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## PANEL 3: Creating Models for Progressive Lawyering in the 21st Century

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## CREATING MODELS FOR PROGRESSIVE LAWYERING IN THE 21ST CENTURY

The panel on *Creating Models for Progressive Lawyering in the 21st Century* consists of three outstanding panelists. The first panelist is Peter Nickles, who is a graduate of Harvard Law School and is now a partner at Covington and Burling. He is one of the firm's leading rainmakers and he also has a long, long career in public service and public interest litigation, particularly in the area of prisoners' rights in the District of Columbia.

The second panelist is Lucie White, who also graduated from this law school and now is a professor here. Lucie White is an activist law professor involved in legal and pro bono work.

The third panelist is Luke Cole. Luke Cole also graduated from this law school, where he was an activist student, and has distinguished himself in developing and doing some of the best work in the country in environmental law. He is now general counsel of the Center on Race, Poverty and the Environment in California.

*Mr. Nickles*

Thank you. I do not think I need a microphone but if any of you have a problem hearing me, put your hands up. I graduated from this school in 1963. Except for some time off, including the investigation of the Kent State shootings,<sup>1</sup> I have been litigating since that time, including litigating a lot of what I call public interest cases. I developed a model and, since the theme of this discussion is models for progressive lawyering, I want to let you

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<sup>1</sup> More than 2,000 students at Kent State University gathered to protest against the Vietnam War on May 4, 1970. During the attempt to quell the demonstration, the Ohio National Guardsmen killed four students and wounded nine others. See Mary Mogan Edwards, *Survivors Return to Kent State*, THE COLUMBUS DISPATCH, May 5, 2000, at 1C.

in on the secrets that have guided my work for now some thirty-seven, thirty-eight years.

The model contains three principal parts. I will discuss them in connection with four cases I have worked on, which I think are quite important. The three principal parts of the model are: 1) identifying the issue and figuring out how to identify it; 2) determining the strategy to attack it in court, in the media, in the executive branch, and in Congress; and 3) playing the end game.

The end game is important. One must determine whether one is looking for a consent decree, for damages, or to embarrass the executive branch so that it will do something on its own. Are you looking to push the courts far enough so that they will look to Congress to remedy gaps in the law? You need to know that from the beginning.

Finally, one must determine why it is important that the private bar participate in this process and what strengths the private firms bring to it.

Let me discuss cases involving prisoners' rights. I have been involved in such cases since 1978. A couple of them were brought to my attention by judges who see problems in the prisons, call law firms and ask the firms to take those cases on. The most recent case I have handled is a class action on behalf of women prisoners.<sup>2</sup> The Women's Law Center<sup>3</sup> and the newspapers brought this case to my attention. I had been working on prisoners' rights cases for some fifteen to twenty years and I had never focused on the fact that, with the mandatory sentencing under the drug sentencing

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<sup>2</sup> *Women Prisoners of the Dist. of Columbia Dep't of Corr. v. Dist. of Columbia*, 968 F. Supp. 744 (D.D.C. 1997).

<sup>3</sup> The National Women's Law Center, located in Washington, D.C., litigates and advocates for women's legal rights in the areas of employment, child and adult dependent care, reproductive freedom, child support enforcement, educational opportunity and social security. The National Women's Law Center, at <http://www.nwlc.org>. (last visited Feb. 14, 2001).

laws,<sup>4</sup> more and more women were going to prison for longer periods of time in a non-violent context.

For example, in the District of Columbia, which is where I practice, the number of women prisoners has risen from forty or fifty to seven hundred and eight. I asked where these women were being kept and what kind of planning had been made for the influx of these prisoners. These prisoners were serving terms of five to eight years, almost all of them for non-violent offenses, almost all of them abused, and almost all of them with some kind of family connection, be it children, mothers, brothers, or sisters, in the D.C. community.

With the help of the Women's Law Center, I identified the issues raised by these cases. I want to point out that private firms can do this important institutional work only if they have an allegiance to what I call an outside public interest firm. The Women's Law Center has a particular division devoted to women prisoners and was working on the day-to-day problems of women prisoners. Thus, the Center and I brought a class action on behalf of all these women. The result was a very broad consent decree, which has brought substantial relief to that class of women.

Another case I have worked on since 1974 is the so-called *Dixon* case.<sup>5</sup> It deals with the movement of individuals out of a

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<sup>4</sup> See 21 U.S.C. § 841 (2000) (setting forth mandatory sentencing guidelines for drug related offenses). The statute imposes a term of imprisonment of not less than ten years and not more than life for any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses a controlled or counterfeited substance. If death or serious bodily injury results from the use of such substances, it imposes a greater sentence of not less than twenty years and not more than life. *Id.* But see The Mandatory Minimum Sentencing Reform Act of 1994, 18 U.S.C. § 3553(f) (2000), and the United States Sentencing Guidelines Manual § 5C1.2 (2000), which require district courts to ignore the statutory minimum sentences for specified drug trafficking crimes when (1) the defendant has no more than one criminal history point; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense; (3) death or serious injury did not result; (4) the defendant was not an organizer, leader, manager, or supervisor of others who participated in the offense; and (5) the defendant provided the government with "all information and evidence" related to the offense.

<sup>5</sup> *Dixon v. Barry*, 967 F. Supp. 535 (D.D.C. 1997); *Dixon v. Kelly*, No. 74-285, 1993 U.S. Dist. LEXIS 6511, at \*1 (D.D.C. May 14, 1993); *Dixon v. Wein-*

mental institution into the community. It seems very fundamental, very easy. I became involved in that case when Judge Pat Long, who was the Chief Judge of the D.C. Circuit and with the Law Reform Unit of Legal Services, approached me. She talked to me about the fact that St. Elizabeth's Hospital, which was a federally run institution, had about twelve thousand individuals, eighty percent of whom could have been treated in the community, and could have been functioning individuals in the community. Congress found, however, that the benefits of a transition from an institution to the community have not been fully realized.<sup>6</sup>

With the help of the Law Reform Unit, I brought a lawsuit in 1974 and obtained a consent decree. Over the years, that consent decree was modified a number of times. We had a special master and now we have a receiver who, two years ago, took complete control over the City of Washington's Commission on Mental Health.<sup>7</sup> We have continued to work with a group called The Basalon Center on that issue.

Once again, this is not an issue that is solved overnight. It is an issue that will continue to perplex us for a long time. In order to deal with the issue, we identified it, established an allegiance with an ongoing public interest group that had ties to the community, and pursued it through litigation to a full trial. Many of the prison cases that I have worked on and that have gone to trial effectively ended by a consent decree in the middle of the case.

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berger, 405 F. Supp. 974 (D.D.C. 1975). A consent decree was obtained in *Dixon v. Weinberger* and was later modified in the two subsequent cases cited.

<sup>6</sup> See 42 U.S.C. § 9401(2) (2000) (providing that the process of transferring mentally ill individuals from institutionalized settings to their home has been accompanied by mental health and support services they need in community-based settings).

<sup>7</sup> See D.C. CODE ANN. § 21-541(a) (1998). The D.C. Code provides:

Proceedings for the judicial hospitalization of a person in the District of Columbia may be commenced by the filing of a petition with the Commission on Mental Health by his spouse, parent, or legal guardian, by a physician or a qualified psychologist, by a duly accredited officer or agent of the Department of Human Services, or by an officer authorized to make arrests in the District of Columbia.

*Id.*

A third case I have worked on was a case on behalf of the homeless. Let me explain how I became involved in that case. I do not know whether any of you remember the name Mitch Snyder. President Reagan promised him that he would build a model shelter in the District of Columbia if he got elected. He got elected and there was no model shelter.

We sued on the theory of breach of contract.<sup>8</sup> I remember going into court before Judge Richey, and the courtroom was absolutely packed. There were people around the halls. Mary MacGrawery, a prominent press figure, was sitting with the press over in the press box and the entire community supported our effort. I was making an argument and it was not going very well because the theory of breach of contract related to a campaign promise. We did have more, but it was not going very well, and suddenly Mitch Snyder came up the center aisle and the marshals grabbed him. The judge asked them to let Mr. Snyder speak. As a result of his statement, we lost. Of course, as a result of my statement, we lost.<sup>9</sup>

We appealed to the D.C. Circuit, and in a two-to-one vote, the D.C. Circuit found that we had standing, and that the Reagan Administration should do something about the issue before the court was forced to decide it.<sup>10</sup> One of the theories and one of the great strengths of that litigation was that Mitch Snyder had the entire community mobilized and the case was heard between Thanksgiving and Christmas, when the weather gets cold in the District of Columbia.

The political pressure that was brought to bear on the Administration through the lawsuit, through the press, and through hearings in Congress, resulted in the building of a model shelter.<sup>11</sup>

The fourth case I am involved in is ongoing, and is an effort to bring to the citizens of the District of Columbia the ability to vote

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<sup>8</sup> Robbins v. Reagan, 616 F. Supp. 1259 (D.D.C. 1985).

