguer and more limited grounds in two successive terms. On the whole this has excited less opposition, though programmatically it is not much different in its back-to-the-state direction. More dramatically, Scalia's simplistic attempt to replace the Warren and Burger Courts on the special protection of religion in *Employment Division v Smith* has been ignored and, hopefully, forgotten. Again, term limits for federal offices was ruled invalid though by a narrower margin than precedent might have dictated.

The Court is reflective of current public opinion in its abandonment of the dreams of an equalized society in favor of the older vision of a color-blind law of order; we are in sense witnessing the end of our second Reconstruction. In *Richmond v Croson* and *Aderand v Pena* the Court relied on the essentially repugnant nature of quotas to invalidate legislative and executive attempts to establish set-asides, though government as a commercial player has been given broader play than as a regulator. But the Court also limited the voting public's right to legally disadvantage gays in *Romer v Evans*.

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Instructions to Contributors

General Information

Law and Courts publishes articles, notes, news items, announcements, commentaries, and features of interest to members of the Law and Courts Section of the APSA. **Law and Courts** is published three times a year in Winter, Spring, and Summer issues. Deadlines for submission of materials are: November 1 (Winter), March 1 (Spring), and July 1 (Summer). Contributions to **Law and Courts** should be sent to:

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Articles, Notes, and Commentary

The editor will be glad to consider brief articles and notes concerning matters of interest to the field. We encourage authors to share research findings, teaching innovations, or commentary on developments in the field.

Footnote and reference style should follow that of the *American Political Science Review*. Please submit two copies of the manuscript; enclose a diskette containing the contents of the submission; provide a description of the disk's format (for example, DOS, MAC) and of the word processing package used (for example, WORD, Wordperfect).

Symposia

Collections of related articles or notes are encouraged. Please contact the editor if you have ideas for symposia or if you are interested in editing a collection of common articles. Symposia submissions should follow the guidelines for other manuscripts.

Announcements

Announcements and section news will be included in **Law and Courts**, as well as information regarding upcoming conferences. Organizers of panels are encouraged to inform the editor so that papers and participants may be reported. Developments in the field such as fellowships, grants, and awards will be announced when possible. Finally, authors should notify **Law and Courts** of publication of manuscripts.

Data and Analysis Information

We would like to publish announcements of datasets concerning their availability as well as their use. Please send suggestions or information to the editor.

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COMMENT:

The State of the Subfield--A View from the Bottom

Anonymous¹

I learned a lot when I read the "Symposium: The State of the Field of Public Law and Judicial Politics, 1996" published in the Spring 1996 issue of **Law and Courts**. I've noticed that there have been quite a few assessments of the subfield recently, perhaps because public law political scientists really are unsure about what we are and what we're supposed to be. (Indeed, my use of the term "subfield," rather than "field" is a reflection of that.) These assessments are always interesting but, as I reported to Sue Davis, editor of **Law and Courts**, they always seem to involve the same people, all of whom are quite senior (though not necessarily "old"!). The thought occurred to me that it might be of some interest (use?) for Law and Courts section members to read what a fairly new member of the profession has to say about the state of the subfield (there's that word again). I mentioned this to Professor Davis, and she has graciously provided me with this forum for presenting my thoughts, "brief" (to quote from the "Instructions to Contributors" section) though they necessarily must be.

I would like to make two preliminary remarks. The first is that, as I mentioned above, I have found the comments of all of the senior scholars who have written to date about the state of the subfield—in **Law and Courts**, those senior scholars are Leslie Friedman Goldstein, Herbert Jacob, Michael W. McCann, Kim Lane Scheppele, Harold J. Spaeth, and Martin Shapiro—to be enlightening. I also would like to mention that I am familiar with the impressive research these scholars have produced over the years but, for reasons that will become obvious in a moment, I am most familiar with Professor Spaeth's work.

The second preliminary remark that I would like to make is that, although many of the subfield essays refer back to C. Herman Pritchett's famous invocation of the old Chinese saying, "Let a hundred flowers bloom" (I didn't know that John Stuart Mill was Chinese!), none have repeated the entirety of his remark, which is: "There are both traditionalists and behavioralists who think that the gate is strait and the way narrow into the public law kingdom, but a more sensible text for all to contemplate is the old Chinese saying, 'Let a hundred flowers bloom.'" Although it may not take much courage to say that "I agree with Professor Pritchett," I would like to say that "I agree with Professor Pritchett." To make the point in more personal terms, public law political



science is what I do, it is not who I am. All things being equal, I would much prefer to be on the PGA Tour but, unfortunately for me, I have a difficult time breaking a 100.

This leads me to my most important substantive point: jobs. When you're viewing the state of the subfield from the "bottom," as I am, the job-issue is dispositive. Indeed, for all of his obvious mastery of the literature, Professor Shapiro's most important insight is the one about jobs (something that Professor Scheppele emphasizes as well). Permit me to generalize from a sample of one (sorry, Professor Spaeth).²

My Ph.D. is from a highly respected, though traditionally-oriented, public law program. My dissertation was revised into a book and published recently by a fine university press. The sales have been quite brisk and the reviews have been quite good, as well as plentiful. I also have published quite a few articles, and I have an edited book currently under publication review at a major university press, another book under contract

(to be co-authored), and yet another is being supported by a generous grant from a private foundation. Unfortunately, not much of my work is quantitative, and here then lies the rub, at least from the "bottom." The view from the bottom is that if you are not quantitative, the "research" schools aren't interested. Indeed, I have been on several job interviews where I have been told that I was the "token" traditionalist on the interview list. On one of those interviews, the first question I got was—I swear—"so what statistics courses will you be offering?" (My initial reaction to this question was to answer, "why are you wasting airfare on me?," but that was not the answer I chose.) Okay, senior scholars might ask, why not work at a "teaching" school? (I'm only visiting at my current institution, by the way.) Because if you publish a fair amount, teaching schools apparently think that you should be—or want to be—at a research school and they shy away. In fact, I have been asked during job interviews at teaching schools, again more than once—and, again, I swear—"why are you interviewing here?" (My initial reaction to this question was to answer, "because I need to eat," but that was not the answer I chose.)

This, then, is the "view from the bottom" of the state of the subfield. For all of the talk about the "behavioral revolution" being over, it really isn't, at least as far as those with power are concerned. (And more than anything else, political science is the study of power, as you know.) The options for me, and for any junior "traditionalist" who publishes a lot, are two: (1) become quantitative so research schools will be interested, or (2) stop publishing so much so teaching schools won't shy away. There are, I suppose, two other options: (1) hope that those with power—the senior members of political science departments—start taking Professor Pritchett's admonition seriously, or (2) work on my short game. I can't count on much progress as far as the latter is concerned, but maybe the former will take a turn for the better. I surely hope so.

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SYMPOSIUM: LITIGATION AND RACIAL JUSTICE

For scholars interested in the political role that law plays there can hardly be a more intellectually rich and politically important link between law and politics than the link between law and racial justice. In perhaps no area of American national policy has the law played so persistent and powerful a role as in the realm of our racial policies. Three quarters of a century after the NAACP Legal Defense Fund conceived of a litigation strategy to attack American racism, litigation remains critically significant in addressing and resolving major national conflicts about racial issues.

This symposium focuses on the role of litigation in the historic struggle to achieve greater racial justice in the United States. The essays published here are eclectic. They do not deal with the subject addressed in an exhaustive, systematic or comprehensive way. Rather, they are intended to provoke questions and further inquiry by others. To that end, in the next issue of **Law and Courts** Gerald Rosenberg, author of the pathbreaking work, *The Hollow Hope: Can Courts Bring About Social Change?* will respond to these pieces. We hope that the dialogue created by the essays in this issue and by Rosenberg's response will prompt future reflection and writing on a subject of considerable intellectual importance to scholars and of even greater political importance to the nation.

Stephen Wasby's essay explores the synergistic relationship between litigation and lobbying by civil rights groups. His work suggests, among other things, that an exclusive focus on litigation underestimates the wider impact that litigation can have in the lobbying efforts in Congress for civil rights legislation and in the executive branch for changes in civil rights enforcement policies. Michael Middleton, a litigator and law professor, offers a piece that complements the work of Wasby. Middleton argues that litigators seeking greater racial justice need to be mindful that litigation is only one of many tools that need to be employed in that struggle. Nonetheless, he also argues that scholars like Rosenberg have perhaps underestimated the impact of litigation by failing to consider fully the indirect consequences that flow from civil rights lawsuits.

I made an effort to persuade Eric Mann to write an essay for this symposium precisely because he is not a professional scholar as such. Rather, he is a sophisticated political organizer and activist who heads an important civil rights group presently involved in a nationally prominent civil rights case brought by the NAACP Legal Defense Fund. Mann brings to this debate the perspective of a political strategist and operative whose organization has resorted to litigation as part of its larger campaign for racial and social justice in Los Angeles. It is valuable to have Mann's reflections about his organization's use of litigation because on the subject of the political use of litigation

scholars can learn from activists and vice versa. My own essay on civil rights litigation and racial justice seeks to explore the political functions litigation and ideas about legal rights have played in the campaign for greater racial equality in American life.

Stephen C. Halpern

Litigating and Lobbying About Racial Discrimination: Some Links*

Stephen L. Wasby

The relationship between litigation and lobbying has remained both problematic and largely unexamined, in part because the two are treated in different parts of the curriculum. To be sure, interest groups' amicus curiae activity has long been considered the judicial equivalent of legislative lobbying, but little has been done to go beyond drawing that parallel.

In policymaking about racial discrimination, litigation has always played a central role — indeed, a more central role than in policymaking on many other subjects. A frequently-offered explanation is that groups at a political disadvantage in the legislative and executive branches turned to the courts, but this does not fully explain civil rights groups' use of litigation (see Olson, 1990). The Warren Court's civil rights record, reinforced by its easing of access to the courts for those wishing to challenge government action, increasingly led blacks, and then other minorities, to turn to the courts for redress of their grievances, not as a last resort, but first, with litigation becoming the *principal*, or even *exclusive*, means of seeking policy goals.

Also relevant to this use of litigation is the presence or absence of resources. If an organization has salaried staff attorneys, even if they were not initially hired to litigate, start-up costs of entering litigation are diminished, and staff lawyers' desire to demonstrate their worth reinforces pressure to litigate. There is also the matter of momentum or inertia. An orientation toward litigation may continue after a group, beginning as an "outsider" and serving as an advocate for the disadvantaged, becomes a mainstream organization.

Perhaps the most important factor explaining contemporary group-related civil rights litigation is the ideology or mindset about the propriety of litigation itself. An ideology that rights exist and can be enforced through litigation — what has been called the "myth of rights" — overstates the amount of change lawyers and litigation can accomplish and thus serves to foster litigation and to diminish resources available for political mobilization and to diminish resources available for political mobilization that might more effectively achieve rights (see Scheingold, 1974). Moreover, a rights-based strategy may pro-

vide symbolic decisions, for example, about desegregation, that ignore crucial issues that are not as easily solved through litigation, such as quality education in the ghetto.

Controversy over the appropriateness and effectiveness of civil rights litigation, and particularly whether it has been used without adequate consideration of alternative political modes of mobilizing for rights, had been evident as early as the formative years of the NAACP's legal efforts. In its more recent form, the argument is that, although civil rights cases can produce political mobilization, lawyers who bring those cases most often focus on mobilization *of* law, not on political mobilization *by* law. Thus there is a need for strategies to integrate litigation with nonjudicial political action.

Whatever the reasons for using litigation to achieve civil rights, the Civil Rights Act of 1964, by bringing greater attention to lobbying of the legislative and executive branches, marked a major shift in the process by which civil rights policy was made. Before 1964, civil rights organizations had engaged in lobbying along with their litigation efforts, most obviously in the NAACP's efforts to enact an anti-lynching statute (see Zangrando, 1980), and in the lobbying efforts that led to the enactment of the Voting Rights Acts of 1957 and 1960. The 1964 Act, however, brought a significant change; its passage meant that those who had focused on litigation to achieve their goals now had to adjust their political attention and even their litigation activities. From focusing almost solely on constitutional questions in the courts, they now had to use the courts to defend legislative victories from challenge and, in doing so, to engage in disputes over the meaning of statutory language, and to devote more attention to the executive branch, both to seek enforcement of the new laws and to assure that the regulations (such as the HEW Desegregation Guidelines) promulgated to implement the statutes were consonant with what the groups had achieved in the legislation itself.

Not only did the 1964 Act mean changes for litigators, but it also provided the basis for devoting more attention to the relationship between use of litigation and use of lobbying. The necessary examination of the relationships between litigation and lobbying reveals considerable parallels between the two. One of the most striking is that interest groups bring similar criteria to bear in the process of selecting and emphasizing issues on which to work, whether it be for lobbying or for litigating. The similarity of criteria is reflected in comparable levels of interest and attention to particular issues. For example, just as racial discrimination in housing was the last area to receive congressional attention, housing litigation lagged far behind schools and jobs as a major area of civil rights litigation. Also common to both lobbying and litigating is the importance of interorganizational relations; for example, cooperation among civil rights groups can be seen in both, as when groups join each other's amicus briefs and join in the work of the Leadership Conference for Civil Rights.

Another parallel is situations in which interest groups feel their participation is required, even if they do not believe that participation is likely to produce substantive results. For ex-

ample, in lobbying, there are instances in which groups, having already made their position clear to legislators, appear before legislative committees out of apprehension that their absence would be more noticeable than their presence. This is like the instances in which major litigating interest groups like the NAACP Legal Defense Fund feel they must file amicus curiae briefs in a Supreme Court case because the Court expects the group to do so and would wonder why it did not.

Linkages Between Litigation and Lobbying

In civil rights policymaking, especially with respect to racial discrimination, the linkages between litigation and lobbying are numerous. The interrelation between school desegregation cases and the HEW Guidelines demonstrate that lobbying and litigation have not been separate. The Guidelines initially provided that a school district under court order to desegregate was deemed in compliance with the Guidelines even if the court order demanded less than the Guidelines independently required; this led some previously-resistant school districts to acquiesce in court orders. Guidelines requirements became, in turn, the basis for some desegregation orders resulting from litigation, and some major school desegregation cases were undertaken when efforts to proceed administratively seemed unsuccessful. When judges, particularly those in the Fifth Circuit, demanded more than the Guidelines then required, the judges' requirements became the basis for Guidelines revision.

For interest groups to use litigation in order to assist legislation requires strategic planning, which may explain why this linkage does not appear frequently. Examples from policymaking on other issues illustrate what can occur. One instance was Common Cause's use of litigation to obtain publicity for its legislative concerns on campaign finance reform. Another is the use of litigation, both for publicity and, through discovery, to obtain information used at legislative hearings, by those opposing Army surveillance of the military; although the ultimate result was the unsuccessful outcome in *Laird v. Tatum* (1972), material for legislative hearings was obtained through the litigation. Another use of litigation to produce political activity in legislative arenas has occurred in connection with school desegregation, where most school board action results from political bargaining rather than from litigation but where the filing of a lawsuit is "essentially another move in the political chess game." (Kirp, 1978: 442)

Interest groups' attention to the Senate's confirmation of federal judges also demonstrates the use of lobbying to aid litigation efforts. The linkage between lobbying and litigation has affected nonjudicial nominations as well. A particularly obvious example is civil rights groups' focused and successful efforts to defeat the nomination to be Deputy Attorney General of William Bradford Reynolds, who, as Assistant Attorney General for Civil Rights, was the person most responsible for the Reagan Justice Department's civil rights litigation activity.

