SYMPOSIUM INTRODUCTION

PERSUASION IN CIVIL RIGHTS ADVOCACY

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In April of 2015, the Michigan State Law Review and the Research, Writing, and Advocacy program of Michigan State University College of Law collaborated to host a symposium devoted to the topic of *Persuasion in Civil Rights Advocacy*. This intersection of the fields of law, persuasive strategies, and social justice provided a wide-ranging discussion of topics that should be of interest to practicing lawyers as well as to members of the legal academy.

The first article in this symposium volume is a transcription of the keynote presentation delivered by Erwin Chemerinsky, Dean of the University of California, Irvine School of Law. Dean Chemerinsky provides insights into factors that separate successful civil rights movements from those that fail. He notes that the involvement of the courts is necessary, but not sufficient, to effect change in the field of civil rights, and that such change ultimately depends on widespread societal support.[1] Judicial action is needed because many minority groups are not adequately protected by the "inherently majoritarian" political process.[2] Fact-finding conducted by the courts can present an "appearance of objectivity" that might be missing from legislative fact-finding.[3] Moreover, judicial action can fulfill a role of "moral prophet" in determining when laws are

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1. Erwin Chemerinsky, *Keynote Address*, 2015 MICH. ST. L. REV. 1235, 1245.
2. *Id.* at 1240.
3. *Id.* at 1240-41.

not consistent with the judiciary's vision of constitutional values.[4] Thus, court decisions (such as that mandating public school desegregation in the 1954 case of *Brown v. Board of Education*[5]) can pave the way for subsequent legislative action (such as the Civil Rights Act of 1964[6]).[7]

Dean Chemerinsky elucidates the degree to which civil rights movements are more likely to succeed when they win initial successes in the courts and when their proponents dedicate sustained efforts over an extended period of time.[8] He observes that such movements are aided when expanding civil rights protection is not perceived as threatening society at large[9] and when enacting such reform does not require a high financial cost.[10] Successful movements can obtain popular support by appealing to values of fairness and tolerance and by winning sympathy from broader society—such as happened when the civil rights movement of the 1960s drew attention to the plight of demonstrators who were beaten and sometimes even killed.[11] In addition, a civil rights movement is more likely to succeed when it can "operate simultaneously in multiple jurisdictions" and thus generate momentum for the movement by obtaining favorable results in various courts and legislatures.[12] Examples of creating such momentum include the state-by-state litigation strategy for school desegregation that culminated in the *Brown v. Board of Education* decision, as well as the more recent state-by-state litigation and legislation strategies pursued by same-sex rights advocates in the drive toward recognizing marriage equality.[13]

Following the keynote address, panelists' articles examine particular topics in civil rights advocacy. In *Hearing Voices: Non-Party Stories in Abortion and Gay Rights Advocacy*, Professor Linda Edwards examines the use of non-party narratives in amicus briefs

4. *Id.* at 1241-42.
5. 347 U.S. 483 (1954).
6. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).
7. Chemerinsky *supra* note 1, at 1238.
8. *Id.* at 1246.
9. *Id.* at 1247.
10. *Id.* at 1247-48.
11. *Id.* at 1246-47.
12. *Id.* at 1248.
13. *Id.*

"to humanize crucial issues of individual rights."[14] For example, in an abortion-rights case before the Supreme Court, an amicus brief presented the first-person stories told by women who had obtained abortions. A similar strategy has been followed by amicus briefs in some same-sex rights cases, such as those challenging the federal "Defense of Marriage Act," through "present[ing] first-person stories of children raised in same-sex families and first-person stories of LGBT teenagers adversely affected by governmental disapproval of same-sex families."[15]

Professor Ruth Anne Robbins's article, *Three 3Ls,* Kairos*, and the Civil Right to Counsel in Domestic Violence Cases*, describes the advocacy conducted by law students in a domestic violence clinic who filed an amicus brief urging that complainants have a right to counsel in domestic violence restraining order hearings.[16] Although the New Jersey Supreme Court declined to grant certification of the case, a Justice's dissenting opinion drew on arguments from the student-written amicus brief.

Professor Charles Calleros considers recurring patterns of resistance to expansion of civil rights in *Advocacy for Marriage Equality: The Power of a Broad Historical Narrative During a Transitional Period in Civil Rights*.[17] This article approaches the debate about same-sex marriage from a perspective that "argues that marriage equality fits within a recognizable historical pattern within the United States, a pattern first of denying a civil right, then recognizing the right, and later wondering—with some embarrassment—how we could ever have voiced uncertainty about the right."[18] Thus, the struggle regarding marriage equality retraces earlier disputes about racial equality and women's rights.

Professor Luis Fuentes-Rohwer's article, *The Racial Evolution of Justice Kennedy and Its Implications for Law, Theory, and the End of the Second Reconstruction*, examines Justice Kennedy's nuanced—and perhaps contradictory—views on the role of racial conditions in civil rights decisions, reflecting his overall turn away

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14. Linda H. Edwards, *Hearing Voices: Non-Party Stories in Abortion and Gay Rights Advocacy*, 2015 MICH. ST. L. REV. 1327, 1353.