<sup>9</sup> *Id.* at 1279-80.

<sup>10</sup> Robbins v. Reagan, 780 F.2d 37, 53 (D.C. Cir. 1985).

<sup>11</sup> See Alexander Stile, *Seeking Shelter in the Law*, NAT'L L.J., Feb. 10, 1986, at 1 (discussing how President Reagan promised to refurbish a local shelter and turn it into a "model shelter" if Mr. Snyder ended his protracted hunger strike during the 1984 presidential election campaign).

for Congressmen in the Senate.<sup>12</sup> Our theory in this case is almost as difficult as our theory in the Snyder case. We brought the case together with the Corporation Counsel, an arm of the District of Columbia. After the complaint was filed, Congress passed legislation that precluded the District of Columbia from providing any funds to the Corporation Counsel's office to pursue this litigation.<sup>13</sup> That illustrates how important it is to have a private law firm involved, because the Corporation Counsel has now been precluded from involving itself in that litigation.

An individual in our firm spends all her time trying to identify issues. What is most important from the standpoint of someone who is interested in pro bono work and who has seen, over the years, a diminution of interest by young people in doing pro bono work, is lawyers' involvement in pro bono cases. At our office we have young associates who want to do some pro bono work, and they bring such issues to the attention of firm management.

Let me just talk for a moment about the strengths that private law firms bring to the identification of issues, the pursuit of and strategizing on those issues, and the end game. First, private law firms bring respectability to the pursuit of the issue. I think the fact that Covington & Burling sued the Reagan Administration to enforce a contract made people hesitate about laughing at the lawsuit. It made the lawsuit credible. Second, all the lawsuits, except that about enfranchisement, have been going on for decades. Class actions that deal with insoluble problems require time, money, and continuity. To some extent I have been involved in such actions long enough to see them through. These lawsuits will go on dealing with the homeless, prisoners, enfranchising citizens, and healthcare. They require time, effort, and continuity.

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<sup>12</sup> See *Adams v. Clinton*, 26 F. Supp. 2d 156 (D.D.C. 1998), *motion granted in part*, 40 F. Supp. 2d 1 (D.D.C. 1999), *summary judgment denied, claim dismissed, remanded* by 90 F. Supp. 2d 35 (D.D.C. 2000), *claim dismissed, summary judgment denied*, 90 F. Supp. 2d 27 (D.D.C. 2000), *aff'd*, 121 S. Ct. 336 (2000), *reh'g denied*, 121 S. Ct. 646 (2000).

<sup>13</sup> See The D.C. Appropriations Act, H.R. 4380, 105th Cong. (1998).

Let me say one thing in closing. One thing that troubles me a great deal is that associate salaries are going through the roof<sup>14</sup> and I am sure all of you have read about the recent efforts to increase them even further, but this, unfortunately, diminishes the number of hours that young people spend on pro bono work. One of the reasons for that is that a firm can only earn money either by the rates it charges or by the number of hours that are worked by its lawyers.<sup>15</sup> What I fear is that in this frantic atmosphere where law firms are raising the salaries for new associates to \$125,000 - \$145,000, where first-year graduates earn more than judges, there will be tremendous pressure on these young lawyers to work long hours: nineteen hundred fifty hours to two thousand hours per year. When that happens, it is very difficult for a young lawyer to do the kind of work that is required in these important pro bono cases.

In conclusion, let me say that I used to interview here years ago. It was really fascinating to me when I interviewed here to see how many of the graduating students asked about the firm's commitment to pro bono work. When our people go out today and conduct these interviews, they hear fewer and fewer questions from the law students about the commitment of a firm to pro bono work.

I would hope, among this group, and perhaps hopefully among a lot of people at Harvard Law School, that this should be a central element in your decision to go with a private firm. Only if you express the interest will a firm continue to make that kind of commitment. Thank you.

*Professor White*

In 1995, Brad Sears, the then editor-in-chief of the CR-CL Law Review, came to me for help in designing a CR-CL Symposium on "Economic Justice in America's Cities: Visions and Revisions of a Movement." Rather than follow the typical talking heads format, the editors decided to take a different approach. They worked with community groups here in Boston to designate a group of "Sympo-

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<sup>14</sup> Anna Snider, *City's Big Firms Pay Similarly and Well: 7th-Year Associates Can Earn Over \$200,000*, N.Y.L.J., Nov. 2, 1998, at 1.

<sup>15</sup> John A. Beach, *The Rise and Fall of the Billable Hour*, 59 ALB. L. REV. 941, 944 (1996).



sium Fellows,"<sup>16</sup> who participated in a series of roundtable discussions with law students and national-level policy works about various justice issues that inner city residents were facing. Their hope was that this process could generate some "bottom up" proposals for policy reforms that would improve the lot of the urban poor.

At the end of the year, the editors concluded that their idea had failed. The Roundtables had failed to generate a single policy proposal for Boston that could be featured in a CR-CL article or translated into a legislative proposal. They had nothing but the rambling transcripts of the Roundtable sessions to fill up the pages of the symposium volume. At this point Brad came back to me and asked if I could write an introduction to the Symposium issue that could salvage something from this failure.

My memory of that introduction is that it was one of the darkest things I have ever written. And that is saying something, because most of my work is pretty gloomy. Yet when I re-read it to prepare for this event, rather than just seeming dark, it also seemed to grope toward an idea of what progressive lawyers have to learn how to do, in order to address the great justice challenge — and opportunity of the new millennium — and that is facing up to the full scope of the race violence that got inflicted on this

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<sup>16</sup> The findings and writings of the Symposium Fellows chosen for this project were captured in the Summer 1995 edition of the Harvard Civil Rights-Civil Liberties Law Review. See Larry Cata Backer, *Welfare Reform at the Limit: The Futility of "Ending Welfare as We Know It,"* 30 HARV. C.R.-C.L. L. REV. 339 (1995); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change,* 30 HARV. C.R.-C.L. L. REV. 407 (1995); Brad Sears, *Rounding Out the Table: Opening an Impoverished Poverty Discourse to Community Voices,* 30 HARV. C.R.-C.L. L. REV. 299 (1995); Robert E. Suggs, *Bringing Small Business Development to Urban Neighborhoods,* 30 HARV. C.R.-C.L. L. REV. 487 (1995); Philip D. Tegeler et al., *Transforming Section 8: Using Federal Housing Subsidies to Promote Individual Housing Choice and Desegregation,* 30 HARV. C.R.-C.L. L. REV. 451 (1995). Lucie White was later selected by the law review editors to write an introduction to the Symposium. See Lucie E. White, *Thirty Years in America's Cities: Lots of Movement, Not Much Justice,* 30 HARV. C.R.-C.L. L. REV. 293 (1995).

planet over the last millennium and thus moving our lawyering practices closer to our strongest theoretical visions of democracy.

I want to begin by reading a few excerpts from that introduction:

“Thirty-five years ago, Harvard Law Students founded the Harvard Civil Rights-Civil Liberties Law Review. The summer before they did that, nineteen-year-old Josephine Abraham packed up her three-month-old baby and boarded a Greyhound bus in Birmingham, Alabama. Three days and two nights later, unwashed and exhausted, they disembarked from the bus in Los Angeles.<sup>17</sup>

“It was July of 1965. Just about a month later, in mid-August, violence broke out a few blocks from Ms. Abraham's new home. Years later, she recalled the trauma of trying to comfort her baby as her husband helped neighbors quell approaching flames. When the violence had subsided, thirty-four people were dead and hundreds injured. Three decades later, the city would witness an even higher death toll from a second urban insurrection.

“The Watts riot<sup>18</sup> — that was what she called it — led Josephine Abraham to rethink the vision of justice that had lured her to take a bus from Birmingham to Los Angeles. Today, she explains both of L.A.'s riots as eruptions of the pent-up rage over slavery, and over too many false promises that one more movement — movement north or west, movement into the city, movement to scattered site Section 8 units in the suburbs, movement back home — would finally lead to justice.

“After the first riot ended, Josephine scrubbed the soot off of the pastel walls of her newly rented bungalow. She made friends with her new neighbors, most of whom turned out to be fellow refugees from the eroding caste system of the deep South. She

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<sup>17</sup> White, *supra* note 16, at 293-96.

<sup>18</sup> See *All Things Considered: Watts Residents Discuss Riots 27 Years Ago* (Nat'l Pub. Radio broadcast June 1, 1992) (explaining that the riots began on a hot and sticky summer night following the arrest of a suspected drunk black driver); *Revolution: The Civil Rights Movement and the Vietnam War Sparked an Unprecedented Upheaval in Politics, Culture and Mores*, TIME, Mar. 9, 1998, at 140 (noting that thirty-four lives were lost and millions of dollars in property damage resulted).

nursed her first baby, gave birth to two more, and enrolled all three in the new Head Start program.<sup>19</sup>

When her husband, fed up with urban 'opportunity,' left her to take to the road, she landed a steady, second shift job, filling orders in a warehouse, eighty miles south of Watts, in Orange County.