That lobbying becomes crucial in aid of litigation also becomes clear in several other ways. The Supreme Court's own linkage of Fourteenth Amendment constitutional jurisprudence with congressional action provides one illustration. At times,

the Court has allowed Congress to set statutory requirements that go well beyond what it would have interpreted the Thirteenth, Fourteenth, and Fifteenth Amendment to require directly, that is, in the absence of congressional action. Another way is that the Supreme Court relies on current signals from Congress to inform its judgment. Thus, in the years subsequent to a statute's passage, if Congress has taken actions favoring the goals of a statute it passed earlier, the justices are more likely to give that law an expansive reading; conversely, a restrained, narrow reading is more likely if the message from Congress has run counter to the statute's original goals. For example, in upholding the Internal Revenue Service's interpretation of tax exemptions for private schools that discriminated on the basis of race (*Bob Jones University v. United States*, 1983), the Court relied on Congress' stance on this issue (Eskridge, 1991:401-402). Where courts are willing to infer certain matters from the legislative text, and particularly when judges turn to "legislative intent" to resolve statutory ambiguity, one can see the importance of lobbying. Here interest groups' use of the legislative record and committee reports to help write a "history" of legislative intent that can later be used to persuade judges of the validity of particular substantive positions is not only important but also further illustrates the links between legislation and litigation.

Litigation and lobbying may also be related in a more fundamental way — when statutes are written so as to facilitate litigation, that is, when legislation creates court-oriented mechanisms for enforcing and implementing a statute's substantive policy. Given the reluctance of the Supreme Court to allow implied private causes of action when Congress has not itself spoken to the subject, provisions like the "citizen suit" provision of environmental statutes are very important. The subject of attorney fees also illustrates how a statute may both facilitate litigation and overcome Supreme Court decisions. The Civil Rights Attorneys Fees Act of 1976 certainly enables such litigation; the effort that led to its passage was largely a response to the Supreme Court's reaffirmation of the American Rule in the *Alyeska Pipeline* case.

Simultaneous and Sequential Use. Litigation and lobbying may be used simultaneously; one may be used in one policy area while the other is used in other policy areas, or both may be brought to bear in the same policy area. They may be used sequentially, with lobbying followed by litigation or with litigation preceding lobbying. Such sequential use may reflect a group's changes in interest and emphasis or it may be causally related as one activity is used in order to facilitate the other, as noted in earlier examples.

Simultaneous Use. Litigation to produce greater racial equality may occur simultaneously with other types of political activity, including lobbying of legislators and executive branch officials and direct action. We can see the simultaneity of litigation and other political activity from civil rights activity in Mississippi, where the presence of litigation was correlated with mobilization of blacks into electoral politics. (Stewart and

Sheffield, 1983:15-16) In the civil rights movement, which is most often associated with "direct action," litigation operated simultaneously with that activity, in close aid of it. At times litigation played a secondary role, as when lawyers assumed the task of releasing demonstrators from jail quickly so they could continue their activities; at other times, it was more central, as when it was used even in the Montgomery bus boycott, which many see as the prime instance of direct action, to help bring about desegregation of municipal transportation (Glennon, 1991).

At some times, litigation and lobbying are brought to bear on the same subject. When civil rights organizations were lobbying Congress to overturn the Supreme Court's *City of Mobile* decision interpreting Section 2 of the Voting Rights Act, they continued to litigate further cases under the Act — indeed, producing the more moderate *Rogers v. Lodge* before Congress revised the statute. The latter lobbying effort also illustrates the use of litigators as lobbyists, with the Lawyers Committee for Civil Rights Under Law shifting litigator Frank Parker from its Mississippi office to Washington, D.C., where it set up a Voting Rights Project, while another litigator, Armand Derfner, who usually operated from Charleston, South Carolina, also moved to Washington, DC, where he was based at the Joint Center for Political Studies, the think-tank focusing on African-Americans' political activities.

Perhaps more common than simultaneous use of litigation and lobbying on a single issue is their sequential use. At times the sequentiality is seen through an organization's changing emphasis. Although some organizations are established to engage primarily in one or the other, they may shift emphasis between litigation and lobbying on particular topics as circumstances require. At other times, the relationship between lobbying and litigation appears to be reciprocal: groups press for protection through statutes; the protection is forthcoming; and groups seek to implement, and perhaps to expand, that protection through litigation. One can see this with Section 504 of the Rehabilitation Act, which provided some protection for the rights of the handicapped; organizations used that statute as a basis for litigation to assure the rights; and rights were further significantly expanded legislatively through the enactment of the Americans with Disabilities Act (ADA).

Legislative interest may have been stimulated by litigation, or experience with litigation may show litigators the need for legislative activity. The latter is particularly necessary to retrieve rights limited by the courts, as in the Civil Rights Act of 1991 and earlier reversals of Supreme Court decisions. In these situations, an organization's commitment to litigation may lead to a commitment to legislative lobbying. When, as in the effort to rewrite Section 2 of the Voting Rights Act to overturn the *City of Mobile* decision, litigators developed expertise useful in the legislative arena, much legislative work will have been completed before the legislative campaign starts.

There are, however, instances in which civil rights groups, having lost in court, do not seek to press for a different out-

come in the legislature; there are many external reasons why they do not do so. An organization may accurately estimate that it could not be successful in the legislature and recognize that its efforts would “deplete valuable political capital or credibility.” (Eskridge, 1991:363) One such example came in the aftermath of the Supreme Court’s interpretation of Title VII in *American Tobacco Co. v. Patterson* (1982) that a valid challenge to a seniority system required proof of intentional discrimination in adoption of the system. In that instance, civil rights groups did not seek to override that ruling, both because they lacked votes and because they were reluctant to spend political ammunition in conflict with labor unions, often their civil rights allies (Eskridge, 1991:363).

Interaction between litigation and lobbying may be lengthy. This can happen when legislation leads to litigation but judicial rulings are harmful to the litigator’s cause; legislation in turn is necessary to overturn those negative judicial rulings, and further litigation is imperative to defend the “reversal statute” against a still-hostile judiciary. This is illustrated by the history of the Civil Rights Act of 1991 and the Supreme Court’s subsequent ruling that the new statute was not retroactive. The reverse development — commitment to legislative lobbying leading to litigation — may also occur in the reciprocal interaction of litigation and lobbying. If legislative victories are to be preserved, then one must be prepared to go to court for favorable rulings to produce the benefits the legislation promises. This occurred with respect to both Title VII of the 1964 Civil Rights Act and the provisions of the 1965 Voting Rights Act. At times, litigation to protect legislative victories, instead of being proactive, may be reactive, as when it is undertaken to fend off attacks on the statute or opponents’ efforts to obtain narrow readings of the statutory language. If legislation does not provide adequate administrative implementation, or if agencies charged with implementation are insufficiently assertive, litigation may be necessary to enforce the statute.

Concluding Thoughts: Strategy and Linkages

If one acknowledges that one sees both lobbying and litigation about racial discrimination and if one recognizes that some organizations like the NAACP engage in both, one needs to ask if the relationship is coincidental or planned, that is, whether strategic consideration is given to the respective use of the two means of achieving policy goals. Certainly one can argue that closer consideration should be given to a planned interrelationship between litigation and lobbying rather than having them exist on unplanned separate, if perhaps parallel, tracks, although at this point we are not able to specify clearly the conditions when litigation or lobbying should be used.

Discovery of these parallels, linkages, and sequential and reciprocal uses of litigation and lobbying is important. It does not, however, mean that the parallels, linkages, and sequential uses result from conscious strategic planning within or among organizations. Lobbyists and litigators working for an organization like the NAACP, perhaps, because of self-selection, having come to the organization already sharing its goals and then having absorbed more of its ethos, may engage in parallel ac-

tivity even if they are not *assigned* to work in parallel. We therefore need to know whether the lobbyists and the litigators within an organization work together to develop an overall strategy, with the lobbyists assigned certain tasks and the litigators other tasks, all in aid of the same objective. Is there a “sitting around the table” with discussion of which tasks should be parceled out to which functions? Or do lobbyists and litigators go their separate ways? Most basically, do lobbyists and litigators working on problems of racial discrimination within an organization even communicate with each other on a regular basis?

Civil rights lobbying and litigation ought to be considered together. Certainly those who study policymaking processes ought to study systematically the potential and actual interaction between the two, instead of treating them as separate, independent processes. More important, those seeking to embed their preferred policies on race into the law need to consider using both, either in tandem or in sequence, as is most appropriate, to facilitate achieving their goals. Although organizational structures and maintenance needs may limit the extent to which litigation and lobbying are joined in a coherent, strategically-planned package, activists should give greater focus than has often been the case to the ways each can assist the other. To date, in the area of racial discrimination, litigation has been seen as the predominant strategy, important in its own right rather than a means to assist legislation. After all, the desired goal is to achieve a given policy. Although whether one gets to that goal primarily through the courts or the other branches of government has implications for the practice of democracy, for those seeking desired policy outcomes, whether these outcomes are achieved through litigation or lobbying should not matter.

* The ideas presented here, for which Bernie Grofman was a major stimulus, are further thoughts on the subject-matter of the author’s book, *Race Relations Litigation by Interest Groups* (University Press of Virginia, 1995).

The Efficacy of Litigation in Achieving Racial Justice

Michael A. Middleton

In his book, *The Hollow Hope*, Gerald Rosenberg joins a rising chorus of scholars who have questioned the effectiveness of the judiciary in producing meaningful social reform, particularly racial justice. Professor Rosenberg usefully exposes the common lawyers’ fallacy of assuming that Supreme Court decisions have a direct and demonstrable impact on social progress. Unfortunately, he underestimates the influence of the Supreme Court in legitimating grassroots efforts to change society, mobilizing public opinion to support such reforms, prompting the political branches to enact and implement progressive legislation, and guiding lower courts in interpreting and applying the law. Although it is difficult to pinpoint the precise effect of any given judicial opinion on subsequent social, political, and legal actions, to deny the existence of such a

causal relationship is implausible. Indeed, my personal experiences help to illuminate some of these subtle yet powerful connections.

As a youngster in the late 1950's and early 1960's joining the throngs of marchers being led past my family home in Jackson, Mississippi by political leaders and organizers such as Martin Luther King, Jr. and Medger Evers, I could see the power of mass action in instigating social change. Attending rallies at the old Masonic Temple on Lynch Street and hearing the likes of Aaron Henry, Fannie Lou Hamer and countless others, I realized the importance of grassroots political activism in changing the culture of the South. I was inspired by the courage of those leaders in the face of the mean-spiritedness of not only the White Citizens Council and the Ku Klux Klan that opposed them so openly, but also of the local law enforcement officials with their fire hoses and police dogs. But also during that period, I was able to observe lawyers including Thurgood Marshall and Robert Carter, who came to the south and joined local lawyers like Jess Brown and Jack Young to take to the courts the issues that were of vital concern to the community. I saw them use the law to defend the political activists against criminal charges and free them to march again, and I saw them argue the core issues and win decisions that shook the power structures of the state of Mississippi to the core. I witnessed these lawyers pave the way for the major social changes that have occurred in that former bastion of subjugation and ultimately, the nation as a whole.

As one who was concerned about the harmful effects of racism in American society and inspired to devote my efforts to working for justice and against oppression, I chose to pursue the approach of the lawyers. It is not clear to me why I chose the law over political activism, but I suspect it was a combination of my recognition that my personality was not conducive to the delivery of rousing speeches, that I was effective working within the established system, that my chances of being elected to political office at that time were slim, that faith without works is ineffectual, and that while being a foot soldier in the battle was valuable to the struggle, I wanted to more fully utilize what I perceived to be my talents.

In recent years, the wisdom of my decision some 35 years ago has been put to question. Legal and political scholars are engaged in a debate over the efficacy of legal action to achieve social change in general and racial justice in particular. Aryeh Neier has observed that "the courts have been . . . the most effective instrument of government for bringing about the changes in public policy sought by social protest movements." (Neier, 1982). Abram Chayes (1976) and Owen Fiss (1979) would agree that the courts can and have often been effective vehicles for achieving significant social change and institutional reform. Thurgood Marshall, one of the fathers of institutional reform litigation, has said, echoing the sentiments of his mentor Charles Hamilton Houston, that "[l]aw cannot only respond to social change but can initiate it." (1967:7). Even Robert Bork, while bemoaning "the temptation of results without regard for

democratic legitimacy," acknowledges that "[w]hen the Supreme Court invokes the Constitution . . . as to that issue the democratic process is at an end." (1990: 2-3).

Robert McCloskey, noting that the Supreme Court "has seldom lagged far behind or forged far ahead of America," has observed that the Court's power to affect social issues is only marginal. (1994: 206-13). Scholars such as Alexander M. Bickel (1986) Donald Horowitz (1977) and Jeremy A. Rabkin (1989) appear to agree that the Supreme Court is limited in its ability to affect major social change. The understanding that the judicial branch is to have limited authority is as old as American democracy. Alexander Hamilton observed in Federalist No. 78 (1961) that the judiciary has "neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

Paradoxically, however, the federal courts' weakness is its greatest strength. Precisely because federal judges employ neither force nor will, but only reasoned judgment and because they can gain nothing politically or financially from their decisions, their opinions are generally accorded more respect than the pronouncements of politicians (Paulsen, 1994). The great prestige and influence of the courts cannot be easily dismissed.

Other scholars, while assuming the influence of the courts in all aspects of American society, question the willingness or propriety of the courts to use that influence directly to affect meaningful reform in the interest of minority groups. Stephen C. Halpern (in this *Symposium*) advances the notion that reliance on the courts for reform in the field of civil rights and racial justice has served the purpose of containing the violence that is a characteristic of racial conflict. He asserts that reliance on the law's reasoned, rational and peaceful conflict resolution processes tends to legitimate the injustices that may exist and nurture the belief that the social order is fair, thus averting the violent disruption that could grow out of frustration with apparent and intractable injustice. When the courts dispense what the majority perceives to be "justice," they serve the salutary functions of maintaining stability and facilitating orderly change.

The tendency of our legal system to mollify demands for immediate and dramatic change by legitimating majoritarian interests as fair and just is a central feature in Derrick Bell's (1992) *Chronicle of the Celestial Curia*. There, the Curia had become so disaffected with litigation as a vehicle for achieving racial justice that it developed a uniquely perverse use of litigation not as an instrument for directly affecting reform, but as a catalyst for revolutionary change. The plan advanced was to have appointed to the Supreme Court an ultraconservative justice - the Conservative Crusader--dedicated to the pursuit of policies so blatantly antagonistic to the interests of the poor and working classes that "the disinherited" would be stirred "toward revolt or reasoned emigration." Despite his conclusion that the civil rights reforms that traditionally result from litigation invariably promote the interests of the majority, Professor Bell argues that in light of the unresponsiveness of legislatures and execu-

tives to the needs of disenfranchised African-Americans, it is reasonable for civil rights lawyers to continue to rely on the courts to deliver racial reform.