15. *Id.* at 1347.

16. Ruth Anne Robbins, *Three 3Ls,* Kairos*, and the Civil Right to Counsel in Domestic Violence Cases*, 2015 MICH. ST. L. REV. 1359.

17. Charles R. Calleros, *Advocacy for Marriage Equality: The Power of a Broad Historical Narrative During a Transitional Period in Civil Rights*, 2015 MICH. ST. L. REV. 1249.

18. *Id.* at 1253.

from insistence on a race-neutral approach and toward acceptance of disparate impact analysis.[19] Justice Kennedy's outlook on civil rights matters is especially intriguing because he often represents the "swing" vote on today's Supreme Court.[20] The article focuses particular attention on the opinions he authored in cases dealing with the Voting Rights Act and the Fair Housing Act.

Professor Linda Berger's article, *The Color-Blind Constitution: Choosing a Story to Live By*, investigates how advocates for civil rights sometimes use phrases that were incorporated into judicial opinions favorable to racial desegregation, only to see the same phrases subsequently used to justify opposition to such desegregation.[21] In particular, "Our constitution is color-blind," declared by the dissent in *Plessy v. Ferguson*[22] and emblematic of the spirit of the ruling in the first *Brown v. Board of Education*[23] case, has been used to reject race-conscious measures aimed at achieving school desegregation. In addition, "with all deliberate speed," which characterized the mandate for desegregation in the second *Brown v. Board of Education*[24] case, has been used to justify delays in desegregation.

Social Psychology and the Value of Vegan Business Representation for Animal Law Reform by Professor Taimie Bryant discusses approaches to legal advocacy for animals, including seeking rights for animals, penalizing cruelty to individual animals, and reducing suffering of animals in research and food production, among other activities.[25] Acknowledging the urgency of the suffering that drives this work, Professor Bryant nevertheless proposes another approach: increase the market share of vegan businesses through legal support to a variety of strategies that will lower costs and enhance access, for example, food trucks. This oblique approach draws on the American cult of celebrity and preference for business solutions. Its goal is to change the food paradigm, thus reducing the actual use of suffering animals. At the same time, changing food

19. Luis Fuentes-Rohwer, *The Racial Evolution of Justice Kennedy and Its Implications for Law, Theory, and the End of the Second Reconstruction*, 2015 MICH. ST. L. REV. 1473.

20. *Id.* at 1491-93.

21. Linda L. Berger, *The Color-Blind Constitution: Choosing a Story to Live By*, 2015 MICH. ST. L. REV. 1397.

22. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

23. 347 U.S. 483 (1954).

24. 349 U.S. 294, 301 (1955).

25. Taimie L. Bryant, *Social Psychology and the Value of Vegan Business Representation for Animal Law Reform*, 2015 MICH. ST. L. REV. 1521.

preferences has a persuasive function of lowering the barriers imposed by ignorance and self-interest to recognition of animal exploitation and of opening doors to political and legal change.

A Conundrum for Animal Activists: Can or Should the Current Legal Classification of Certain Animals Be Utilized to Improve the Lives of All Animals? The Intersection of Federal Disability Laws and Breed-Discriminatory Legislation confronts the dilemma of advocating for individuals through indirect legal strategies that offer remedies for some, but not all, members of the group.[26] Professor Rebecca J. Huss discusses using the ADA and FHA and the special status of service and assistance animals for persons with disabilities to overcome barriers posed by breed-discriminatory legislation aimed at pit-bull-appearing dogs.[27] Success in court on these grounds improves the lives of individual animals and humans, but has another important persuasive goal: education of the public and rehabilitation and normalization of pit-bull-appearing dogs. Service and assistance animals will be ambassadors of the breed.[28] An important focus of both the legal work and the social agenda is the transfer of judgment from appearance to behavior, that is, from assessment based on membership in a group to assessment based on real characteristics of individuals.[29]

In *Bullshit and the Tribal Client*, Professor Matthew Fletcher explains conflicts that can arise because of divergent goals of various actors in representing American Indian tribes.[30] The array of these actors can include tribal government, in-house tribal counsel, outside counsel, and specialists such as advocates who appear before the Supreme Court. In addition, litigating a particular tribe's cause without a good chance of success may conflict with others' interests to avoid setting adverse precedent for tribes nationally.

Similar complexities are examined by Professor Michael A. Olivas in *Who Gets to Control Civil Rights Case Management? An*

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26. Rebecca J. Huss, *A Conundrum for Animal Activists: Can or Should the Current Legal Classification of Certain Animals Be Utilized to Improve the Lives of All Animals? The Intersection of Federal Disability Laws and Breed-Discriminatory Legislation*, 2015 MICH. ST. L. REV. 1561.

27. *Id.* at 1574.

28. *Id.* at 1592.

29. *Id.* at 1570-72.