"Getting this job was a big moment for Josephine Abraham. The only work that women in her family had been allowed to do in Alabama was cleaning white folks' houses, doing their laundry, raising their kids. Josephine had helped her mother care for white children since she was ten. She had learned to turn her anger inward, answering her employers' insults, and her mother's weariness, with silence. One of her visions of Los Angeles was that it would be a place where she could find work that would not force her to feign love for white people's children.

"Josephine's job did not require her to scrub white folks' toilets or change their diapers. But it was hard, dirty, boring work, a two-hour drive from her home on the San Diego Freeway. For almost ten years, she hardly saw her children, who were cared for after school by a neighbor, a distant cousin from back home. Then, abruptly, in 1980, her job disappeared.

"Moving to the city enabled Josephine Abraham to escape the overt, everyday violence that had shaped her people's life in Alabama. But L.A. was hardly an escape from race hatred, or from color-coded social institutions — work sites, welfare offices, schools. Instead, as the sixties advanced into the seventies and eighties, it became more and more apparent to her that life in Watts meant being locked inside an entirely race segregated world. Her neighborhood in Watts was never all black; indeed, by the early 1980s, many of her neighbors were recent refugees from the Central American wars. But in all of her years in the city, Josephine Abraham never recalls having any neighbors who were white.

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<sup>19</sup> Head Start is an early childhood development program. See U.S. Department of Health and Human Services, HHS Fact Sheet, *Head Start: Promoting Early Childhood Development*, available at <http://www.hhs.gov/news/press/2001pres/01fsheadstart.html> (last visited Mar. 1, 2001). It was started in 1965 and provides comprehensive developmental services to low-income, preschool children ages three to five. *Id.* Head Start provides diverse services designed to meet each child's educational, health and social service needs. *Id.*

“She was never sure exactly what was shoring up such thick walls of race segregation in a trendy, open city like L.A. Perhaps it was just that the city was so vast and confusing; apartments were so expensive; landlords were so cold; life was so hard if you did not stay among family; and white people could be so hateful if you dared to move too close to them. The color bar had seemed so much clearer in Alabama, where it was a question of removing the signs over the water fountains and registering people to vote. In L.A., the color bar was so much more elusive. Unlike Alabama's, it did not hold everyone down. Indeed, just about every family that Josephine had met in Watts from Alabama had at least one child who had graduated from school, found a good job outside of the city, and stayed away. One of her own nieces is a lawyer with the United Nations in Geneva; she comes back to visit the old neighborhood every couple of years. And especially since the early 1980s, countless other kids have moved away for a while, drifting back into the neighborhood when they lost their jobs.

“Some of the women in Josephine's neighborhood are newcomers to the city, arriving after harrowing journeys from faraway places where political violence and economic hardship pose an urgent threat to life. These women are not welcomed in Los Angeles; their lives go underground.”

I want to turn now to a short excerpt from an essay I published in the Winter 1998 issue of the Review, *On the Guarding of Borders*, which features another woman's remembrances of such a journey:

I remember the person that helped me escape. “You don't stop here. You see all these cars coming . . . Let them stop, but you don't stop.” And I didn't even know why he was saying that. I didn't even know the freeway. I didn't even know what the freeway was. So, they told me, you don't stop here. You make them stop, you run and run. You see a car coming, don't stop, you run and run and run. I remember I was so tired. I was so tired. Tired. I didn't even know where I was going. What I was going through. My sister told my cousin to let me have pants. But they forgot to tell me. So I was wearing a skirt, I was wearing shoes like this. And I was running and running. It was the middle of the night, one o'clock in the morning. I was

scared, so scared. . . . In L.A., they used to have helicopters, horses, and motorcycles. . . . The first night, the first week when I was here, I remember, in my sister's house. I was eating and then . . . the airplanes . . . I used to go under the table. I used to grab my sister. I used to be so scared.<sup>20</sup>

Many of the women in Josephine's neighborhood no longer have dreams about movement. Instead, they seem caught up in despair.

I want to move now to the question of new models of progressive lawyering for the new millennium. Specifically, I want to talk about convergent practices of progressive lawyering that are emerging in many places — all over the world — in response to the interplay between legacies and continuing institutional practices of colonialism, slavery, and Jim Crow/apartheid,<sup>21</sup> on the one hand, and the accelerating polarization of wealth and power in the new, global e-economy, on the other.

Before I tell you a story to illustrate this emergent practice, I want to throw out a few conceptual sound bites, for those of you whose imaginations are best primed through words.

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<sup>20</sup> Lucie White, *On the Guarding of Borders*, 33 HARV. C.R.-C.L. L. REV. 183, 193-94 (1998).

<sup>21</sup> See RALPH E. LUKER, HISTORICAL DICTIONARY OF THE CIVIL RIGHTS MOVEMENT 133-34 (1997). Luker defines "Jim Crow" as:

Jim Crow. A term which refers to a wide variety of legal and extralegal practices of racial discrimination in the United States in the nineteenth and first half of the twentieth centuries. The term had its origin in a white minstrel show popular across the North in the 1830s. In it, Thomas Dartmouth "Daddy" Rice, appearing in blackface, danced and sang a number called "Jump Jim Crow." Later, the white South reacted to emancipation and the end of Reconstruction by enacting laws separating the races, restricting the franchise of African Americans and confirming social mores that discriminated against them. These laws and mores were called "Jim Crow." In law, they banned intermarriage, disfranchised African Americans by a variety of provisions and mandated separate housing, public accommodations, schools, and transportation.

First of all, this emergent lawyering is what Austin Sarat calls cause lawyering.<sup>22</sup> It takes on all kinds of projects, but always with the overriding goal of attacking the link between race and poverty — between racialized institutional practices and the increasingly bipolar distribution of income, wealth, status, and power. This emergent lawyer's tactics may be all over the map — she may be involved in litigation, or in transactional work that seeks to develop enterprises or build community institutions. She may be involved in drafting legislation or lobbying for its enactment. She may be involved with all kinds of clients, groups, organizations, and social movements. But no matter where, how, or for whom she works, her overriding cause is to represent the most disempowered in today's world: to expose, historicize, denaturalize, and challenge the linkage between racial formations and the increasing north-south polarization of wealth and power. By challenging this linkage repeatedly, in big and small ways, she seeks to help disrupt the complacent coupling of race subordination and wealth division, the way that a swarm of gnats might disturb the peace of an sleeping lion. The Internet helps.

Furthermore, no matter what this emergent lawyer's specific business is, she always seeks to activate political action, and thus build the capacity for more powerful political intervention. It is like improving your level of fitness by having sex instead of working out on a treadmill. What are the dimensions of political capacity that the progressive lawyer wants to draw forth and thus build up, through every move that she makes? There are six on my list: (1) every person's capacities for voice, for relating and caring for others, for maintaining well-being, for moral imagination; (2) the people's capacities for forming and working effectively in action groups; (3) for forming effective coalitions; (4) for staging cultural performances and kicking off social movement; (5) for critical

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<sup>22</sup> See John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 *FORDHAM L. REV.* 1927, 1928 (1999) (explaining that cause lawyering “encompasses various law-related activities, from rights assertion to legal counseling, that relies on law-related means to achieve social justice for individuals and subordinated or disadvantaged groups”).

deliberation and astute strategic planning; and (6) for democratically constituted leadership.

So much for the sound bites. Now for the pictures. The scene is Harvard Law School, August 1996. Bill Clinton has just signed his new welfare reform bill into law.<sup>23</sup> Welfare as we knew it is over for good. A project emerges through the collaboration of the Radcliffe Public Policy Center's Low Income Working Circle,<sup>24</sup> the Women's Educational and Industrial Union,<sup>25</sup> the City of Cambridge, and some Harvard students and teachers. We call it "Across the Divide."<sup>26</sup>

Our approach here in Boston is informed by projects in other cities, in which law schools and universities have sought to work in partnership with low income communities. For instance, at the University of Michigan Law School's urban law project,<sup>27</sup> students

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<sup>23</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

<sup>24</sup> The Radcliffe Public Policy Center ("RPPC") creates projects to enhance the work environment by examining economic, social, and political issues, at <http://www.radcliffe.edu/pubpol/projects/index.html> (last visited Feb. 14, 2001).

<sup>25</sup> The Women's Education and Industrial Union ("WEIU") is a membership organization designed for "expanding economic, social and educational opportunities for all women." WEIU's programs and services also "advocate for and support women's efforts to sustain themselves and their families, and enhance their communities." The Women's Educational and Industrial Union, at <http://www.bostonwomen.com/orgs/weiu/l.html> (last visited Feb. 14, 2001).