The concerns revealed in the work of Professor Halpern and Professor Bell lie not so much in questions of the power of the courts to affect change as in questions regarding the willingness and propriety of majoritarian institutions to act in ways perceived to be inconsistent with majoritarian interests. Both recognize that litigation has been instrumental, either directly or through its influence on other change-producing social institutions, in accomplishing what have generally been considered advances in the field of civil rights. Their primary concern, and the concern of a number of scholars working in the field of racial justice, is with the nature of the change delivered by the courts. The question for these scholars is not whether the courts can affect change, but rather what change should the courts affect.

Professors Bell and Halpern both recognize that the majoritarian focus of the courts coupled with the respect with which their decisions have generally been viewed by the American public, make the judiciary a powerfully influential institution. The courts serve dual and often conflicting functions. They maintain order and stability by delaying the accomplishment of what may be perceived as precipitous social reform, and they facilitate the accomplishment of reform where the status quo is perceived to be unjust. Injustice, even when cloaked with the legitimacy of "the law," cannot avoid indefinitely the scrutiny of those who suffer it. When those affected are dissatisfied with the "justice" dispensed by the courts, the power of other instruments of social change becomes apparent. The *Curia* suggests two immediate forms of expressing dissatisfaction with obviously antagonistic judgments of the courts - revolution or emigration. Other more traditional forms include, lobbying the legislative and executive branches, grassroots political organizing, and mobilizing public opinion to support reform. As Stephen Wasby notes, these activities both influence and are influenced by the courts.

From the perspective of one seeking major reform on behalf of minority interests, the courts may legitimately be criticized as acting out of majoritarian self-interest, delivering only marginal change that operates to placate demands for more significant reform. But the courts cannot legitimately be characterized as having an insignificant role to play.

Gerald N. Rosenberg's (1991) work is an important addition to the debate among scholars and other court observers because he appears to advance the counterintuitive proposition that the courts are powerless to produce social change. Rosenberg uses, among others, the Supreme Court's decision in *Brown v. Board of Education*, the case generally credited as giving birth to the "public law" litigation model, as the prime example of the ineffectiveness of litigation in producing social change. By noting that significant progress in school desegregation did not occur until after legislative and executive action in the mid-1960's, by looking for and failing to find substantial

evidence that the executive and legislative branches made specific reference to the *Brown* decision as motivating their civil rights initiatives, by finding little evidence that *Brown* motivated whites or blacks to engage in activity that prompted executive or legislative action, by finding no significant increase in press coverage of civil rights issues after *Brown*, Rosenberg attempts empirically to support his conclusion that "the courts are impotent to produce significant social reform." (1991:71).

In assessing the efficacy of the courts in producing social reform, one must be careful not to overgeneralize. Rosenberg and others who offer arguments supporting his conclusions regarding the marginality of the courts in producing social change generally focus their discussions only on the activity of the Supreme Court. Little attention is paid to the day-to-day activity of the federal district and appellate courts, and the countless state and local courts that direct the activity of local officials in ways that have significant impacts on a local level. When these scholars do recognize the work of the lower courts, the enormous precedential force of Supreme Court decisions on lower court decision-making is generally underestimated. Any effort to assess the efficacy of "the courts" or of "litigation" that looks only to Supreme Court decisions is of limited value.

More importantly however, the influence of the courts on the other processes that generate reform is grossly underestimated by those who marginalize litigation in producing social change. The subtle effects of court decisions on the actions and attitudes of individuals and institutions may be very difficult to identify, and once identified, to measure. It may also be extremely difficult to identify the myriad other factors that affect the actions and attitudes of individuals and institutions, making the effect of intervening and concurrent causes on observed results even more difficult to assess.

How can one really measure the effect of the Supreme Court's decision in *Brown v. Board of Education* on the administrative efforts of the executive branch or on Congress' willingness to pass the Civil Rights Act of 1964 or the Voting Rights Act of 1965 without a detailed examination of the impact of the case on all of the other social processes that must fall into place to produce federal activity in any particular area? Surely the *Brown* decision was a necessary predicate to the passage of legislation requiring desegregation since it is highly unlikely that Congress would have enacted laws so blatantly inconsistent with the law of the land holding "equal but separate" to be constitutionally permissible. *Brown* amounted to a fundamental change in the understood meaning of the 14th Amendment's Equal Protection Clause in the field of racial equality. In a purely legal sense, the significance of *Brown* in setting the stage for the legislative and executive action that followed cannot be discounted. Moreover, the utility of executive and legislative action is, in my experience, significantly enhanced by litigation or the threat of litigation. While the threat of withholding or the promise of providing federal funds may serve as an incentive for compliance, there can be no doubt that the additional threat

of litigation serves as an often necessary additional incentive. Litigation also serves the important function of explaining and enforcing legislative mandates.

Beyond the technical legal effect of *Brown* decision, without the Court's articulation of the value that the nation places on equality, it is unlikely that the political support for the executive and legislative activity of the sixties could have been generated. *Brown* clarified the national ideal of equality and legitimated those who fought for it. *Brown* gave cover to both those who were sympathetic but reluctant to be more activist, and those who were unsympathetic but tired of resisting. Whatever impact those executive and legislative actions might have had on advancing educational equity must be attributed in some part to the Supreme Court's *Brown* decision and the activity of lower courts in interpreting and implementing that decision.

How can one credit the advances that have been made toward achieving racial justice to the sit-ins, boycotts and other non-judicial pressures exerted in the early 1960's without recognizing the significance of the *Brown* decision in empowering those who participated? The *Brown* decision put the law on the side of those engaged in civil disobedience to ensure racial justice. For one who respects the principle that America is a "government of laws, not men," the knowledge that the ultimate arbiter of the law agrees with one's cause gives a person who is inclined to participate but reluctant to defy authority greater comfort in the legitimacy of civil disobedience as an agent of change. As a young African-American in the South during the late 1950's and early 1960's, I can attest to the fact that while incidents like the murders of Emmitt Till, Medger Evers and Goodman, Schwerner and Chaney enhanced our sense of outrage and hardened our resolve, the *Brown* decision gave many of us the confidence and encouragement we needed to continue in the struggle against racism and oppression. While there were, no doubt, a number of incidents that generated the civil disobedience of the early 1960's, to discount the impact of the *Brown* decision is to underestimate severely its influence on the participants. It may be that the movement would have proceeded without *Brown*, but it is unthinkable that it would have proceeded when it did and as it did.

This is not to say that the Supreme Court or judicial system alone can accomplish significant social reform. Those who would suggest such a proposition ignore the synergistic relationship among those various social processes that is necessary to produce meaningful social change. The structure of our American democracy requires the concerted action of the legislative, executive and judicial branches, and it is well known that none of those branches operates in a vacuum. They each recognize and to some degree respond to the dynamic attitudes, desires and morality of the American public as is generally reflected in, and often influenced by, the popular media. Any effort to isolate a single component of such a multifaceted phenomenon and to determine its precise effect on an observed outcome is doomed to failure. American democracy

is founded upon the notion that change is accomplished only through the interplay of a variety of forces. The suggestion that any of these forces alone can lead to significant social change is as misguided as is the suggestion that any of those forces are irrelevant to the achievement of such change.

A careful reading of Rosenberg's work reveals that he has not fallen into that trap. He concludes only that American courts are not all-powerful. To the extent that his conclusion suggests that those interested in achieving social reform should direct their resources to other strategies (Rosenberg, 1991:336-343), I caution the reader to understand that in our complex system of government, designed to ensure that no one factor can be outcome-determinative, all of the players need to be in the game. For me, in the struggle for racial justice, the law and litigation is the role that I chose to serve. Others may choose lobbying, political organizing, elective office, moral suasion, education or some other avenue for affecting change. No one would suggest that because of the systemic limitations placed on legislation, or the media or political activism in achieving social change that the legislator not legislate, the journalist not write, or the organizer not organize. Why suggest that the litigator not litigate? Recognition of the fact that the courts play only one part in the production of major social change does not mean that use of the courts should be avoided or even minimized. The facts do suggest that those involved in movements for reform must grasp the multi-dimensional nature of change in America, understand the limits placed on all institutions and modes of reform, and commit to an organized struggle on all fronts.

Professor Bell said in his epilogue to *Faces at the Bottom of The Well: The Permanence of Racism*, that:

Both engagement and commitment connote service. And genuine service requires humility. We must first recognize and acknowledge (at least to ourselves) that our actions are not likely to lead to transcendent change and may indeed, despite our best efforts, be of more help to the system we despise than to the victims of the system whom we are trying to help. Then, and only then, can that realization and the dedication based on it lead to policy positions and campaigns that are less likely to worsen conditions for those we are trying to help and more likely to remind the powers that be that out there are persons like us who are not only not on their side but determined to stand in their way (1992:198-199).

I would agree. I know of no Civil Rights lawyer who has advanced the notion that litigation alone can achieve racial justice. And any who do, fail to recognize and appreciate the interdependency among the various forces that influence decision making in this democracy, and do their clients a major disservice. Lawyers who devote all of their attention to the courtroom or who ignore the courtroom and instead rely exclusively on community organizing, lobbying, economic development activities or any other single form of influence are attacking the problem only partially armed. Lawyers seeking social justice in America must understand that the struggle is likely to be continuing and ever changing. Rejection of any vehicle available for affecting change is not an option.

Rights Theory, Social Movements, and the Courts

Eric Mann

*“Fight Transit Racism!
A 50 cent fare and \$20 passes
Mass transportation belongs to the masses
We’re the Bus Riders Union
And this is our fight
Public Transportation is a Human Right”*

Chants of the Bus Riders Union at rally in front of Los Angeles Metropolitan Transportation Authority

“Plaintiffs papers filed with this Court read as though there is a federal right to free or subsidized transportation...there is no constitutional right here to free or subsidized bus service...Even if an extremely strong correlation existed between poverty or income and race, this does not mean that a disparate impact analysis on income will yield disparate impact on a race.”

Arguments of MTA, defendants in Labor/Community Strategy Center and Bus Riders Union v. MTA (class action civil rights suit)

Is affordable public transportation a “human right” in the most wealthy, advanced capitalist society in the world? Do working-class people and low-income communities of color retain certain inalienable rights, even if they are in contradiction to the laws of an increasingly class stratified and racist society? Are the courts an appropriate arena for the resolution of class-based racism, or any forms of racism seeking redress? If my answer to the first two questions is an unequivocal “yes”, and my answer to the third is a problematic “under certain conditions” then what does one do at this point in history.

The Strategy Center and the Bus Riders Union (BRU) are lead plaintiffs in a pathbreaking civil rights lawsuit—the Labor/Community Strategy Center et al. v. the Los Angeles Metropolitan Transportation Authority (MTA), with co-plaintiffs, the Korean Immigrant Workers’ Advocates and the Southern Christian Leadership Conference. We are charging the MTA with establishing a separate and unequal mass transportation system in violation of Title VI of the 1964 Civil Rights Act and the equal protection provisions of the 14th amendment.

In Los Angeles, the Labor/Community Strategy Center is trying to build new counterhegemonic, multiracial social movements of the urban poor and working class. We differentiate our work from the dominant model of narrow “issue oriented, self-interested, and often ‘color blind’” organizing raised to the level of theory by Saul Alinsky. Instead, we challenge transnational capitalism, as well as working people themselves, in the critical realm of ideology—opposing a profit-driven model of organizing society. We formulate radical reform demands that if won, result in greater structural power for insurgent movements of the oppressed, and reduced power for corporate and governmental elites. Whether demanding that General Motors keep open its last auto plant in California, or that auto, oil, and chemical compa-

nies dramatically shift technologies and reduce toxic emissions, or confronting anti-immigrant initiatives with demands for “full rights for immigrants” or developing comprehensive inner city development plans that challenge market-driven models, (reflected in our post-rebellion manifesto, *Reconstructing Los Angeles—and U.S. Cities—from the Bottom Up*), for more than a decade our work has centered on the battle over rights—worker, community, environmental, civil, and human rights versus management and corporate rights.

Too often in political discourse, the discussion of “rights” is either legalistic (implicitly supportive of whatever the courts rule) or metaphysical (inalienable rights such as life, liberty, and the pursuit of happiness—until anybody gets specific). In my view, rights are historically and socially determined and resolved through the struggle of political forces. For example, the South African apartheid regime for decades argued that apartheid and white supremacy were “rights” and, conversely, that black liberation and its organized form, the ANC, was illegal—while its system’s courts upheld that view of “rights” and imprisoned those who tried to overturn it. Now, the new ANC-led regime has declared apartheid null and void and asserts that non-discrimination and housing are “human rights”—rights it argues existed long before the fall of apartheid. With regard to preventing the reemergence of apartheid there is a strong multiclass coalition that will enforce a new consensus, asserting that freedom from the most blatant, institutional forms of racial segregation is now a human right. But with regard to the new material entitlements, such as “housing as a human right”, the ANC is faced with a major class confrontation. The advocates of the housing rights theory are the majority of the ANC, the South African Confederation of Trade Unions (KOSATU), the South African Communist Party—backed by the black urban poor who were on the front line of the battle against apartheid but who, so far have reaped the least material rewards from its overthrow. The opponents of the “housing rights” movement are the South African corporate class, the World Bank, International Monetary Fund, U.S. A.I.D. and conservative elements within the ANC itself who feel that the attraction of capital, more than the housing of the poor, should be the nation’s priority. The debate to determine, in the realm of policy, whether “housing is a human right” will be determined through the class struggle of the forces who are competing to define the meaning of a post-apartheid “free South Africa.”

Similarly, the Bus Riders Union/Sindicato de Pasajeros (BRU/SDP) “Billions for Buses” campaign is based on an historically, socially determined theory of rights. The BRU, initiated by the Strategy Center, is a multiracial, majority Latino and African American, membership organization fighting to dramatically improve the L.A. bus and mass transportation system. The BRU opposes “the corporatization of government” in which the MTA’s public funds, confiscated from the bus system, are used to deliver guaranteed, cost-overrun profits to rail construction firms and real estate developers, and “transportation racism” in which MTA fiscal priorities provide a “Third class bus system for Third

World people.” Armed with a deeply held belief that “public transportation is a human right” the BRU is taking its case to the bus riders, the bus drivers, the low-wage working class, the civil rights and environmentally oriented middle class, and, to the courts. We see the political struggle, including the struggle in the courts, as determining whether that right can be realized at this point in history, but not whether or not it exists.

From the Streets and the Buses to the Courts

The Strategy Center was formed in 1989, and by 1993 one of our main arenas of organizing was mass transportation. We had an analysis—that L.A. was the most air polluted city in the U.S. and that a first-class mass transportation system could reduce toxic air pollution, reduce environmentally-caused disease, especially in auto congested and industrial low-income communities, get workers to work and students to school, and provide jobs for unemployed workers building clean fuel buses for the MTA. We formed a Transportation Policy Group of low-income activists and professional transportation planners, and by 1994 had organized the Bus Riders Union and clarified our programmatic demands.