30. Matthew L.M. Fletcher, *Bullshit and the Tribal Client*, 2015 MICH. ST. L. REV. 1435.

Essay on Purposive Organizations and Litigation Agenda-Building.[31] Professor Olivas uses the history of the Mexican American Legal Defense and Educational Fund (MALDEF) and its involvement with similar organizations, such as the NAACP, to illustrate the growth of a civil-rights-litigation organization.[32] He discusses intricacies of selecting plaintiffs, legal strategies, and advocates, particularly when several organizations with varying histories, priorities, and resources participate in or compete for control of key cases and the narratives those cases will involve both in court and in society at large. Thus, he provides a behind-the-scenes look at long-term, multi-jurisdictional litigation strategy, identified by Dean Chemerinsky as crucial in establishing and advancing civil rights in the courts.

Persuasion in Civil Rights Advocacy: Lessons Learned in Representing Guantanamo Detainees recounts the lessons learned by Judge Advocate (JAG) David J. R. Frakt while participating in the effort to extend the rule of law and basic rights to detainees suspected of terrorist activity and held at the United States Marine Corps base at Guantanamo Bay, Cuba.[33] As counsel for a minor detainee who was found to have been tortured in detention, he adopted a variety of persuasive approaches both in and out of court to influence those with power over the fate of his client, including opposing counsel, judges, policy makers, media, and the public at large. A recurrent factor was the impact of a readily understood narrative of mistreatment sanctioned or performed by an opposing party: torture of a minor. Even when contested, successful invocation of such a morally charged narrative created persuasive sympathy for the defendant and underlined moral costs associated with the government position. For example, an opposing counsel resigned and a judge eventually ruled favorably on a petition for habeas corpus.

Investigating the power of a similarly charged rhetorical strategy in *NCAA Athletes, Unpaid Interns, and the S-Word: Exploring the Rhetorical Impact of the Language of Slavery*, Professor Maria L. Ontiveros provides data on the use of the language and imagery of slavery in struggles over labor rights,

31. Michael A. Olivas, *Who Gets to Control Civil Rights Case Management? An Essay on Purposive Organizations and Litigation Agenda-Building*, 2015 MICH. ST. L. REV. 1617.

32. *Id.* at 1618.

33. David J. R. Frakt, *Persuasion in Civil Rights Advocacy: Lessons Learned in Representing Guantanamo Detainees*, 2015 MICH. ST. L. REV. 1599.

focusing primarily on collegiate athletes and unpaid student interns.[34] Acknowledging that such rhetoric is readily contested on the basis of voluntariness—slaves work involuntarily, unlike athletes and interns—she points out that such rhetoric endows with particular resonance other aspects of the same conceptual complex: one-sided benefits running exclusively to the owner/employer through free work, high levels of control of the workers, and workers' vulnerability to abuse because they are unprotected by work-place rights such as a right to be free of discrimination. The language of slavery, in conjunction with the facts, may have created sympathy for such workers and reduced resistance to improvement in their situations, contributing to emerging legal and out-of-court successes.

Disqualifying Universality Under the Americans with Disabilities Act Amendments Act by Professor Michelle A. Travis indirectly illustrates the necessity of a legal and public persuasive strategy that reinforces inclusive messages while dampening majoritarian fear of social and personal cost.[35] The Americans with Disabilities Act (ADA) and the ADA Amendments Act (ADAAA) failed to establish more extensive civil rights for workers with disabilities because employers largely succeeded in reframing the ADA as welfare, invoking fear of cost due to undeserving persons with disabilities benefiting at the expense of other workers and employers. Courts thus focused not on sustaining rights, but on policing the beneficiaries. The ADAAA prompted an even more effective persuasive strategy: Seemingly neutral job descriptions were rewritten to incorporate general norms, often bearing little relationship to actual job duties or the ability to perform them, thus inserting exclusionary stereotypes into "the definition of work itself."[36] As Professor Travis points out, successful advocacy will require re-education of judges and public alike, the dual aspects of successful persuasive strategy identified by Dean Chemerinsky.

The symposium articles collectively address a variety of civil rights contexts and illustrate the truth of Dean Chemerinsky's thesis that court action is necessary, but not sufficient, to advance civil rights. Litigation must be coupled with long-term strategies, coherent framing of issues, and persuasion of the general public to diminish

34. Maria L. Ontiveros, *NCAA Athletes, Unpaid Interns, and the S-Word: Exploring the Rhetorical Impact of the Language of Slavery*, 2015 MICH. ST. L. REV. 1657.

35. Michelle A. Travis, *Disqualifying Universality Under the Americans with Disabilities Act Amendments Act*, 2015 MICH. ST. L. REV. 1689.

36. *Id.* at 1706.

perceived threat and cost of civil rights advances and to increase buy-in and sympathy. Complex interactions between the needs of individual plaintiffs and of disadvantaged groups, choice of legal avenues, and crafting of persuasive messages for judges and society as a whole drive effective advocacy in the civil rights arena.