<sup>26</sup> Across-the-Divide Project is a two-year project created out of RPPC's Low-Income Working Circle to act as a liaison between public policy makers and the targeted people. See Pamela Wescott, *Across the Divide*, at <http://www.radcliffe.edu/pubpol/publications/acrossdiv.html> (last visited Mar. 1, 2001).

<sup>27</sup> The University of Michigan Law School, Law School Course Descriptions, *Legal Assistance for Urban Communities*, at <http://www.law.umich.edu/cfusion/template/course.dbm?CourseID=955A11> (last visited Feb. 22, 2001). The students in the Urban Communities Clinic at the University of Michigan's Law School provide legal and technical assistance to Detroit community-based organizations that are involved in affordable housing development. The clinic serves approximately twenty-five non-profit development clients in areas such as: (1) "basic corporate structuring (i.e., preparing articles, by-laws and board education/development);" (2) "non-profit tax applications for federal tax exemption and counseling on IRC section 501(c)(3) status;" (3) "real estate transactions; partnerships between non-profit and for-profit entities;" and (4) "affordable housing/development identification of, and closing on financing; and other aspects of

and faculty meet with a consortium of Detroit community development organizations each fall to identify priorities for the year's work. At both Yale and Golden Gate Law Schools, students convene small conversations with community members to shape common endeavors. At Golden Gate, such meetings enabled Oakland residents to move beyond a dead-end litigation strategy in challenging the construction of a waste-intensive electrical power plant in their neighborhood.<sup>28</sup> At Yale, this approach produced an interdisciplinary student-community working group that redesigned both the physical space and the curriculum of a distressed public school in the shadow of the Law School's campus. Law students working with the University of Minnesota's Institute on Race and Poverty<sup>29</sup> regularly collaborate with low income urban residents to do field research on racial patterns in the dispersal of viable small businesses, decent housing, and accessible social services. And Northeastern Law School's CDC-funded collaboration with Dorchester neighborhood groups seeks innovative ways for area residents, medical and social service professionals, and lawyers to work together to *prevent* domestic violence.<sup>30</sup>

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the development process." The students are required to attend periodic community or client meetings in Detroit, and to meet each week with their project team and supervisor for a group discussion of their clients and projects. *Id.*

<sup>28</sup> Golden Gate University School of Law, Environmental Law and Justice Clinic, at <http://www.ggu.edu/schools/law/clinics/eljc.html> (last visited Feb. 22, 2001). Students in the Environmental Law and Justice Clinic "represented a grass roots low-income San Francisco organization in successfully opposing a proposed new fossil fuel power plant in the Hunters Point neighborhood and the shutdown of another plant." *Id.*

<sup>29</sup> Institute on Race and Poverty, at <http://www.umn.edu/irp> (last visited Feb. 22, 2001). The Institute on Race and Poverty is a research center created to focus attention to the unique dynamic created by the intersection of racial segregation and poverty. The Institute's goals are to create scholarship, commentary, and dialogue to promote a better understanding of the issues confronting communities facing these combined challenges. Through the organization of forums and conferences and the initiation of research projects and community outreach efforts, the institute works collectively with various organizations and community groups to devise solutions to these problems. *Id.*

<sup>30</sup> Northeastern University School of Law, *Clinics, Institutes, Research Centers*, at <http://www.slw.neu.edu/clinics> (last visited Feb. 22, 2001).



Here in Boston-Cambridge, our project began with the goal of finding a good point of entry for responding to the federal welfare reform law in ways that would enhance all those kinds of political capacity that I mentioned, while zeroing in on how racialized subordination helps to further wealth and power polarization. Rather than trying to figure out the best focus ourselves, we began with a series of forums in which we posed the question to a group of Boston-based grassroots welfare activists.

Out of the discussion at these forums, we decided not to focus on the issues that received so much press in the welfare reform debates — workfare, or childcare, or welfare time lines, or the difficulty of former welfare recipients to make ends meet in low wage jobs. Rather, we decided to focus on what the press had reported as a minor provision of the 1996 federal law — the outright, no holds barred termination of the SSI old age and disability benefits of fully documented immigrants who were not United States citizens.<sup>31</sup> This provision would have cut about 40,000 Massachusetts residents — 10,000 here in Cambridge — off of their only source of cash income.<sup>32</sup> These ten thousand people

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Northeastern Law School's Domestic Violence Clinic is part of the Domestic Violence Institute. The Clinic focuses its efforts on the Dorchester community, and upper-level students counsel clients and advocate in the courtroom on issues including violence prevention, restraining orders, enforcement and criminal intervention. First year students who are interested in joining the Clinic are encouraged to participate in the Domestic Violence Institute's annual fall conference as an introduction to legal advocacy on behalf of battered women in Massachusetts. *Id.*

<sup>31</sup> See Michael Grunwald, *Cuts Imperil 30,000 Legal Immigrants; State Says \$80m Needed to Restore Aid Eliminated by US Welfare Law*, BOSTON GLOBE, Nov. 21, 1996, at A1. Designed to save \$23.7 billion nationally over six years, the immigrant provisions in the welfare reform law deny food stamps and disability benefits to non-citizens unless they have honorable military discharges, refugee or asylum status (but for less than five years), or ten years of United States work experience. *Id.* The immigrant provisions also bar legal immigrants from welfare, Medicaid and other programs during their first five years in the United States. *Id.*

<sup>32</sup> Kristina Brenneman, *Faces are Changing at Local Food Pantries: Number of Elderly, Immigrants Growing*, PATRIOT LEDGER (Quincy, Mass.), Mar. 11, 1998, at 10; Richard Chacon, *Panel to Study Welfare Changes' Effects on City*, BOSTON GLOBE, Nov. 14, 1996, at B4.

were all very old or very sick.<sup>33</sup> Almost all of them were people of color — many from places like Haiti and El Salvador, with horrendous histories of colonial oppression. Many did not speak English. Some had worked for wages in this country for years. Others — particularly the elderly women — had spent their working lives caring for grandchildren, either here or in their home countries, so that their sons and daughters could work for wages too low to enable them to buy formal child care. Some of these sons and daughters come to this law school at night, as we are leaving, to polish the stairs and clean the bathrooms, and are gone before morning.

The group decided to focus-in on the SSI terminations,<sup>34</sup> rather than the dismantling of the AFDC entitlement,<sup>35</sup> because this was the feature of welfare reform that most directly played upon racialized attitudes and practices to increase North-South distributional inequality. Cutting immigrants off of SSI would exacerbate the bipolar income distribution in Massachusetts, by rendering this large group of racially-marked and politically excluded people entirely destitute. This measure would shift the social reproduction of immigrant workers onto the welfare budgets of poor countries like Haiti, and, by removing the “exit” strategy that disability benefits provide would make their families even more vulnerable to workplace exploitation. Furthermore, this feature of the welfare reform law, in our view, was the most obnoxious of a long list of horrible provisions of the new law, in human terms. Without much dissent, the groups of welfare advocates that we brought together came to a consensus that this was the feature of the law that the Across the Divide project should challenge. The hope, which has been realized, is that a unified campaign against the SSI cuts could lay some groundwork among

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<sup>33</sup> Chacon, *supra* note 32, at B4; George B. Griffin, *Bill Would Restore SSI to Legal Immigrants*, TELEGRAM & GAZETTE (Worcester, Mass.), Aug. 5, 1997, at A1; Editorial, *A Raid on Legal Immigrants*, BOSTON GLOBE, Mar. 30, 1997, at E6.

<sup>34</sup> 8 U.S.C. §§ 1601, 1611, 1612, 1622 (2000).

<sup>35</sup> 42 U.S.C. §§ 601-17 (2000) (creating the Temporary Assistance for Needy Families system of block grants to states for assistance to needy families to replace the previous Aid for Families with Dependent Children system).

a range of specific issue-oriented low income groups for the longer-term project of challenging the features of the new welfare reform law that increase the impoverishment of native-born low income adults, especially women, with children.

After deciding on this target, the forums helped us identify several community sites from which to launch our work. One site was a food pantry administered by the City of Cambridge. With a small grant from the United States Department of Agriculture, the City had already convened a weekly support group for pantry users. Thus, in October, a group of undergraduate and law students began intensive work with the most active participants in the pantry support group.

For several months, the students did routine tasks alongside of pantry participants, such as stocking shelves and bagging rice. We also met among ourselves in weekly seminars, to talk about the many things that were likely to get in the way of our work.

By December, a core group of pantry users had decided to join with students to hold a series of educational workshops on the new welfare law. We called them "human rights" workshops. We used popular education methods in the workshops. This is an approach to grassroots organizing, associated with people like Paulo Freire<sup>36</sup> and Augusto Boal,<sup>37</sup> with the goal of moving a group, through

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<sup>36</sup> Paulo Freire is a critically acclaimed Brazilian educator and philosopher who wrote *Pedagogy of the Oppressed*, a manifesto on educating the poor. Freire was exiled from Brazil for ten or fifteen years for his views that education should be "training for transformation" where educators serve as facilitators to students who develop their own solutions to problems instead of teachers who instill institutional values in students for the benefit of the state. *Global Health and the Limits of Medicine: An Interview with Dave Hilton*, 18 *SECOND OPINION* 52 (Jan. 1993).