- * a major infusion of funds into the bus system
- * a moratorium on new MTA rail projects, to free up funds to double the bus fleet and lower bus fares
- * an end to MTA policies that distributed funds between rail and bus in a racially discriminatory and class biased manner

In response to our demands, in July 1994, the MTA defiantly:

- * Voted to begin a \$1 billion Pasadena rail line by confiscating sales tax funds that were needed and available for bus improvement
- * Simultaneously declared a budget shortfall
- * Voted to raise the one-way bus fare 25 cents a ride (from \$1.10 to \$1.35) and to eliminate the unlimited-use \$42 a month bus pass altogether

In August 1994, out of resourcefulness and desperation, I faxed a proposal to the NAACP Legal Defense and Educational Fund asking if they would file a temporary restraining order against the MTA’s scheduled fare increases—arguing that they would cause “irreparable harm” to, and violate the civil rights of, an overwhelmingly minority bus ridership. After days of moot court debates to test the strength of our case, LDF attorneys agreed to represent us.

On September 1, 1994, the day the fare increases were scheduled to go into effect, federal district judge Terry Hatter issued a temporary restraining order in the case of the Labor/Community Strategy Center et al. v. Los Angeles MTA, enjoining the MTA from raising the bus fare and eliminating the monthly bus pass. Five months later, in a pre-trial compromise encouraged by the court, the MTA was allowed to raise the one way bus fare to \$1.35 in return for agreeing to maintain the unlimited use monthly bus pass at \$49—a critical victory for the low-income transit dependent riders that has lasted for almost two years.

Since we first went into court, the Bus Riders Union’s far greater public visibility and aggressive on-the-bus organizing

has increased paid membership from 200 to 1,000, with thousands more regular readers of our bi-weekly “newsleaflets.” At present, the Strategy Center and BRU, and MTA have agreed to court-encouraged mediation. If we do not reach agreement, we are scheduled to go to trial in October 1996.

Documenting Transportation Racism

Title VI of the 1964 Civil Rights Act states, “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” The crux of our argument is that the MTA has used \$3 billion a year to generate massive funding and service disparities between “rail” (with disproportionate white ridership) and “bus” (overwhelmingly people of color)—thereby establishing a two-tier, racially discriminatory, separate and unequal mass transportation system.

The Los Angeles rail system is a costly, fixed route pork-barrel in one of the nation’s largest urban centers encompassing 4,000 square miles. In a region with expensive land values, multiple and rapidly changing manufacturing, commercial, and residential centers and a highly dispersed population, a rail system that is bankrupting the agency and at best, will only serve 10% of mass transit riders defies rational transportation theory. With only 26,000 daily riders—as suburban commuters still prefer their cars and refuse to transfer to overcrowded inner-city buses—and cost overruns of over 344%, the MTA is subsidizing a significantly white rail ridership at levels from \$5 to \$20 per ride. The subsidy for security alone is \$1.17 per passenger ride.

The bus system is the only potentially effective and flexible mass transportation mode in an urban megacity that has been designed for the automobile. At present, however, the most overcrowded and undermaintained bus system in the U.S. misrepresents 350,000 daily bus riders (down from 500,000 since the MTA allowed service to disintegrate and implemented higher bus fares). With inner city lines running up to 140% of capacity, bus riders in general receive a subsidy of only \$1.17 a ride, and on the most overcrowded lines the subsidy is as low as 33 cents. The subsidy for security is only 3 cents per passenger ride.

As the MTA explains, “The average MTA passenger is a woman of color (Black or Latino) profoundly poor, and transit dependent, with no other means of transportation.”

* 81% of the MTA’s bus passengers are people of color, specifically 47% Latino, 23% African American, 9% Asian Pacific Islander, 2% Native American, and 19% white. Latinos and African Americans are dramatically overrepresented on the buses (the African Americans percentage of bus riders is 200% of their population in the county) while whites are significantly underrepresented among bus riders (less than 50% of their population in the county.)

* 57% of the bus riders are female

* 60% of the bus riders have annual family incomes of \$15,000 and another 24% have family incomes between \$15,000 and \$30,000.

* More than 50% of the bus riders are transit depen-

dent, often low-wage workers, high school students, the elderly, and the disabled.

In order to pay for the massive cost overruns of rail projects the MTA diverts 70% of all MTA discretionary funds to only 6% of the passengers (the rail riders) while spending only 30% of the discretionary funds on 94% of the passengers (the bus riders). These gross disparities of subsidy and the “disparate impact” of MTA policy based on race constitute racial discrimination in the distribution of public funds—which is exactly what Title VI was enacted to prevent.

Demands and Legal Remedies

If the court issues a “finding of liability” against the MTA—that is, finds them guilty of violating the civil rights of bus riders—we will move into the remedy phase.

Our key demands focus on:

- * Reducing the one-way bus fare from the existing \$1.35 plus a 25 cent transfer (\$1.60) to 90 cents with free transfers.

- * Reducing the cost of the unlimited use bus pass from \$49 a month to \$36 a month, purchasable in two \$18 installments.

- * Doubling the existing bus fleet from 2,000 buses to 4,000 Compressed Natural Gas or other clean fuel or zero emission buses.

The price tag for this bus improvement plan—including the hiring of more than 2,000 unionized, well-paid bus drivers, mechanics, and maintenance people—will be approximately \$1.25 billion over 5 years and \$ 3 billion over 10 years. The MTA has that money within its \$3 billion a year budget, but only if it stops funding rail projects, and corrects past racial discrimination.

The legal debate about rights—does the low-wage working class of color have any civil rights?

We well understand that a purely class-based argument of “rights” in a society that names itself capitalist can only expect a hostile response from the courts—and social movements that want to expand those rights must find other terrains of struggle. But in the *Labor/Community Strategy Center v. MTA*, the claims of the low-wage working class of color open up the possibility for a massive remedy that is consistent with classic civil rights argumentation. That is, because 81% of the bus riders are people of color and bus riders as a class comprise 94% of the MTA’s passengers and yet receive only 30% of the money, the analogy between the separate and unequal of *Brown v. Board of Education* and *Strategy Center v. MTA* (which civil rights scholar, Professor Robin D.G. Kelley, has made explicit) is painfully obvious.

Black, Latino, and Asian poor people cannot afford the existing MTA fares let alone the 25 cent increase. They work at low-wage jobs, or are in pursuit of low-wage jobs, and desperately need public transportation. Moreover, there is an explosive relationship of identity between an increasingly minority (and female) low-wage workforce, and an increasingly stratified U.S. class structure that goes to the heart of our civil rights challenge. The MTA, in its efforts to rebut our charges in court, has evolved a “no rights” theory:

Plaintiffs papers filed with this Court read as though

there is a federal right to free or subsidized transportation. In fact, there is no constitutional or other federal right to subsidized monthly passes or to \$1.10 cash fares...If there were, New York’s transit fare structure could not survive because it does not provide for either monthly passes or discount tokens. And if there were a right to a deeply discounted monthly pass, Chicago’s \$72 monthly passes may well be illegal.

Indeed any suggestion that there is a constitutional right to free or subsidized bus fares must be rejected. In *Kadrmas v. Dickinson Pub Schs.* (1988) the Supreme Court held that a school bus fee charged to both students from poor families as well as to others did not violate equal protection. The Court noted:

“The Constitution does not require that such services be provided at all, and it is difficult to imagine why choosing to offer the service should entail a constitutional obligation to offer it for free.”

As in *Kadrmas* there is no constitutional right here to free or subsidized bus service. Nor is there special protection against governmental actions that have different effects on the rich and poor. *Harris v. McRae* (“Poverty, standing alone, is not a suspect classification.” 1980); *Ortwein v. Schwab* (holding that litigation dealing with level of welfare payments “is in the area of economics and social welfare” and therefore did not invoke heightened scrutiny, 1973); *Dandridge v. Williams* (1970, “The Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.”). Accordingly, Plaintiffs declarations from low-income residents to the effect that the fare restructure will burden them, which claims are certainly deserving of sympathy, are not relevant to the legal issues raised by the lawsuit...Low income bus riders are not a group protected by Title VI. A disparate impact analysis must directly address the race, color, or ethnic origin of the sample. Even if an extremely strong correlation existed between poverty or income and race, this does not mean that a disparate impact analysis on income will yield disparate impact on a race.

To begin with, the Bus Riders Union *does* believe there is a right to free or highly subsidized public transportation—based on the needs of the poor “regardless of race” but we do not expect that right to be upheld by the courts. The debate in our case however, is whether a government agency receiving federal funds can provide free and subsidized public transportation for a group of affluent, significantly white train riders and not for poor, bus riders of color. For example, when the MTA opens up a new rail line, the fare is often “free” to attract new riders, followed soon thereafter with very low, subsidized “teaser” fares, such as 25 cents for the underground downtown Red line—while the buses that run aboveground charge customers who can’t even get a seat increased bus fares of \$1.35 plus a 25 cent transfer.

Similarly, when the MTA is asked why its rail projects are so expensive, it argues that it is subsidizing the suburban riders to entice them out of their cars (from \$5 to \$20 a ride) whereas there is no need to subsidize bus riders because so many of them are transit dependent. It is the MTA's denial of this "free and subsidized service" to a bus ridership that is 81% people of color that constitutes a violation of Title VI and the 14th amendment.

The MTA's brazen assertion that the constitution allows it to punish the urban poor and the urban poor of color under the "poverty standing alone" ruling is both unethical and legally unpersuasive. Unethical, because the litany of rulings that the MTA cites in which federal courts refused to establish constitutional protection for low-income people offers a telling moral indictment of our society and its courts—and those who would choose to hide behind those rulings. Each of those legal challenges on behalf of America's low-income class reflected valiant efforts by public interest attorneys to argue that if the 14th amendment's "equal protection" language is to be taken seriously in the richest society in the world, it must include a floor of *minimum* economic rights and standards to protect the population from unacceptable levels of poverty that are a direct consequence of a "free market" economy. The MTA's jubilant assertion that governmental policies that privilege the rich over the poor may be unfortunate, but are clearly legal should be required reading for any family with incomes under \$30,000—and any political science and constitutional law faculty person teaching about "capitalist democracy."

Legally unpersuasive, because in its efforts to hide behind the "poverty standing alone" argument, the MTA is trying to evade the debate about racial discrimination. The plaintiffs in the *Labor/Community Strategy Center v. MTA* are charging the MTA with violating the civil rights of a class of 350,000 overwhelmingly minority bus riders based on their race. Their concomitant poverty is a modifying and illuminating but not legally essential component of our complaint. From the advent of slavery, with a virtual 100% correlation between race, poverty, and bondage for African Americans, *high levels of poverty have always been one of the defining characteristics of racial discrimination visited upon entire groups of people*. Increasingly in the United States, poverty does not stand alone, but is highly shaped—demographically and causally—by racial and gender discrimination, while racial discrimination does not stand alone, but is increasingly given its debilitating form by the imposition of race-based poverty, such as denying people of color viable public transportation.

Thus, the MTA's attack on its minority ridership for being poor is an attempt to disaggregate race and poverty in front of the judge. The 350,000 bus riders are not divided into

three separate groups of passengers—81% of "people of color" 57% "female" and 84% "poor." In fact, the majority of bus riders are "profoundly poor" women and men of color. Their legitimate and long overdue claims to racial equality cannot be subverted by the MTA's argument that if a group of people of color is also low-income their deprived economic status disqualifies them from protection against discrimination because of race. While the federal courts have "ruled," reprehensibly, that governmental agencies cannot be barred from implementing programs or policies that benefit the rich and punish the poor, there is no provision in the civil rights act, at least not yet, that permits government agencies to discriminate against people of color because they are poor.

At present, with social movements in the U.S. in disarray, a two-party Right dismantling both the ideology and structure of any social service obligations of government, and the courts dismantling black and Latino electoral districts and race-based affirmative action college admissions, our court case is simultaneously a challenge to governmental racism and to our own organizing capability.

On the legal front, we are working closely with our attorneys to shape the argumentation of our case, and many of our key members are both named plaintiffs and witnesses. LDF has crafted a very strong case on both disparate impact and intentional discrimination, based largely on the MTA's own data, and we look forward to putting the MTA on trial.

On the grassroots insurgency front, we are putting 8 to 10 teams of organizers on the buses every day, making presentations to community groups, churches, synagogues, and unions, and launching a major radio and print media campaign, pointing towards Saturday, October 5, 1996—with the goal of organizing the largest march and rally and the broadest coalition in support of our demands—and our October court challenge.

Ultimately, the responsibility to expand working class rights and civil rights cannot be placed at the feet of the MTA or even the courts. It is the bus riders themselves, the poor, the women, the disabled, the students, the elderly, black, Latino, Asian, and white, as well as progressive intellectuals and members of the middle class, who must decide if they are willing to take history—and the law—in their own hands. I am convinced that in our lifetime, especially on an international stage, we will see the reemergence of radical and militant social movements of those most oppressed by the barbarism of late capitalism, and a new generation of conscious and trained grassroots leaders who will not accept the shackles of the present policies or discourse. They will not stand before the courts debating as to whether it is poverty or racism which can stand alone, but instead, will forcefully assert that poverty and racism cannot be allowed to stand at all.

On Rationalizing Racial Inequality and Containing the Explosiveness of Racial Conflict ... Or, Why We Are Committed to Fighting Racial Injustice Through Legal Rights and Litigation

Stephen C. Halpern

If, as W.E.B. Dubois suggested, the color line is the central question of the twentieth century, Americans have addressed that question primarily through legal action, consistently seeking to remedy our racial problems by establishing legal rights and by resorting to litigation. The link between racial issues and legal rights so pervades American culture that one cannot study racial problems in the United States without a good understanding of how our legal system has tried to deal with those problems. Indeed, it is hard to think of a significant racial controversy in the United States which has not been reduced to a legal question.

This essay explores the connection between race and law and tries to understand why that link has been so powerful. It suggests that the answer turns on characteristics of both our racial problems and of the legal process itself. It concludes by advancing a kind of "legal rights, racial conflict, containment theory" that posits the following: The persistent use of legal rights and litigation to redress racial problems has helped rationalize existing policies and proposed reforms, and has helped contain the explosive, violent, and socially disruptive character of racial conflict in the United States.

The Resort to Law Implicitly Rejects the Resort to Violence and Social Disruption

One cannot understand the link between race and law in the United States without appreciating how the specter and actual use of violence has permeated the history of black/white relations. Where we have been able to establish a precarious peace between the races, that peace has always veiled an underlying fear of violence that cuts both ways, blacks fearing violence by whites, and vice versa.

Blacks fear violence by whites because whites outnumber them, hold greater power, and have historically demonstrated a willingness to use that power in brutal ways. From the violence inherent in slavery itself, to the beatings and physical intimidation of blacks that continued after slavery, to lynchings, to the most recent spate of church bombings, whites have repeatedly demonstrated a willingness to deal with their racial anxieties and animosities by resorting to violence.

In turn, whites fear violence by blacks. That is so not merely because so much contemporary violent crime is statistically linked to blacks, but more importantly because any group that historically presides over the systematic mistreatment of another must, at some level, fear reprisal and revenge by the subjugated group. However unspoken, that fear has long been a concern to whites. SO, in reflecting on the dilemma of ending slavery in America and on his worry about possible retribution by freed slaves, an uneasy Thomas Jefferson wrote: "[W]e have the wolf by the ears, and we can neither hold him, nor safely let him go. Justice is in the one scale, self-preservation in

the other." (Takaki, 1993: 76)

To understand the fears that whites have today, one can turn to the insights of Andrew Hacker, perhaps the nation's preeminent white writer on contemporary race relations. Hacker sees white fear of racial retaliation by blacks in the anxieties whites have about black-on white robbery. For whites who are robbed by blacks, according to Hacker, the loss of cash or valuables is seldom their chief concern:

Rather, the racial character of the encounter defines the experience.... [T]he tables have been turned. For the present, a black man has the upper hand. Hence, the added dread that your assailant will not be satisfied simply with your money, but may take another moment to inflict retribution for the injustices done to his race (1992: 193)

One can also appreciate the role that violence continues to play in race relations by recognizing that the greatest power possessed by the black underclass is the threat that they might disturb the public peace by rioting. Daniel Patrick Moynihan has observed, for example, that a restive and potentially violent black underclass gives blacks "an incomparable weapon with which to threaten white America." (Graham, 1990:311) In his recent book, Stephen Steinberg has observed that throughout the twentieth century it was the prospect of racial violence that was "the primary catalyst" for both scholarship and political action with respect to "the Negro problem." It was this danger, he concludes, that made "the Negro problem" a "problem" in the first place (1995:23). The "naked truth," Steinberg concludes, is that "our political system is incapable of addressing racial inequities unless the nation's ghettos erupt in violence." (1995: 204)

Seeming to accept Steinberg's point about violence, Derrick Bell, in reviewing Steinberg's book, observed:

When, as is apparently inevitable, America's reflexive refusal to acknowledge racism's devastation forces black people to reject peaceful protests in favor of riots and revolts, readers of Stephen Steinberg's revelatory analysis ... will understand why so many downtrodden black people chose to risk death rather than live lives of despair and degradation.

Julius Lester, also noting the potential significance of violence by blacks against whites, has observed that "[t]hose black gangs that are now killing blacks will, one day in the near future, start randomly killing whites." (Lester, 1994:176)

Appreciating the persistent resort to or fear of racial violence in black/white relations enables us to better understand why we have so consistently sought to channel our racial conflicts into legal disputes and to manage our racial tensions via litigation. Litigation is a *peaceful* method of resolving otherwise bitter conflicts between angry and embattled adversaries. To resolve our racial problems through litigation represents a rejection of violence and a commitment to the most establishmentarian and orderly of processes. Resorting to law in racial disputes is a commitment to resolving conflict through a sys-

tem of socially acceptable combat -- not in the street, but in the courtroom. And those orchestrating that combat -- lawyers and judges -- are among the most conservative professionals one could find.

Historically, whites have expected, therefore, that passing civil rights laws and providing the outlet of litigation would buy racial peace. David Garrow's description of Lyndon Johnson's actions after Johnson signed the 1964 Civil Rights Act illustrates that expectation. Garrow notes that Johnson met privately with Martin Luther King, Jr., Roy Wilkins, Whitney Young, and other black leaders following the public signing ceremony. At that meeting, the President admonished the assembled civil rights leaders, according to Garrow, that there had to be "an understanding ... that the rights Negroes possessed could now be secured by law, making demonstrations unnecessary and possibly even selfdefeating." (Garrow, 1986:338-339) Johnson made the terms of the deal clear: In return for the legal rights and legal recourse provided to blacks in the 1964 Act, the nation's black leadership would have to guarantee racial peace. Johnson's expectations reflected a much larger set of historical forces at play in the long legal fight for racial equality.

In making the pursuit of legal rights the central goal of the modern civil rights movement, blacks curtailed their resort to other strategies that whites viewed as more threatening and socially disruptive, such as mass political action, organizing, marching, protesting, and demonstrating. There were profound consequences to that tactical decision.

To focus on legal action to achieve racial justice was to struggle within the narrow and well-regulated confines of the legal system. The central protagonists in that struggle were not leaders of community based organizations or of social movements but rather were lawyers and judges. The central strategy was not mass, grassroots mobilization and action by blacks, but the filing of lawsuits by lawyers acting on their behalf. Consequently, in the legal campaign for racial justice, issues of constitutional doctrine and jurisprudence tended to dominate the discourse, limiting the questions that got discussed, the people who participated, and the remedies that got considered. For example, in a discourse that focused on legal rights, it proved difficult to address the critical issues of jobs and economic justice for the black underclass.

Perhaps, even more important, a struggle for racial justice led by lawyers and centered on legal rights produced a struggle that was removed from the mass of black people and largely divorced from any organized social or political movement. Indeed, to the extent that critical racial issues consistently got translated into legal questions and ultimately resolved in litigation, there seemed less and less reason for blacks to organize and mobilize politically, and more and more reason for them to "just leave it to the lawyers."

Although it is true, as Michael Middleton points out earlier in this symposium, that for a brief time in the 1950s, civil rights lawyers worked closely with political activists who were nurturing a mass movement, that collaboration has been more the

exception than the rule. Indeed, by focusing on legal initiatives, the campaign to achieve racial justice inadvertently supplanted and ultimately diminished grassroots, mass political action by the black masses and their white allies. What is so different and potentially important about the litigation against the Los Angeles Mass Transit Authority that Eric Mann writes about in this symposium is that it is civil rights litigation driven, not by lawyers, but by a community-based organization trying both to litigate and develop a grassroots social movement.

The Resort to Law Rationalizes and Disguises the Exercise of Power and Coercion in Race Relations

Legal systems function to provide a uniquely important commodity--justice. Consequently, in all regimes, but especially those in which there are blatant injustices, one of the most important purposes of the legal system is to legitimate those injustices--to explain them away and make them appear to be fair. In this way, in all regimes, legal systems try to nurture the belief that the state and the social order are just. Legal systems perform this function by developing a jurisprudence that rationalizes those injustices. Legal doctrine constitutes the formal, written explanations that courts develop to explain and legitimate such injustices as do exist.

Legal systems also nurture an ideology that, like legal doctrine, serves a statist function. Hence, we have such small, but important symbolic aspects of the American legal system as the words on the frieze of the U.S. Supreme Court declaring, "Equal Justice Under Law," or the popular depiction of the legal process in the figure of a blindfolded woman weighing the scales of justice, who supposedly symbolizes the even-handedness of the system. In short, in all regimes both the jurisprudence and ideology of the legal system provide the patina of legitimacy for the state and for the injustices that inevitably exist.

Given the gross racial inequalities that have pervaded American history, our legal system has necessarily had to play an indispensable role developing official explanations and justifications for those inequalities. Two dramatic examples of courts fulfilling that function, drawn from our constitutional jurisprudence, should suffice to make the point. The first is *Plessy v. Ferguson* (1896) the second is *Milliken v. Bradley* (1974).

In *Plessy*, of course, after slavery was banned and racial equality before the law was written into the Constitution, the Court provided the constitutional seal of approval to a new system of racial subjugation. Rationalizing the system of Jim Crow discrimination that supplanted slavery, the Court distinguished *social* equality between the races from *legal* and *political* equality. In perhaps the most disingenuous effort in our constitutional history to rationalize an injustice, the Court also argued that if blacks concluded that "enforced separation stamped the colored race with a badge of inferiority" that was so "solely because the colored race chooses to put that construction on it."

In a similar vein, and with only a little less intellectual dishonesty, the Court in *Milliken* argued that the overwhelmingly

black student population in the Detroit city schools and the overwhelmingly white student population in some fifty-three outlying suburban districts, was not the result of any measures taken by the state of Michigan that helped produce that racial segregation. With enormous consequences for the nation, both *Plessy* and *Milliken* sought to legitimate the different, but pervasive racial inequalities of their day. Consequently, if one of the major functions of a legal system is to nurture the belief that the state is just and fair, it should not surprise us that, where the state is consistently unfair, it would be heavily dependent on the legal system to strive mightily to rationalize and legitimize the prevailing injustices.

Resorting to Litigation Nurtures the Belief that "Reasoned" Evaluations and Not Power Determines the Outcome of Racial Conflict

Most legal systems, including America's, are premised on the supposition that the litigation process is independent of politics. By that I mean that the prevailing ideology assumes that the outcome of litigation is not determined by political considerations or by the status, power, or other resources of the litigants, but rather on an objective evaluation of the "merits" of the case. This idea, as noted earlier, is reflected in the symbolism of a blindfolded figure who disinterestedly dispenses justice without considering the identity of the litigants. That portrayal reveals much about the way in which we are socialized to think about litigation. It fosters the ideology that litigation is an apolitical, objective process in which the outcome is determined, not by power and politics, but by dispassionate, reasoned deliberation.

The above portrayal of the legal process is not just part of our popular ideology. It is deeply imbedded in our system of legal education and in the way lawyers (including civil rights lawyers) are socialized to think about the legal process. This "apolitical" way of conceiving of litigation has roots in our jurisprudence going back centuries to the Blackstonian ideal of judges "discovering" the meaning of the law through a special reasoning process which they have supposedly mastered as a result of being trained in their craft as lawyers. That ideal is reflected as well in Herbert Wechsler's famous call, in the wake of the *Brown* decision, to find a way to justify the result in that case based, not on sociological or psychological findings, but rather on what Wechsler termed "neutral principles" of law.

Both the adjective and noun in Wechsler's phrase--*neutral principles*--reveal the way mainstream legal scholars conceive of the considerations that should determine the outcome of constitutional litigation. "Principles" derive from ethical or moral considerations, rather than considerations of power or politics. Moreover, the notion that the operating principles to be applied should be "neutral," suggests that the moral or ethical precepts that the justices should use in deciding cases can be objective, impartial, and apolitical.

Legal theorists like Blackstone and Wechsler, and lawyers and judges weaned on their theories, believe that law can be divorced from politics and power, and that legal disputes can be resolved by a logical reasoning process. If one conceives of

the judicial process in that way, then one might believe, in turn, that the prejudices and power considerations that pervade American racial policies and politics could be negated, or at least circumvented, by transforming racial controversies into legal disputes and resolving them through litigation.

The calculated and persistent resort to litigation by civil rights lawyers in this century has been based, at least in part, on ideas implicit in the Blackstonian and Wechslerian models. Those who resorted to a litigation strategy to challenge American racial practices had to assume, at some level, that in litigation one stood the chance of obtaining a decision based on a "reasoned," "objective," and "apolitical" evaluation. They had to have some faith, as well, that in the legal process the ultimate decision would be driven more by notions of what was principled, fair and just, than by the power of the litigants or by what was politically expedient.

In short, civil rights lawyers and their allies had to believe that they stood a chance of prevailing in litigation because of certain presumed attributes of the legal process -- most prominently, its emphasis on equal treatment as between the parties, on objective, independent judicial analysis, and on the obligation that judges have to render just and rationally defensible decisions. To this day, a commitment to and belief in those very attributes of the legal process is typically present in racial inequality litigation brought by black plaintiffs, including the litigation involving the Los Angeles Mass Transit Authority that Eric Mann analyzes in this Symposium.

The Resort to Law is the Resort to a Rational and Safe Process for Dealing with a Subject that is Irrational and Emotionally Evocative

In the close link between race and law in America there is an odd convergence of opposites. This is so because law stands for everything that race relations in the United States are not.

The subject of race in America is a topic driven by the most subjective, emotional, and irrational considerations. That whites and blacks have powerful reactions to one another based solely on color is both indisputable and inexplicable. That we persist in attributing such significance to something as arbitrary as skin color is inherently unjustifiable and irrational. It is hard to comprehend why skin color remains so potent, complex, and volatile a subject and even harder to determine what we can do to manage, let alone eliminate, the passions it engenders.

We simply do not understand why, as individuals, we feel the emotions we do based on color and why, as a people, the subject has bedeviled us for centuries. We do not understand the source of the anxieties, fears, uncertainties, insecurities and animosities that continue to drive America's racial dynamics. At best, all we can do is concede that there is something unexplainably powerful, illogical and arbitrary perpetuating the black-white tension in this nation. In contrast to these features of our racial problems, in the legal system judges are supposed to reject the emotive, visceral and irrational.

As I have suggested, the legal process is dedicated to the systematic presentation of reliable factual information and on the independent and objective evaluation of that information

so as to reach rationally defensible decisions. Paradoxically, these very traits make litigation well-suited for dealing with so dangerous, irrational, and unnerving an issue as race. The resort to law transmogrifies our anxieties and apprehensions about race into rational, manageable, definable questions about which there can be polite, boring, intellectual deliberations regulated by the safest of people--lawyers and judges. In these ways, the legal process helps diffuse the power and emotionality at the core of racial tensions in America.

So, at different times, the questions to be considered in dealing with pressing racial dilemmas have gotten translated into these harmless and innocuous "legal" questions: Are the racially segregated facilities, in fact, equal? What is the evidence with respect to the disparate impact of a policy on blacks and whites? What is the evidence from which one might infer that a defendant, in fact, intended to discriminate on the basis of race? Is there a bona fide explanation, other than a racial one, for the defendant's challenged policies? Are there alternative methods for the defendant to have achieved its legitimate objectives that would have had less adverse impact on blacks?

The transformation of power-packed, emotional, and potentially disruptive racial issues into dull, abstract legal questions tends to strip those issues of their punch and passion--and perhaps of much of their meaning and importance. Indeed, translating racial conflicts into legal questions tends to force lawyers and judges, and the public as well, to conceive of those conflicts without thinking about the power, coercion, historical context, or human dimension in black-white relations. What litigation offers instead, is a seemingly de-politicized, abstract, intellectual process that, in an orderly and controlled way, helps us to manage an incomprehensibly complex, potentially dangerous, and uncontrollable subject. Hence, for a variety of reasons, and with good and bad consequences, the legal process has come to function as the safest possible venue for dealing with the most explosive issue in all of American history.