<sup>37</sup> Augusto Boal is a Brazilian director and advocate of political theater who pioneered a drama movement known as the Theater of the Oppressed that incorporates "theater of liberation techniques [to] promote dialogue between trained actors and nonactors." Misha Berson, *Bathhouse Decision was Behind-the-Scenes Drama*, *SEATTLE TIMES*, Feb. 13, 2000, at M6. Boal was tortured and jailed by military dictators for his revolutionary work and exiled himself to Europe upon his release. William Steif, *Rio Rhythms Revolutionize the Classics*, *BOSTON GLOBE*, Sept. 6, 1999, at A2. Boal eventually returned to Brazil where he served as a councilman for Rio de Janeiro from 1993 until 1996. *Id.*

education, toward action that will challenge unjust power hierarchies while developing participants' political capacities.

Thus, each session was co-facilitated by students and low-income individuals. The workshops sought the participants' own analysis of the SSI cuts, and their ideas for what to do about them. We always wrote down the group's suggestions, so that we could all see how much we already knew, as a group, and build from each other's ideas. The workshops drew eighty- and ninety-year-old Haitian and Latin American immigrants into spirited debate about the best tactics for holding the line on the government's effort to take away these benefits. They urged that our goal must be to keep every single one of the ten thousand targeted people in Boston/Cambridge ON governmental benefits, one way or another.

These workshops — as well as the months of trust-building work that enabled them — were one part of the project's lawyering process. The workshops generated a number of ideas for further action that placed both the law students and the pantry users in new roles. Some volunteered to give front-line advocacy assistance at local Social Security Offices. Others trained these volunteers. One team of students designed an elaborate “triage” plan for community-based agencies, and then trained front-line service providers to spot high-risk SSI recipients, who would need help from tax or criminal lawyers to get onto alternative benefit programs. They then began to organize a phone-bank through which these specialist lawyers could give on-the-spot advice to community advocates in these hard cases. The rallying cry of the entire effort was that, one way or another, the government was going to be stopped in its effort to put these forty thousand people out in the cold.

At the same time that the group focused on helping individuals stay on government benefits, they also allied with other local groups that forced the governor to increase the budget and monthly stipends in the state's disability program,<sup>38</sup> which did not bar

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<sup>38</sup> See Associated Press, *State Senate OKs Immigrant Aid Bill*, TELEGRAM & GAZETTE (Worcester, Mass.), Apr. 4, 1997, at A2 (stating that the Massachusetts State Senate had voted to pass a bill that would aid immigrants who had been cut off federal SSI program); Sally Jacobs, *Immigrants Face Test of Lifetime; Amid Benefit Cuts, Noncitizens are Scrambling for Answers*, BOSTON

immigrants. And they linked with organizing efforts in other cities, to strategize about civil litigation that state and local governments might file against the federal government to challenge the dumping of this huge piece of the federal welfare budget onto state and local tax rolls<sup>39</sup>— not to mention the bankrupted budgets of the poor countries from which the immigrants had come. At the same time, an intensive effort was launched to focus media attention on the problem, thus building pressure for Congress and the Clinton Administration to repeal the SSI cutback from the federal welfare law. George Soros<sup>40</sup> — bless his soul — got involved in the funding of these national efforts. Less than a year after Congress acted to terminate immigrants' SSI benefits, the policy was reversed.<sup>41</sup>

This fairy-tale ending is not the point of the story. Rather, the point is to illustrate some of the features of an emergent model of progressive lawyering that seeks to build the kinds of political capacity that can successfully resist and reverse the increasingly race-skewed maldistribution of wealth and power in the new global order, every single time that it happens, right on the ground. An

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GLOBE, Mar. 16, 1997, at A1 (stating that Massachusetts governor William Weld will support resumption of aid to immigrants).

<sup>39</sup> See, e.g., *Massachusetts v. United States*, 435 U.S. 444, 446 (1978) (holding that annual registration tax on all civil aircraft that fly in the United States does not violate the implied immunity of a state government from federal taxation when applied to a state-owned aircraft used exclusively for police purposes).

<sup>40</sup> See Dick Kirschten, *The Huddled Masses Breathe A Little Easier*, NAT'L J., July 3, 1999, at 19 (describing how, as a result of a strong economy and low unemployment rate, the harsh political attitude towards welfare for immigrants has eased from the negative outlook in 1996 when the national welfare reform bill was passed). Financier and philanthropist George Soros, a Hungarian immigrant, was opposed to the harshness of the 1996 welfare reform bill and pledged fifty million dollars to assist those immigrants harmed by what he called the "injustice" of the welfare reform bill. *Id.* Most of the Soros gift was dispersed to community-based organizations assisting immigrants who want to become U.S. citizens. The grants were not to be used for lobbying, but they may have in some cases permissibly "freed up resources" for advocacy work aimed at restoring immigrant benefits. *Id.*

<sup>41</sup> See The Personal Responsibility & Work Opportunity Reconciliation Act of 1996, 42 U.S.C. §§ 601-1399 (2000).

essential part of the approach is for the lawyers to work side by side with low-income people in community-based settings, in which those people are included as members, rather than served as clients. Often the approach requires that the lawyers participate in the creation of such places, either through entrepreneurial initiative, or by creative working of governmental social programs. The approach tends to center the client work in the practice of popular education — building group dynamics that generate new ways to think about old issues, and creative action strategies. The lawyers are both inside and outside of this process. They help with the transactional work — the convening, the facilitation, the planning — that enables such mini-movements to get off the ground. They help to devise and carry out the action strategies that the movement generates. And all the while, they critique *both* how well the action is realizing the project's organizing priorities, bread-and-butter objectives, and normative goals — and those priorities, objectives, and goals themselves.

The approach has an obvious element of magical realism about it. There is always the risk that the magic will overwhelm the realism. There is the risk that doctrinaire notions of the “model” will stifle the eclecticism that produces its energy. There is also the risk that the lawyers who participate in the approach will either deny or aggrandize their own power. These risks are fed by the same kinds of frustration and uncertainty that lead others to hold rigidly onto older notions of impact litigation or routinized service work as the best model for progressive lawyering in the new millennium. Ironically, the best way to steel oneself against this risk is to seek out the solidarity with others that this approach to lawyering engenders.

I said at the beginning of these remarks that when I re-read my introduction to the 1995 CR-CL Law Review's Symposium on Economic Justice in America's Cities, I noticed a fascinating shift in my own perspective. Five years ago, I was in accord with the Review's editors that the Symposium's innovative format had been a failure. It had failed to generate any quick-fix policy “solutions” to the injustices posed by America's race-linked urban poverty. Yet when I re-read that introduction, and the published notes from the

Symposium Fellows' Roundtable Discussions in February, 2000,<sup>42</sup> in preparation for this event, I viewed the Symposium's very failure as a source of hope. I saw the Symposium's format not as an impractical experiment in direct democracy, but rather as normatively challenging, procedurally imaginative, and strategically daring institutional politics. I saw it as an example of the kind of "trespass" of which Luke Cole has spoken.

The Symposium's format was defying taken-for-granted practices in the production of legal academic "knowledge." It was taking a stand against academic institutional practices that shore up unjust hierarchies of status and power within the academy, while isolating progressive academics from the relationships that might stimulate imaginative political analysis and action. When I read the Symposium issue five years after it was published, it was clear to me that the Symposium's "failed" format was one moment in the movement toward a new "model" of progressive lawyering against race-linked power inequality that I have pictured in this talk.

I want to conclude by returning to the final paragraphs of my introduction to that "failed" 1995 Symposium issue:

"The Symposium editors envisioned this conference as a forum for 'exploring strategies for addressing the economic inequalities that lie at the roots of our urban dilemmas.'"<sup>43</sup> Because the root causes of the problems in America's cities rest in the wider, race-linked maldistribution of wealth and power, it was not possible for this Symposium to arrive at a "reform agenda" confined to the "urban dilemma." The Symposium, therefore, was doomed to be a failure. Yet at the same time, through its format, the Roundtables that the Review sponsored did achieve a different and perhaps ultimately more significant goal. For women and men like the Symposium Fellows, people whom Cornel West<sup>44</sup> calls the

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<sup>42</sup> See David Dante Troutt, *Ghettos Made Easy: The Metamarket/Antimarket Dichotomy and the Legal Challenges of Inner-City Economic Development*, 35 HARV. C.R.-C.L. L. REV. 427 (2000).

<sup>43</sup> White, *supra* note 16, at 296.

<sup>44</sup> Cornel West is a notable African-American philosopher, scholar, educator, and writer. NOTABLE BLACK AMERICAN MEN 1202-04 (1999). He was born in Tulsa, OK in 1953 and participated in his first political demonstrations of many at the age of ten. *Id.* His work focuses primarily on how to put the fundamental

“humble freedom fighters” for social justice, the Symposium announced a commitment to, and undertook a project of, solidarity. The Symposium announced this journal's commitment to bring socially and economically disfranchised people and their street-level advocates to the center of its own deliberations about social justice. The Symposium announced this journal's commitment to examine its own norms and practices for unconscious complicity with a skewed distribution of social power, rather than simply casting its gaze on the people who suffer the consequences of poverty.

Finally, the Symposium announced this journal's commitment to cross-class, cross-community coalition in pursuit of economic and social justice, as well as to the self-reflection and change that such coalition requires. Such coalition is a first step toward the kinds of innovative practice, across the boundaries of geography, class, and race, that will end the history of guarded borders and forced movement that we have witnessed in this country, and from South to North, over the thirty years since this journal was founded. For, as Kenneth Clark<sup>45</sup> wrote in 1965:

But the chances for any major transformation in the ghetto's predicament are slim until the anguish of the

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issues of employment, health and child care, housing, ecology, and education on the agenda of the powers that be while fighting racism, patriarchy, homophobia, and ecological abuse. *Id.* After receiving his B.A. from Harvard, West furthered his studies in philosophy at Princeton, earning his Ph.D. in 1980. *Id.* West has since lectured in the United States and Europe, and has taught at Union Theological Seminary, Harvard University, Yale University, Princeton University, and the University of Paris. *Id.*

<sup>45</sup> Dr. Kenneth Bancroft Clark was born in 1914 in the Panama Canal Zone, but his family immigrated to New York City soon thereafter, and Clark grew up in Harlem. 5 CONTEMPORARY BLACK BIOGRAPHY 51-55 (1993). He attended Howard University as an undergraduate. *Id.* He was the first African-American doctoral degree candidate in psychology at Columbia University and obtained his Ph.D. in psychology in 1940. *Id.* He taught psychology for many years as a professor at the City College of New York. *Id.* As an uncompromising advocate of integrated schooling, he has authored a series of highly influential books and articles about ghetto life, education, and the war on poverty. *Id.* He began to receive wide recognition after the Supreme Court cited his work in *Brown v. Board of Education* as a reason to integrate public schools. *Id.*



ghetto is in some way shared not only by its victims but by the committed empathy of those who now consider themselves privileged and immune to the ghetto's flagrant pathologies. . . . [T]he combined energies and strategies of understanding and power in the society as a whole must be mobilized and given the force of sustained action to achieve actual changes in the ghetto so its people may have a realistic basis for a life of humanity and dignity.<sup>46</sup>

*Mr. Cole*

Thanks. As I was preparing for this talk, I took a look through some of the literature on models of progressive lawyering, and there are a number of models out there. There is the Gladiator Model.<sup>47</sup> There is also the White Knight Model,<sup>48</sup> which I think Peter talked about. There is Tony Alfieri's Reconstructive Mod-

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<sup>46</sup> KENNETH B. CLARK, *DARK GHETTO: DILEMMAS OF SOCIAL POWER* 222 (Wesleyan Univ. Press 1989) (1965).

<sup>47</sup> Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 *DUKE J. GENDER L. & POL'Y* 119, 128 (1997) (explaining that the Gladiator Model is the dominant model of lawyering that is taught in law schools and practiced in the legal profession). This model "values toughness, intellectual rigor, and competitiveness." *Id.* at 128. "Crisis management, damage control, and high profile battles constitute the glamour work of lawyers," and "success is defined as winning, especially against the odds." *Id.* Professor Sturm offers a critique of the Gladiator Model, suggesting that the dominance of this model inhibits the advancement of women in the legal profession. *Id.* at 126-129. Instead, Professor Sturm proposes a problem-solving orientation to lawyering, which would enhance the future of women and other under represented groups in the legal profession. *Id.* at 122.

<sup>48</sup> See JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION*, at xvii-xix (1994) (recounting the civil rights movement by the illustrious white civil rights lawyer who wanted to help under-represented groups such as African-Americans attain greater political and economic power); Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 *FORDHAM L. REV.* 2475, 2502 (1999) (discussing the Law Reform model of progressive lawyering in the poverty law practice).

el.<sup>49</sup> There is Jerry Lopez describing the tension between the Regnant Model and the Rebellious Model.<sup>50</sup> In my own writing, I discuss the Macho Law Brain Model versus the Public Citizen or Power Model.<sup>51</sup> What I realized in looking at all these different models was that this was not really what I was doing as a lawyer. I come to this from the very different perspective of a movement activist trying to make progress within the social movement of which I am a member, the Environmental Justice Movement.<sup>52</sup> I am an Environmental Justice lawyer and activist, and have been for the last eleven years.

What I wanted to do today is try to situate lawyering within the context of a movement for social change, within the larger struggle, and to talk about some of the roles lawyers can play within the movements for social change.

In our work at the Center on Race, Poverty, and Environment in California,<sup>53</sup> we have three goals when we get involved in any community campaign. The first goal is that the campaign should build the capacity of the individuals who take part in it. You can call this “personal empowerment.”

The second goal is that, through the campaign, we should be changing the power dynamics in a particular community or neighborhood so that the people with whom we are working have

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<sup>49</sup> Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1987/1988).

<sup>50</sup> GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992).

<sup>51</sup> Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 VA. ENVTL. L.J. 687 (1995).

<sup>52</sup> See generally LUKE W. COLE & SHEILA R. FOSTER, *FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT* 19-33 (2001).

<sup>53</sup> The Center provides legal and technical assistance to low-income communities fighting environmental hazards, focusing on community-based and community-led solutions. The Center has worked with hundreds of community groups over the past decade, primarily in California but also in areas ranging from Alaska to Florida, Arizona to New Jersey. *Center on Race, Poverty, and the Environment; California's Rural Legal Assistance Foundation*, at <http://www.crlaf.org/crpe.htm> (last visited Mar. 10, 2001).

more power collectively, as a group, at the end of the struggle than they did going into the struggle. This is an institutional change goal. These first two goals echo some of Lucie's six criteria as well.

The third goal is to concretely address the problem at hand. If we are challenging a toxic waste incinerator, the goal is to shut down the toxic waste incinerator. If we are challenging a lead smelter, it is trying to shut down the lead smelter and clean it up. If we are challenging a garbage dump, the goal is to shut down the garbage dump. Although there is a concrete element to it, the largest part of our work is process-oriented rather than outcome-oriented. Winning the particular struggle at the end of the day is only part of what is going on here.

Where does the lawyer fit in this idea? For me, the question is less what the right model is, and more what the role of the lawyer is. I am pessimistic about the use of the courts in the year 2000 to expand or even defend the rights of people who have historically been oppressed and continue to be oppressed. On the other hand, I do think that lawyers can play a useful role in movements for social change. I want to talk about two useful roles that I have been called upon to play in the course of my advocacy, and then talk about some of the problems for the lawyer involved with those roles.

The first role is the lawyer as sacrificial lamb. The second role is the lawyer as trespasser. Let me get to these. What I am going to describe here are two moments of environment justice advocacy. I use the term "moments" because I want to situate them within much broader multi-year struggles of two different communities. One moment I am talking about took about two and a half years, but in the overall context of this campaign, it was just a moment. The term "moment" gives them the appropriate weight in the overall campaign. They are just illustrative of ways in which lawyers can act on behalf of clients.

First, the lawyer as sacrificial lamb. My friend, Francis Calpotura, who runs the Center for Third World Organizing in Oakland, has said that one of the few ways he would ever use a

lawsuit is to end a campaign that one had already lost.<sup>54</sup> He believes that lawyers have virtually no role in movements for social change. One role they do have is to end campaigns one has already lost.

I represented an Indian Nation, the Timbisha Shoshone Tribe of Death Valley,<sup>55</sup> in its struggle against a cyanide heap leach gold mine that was located just outside the boundaries of Death Valley National Park on the tribe's ancestral homeland. The tribe did not have title to that land in any way. It was part of the State of California. They did not, at that point, have a reservation at all, and through a variety of circumstances, they lost a vote at the County Board of Supervisors about whether this cyanide heap leach gold mine would go forward or not.

For those of you who are not familiar with heap leach gold mining, basically the proposal was to take a mile-long mountain that was half a mile high, chew it up, and crush it into little gravel-size particles. Then you put the particles on a plastic pad and spray cyanide solution over them to separate out the little gold flecks that were in this mountain. This yields less than an ounce of gold per ton of ore that is crushed up. Obviously, it is very environmentally destructive. You have removed this mountain and crushed it up into little pieces and then poured a very toxic substance all over it. The tribe was not very enthusiastic about this happening in an area that had spiritual and cultural significance to them and included grave sites of their ancestors.