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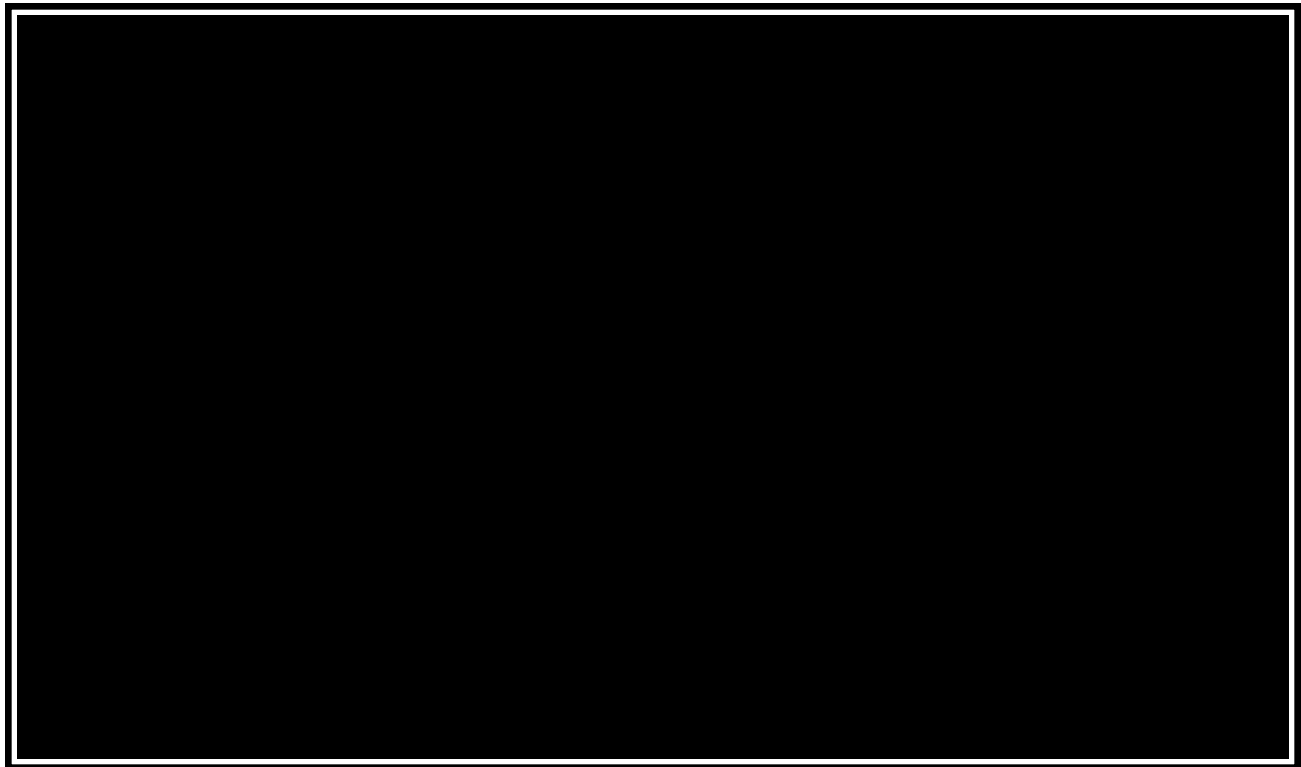
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WEB-FOOTED ACADEMICS POINT YOU TO THE FUTURE

"TIS TRUE; THERE'S MAGIC IN THE WEB OF IT"*

*William Shakespeare, *Othello*

Lee Epstein, *Washington University* and Jerry Goldman, *Northwestern University*

We decided to devote this column to some of our favorite law/courts web sites and those of more general interest to political scientists. Of course, the list is necessarily incomplete; there are hundreds of other sites relating to the courts and law. It's also a bit self-serving, as our notations within particular entries indicate.

Still, we think we've identified some of the more interesting, even unusual sites. And, if we've missed your favorite, just email the URL to us [Lee at epstein@wuecon.wustl.edu or Jerry at j-goldman@nwu.edu] and we will include it in a future column.

About URLs...

Before we present our list, a few words about URLs are in order. A **URL** (or Uniform Resource Locator) follows a well-defined syntax. It starts with something called a "scheme" followed by a colon and then a scheme-specific-part whose interpretation depends on the scheme.

<scheme>:<scheme-specific-part>

For this column, we elaborate URLs beginning with the scheme, "http." This stands for Hypertext Transfer Protocol and directs your browsing software to "pages" on the World Wide Web. For example, the "home page" of APSA on the World Wide Web takes the following form:

<http://www2.dgsys.com/~apsa/>

There are other schemes and you may be familiar with them, such as ftp, gopher, and telnet. Your browser should be able to locate these other internet resources following a similar scheme. Since we are focusing on web pages (URLs that begin with <http://>), we will drop the front end matter. Your browser should be able to resolve the address without the http stuff, anyway.

Some Great Law-Related Sites

The Legal Information Institute <www.law.cornell.edu/>. The Supreme Court of the United States gets significant attention on the Web. Of course, the Court does not have a web page, fearful that its vaunted security might be breached. Wireheads know that separate functions (web and network) need not be linked. Despite its decided lack of interest, others—including the Legal Information Institute (LII) at Cornell Law School—have brought the Court to the web.

The LII site is perhaps most well-known for its index of

and access to U.S. Supreme Court decisions. The Supreme Court has been distributing its opinions electronically since 1990. LII indexes the opinions and offers an impressive array of indices and search capabilities. The opinions themselves are archived at another location (at Case Western Reserve), but LII has added an elegant "front-end" to translate arcane docket numbers into case titles we have come to love.

You can read opinions from your browser, have them emailed to you, or download them immediately. You have two choices: ascii (or plain text without formatting or footnoting) or WordPerfect for PCs (with formatting and footnoting). The opinions come in parts: syllabus, opinion, concurrences, dissents. Unfortunately, there's no way to distinguish one dissent from another. So if you're looking for a separate dissent in a multi-dissent case, you will have to download them all.

LII has begun to create an archive of historically important Court opinions prior to 1990. These opinions contain hyperlinked footnotes and pagination that matches the U.S. Reports. Watch for this list to grow in the coming months.

The LII also contains many other interesting features, including links to various documents (such as the U.S. Code and state statutes) and to a vast array of legal indexes, libraries, and search engines (for more information on search engines, keep reading). In other words, if you don't find the legal material you're looking for here, you'll probably be able to locate it by clicking one of the links this site contains.

Finally, check out the LII's Court Statistics Service (you can get to it from the LII home page or by navigating to <www.law.cornell.edu/focus/statistics.html>). This is an interactive site that provides data on district court caseloads. Users can request information on particular kinds of cases (or all cases), specific district courts (or all courts), modes of trial (judge, jury or both), and so forth; the site will supply you with responses by year, beginning with 1979 and ending in 1994. A great tool for instructors in courses on the judicial process.

Federal Court Locator <www.law.vill.edu/Fed-Ct/fedcourt.html>. Billed as "The Home Page for the Federal Courts on the Internet," (and trademarked accordingly!),

this site—maintained by the Villanova Center for Information Law and Policy—receives a lot of traffic (at our last check, over 237,000 hits). This is hardly surprising as it contains two highly useful sets of links. The first take navigators to decisions of the U.S. Courts of Appeals. Merely click on the circuit of interest and you will be transported to sites containing the requested opinions. The second link leads you to the Web pages of four federal agencies: Administrative Office of the U.S. Courts, Federal Judicial Center, U.S. Department of Justice, and the U.S. Sentencing Commission—all but the FJC contain useful information. The Administrative Office site, for example, now houses a list of federal court vacancies and nominees for the various openings; and the one maintained by the Sentencing Commission contains guidelines and various research reports.

Oyez, Oyez, Oyez: A Supreme Court WWW Resource <oyez.at.nwu.edu/oyez.html>. This site is a departure from most others on the WWW. Developed by Jerry Goldman with support from Northwestern University, OYEZ contains the complete audio files of Supreme Court oral arguments for constitutional cases decided between 1955 and 1995. The site employs Real Audio technology to stream compressed digital audio files to your computer. To listen to these materials, you must install a piece of free software called the Real Audio Player. It comes in a flavor to match almost all operating system. <www.realaudio.com> If your browser supports “plug-ins” (software additions to enhance your netsurfing), be sure to add the Real Audio plug-in. It will enhance the OYEZ experience.

At the moment, the OYEZ site contains more than 50 cases and over 60 hours of audio materials linked to summaries of each case. In selected cases, you can listen to the justices deliver their opinions (*Regents v. Bakke*, *FCC v. Pacifica*, *U.S. v. Nixon*). Thanks to a grant from NSF, Goldman aims to expand the archive to 500 cases and 700+ hours of audio in the next 1-2 years and add the full text of opinions, lower court opinions, and search capability including a search for justice voice.

The Law and Politics Book Review

<www.polisci.nwu.edu:8001/>. This is an electronic periodical, published by our Section and edited, with great skill, by Herb Jacob. It contains reviews of books pertaining to law and courts. Listings are alphabetical, by author. So clicking on the author's name will take you to the book review.

Jacob also provides pages that list reviews of constitutional law and judicial process text books, which have appeared in LPBR. You need only navigate to those pages to locate the relevant listings. For additional information see page 28.

COURT TV Law Center

<www.courtstv.com/index.html#Top>. This site provides everything from mundane (the latest information on trials

across the country) to the absurd (the wills of famous people including Jerry Garcia, Chief Justice Burger, Richard Nixon, and, of course, Elvis Presley). And all that lies in between.

Of course, it is the in-between stuff that makes this site a winner. Users can participate in on-line seminars on workplace violence and cyberspace law; access case files in some of the most salient cases of the year and some that are less so; and, perhaps best of all, watch and hear COURT TV on their computer monitors via a live video feed.

This site is really worth a look-see, if only to obtain great filler material for those tired lectures. A first-time visitor may want to start with the Law Library and follow the Hot Documents path. There, they'll find all the latest legal news and supporting information, such as the FBI affidavit in the Unabomber case, 1996 Supreme Court opinions, and a range of odd and not-so-odd stories that have a law-related angle. **The Court of Last Resort** <www.sandbox.net/court/pubdoc/home-x.html>. “Is that pesky neighbor of yours blasting thrash metal music at three in the morning again? You can't afford a lawyer, don't have time for small claims court, and don't really want to do time for assault. So where do you turn? Meet the Court of Last Resort.” Or so says COURT TV...

Seriously, the developers of “The Court of Last Resort” play off the fascination Americans have with the judicial system, their willingness to litigate, and their interest in avoiding legal costs. To play the legal game, all one has to do is submit a complaint and, then, according to the instructions on the site, “follow the road to justice with an e-mail invitation to the opposing party to settle the dispute. Both sides continue by submitting evidence and sharing their arguments for their side of the story.”

Who reaches the verdict? None other than an on-line jury of your peers! And this may be the site's most useful feature. You can have your students participate as jurors on electronic trials. The site will allow them to hear depositions and review the evidence before casting a vote. There's no charge for playing the game; all they (or you) need do is complete an on-line registration form.

The Search Engines and Indexes. Search engines, such as **Yahoo** <www.yahoo.com/> and **Alta Vista** <www.altavista.com>, are vehicles for locating legal and other resources that our picks may not contain. Simply enter the search word(s) and the engine will match the term against its database of web sites. If you want to limit your search to legal resources, invoke a one of Yahoo's specific search index mechanisms, such as **Government: Law, Legal Research** <www.yahoo.com/Government/Law/Legal_Research/>. From there, you can conduct general searches or further delimit your search to one of the following categories: Academic Papers, Cases, Companies, Institutes, Journals, or Libraries.

Indexes provide listings of specific resources. One of

our favorites is Legal Sites on the Web <www.geocities.com/CapitolHill/1814/legal.htm>. This provides links to hundreds of law and court-related sites on the Web—from the home pages of law reviews to hotlines on sexual harassment to legal search engines. And, if you locate a site that is not listed, you can submit it to the developer via email.

Sites of General Interest to Political Scientists

The Political Scientist's Guide to the Internet

<www.trincoll.edu/pols/home.html>. Yes, there really is such a thing....Created by Peter Adams for an independent political science project during his senior year at Trinity College in Hartford Connecticut, this site houses a wealth of information of interest to scholars and their students.

The main menu consists of two categories: the U.S. Government and Political Resources. Clicking the "Federal" icon in the U.S. Government menu will take you to links on the executive, legislative, and judicial branches.

From these, you can take a tour of the White House, visit exhibits at the Library of Congress, connect to THOMAS (containing the full texts of congressional legislation), and search rulings of lower court decisions. The "State" icon on the government path takes navigators to a listing of each state, with links—varying by state—to home pages, court decisions, codes, and so forth.

The Political Resource links are equally as numerous. Especially valuable for students deciding on a graduate school or for those on the job market is a listing of the web sites of the Nation's political science departments. These often house the names of faculty members and their research and teaching interests (including syllabi). Simply click the Political Research icon (under the Political Resource category) and follow the academic department path. (If your department maintains a web site that is not listed, you can submit its URL by filling out the form at the bottom of the page.)

CQ's American Voter <voter96.cqalert.com/>. Congressional Quarterly's site has made many top 10 lists—for good reasons: It's both informative and fun, particularly for students. Clicking the "On the Job" icon, for example, enables navigators to learn about their (or any) member of Congress. Simply put in the name of your Senator or Representative (or your zip code) and CQ provides examples of floor speeches, bills introduced, and committee votes—surely, a painless way for students to obtain interesting information about their MCs. The "Candidates '96" page may prove equally useful in the classroom. Here users can enter the names of candidates running for federal office or for governor (or the state of interest), and obtain biographical and other data.

Law and courts also get some attention in CQ's site. Clicking the "CQ Mall" icon, and following the Books path to the Courts and Constitution page (or merely navigating to: http://voter96.cqalert.com/plweb-cgi/cq_mall.pl?+books.html) will eventually lead you to excerpts of important cases decided during the current term. Since these contain factual set-ups and commentary written by Lee Epstein and Thomas G. Walker, they may be useful to instructors of case-law based courses. Moreover, following the judicial path on the CQ HotList will take you to various links, including Judicial Information from the Library of Congress and biographical data on Supreme Court justices.

Politics Now

<www.politicsnow.com>.

This site is sure to be a hit with politics junkies, and we know some members of this section who fit this description. Politics Now is a collaboration of ABC News, *National Journal*, *Washington Post*,

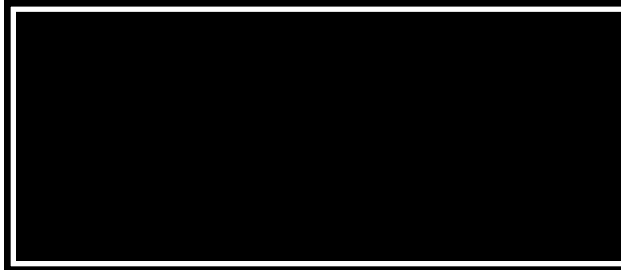
Los Angeles Times, and *Newsweek*. If you are looking for up-to-the-minutes stories, thoughtful commentary, sharp graphics, and engaging interface, search no more. Check the polling data, including state-by-state tracking polls for the presidential election. In terms of visual design and user interface, few sites will match Politics Now.

Political Methodology Section of the APSA

<wizard.ucr.edu/polmeth/polmeth.html>. The political methodologists have us court scholars beat—at least on the WWW front. Their section maintains a wonderful web site that houses working papers and back issues of their newsletter (*The Political Methodologist*) and links to many useful sites, including statistical and software banks and the home pages of many of leading political science organizations and journals.

If you navigate to this site, you will notice a link to the **Home Pages of Political Scientists** <www.u.arizona.edu/~bsjones/psdir.html>. This will take you to Brad Jones' (of the University of Arizona) listing of political scientists who have their own web pages—a real growth industry! Jones has organized the pages by field but he also has a master list, making it easy to locate colleagues across the country.

For those of you who would like to join this ever-increasing list but don't know how to get started, stay tuned to this column. For, in the next issue of **Law and Courts**, we will provide you with step-by-step directions to create a web site of your very own.



THE UNITED STATES COURTS OF APPEALS DATA BASE*

*A Multi User Data Base Created by a Grant from the National Science Foundation (SES-8912678)

Donald R. Songer, *University of South Carolina*, Principal Investigator

Background

Following the initial proposal for the creation of an appeals court data base, the National Science Foundation funded a planning grant that created a committee of distinguished scholars from the law and courts community to design a data base that would serve the diverse needs of the law and social science community. That advisory committee brought together distinguished scholars from political science, sociology, and law who shared an interest in the systematic study of the federal courts.

After a year of development by the advisory board, I submitted a revised proposal to the National Science Foundation to create a multi-user data base consisting of data from a substantial sample of cases from 1925 to 1988. This proposal was funded with a \$680,000 grant from the NSF in 1989 and a new Board of Overseers was created. The new Board, consisting of Professor Gregory Caldeira (Ohio State University), Professor Deborah Barrow (Auburn University), Professor Micheal Giles (Emory University), Professor Lawrence Friedman (Stanford Law School), Donna Stienstra (Federal Judicial Center), and Professor Neal Tate (University of North Texas), immediately began a year-long process of re-examining the proposed design of the study and evaluating the results of the pre-tests of proposed coding instruments. As a result of Board deliberations, the data base project was divided into two phases. The first phase was to involve the coding of a random sample of cases from each circuit for each year for the period 1925-1988. The total size for this sample is projected to be around 20,000 cases. The second phase of the data base was designed to code all the appeals court cases whose decisions were reviewed by the Supreme Court in a decision reported in a full opinion in *United States Reports* for the period covered by Harold Spaeth's Supreme Court Data Base, Phase I. This phase is expected to result in the coding of approximately 4,000 additional cases. When completed, it is anticipated that this data base will be capable of being merged with the Supreme Court Data Base so that scholars can track changes in the nature of the issues and litigants as the case moved up the judicial hierarchy and can examine cross-court voting alignments. Since the identity and vote of the district court judge who heard the case below will also be coded, it means that with this second data set scholars will be able to track a case as it goes through 5 votes: the district court, the court of appeals, the cert vote in the Supreme Court, the conference vote, and the final Supreme Court vote on the merits.

The Appeals Court Data Base Project was designed to create an extensive data set to facilitate the empirical analysis of the votes of judges and the decisions of the United States Courts of Appeals. In order to increase its utility for a wide variety of potential users, data on a broad range of variables of theoretical significance to public law scholars were coded. A major concern of the Board of Overseers appointed to advise the Principal Investigator on the construction of the data base was to insure the collection of data over a sufficiently long period of time to encourage significant longitudinal studies of trends over time in the courts. The paucity of such studies in the past was identified as one of the major weaknesses of recent scholarship. Thus, the data base was designed to code a random sample of cases for the period 1925 - 1988. The original end date (1988) was dictated by the availability of data at the time the proposal was submitted. A new proposal is currently pending at the NSF requesting funding to bring the data base up to date through the end of 1996.

The Appeals Court Data Base project, as originally conceived, is nearing completion. At its last meeting, the Board of Overseers approved a plan to archive the first phase of the data base at the ICPSR in the summer of 1996. When released, it will include an extensive collection of data from over 20,000 cases. The second phase of the data base is expected to be archived at the ICPSR in late fall 1996. 222 variables are coded for each data set, including the following: a detailed coding of the nature of the issues presented; the statutory, constitutional, and procedural bases of the decision, the votes of the judges, and the nature of the litigants. The coding conventions employed in the collection of the data were designed to make comparisons to the Supreme Court Data Base and Bob Carp's district court data feasible, in addition to providing a wealth of information not in either of these data bases of the decisions of courts above and below the courts of appeals. The variables included in the data base are divided into three sections: basic coding, coding of litigants, and issues coding.

Basic Coding

The first component, generally referred to as the "basic coding" will include a series of miscellaneous variables that provide basic descriptive information about each case. Included in this series of variables will be the decision date, case citation, first docket number, the number of docket numbers resolved in the opinion, length of the opinion, the procedural history of the case, the circuit, the district and state of origin, a code for the district

court judge who heard the case below, the type of district court decision appealed, the citation of the decision below, the identity of any federal regulatory agency that made a prior decision, the decision of the appeals court (for example, affirmed, reversed, vacated), the number of dissents and concurrences, the number of amicus briefs filed, the nature of the counsel on each side, whether the case was reviewed by the Supreme Court, and whether the case involved a class action, cross appeals, or an en banc decision.

Coding of the Litigants

The Appeals Court Data Base includes a very detailed coding of the nature of the litigants in each case. First, litigants are categorized into seven basic types (natural persons, private business, non-profit groups or associations, federal government agencies, state governments and their agencies, units of local government, and fiduciaries or trustees). Then the number of appellants and the number of respondents falling into each of these categories is recorded. The actual names of the first five listed appellants and the first five listed respondents are recorded. Each of the seven general categories is then broken down into a large number of specific categories. These codes for the detailed nature of the litigants are recorded for the first two appellants and the first two respondents. In addition, the data base matches the appellant and respondent to the plaintiff and defendant in the original action, indicates whether any of the formally listed litigants were intervenors, and indicates whether any of the original parties with actual substantive adverse interests are not listed among the formally named litigants.

It is impossible to list all of the detailed litigant categories in a short overview, but two examples may illustrate the nature of the detail available. The private business category is broken down into 77 specific types of business (for example, oil and gas mining or extraction, residential construction, chemical manufacturing). Then each of these 77 types is categorized as to whether or not it was bankrupt and what the scope of its operations were (that is, clearly local, clearly national or international, intermediate scope, impossible to determine scope). Thus, there are 616 possible categories for private business litigants. The natural person codes record the gender of the litigant, a detailed ethnic categorization, citizenship (U.S. or other), and the income status (definite evidence that litigant is poor, presumed poor, above the poverty line but not clearly wealthy, presumed wealthy - high status job, clear indication of wealth, not ascertained).

Coding of Issues

Three types of variables are coded in order to capture the nature of the issues in the case. First, the Appeals Court Data Base includes a traditional categorization of issues that parallels the issue categories in the Supreme Court Data Base. These issues capture the nature of the dispute that led to the original suit. Eight general categories (criminal, civil rights, First Amendment, due process, privacy, labor relations, economic activity and regulation, and miscellaneous) are subdivided into a total of 220 specific issue categories. For example, specific categories include due process rights of prisoners, school desegregation,

gender discrimination in employment, libel or defamation, obscenity, denial of fair hearing or notice in government employment disputes, abortion, right to die, union organizing, federal individual income tax, motor vehicle torts, insurance disputes, government regulation of securities, environmental regulation, admiralty, personal injury, eminent domain, and immigration.

For each of these traditional issues, the directionality of the court's decision was recorded, using the definitions of directionality in the Supreme Court Data Base. In addition, the identity of each judge was recorded and the directionality of the vote of each judge on each issue was recorded.

A second way to get at the issues in a case is the series of variables that are coded from the headnotes describing the West Topics and keynumbers at the beginning of each case. From these headnotes we coded the two most frequently cited: constitutional provisions, titles and sections of the United States Code, federal rules of civil procedure, and the federal rules of criminal procedure. This coding should be useful for scholars interested in the application and interpretation of specific elements of law.

Finally, the issues in each case were coded from the standpoint of the judge who wrote the opinion. Each of the 69 variables in this section is phrased in terms of an issue question. For each variable, coders indicated whether or not the issue was discussed in the opinion. If the opinion discussed the issue, the resolution of the issue was also recorded (generally whether the issue was resolved in favor of the position of the appellant or the respondent). All issues discussed in the opinion were recorded (that is, finding that a given issue was discussed did not preclude the conclusion that any other issue was discussed as well). The first set of variables recorded whether a series of threshold issues were addressed (for example, standing, failure to state a claim, mootness, jurisdiction). Next, each case was coded for whether or not the opinion engaged in statutory construction, the interpretation of the Constitution, or the interpretation of court doctrine or circuit law. Following these preliminary variables, a long series of variables were recorded to capture whether the court dealt with each of a series of questions relating to civil and criminal procedure (for example, was there prejudicial conduct by the prosecutor, was there a challenge to jury instructions, was there a challenge to the admissibility to evidence from a search and seizure, did the court rule on the sufficiency of evidence, was there an issue relating to the weight of evidence, was the validity of an injunction at issue, was there an issue relating to discovery procedures, was the application of the substantial evidence rule questioned, did the agency fail to develop an adequate record, were the parties in a diversity of citizenship case truly diverse).

The Appeals Court Data Base project represents the largest commitment of money by the Law and Social Sciences program of the NSF of any project funded within the past decade (and perhaps longer). From its conception it was designed to create a data base for the benefit of the entire constituency of the Law and Social Science program. The NSF anticipated that the data

(continued on page 27, column 2)

BOOKS: BRIEFLY NOTED

A CIVIL ACTION

Jonathan Harr
(Random House, 1995)

The recent debate over tort reform has shown not only how little most people know about civil litigation but how wrong much of that “knowledge” is. In *A Civil Action*, Jonathan Harr, who was granted full access by the plaintiffs and more than a little by the defense, follows a nine year case brought by a group of families who charged that W. R. Grace and Beatrice Foods were responsible for water pollution that allegedly caused an unusually high concentration of child leukemia. Harr’s book makes a wonderful supplementary text. Although long, it has the elements of a novel — memorable characters, suspense, emotional highs and lows, tragedy, and more. The central character, attorney Jan Schlichtmann, is a flawed crusader. A big man with luxurious tastes, he develops such a sense of mission in pursuing this case that the reader cannot help but cringe at and admire his behavior. The book conveys a real sense of the excitement involved in pursuing such a large scale case coupled with the frustrations of our legal system. Along the way, students will learn quite a bit about rules of evidence, discovery, the roles of judges and attorneys, the advantages and disadvantages of contingent fees, how juries work and a host of other matters that are often explained to them in a much drier fashion by their professors. They will also see the importance of the human dimension and the difficulty of coming to a fair outcome in our legal system.

A Civil Action is a wonderfully written example of the journalistic case study. In exchange for its liveliness and detail it has many of the faults of the genre. As fascinating a character as Schlichtmann is, we learn more about him, from his wardrobe to his sex life, than most of us need to know. In focusing so much on this one case, we lose sight of the larger picture. It would be particularly helpful to know how other cases compare to this one. If the book is a supplementary text, however, the course instructor can provide that large picture through other readings, lecture, and class discussion. The detail and excitement that Harr supplies would be difficult to find anywhere else.

Bruce E. Altschuler
SUNY Oswego



WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE

Ian F. Haney Lopez
(New York University Press, 1996)

Ian Haney Lopez argues and successfully demonstrates that the category of race is purely a social construction defined as “historically contingent social systems of meaning that attach to elements of morphology and ancestry” (p.14)

More to the point, however, he argues persuasively that the U.S. is an ideologically white nation not by accident but by design with the legal system being central to crafting and implementing rules to perpetuate white hegemony.

The focal point of the analysis is immigration and naturalization policy with Haney Lopez using the heretofore obscure (at least to me) prerequisite cases decided by the U.S. courts between 1875-1925 (including two U.S. Supreme Court cases — *Ozawa v. U.S.*, 260 U.S. 178, 1922 and *U.S. v Bhagat Singh Thind*, 261 U.S. 204, 1923) to support his argument. The high court upheld a requirement of “whiteness” (defined in one case by “common knowledge” and in another by a “scientific” standard that said being Caucasian didn’t mean being white) for naturalization.

I think this volume might be of interest to section members for several reasons. Its sheer information value alone makes it worthwhile. For example, I was surprised to learn that the final racial barrier to citizenship (via naturalization) didn’t fall until 1952. The extent to which the legal system has perpetuated racism — and the implications of that — is effectively and powerfully demonstrated in this case study. I anticipate these observations being useful when I teach Judicial Process to undergraduates. Second, the volume is analytically powerful given the author’s emphasis on the legal construction of WHITENESS or the privileged category. The volume provides a nice complement to the work of critical race theorists for that reason. This analysis of whiteness also allows Haney Lopez to offer timely critique of the contemporary debates over affirmative action and immigration, etc. with him making a convincing case for race-consciousness in law and policy. Finally, Haney Lopez does give some attention to the role of judges in the legal construction of race (pp.133-146 most specifically) suggesting there is an unconscious racism among most judges and that “whiteness is virtually defined by a host of unexamined assumptions of superiority and inferiority,, of worth and worthlessness” (p.146). Although his methodology and research strategy are clearly those of a law professor rather than a political scientist, there is still much here to provoke and stimulate those interested in judicial politics and the relationship between law and society.

Lauren Bowen
John Carroll University

**LAW IN THE COURTS OF LOVE: LITERATURE
AND OTHER MINOR JURISPRUDENCES**

Peter Goodrich

(London: Routledge, 1996).

When I think of Public Law in Political Science I guess I still think of a certain kind of empirical judicial process work even though my own work and that of a number of other scholars in Political Science has moved some distance from that intellectual point. Peter Goodrich is a most intriguing scholar, who teaches in London and offers us something more. The book he wrote last year, *Oedipus Lex*, looks at law from a psychoanalytic perspective. A new book, *Law in the Courts of Love* is a contemporary intervention in the debates about the plurality of law.

Goodrich uncovers little known forms of law, such as women's courts in medieval France, and presents them with such vitality and erudition that they challenge the conventional picture of a state centered positive jurisprudence. Included in this collection and helping to articulate the importance of its historical material is Goodrich's "Sleeping With the Enemy," a wonderful essay on contemporary Critical Legal Studies which examines its attempt to create "a justice of the future." CLS "fails in its radicalism" according to Goodrich, because, for one thing, it focuses on "a reality whose object is defined by the citation of other critical legal texts." This critique of scholasticism is compelling and it becomes the basis for appreciating Goodrich's own scholarly seductions.

John Brigham

University of Massachusetts-Amherst

OVERCOMING LAW

Richard A. Posner

(Harvard University Press, 1995)

Posner covers a wide variety of topics: the profession of judging, the glories, limits, and variety of contemporary constitutional and legal theories, the way radical feminist and critical race theories have explored issues of gender and race, comparisons of philosophical and economic perspectives of law, and reconsiderations law and literature and law and economics approaches to important social and legal questions of the day.

At the core of this book of original essays is Posner's rethinking of issues, plus an argument for pragmatism in legal theory and a mature law and economics approach. Posner weaves a most interesting dialogue, drawing upon contemporary scholars and his past views. He seeks to explore the relationships between pragmatism, economics, and liberalism—with a strong dose of what constitutes good judging. We get his view of the process of judging.

This book presents neither traditional political science visions of judicial decision-making nor classic constitutional theory as to how the Constitution should be interpreted. Rather, Posner offers an argument for judicial problem-solving, that is, for judicial decision-making based on an instrumental concern for outcomes rather than supporting fundamental rights and polity principles. Because Posner assumes that justices are, and should be, instrumental rather than constitutive in their decision-making, severe limitations are placed on the applicability of his findings on constitutional theory and practice to Court decision-making today. Even so, this book is superb at stirring the intellectual juices of empiricist and jurist alike, and thus, is must reading.

Ronald Kahn
Oberlin College

BOOKS TO WATCH FOR

Rogers Smith supports his "multiple traditions" view of American political culture, against Hartz's "liberal society" thesis in *Civic Ideals: Conflicting Visions of Citizenship in U.S. Public Law*, forthcoming from Yale University Press in 1997. In order to support his argument, Smith provides a comprehensive survey of federal statutes and judicial decisions that defined access to full citizenship from the nation's founding through the Progressive Era. The book argues that, because of the political and psychological appeal of racist, sexist, and Protestant nativist myths of civic identity, American leaders have frequently blended elements of such inegalitarian ascriptive doctrines in their political ideologies and their civic laws, along with often inconsistent liberal republican elements. It concludes by contending that such inegalitarian ascriptive doctrines are resurgent today, as they were in the late nineteenth and early twentieth centuries, and that contemporary

liberal democratic theories need to be significantly revised if they are to combat the appeal of such doctrines effectively.