We were in a situation where we had lost the battle politically. The county had decided it would go forward with this mine; the mining company had gotten all the necessary permits. Two other lawyers and I were the legal team, and we determined that we did

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<sup>54</sup> Francis Calpotura, *Why the Law?*, RACE, POVERTY & ENV'T (Center on Race, Poverty and the Environment, California Rural Legal Assistance Foundation), Fall 1994-Winter 1995, at 63.

<sup>55</sup> The Timbisha Shoshone are a federally recognized tribe in eastern California. See 146 CONG. REC. H11947-01, \*H11947 (2000) (providing that "[t]he President notified the Clerk of the House that on the following dates he had approved and signed bills of the Senate of the following titles: . . . November 1, 2000: s. 2102. An act to provide the Timbisha Shoshone Tribe a permanent land base within its aboriginal homeland, and for other purposes").

have a case we could win. It was a righteous case, a just case, and a morally correct case. It just was not a very good legal case in the political context of Inyo County. We took that to our clients, and they replied that we had to sue anyway.

This was my first lesson in one of the roles that lawyers could play. I was the sacrificial lamb in court because I went in and the trial court judge first, and later the three judges on the Court of Appeal, were not excited at all about my legal arguments.<sup>56</sup> That lawsuit played a very critical role, however. Even though it was a lawsuit we knew we would probably lose, it played a critical role in the struggle of the Timbisha against the County. It showed the County that we would fight this all the way, even if we knew we were going to lose. For the client's best interest, I had to do something that was not necessarily in my own personal interest, because one of the problems with the role of lawyer as sacrificial lamb is that being sacrificed is not a lot of fun. I spent two and a half years working very hard on a case that I knew I was probably going to lose. That is a lot of time and energy on something that, if your ambition is the courtroom outcome, can be very daunting. I described the situation to Lucie at a workshop we were at last weekend, and she said that my desire to have a good outcome in court was part of my pre-Oedepal need for a judge's approval.

When we ultimately lost the case, I was very disappointed, because I thought I had let my clients down, even though I knew from the start that we were not going to win the case. The Tribal Chair was sixty-eight years old and had basically brought the tribe back from "extinction" in the 1920s to being a federally-recognized tribe today. She said to me: "What did you expect? Do you think we are ever going to get justice in a white court?" I guess I had some hope that we might. Otherwise I would not have taken the case. I realized that my role in that situation was not to win or lose. It was to have somebody in there fighting for the tribe so that they could go on to the next level, to the next battle. I was the sacrificial lamb. That is one role that lawyers for social change can play.

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<sup>56</sup> *Timbisha Shoshone Tribe of Death Valley v. County of Inyo*, Nos. E01832, E019234, E019851 (Cal. Dist. Ct. App. Mar. 17, 1998).

The second role is a very different role, and I will talk about the tensions between the two roles in a moment. The second role is the lawyer as trespasser. A trespasser is someone who goes onto the property or territory of another intentionally, and disturbs the other person's exclusive use of that territory. I represented, and still represent, a group in Buttonwillow, California, that has been fighting a toxic waste dump expansion there for the last eight years.<sup>57</sup> We were at a Board of Supervisors hearing in Kern County, a very conservative rural county, which is where I do most of my work. The residents of Buttonwillow were testifying about a procedural matter leading up to the ultimate vote on the dump, which happened about six months later.

It was a room not unlike this room, where there were chairs, there was a larger well, and the Board of Supervisors sat up behind a big table. The members of the community group all came down into the well to testify at microphones. They were standing in the well of the Board of Supervisors chambers, about forty people, and after they had testified, the Board Chair told them to go and sit down. I stayed with my clients and told them to stay in the well. Another organizer agreed with me. Everybody stayed put, even though there was a little murmuring.

The Board Chair started pounding his gavel and ordered us to sit down. My clients stayed put, and very quietly, very politely, but

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<sup>57</sup> See Reynolds Holding, *Rural Residents Fight Toxic Dumps - Say Latino Areas Singled Out*, SAN FRANCISCO CHRON., Dec. 10, 1994, at A17 (explaining that on December 9, 1994, a complaint was filed in California alleging that Laidlaw, Inc. violated civil rights laws by building toxic waste dumps near predominantly Latino populated rural towns, and far away from where the wastes were produced). The complaint also alleged that the Department of Toxic Substances Control and various county and regional agencies violated civil rights laws for approving the placement of the dumps. *Id.* The plaintiffs sought to stop expansion of the toxic waste facilities and to force local agencies to pay closer attention to the concerns of minorities. *Id.*; see also Dana Wilkie, *Nuclear Material Stored Atop 3 Aquifers; State Politicians Have Not Acted on Dump's Safety, Water Issues*, SAN DIEGO UNION-TRIB., May 30, 1999, at A1 (reporting that the Buttonwillow dump is constructed atop ground water that is recycled for drinking water); Todd Woody, *A New Civil Rights Fight*, THE RECORDER, Aug. 14, 1995, at 1 (discussing the Environmental Protection Agency and the Department of Housing's investigation into the toxic dump sites).

very firmly said that they were going to stay. The Board Chair got more and more angry and then he realized that he would either have to bring the sheriff in and clear everybody out or have to go on with the meeting. He chose to go on with the meeting. He moved on to the next item on the agenda.

At that moment, my role as the lawyer was to be the trespasser, to help my clients understand the contingency of the Board Chair's power. The Board Chair had power in that moment because we allowed him to have that power. If he told us to sit down and we were to comply, he would occupy the entire territory of power. Because we did not comply, it was a very small and ephemeral moment of the people of Buttonwillow taking their power back and showing the Chair that they had power in that small social moment.

The lawyer as trespasser contrasts with the lawyer as sacrificial lamb. The role of the lawyer's agency is very different in each one. As a sacrificial lamb, the lawyer basically has no agency. The lawyer is directed to do something and does it. He may do it well or he may do it poorly, but he does not really have a choice in what to do. In the lawyer as trespasser, it is the lawyer's almost complete agency that is allowing the clients to operate. The lawyer, through his or her position of being someone who may be privileged by race, as I was in this situation, or privileged by knowledge or experience of what the Board Chair might do, is able to trespass first. Then he can create the space for others to trespass and take back their power. Here is a problematic question: should the lawyer be in that role? I do not know. I have not worked that out yet and I am hoping we get a chance to kick that around.

I wanted to offer you these two moments — the lawyer as sacrificial lamb and the lawyer as trespasser — as roles that lawyers can play. I offer these because I think that as progressive lawyers, we need to be fundamentally aware of how even the most minute decisions we make, where we stand in the Board of Supervisors Chambers, when we stand there, have an impact on power relations in society.

I think we can get lost in the theory of what lawyering for social change is about, and in our own egos saying, "Look at these great big cases we are doing." When you actually get down to it, if we are going to change society, it has to be a very slow, tedious,

one-to-one process of social change work. These are just moments along the way in my own personal effort to do that work.

*Audience Member*

When you work for individual clients, are there still some legal battles that you feel cannot be won, and can the sacrificial lamb and the trespasser models be translated into an individual advocacy model?

*Mr. Cole*

Obviously, in any type of symbolic litigation the lawyer is the sacrificial lamb on some level. It is a sacrifice either of the lawyer's time or of his or her reputation. If you bring a suit where people laugh at you because of the action you are bringing, then you are sacrificing something. Certainly, the lawyer as sacrificial lamb and the lawyer as trespasser are merely the lawyer modeling actions that are disrupting the perceived hierarchy in any situation. You can do that in everyday life. Lucie was doing that in the examples where you see the photograph of the woman on welfare teaching Harvard law students. That is a moment that the lawyers created. I am not sure the lawyer as trespasser is an accurate description of that moment, but it is the same type of upending hierarchy that allows us to conceive of power in a different way.

*Audience Member*

That would seem to raise some ethical considerations, such as whether it is right for a lawyer to take an individual client's case that does not seem winnable. In the case of something like a



landlord/tenant dispute, would that raise Rule 11<sup>58</sup> claims, and how would you think about the effects on the other parties?

*Professor White*

I take those issues pretty seriously. Law is a heavy burden. Bringing suits is a heavy burden to place on others, and when one is working at the neighborhood level, the others are often not larger institutions, particularly in the landlord/tenant area. They are other individuals or small entrepreneurs. I think the legal job there is also to be very, very good lawyers.

In the technical sense, it is not easy to be a good lawyer when you try to do it by going out to grassroots institutions that do not have much training. You have to have a claim, and if you are a good lawyer, you can often find a claim. If not, then you have to bring in the law reformist. If the law is against you, then you cannot just practice and accomplish positive things. In the 1990s, many laws changed with probably less effort and enforcing or trying to see how those changes could actually play out and benefit the people they were intended to benefit. I have not found that there has ever been an absence of claims if you are skilled, but you have to be skilled.

*Mr. Cole*

I just want to make it very clear that we were not bringing a frivolous suit. I would not recommend bringing a frivolous suit. We were bringing a good sound suit in Inyo County, which is a cowboy county, and we are suing on behalf of the Indians.<sup>59</sup> It just was not a suit that was going to win in that context. I am not recommending bringing frivolous suits. Instead, I am saying that

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<sup>58</sup> Rule 11 sanctions are given for various misrepresentations made to the court and may include directives of a non-monetary nature, an order to pay a penalty to the court, or an order directing payment to the movant for some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation. FED. R. CIV. P. 11.

<sup>59</sup> *Timbisha Shoshone Tribe of Death Valley v. County of Inyo*, Nos. E01832, E019234, E019851 (Cal. Dist. Ct. App. Mar. 17, 1998).

you may have to bring a suit you do not think you can win in a particular court.

*Audience Member*

You constantly hear about the law students who want to do public interest work during their first summer but succumb in their second summer. You are always learning how to work within the system of law. I was wondering how your organizations are funded and how one organizes in that way where huge forces of corporate economics can sort of suck you in here.

*Mr. Nickles*

Let me address that. The first thing you have to be in any enterprise, whether it is litigation or speaking before a Board of Supervisors, is effective. That does not always mean you have to win in the sense of winning one hundred percent. You have a reputation because you have carried that reputation throughout your career, so the next time your name shows up on a pleading or on a piece of paper, people look at that and say: "Well, that is the guy who brought that crazy lawsuit. Let's not pay any attention to him" or "that was the guy who really tied everybody in knots. We have to sit down with that guy and get this resolved before it gets out of hand."

In terms of financing these matters, when you bring mature and effective concrete class actions, there are legal fees. There are significant legal fees at the end of the process so that you need some sustaining force during the process.

In addition, in a private world and I guess as more of an establishment lawyer, I have a great deal of confidence in the court system. I do not believe that the court system is resistant to change as long as there is some basis for change. If enough of the young lawyers who are coming from this school are demanding that the firm dedicate its resources to the pursuit of important institutional reform cases, then the money will be provided. Rather than paying everybody an extra five thousand dollars or the partners getting an extra forty thousand dollars, the money can be provided to do these things. In every case, it is an individual situation.

If at Firm X the young people are not demanding that there be dedication to public interest work, it will not happen. Each of you will say that the firm suggested you work nineteen hundred hours so you have to get your nineteen hundred hours in before you can work on that public interest case that someone is asking your assistance with.

So much depends on what it is you young lawyers have the power to do, and it is not just to demand more money. That is easy. Everybody demands more money. It is to demand more of your profession, to demand more of the law firm, and to demand more of the corporation you are working for.

*Professor White*

I just want to second that. To bookend this, I never thought about working in a firm. I think I interviewed once and just did not do it. It seemed very strange in 1968, particularly as a woman, to be working for a firm and I just did not. There are not that many good jobs out there. It is not foolish to think about the fact that you need to earn a living, you have to pay your rent, you have to eat, and you have to do other things.

There are serious issues in many of the conventional public service/public interest jobs about the training that you get and the idea that you do not serve anybody well if you do not become a good lawyer or good at what you do. If you go to a firm and you have these interests, you might well get trained very well there. You might not, but you might, and you certainly want to be looking at that. You can, if you go there, or if you go there with your friends, make the claim that you will take \$140,000 if they let you do this work and give you some time back.

I think you would be surprised at how many firms would breathe a sigh of relief if students came in and asked for public interest work. You are so wanted right now. The market is strong and you have market power. Do not be progressive and think that markets are just something you do not want to think about. For God's sake, you have a ton of market power. Use it.

*Mr. Cole*

I wanted to answer your initial question about how we get funded. We get grants, fellowships, and attorneys fees in cases we win. All of the panelists are making the same point, which is that if you end up in a corporate law firm, there are good things you can do.

*Audience Member*

I was just very struck with your remark when you said we should make demands of the firms we are talking with, and I guess it was either not known or has been forgotten that an awful lot of the 1960s radicals are now the powers-to-be in the law firms. They are really quite receptive to student demands and probably wish there were more of them.

*Mr. Nickles*

An interesting fact is that my son is a lawyer. He was talking about what appears on the Internet. The whole discussion was about who is making what amount of money at what firm so that associates at one firm could go in to the hiring partner and ask for a certain amount of money based on what another firm pays its associates. I asked him whether anyone ever talks on the Internet about what kind of important public interest work is being offered by the firm. If you have this appropriate communication, you have power.

*Audience Member*

I just wanted to make sure that everybody realizes that they do not have to go to a firm at any point in their lives in order to have a good life. Having a good life is not just a professional thing, it is a personal thing. You have to make decisions about what you want your life to be. It is not so easy when you graduate, because many things are unclear.

I went to a reunion of our class a few years ago and was struck by the fact that the people who had been doing public interest work

were the people who were happy with their lives. The people who were successful in the corporate fields had a sense of emptiness. They have done what they wanted to do, but somehow it has lost meaning to them.

*Audience Member*

My name is Robert Wilkins and I have been a Public Defender in Washington, D.C. for ten years. I have two comments. One is, from the Public Defender perspective, that the models of why we do something or what we seem to accomplish when we do it are a little different. We try to get some sort of individualized justice in that circle. Some of us see ourselves as real warriors who are trying to fight off the system and make things difficult, such as tying people up in knots so that they will have to take us seriously or take the next client seriously.

I have become increasingly frustrated with all of those models as a Public Defender, and have not really seen litigating in court effecting much change or getting some evidence suppressed as having any real meaning overall in how law enforcement acts. I have turned to working on things from the policy and legislative angle, and still have become quite disillusioned with the political culture around crime and sentencing issues.

I am going to say something I thought I would never say. As a student here, I was never interested in working for a firm. As someone who still has never worked at a firm, and who is trying to create a national African American Museum, I must say we need lots of help from transactional lawyers, people who know real estate issues, tax issues, and other issues.

There are lots of ways in which you can help churches, community organizations, and homeless groups with your expertise and knowledge as a firm. As a person at a corporate-based law firm, there is a lot you can offer. It is still not something that I chose to do or that would be my first choice coming out of law school. But there is a lot you can do other than litigation that is so important for people who are just trying to survive and, even if incrementally, improve their lives.

*Audience Member*

I was the Editor-in-Chief of the Harvard Law Review about twenty-nine years ago. I can echo both positions. I have never worked in a law firm in these twenty-nine years and have done many different interesting and satisfying things. But I have also worked very closely with a lot of my classmates and with people from the class of 1958, who created the Appleseed Foundation.<sup>60</sup> This foundation is building public interest work opportunities for people in law firms all over the country. I am on the Board now. It has expanded to nearly a dozen states: Massachusetts, New York, Nebraska, Montana, Louisiana, and a lot of places where lawyers like Peter would be able to bring about social change.

Each of you has spoken about bringing lawsuits in terms of ways of bringing social change. I was really struck with Peter's third point about having in mind the end game of what you are trying to achieve. I would be interested in hearing what your reactions are. More and more public interest advocates are turning to the use of consent decrees and various kinds of structured settlements as the way to really bring about lasting reform, as opposed to getting a decree from a judge, but not really changing things.

*Mr. Nickles*

The benefit of the consent decree is that it enables you to deal with intractable problems over a long period of time, to do the best of your abilities. These are problems that will never be solved. When you have a consent decree, you have the power of the

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<sup>60</sup> Known as Harvard Law School's Appleseed Electoral Reform Project, its goal is to improve voting rights, ballot access, proportional representation, and other areas of deficiency in the electoral process that disadvantage minorities. Harvard Law School, *Appleseed Electoral Reform Project Goals*, at <http://www.law.harvard.edu/programs/reform/goals.html> (last modified Oct. 23, 2000). The Project studies and seeks reforms that promise, specifically, to promote the political participation of all of the American people. *Id.* The Project promotes its goals through litigation, workshops, conferences and publications and by encouraging students to work in the field of legislative reform. *Id.*

judiciary, the power of the executive, and you have your own power as a private lawyer to monitor whether progress is being made. That is all you are seeking to do with the homeless, with healthcare, and with prisoners. You are seeking to assure progress.

When you have a consent decree that is specific and says you must do something by a certain time, then you have not only a lawsuit, but you also have a lawsuit that has been successful and permits you to guide the progress in that area for decades.

In a lawsuit I brought in 1974, a consent decree was entered in 1979 and I still have, with variations, that consent decree. I have worked on several cases that have resulted in consent decrees. For example, the homeless case I worked on has a consent decree.<sup>61</sup> I must tell you all that the only way to deal with these difficult issues is to have a consent decree that you go back to time and again, because in monitoring the progress, you find that is not the precisely correct way to go.

In terms of end game, that is a hell of an end game.

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<sup>61</sup> Robbins v. Reagan, 616 F. Supp. 1259 (D.D.C. 1985).