Elliot Slotnick and **Jennifer Segal** are working on a manuscript for Cambridge University Press examining television coverage of the U.S. Supreme Court on network evening newscasts. The book will include analyses of coverage of the 1989-90 Supreme Court term based on utilization of videotapes of the network newscasts in addition to a focus on the 1994-95 term utilizing the abstracted index of the Vanderbilt Television News Archive. Also included will be case studies of television coverage of the *Bakke* affirmative action and *Webster* abortion cases. In addition, the book will draw on extensive interviews with the current Supreme Court reporters for all three television networks as well as with former network correspondents who covered the Court.

(continued on the next page)

John Brigham focuses on four ideological movements and their strategies, among them the struggle over the closing of gay bathhouses in the early years of the AIDS crisis and the radical feminist use of rage and radical consciousness in anti-pornography campaigns in *The Constitution of Interests: Beyond the Politics of Rights* (New York University Press, 1996). The effect of law on politics, Brigham convincingly reveals, is pervasive precisely because political life finds its expression in a surprising variety of legal forms.

Many of America's most important social and political movements--abolition, women's suffrage, civil rights, women's liberation, gay and lesbian rights--have organized in the shadow of the law. All are based in their theoretical opposition to the law. Yet at the same time, they are dependent on the laws that prohibit them. Law is thus formed as much through the dynamic tensions that govern how these laws are received as through their official decree.



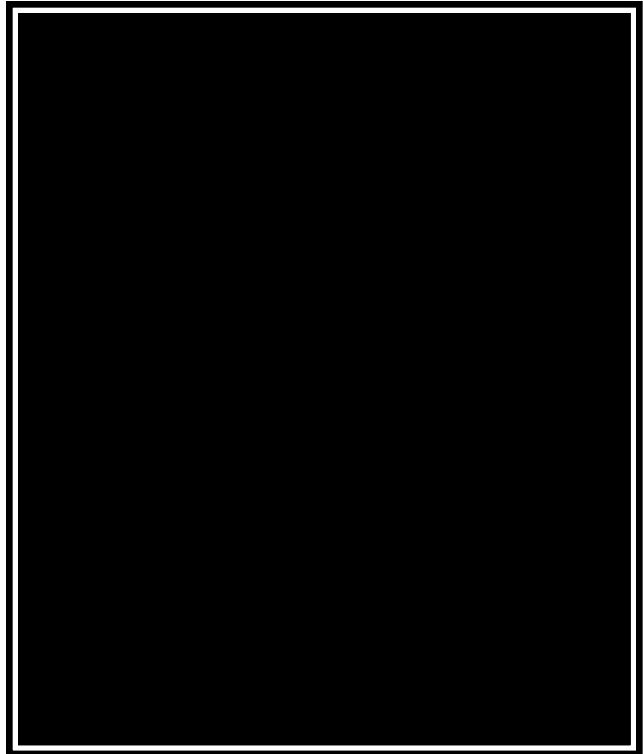
From the Section Chair

(continued from page 1)

Perhaps the area most reflective of the intellectual and social power of Brennan's deft weaving of multi-pronged tests has been the persistence of old freedom-of-expression doctrines, and even their expansion. Commercial speech is now considerably more protected and both liberal and conservative justices continue to write in the spirit of *New York Times v Sullivan*.

The most distressing part of the retreat from remedial integration is in the Court's insistence on a total color blindness on apportionment. Even Frankfurter saw the 13th, 14th, and 15th Amendments as requiring special judicial responsibility for voting rights for Blacks. The logic of *Carolene Products* cuts even deeper. The principle of remedial action has some public equivalency. In any event, the Voting Rights Act that triggered Bush administration Department of Justice actions and prompted the disputed apportionment, is racially neutral.

More importantly, the denial of racial categories in policy outcomes looms as more reasonable if the group involved retains adequate access to the process. Closing off both the outcomes and the means of achieving seems something like double jeopardy.



A View from the Bottom

(continued from page 3)

The freedom non-tenured scholars have is often restricted in subtle ways. Indeed, some scholars may feel that it is only when a scholar acquires tenure that she or he may (safely?) say something controversial. Hence, my writing as "Anonymous." In any event, the success of *Primary Colors* inspired me to write as "Anonymous." Although readers will not know my name, I hope they do know that my intentions are good: My goal is simply to add another view—"a view from the bottom."—about the state of the subfield.

It isn't really a sample of one. I've talked to quite a few other junior public law political scientists, although perhaps not the requisite 30. Maybe I should just call this essay a "case study."

The Court of Appeals Data Base

(continued from page 24)

base created by this grant would be a tremendous benefit and interest to a very wide spectrum of students of law and courts. The Board of Overseers took special pains to insure that the project was designed in such a way that it would serve the interests of the widest group of scholars possible. When complete, the data base may be the richest available to public law scholars anywhere in the world.

Now that the data base is nearing completion after nearly seven years of planning and data collection, the NSF program director, the Board of Overseers, and myself are anxious that the community of scholars in the Law and Courts Section of the APSA have a chance to learn about this tremendous resource and how it might enrich their research. I will be happy to send you a list of variables; please contact me at Dsonger@sc.edu

SECTION NEWS AND ANNOUNCEMENTS

The Law and Politics Book Review

Professor Herbert Jacob is resigning from the editorship of the *Law and Politics Book Review* for health reasons. Sam Krislov, Section Chair of Law and Courts has appointed a search committee consisting of

Bert Kritzer, Chair (University of Wisconsin)

Sue Davis (University of Delaware)

Kevin McGuire (University of North Carolina)

The search committee seeks applicants and nominees for this important position. The committee hopes to be able to make a recommendation to the Executive Committee of the Section no later than at the San Francisco APSA meeting.

The job requires a broad appreciation of scholarship in the field of Law & Courts/Public Law, and a commitment 6-8 hours a week. The Section has provided approximately \$500 to assist with postage, telephone, and student assistance; during Herb's tenure as editor the home institution has essentially matched this.

Requirements for the Position are as Follows:

Access to computer resources, including a listserv (by which the Review is distributed) and a website (by which published reviews are archived).

Sufficient computer skills to learn how to manage the listserv and the website.

Administrative skills to run a small operation efficiently including a proclivity to adhere to deadlines.

A modicum of editing skills to identify and correct minor grammatical and stylistic problems in submitted reviews.

A willingness to reach out to all corners of the subfield for reviewers.

Nominations and applications should be sent, preferably by August 1, to Bert Kritzer:

KRITZER@POLISCI.WISC.EDU

1050 Bascom Mall

University of Wisconsin

Madison, WI 53706

608-263-1793 or 608-238-7734

608-265-2663 (fax).

Other members of the committee can be reached as follows

Sue Davis: suedavis@strauss.udel.edu

302-831-1934 (office) or 302-831-4452 (fax)

Kevin McGuire: kmcguire.ham@mhs.unc.edu

919-962-0431 (office) or 919-942-7202 (home)

92ND APSA ANNUAL MEETING

AUGUST 29-SEPTEMBER 1, 1996

SAN FRANCISCO, CALIFORNIA

Short Courses: Wednesday, August 28

Examining New and Existing Data Bases in Public Law: The U.S. Courts of Appeals, The Supreme Court and State Supreme Courts (Short Course 10)

Contact Donald Songer, Department of Government and International Studies, University of South Carolina, Columbia, SC 29208. Location: Crown Plaza Park Fifty-Five Hotel. Checks should be made payable to Donald Songer.

Time: 9:30 am-12:00 pm Cost: \$10.00

The Political Scientist as Pre-Law Advisor (Short Course 4)

Contact Frank X.J. Homer, University of Scranton, Department of History, Scranton, PA 18510-4674. Location: University of California's Hastings College of Law and the University of San Francisco. Checks should be made payable to NAPLA.

Time: 9:30 am-4:00 pm Cost: \$45.00 Faculty /\$20.00 Students

Requisites for Survival of Constitutional Democracy (Short Course 8)

Contact Fred Riggs, Department of Political Science, University of Hawaii, 2424 Maile Way, Honolulu, HI 96822. Checks should be made payable to University of Hawaii Foundation, Constitutionalism Project.

Time: 9:30 am-12:00 pm Cost: \$45.00

Panels

Law and Courts. Chairs: Howard Gillman, University of Southern California and Major G. Coleman, SUNY, Buffalo. Panels 12-1 through 12-18.

Constitutional Law and Jurisprudence. Chair: Joseph Stewart, Jr., University of New Mexico. Panels 13-1 through 13-9.

(For a detailed listing of panels see *PS*, June 1996, page 275)

Law and Courts Section Business Meeting, Friday 5:30: Election of New Officers

The Nominating Committee, composed of Malcom M. Feeley, Chair (University of California, Berkeley), Twiley Barker (University of Illinois, Chicago), Gregory Caldiera (Ohio State University), Beth Henschen, Robert Seddig (Alleghany College), will offer the following nominations for:

Chair Elect: Joel Grossman, Johns Hopkins University

Secretary-Treasurer (three-year term): Donald Jackson, Texas Christian University

Executive Committee (two-year term):

Lee Epstein, Washington University

Christine Harrington, New York University

Reception in Honor of Herb Jacob, Friday 6:30, Union Square Room #12



EMPLOYMENT AND FUNDING OPPORTUNITIES

Director of Programs. The American Judicature Society, a national not-for-profit court reform and education organization seeks to fill a senior level position responsible for directing a wide range of educational programs, conferences, research projects, and publications that are devoted to improving the administration of justice at both the state and federal levels. The job includes oversight and coordination of a staff of professionals and nonprofessionals, development of program ideas and proposals for funding new projects, and serving as a spokesperson for the Society with the media and other organizations. Candidates must have significant expertise (and preferably teaching and research experience) in the American judicial system and be comfortable working with judges, lawyers, academics, and the public at large. Ph.D. and/or law degree preferred. Excellent written and oral communication skills are required, as is the ability to work closely with others in an extremely collegial environment. Salary is commensurate with experience.

The position will remain open until filled; it is available as of July 1, 1996. Submit letter of application, vita, salary history, writing sample, and a list of professional references to
Personnel Coordinator
American Judicature Society
180 N. Michigan Avenue, Suite 600
Chicago, IL 60601

The National Endowment for the Humanities announces the October 1, 1996, deadline for the **Summer Stipends** program. NEH Summer Stipends support two months of full-time work on projects that will contribute to scholarly knowledge or to the general public's understanding of the humanities. Projects may address broad topics or consist of research and study in a single field.

In most cases, faculty members of colleges and universities in the United States must be nominated by their institutions for the Summer Stipends competition, and each of these institutions may nominate two applicants. Prospective applicants who will require nomination should acquaint themselves with their institution's nomination procedures well before the October 1 deadline. Individuals employed in nonteaching capacities in colleges and universities and individuals not affiliated with colleges and universities do not require nomination and may apply directly to the program.

APPLICATION DEADLINE: October 1, 1996

TENURE: Tenure must cover two full and uninterrupted months and will normally be held between May 1, 1997, and September 30, 1997.

STIPEND: \$4,000

INQUIRIES:

Summer Stipends Program
Room 318
National Endowment for the Humanities
1100 Pennsylvania Avenue, NW
Washington, DC 20506
202/606-8551
stipends@neh.fed.us

The Law and Social Science Program of the National Science Foundation wishes to remind interested social, behavioral, and economic scientists of its regular and special grant competitions.

Types of Proposals

In addition to standard research proposals, the Law and Social Science program regular and Global Perspectives on Sociolegal Studies competitions welcome planning grant proposals, requests for conferences and other activities to lay the foundation for research, and proposals for improving doctoral dissertation research.

Regular Competition

The regular grant competition supports social scientific studies of law and law-like systems of rules. These can include, but are not limited to, research designed to enhance the scientific understanding of the impact of law; human behavior and interactions as these relate to law; the dynamics of legal decision making; and the nature, sources, and consequences of variations and changes in legal institutions. The primary consideration is that the research shows promise of advancing a scientific understanding of law and legal process. Within this framework, the Program has an "open window" for diverse theoretical perspectives, methods, and contexts for study. For example, research on social control, crime causation, violence, victimization, legal, social and political change, patterns of discretion, procedural justice, compliance and deterrence, and regulatory enforcement are among the many areas that have recently received program support.

The target date for the submission of proposals in the regular competition is August 15 for proposals to be funded in or after January, 1997.

Global Perspectives Competition

The Program is also continuing its special competition for research dealing with global perspectives on sociolegal studies. The aim of this initiative is to support research on law and law-related processes and behaviors in light of the growing interdependence and interconnectedness of the world. The competition seeks to encourage examination of both global dimensions of sociolegal phenomena (e.g., disputing, law and social change, legal pluralism, legal system development, social control, crime causation) and sociolegal dimensions of global phenomena (e.g., democratization, economic and commercial transactions, immigration and population shifts, social and ethnic conflict, regulation of the environment, public and private governance). Proposals are welcome that advance fundamental knowledge about legal interactions, processes, relations, and diffusions that extend beyond any single nation as well as about how local and national legal institutions, systems, and cultures affect or are affected by transnational or international phenomena. Thus, proposals may locate the research within a single nation or between or across legal systems or regimes as long as they illuminate or are informed by global perspectives.

Proposals with a global perspectives theme are welcome for the August 15 competition.

Special Competitions

In addition to the two Law and Social Science Program competitions, researchers should be aware of special competitions that cross the boundaries of NSF's programs. Within the Division of Social, Behavioral and Economic Research (SBER), the Law and Social Science Program's parent division, there may be special funding competitions for proposals addressing the concerns of the (1) the Human Capital Initiative, (2) Democratization, and (3) Human Dimensions of Global Change research opportunities, and for (4) Social Science Instrumentation. For further information, contact the Law and Social Science program.

Application Procedures

There may be specially designated application point and review procedures for the instrumentation competition. For all the other competitions discussed here, sociolegal proposals may be submitted to the Law and Social Science Program. Proposals should be prepared in strict accordance with the guidelines in NSF's Grant Proposal Guide (NSF 95-27). Proposals that do not conform to these guidelines may not be considered.

The review process for the Law and Social Science Program requires approximately six months. It includes appraisal of proposals by ad hoc reviewers selected for their expertise from throughout the social scientific community and by an advisory panel that meets two to three months after the target/closing date for the competition.

For further information, e-mail, call, or write : C. Neal Tate, Program Officer, Law and Social Science Program - Room 995, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. e-mail: CTATE@NSF.GOV; Phone: (703) 306-1762; Fax: (703) 306-0485.

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Subscriptions to **Law and Courts** are free to members of the APSA's Law and Courts Section. Please contact the APSA to join the Section.

The deadline for submissions for the next issue of **Law and Courts**: November 1, 1996.

Law and Courts

Sue Davis, Editor
Department of Political Science
University of Delaware
Newark, DE 19716

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