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# Social Justice Advocacy in the Third Dimension: Addressing the Problem of "Preservation-Through-Transformation"

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# SOCIAL JUSTICE ADVOCACY IN THE THIRD DIMENSION: ADDRESSING THE PROBLEM OF "PRESERVATION-THROUGH-TRANSFORMATION"

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> The ways in which the legal system enforces social stratification are various and evolve over time. Efforts to reform a status regime bring about changes in its rule structure and justificatory rhetoric — a dynamic I have called . . . "preservation-through-transformation."
> — Reva Siegel[1]

> [T]hird-dimensional lawyering involves helping a group learn how to interpret moments of domination as opportunities for resistance.
> — Lucie White[2]

## I. INTRODUCTION

This Essay considers illustrative voices and visions of social justice as they connect with some of the contexts and contents of social justice practice. Increasingly, social justice concerns are drawing the attention of people from the grassroots to mainstream political campaigns. Last fall, for instance, newspapers across the nation reported that two principal Democratic Party presidential candidates, Howard Dean and John Edwards, each promised that he would convene a summit on social justice within ninety days of taking office.[3] While I am not suggesting that either should serve as a role model for social justice, I write with the conviction that it is important to develop, quite conscientiously, a progressive agenda that makes social justice the center of our work. Thus, I am gratified to participate in a global classroom that the sponsoring law schools describe as "a unique study abroad program devoted to law, policy and social justice activism."[4]

In an early description of critical race theory, Kim Crenshaw stated, "[t]he normative stance of critical race theory is that massive social transformation is a necessary precondition of racial justice."[5] As a normative stance — however difficult it may be to translate into practice

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1. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997).

2. Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 763.

3. Holly Ramer, *Edwards, Dean Vow Focus on Social Justice*, HERALD-SUN (Durham, N.C.), Oct. 20, 2003, at C9.

4. Critical Global Classroom, *available at* http://personal.law.miami.edu/~fvaldes/latcrit/events/cgc/index.html (last visited July 20, 2004).

5. KIMBERLÉ CRENSHAW, *A Black Feminist Critique of Antidiscrimination Law and Politics*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 214 n.7 (David Kairys ed., 1990).

— it distances us from liberal fallacies that "ensure [ ] that the steps toward justice will be small, halting, and self limiting."[6] In Richard Abel's view, the basic fallacy of liberalism is "the belief that it is possible to achieve equality in one circumscribed realm without addressing other structural inequalities."[7]

A principal challenge to social justice lawyering, as political lawyering and community lawyering, is to develop an advocacy model that is both clever and adroit, one that can effectively operate not only within the constraints of liberalism when necessary, but also beyond the limits of liberalism and its fallacies when possible. At the same time, active resistance to the pressures of reactionary and conservative forces remains the greatest challenge. Too often, progressives have failed to respond to those forces, because we have been so diligent — over-zealous, really — in critiquing liberalism. Those of us who seek to connect theory and practice in progressive ways must figure out how (1) to fight the right, (2) struggle with the liberal left even as we operate within its constraints, and (3) work to break free of those constraints without being quixotic or Sisyphean in trying to make social justice a real experience for those who are marginalized, subordinated, and underrepresented.

As Peggy Davis noted at a critical race theory workshop in the mid-1990s, this effort is daunting because when we try to say something in our scholarship that advocates and client communities can really use, we often find ourselves limited to "trying to solidify an optimism about limited transformation."[8] I sense a lot of frustration among critical, progressive scholars and those with whom we collaborate. That frustration, in significant part, reflects impatience with solidifying "an optimism about limited transformation" even though we are frequently unable to offer more.[9] But at every opportunity, as I think this colloquium demonstrates, we must offer more.

In my own attempt to offer more, along with Martha Mahoney and Stephanie Wildman, I recently co-authored a book that presents social justice lawyering as theory and practice.[10] Building on that work, this "oral essay" addresses a general theme in the book, that of looking at lawyers

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6. Richard Abel, *Big Lies and Small Steps: A Critique of Deborah Rhode's Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 1019, 1024 (1998).

7. *Id.*

8. Peggy Davis, comments made during a panel discussion on "The Application of Critical Race Theory to Progressive Practice," Critical Race Theory Workshop, Philadelphia, June 1995.

9. *Id.*

10. MARTHA R. MAHONEY, JOHN O. CALMORE & STEPHANIE M. WILDMAN, SOCIAL JUSTICE: PROFESSIONALS, COMMUNITIES, AND LAW (2003).

and political struggles toward lasting transformation.[11] This theme compels an examination about power and the self-awareness attorneys must assume about their role in advancing a social justice agenda.[12] In our book's examination of this theme we raised a number of questions that frame the present discussion:

> Will the community's concerns, which may have political and social aspects, be reformed around claims that can be taken to court? What will be gained and lost through such an approach? Will the lawyer become the spokesperson, the media figure, or the political adviser? Is the goal of legal work for social justice to win recognition of rights, such as passing a statute against discrimination, or is the ultimate goal a change in the culture and practice in a society that brings about greater equality for all? . . . What can lawyers do when systems of oppression are deeply interrelated and no single intervention can adequately address structural injustice? . . . How can lawyers, scholars, and activists raise demands that continue to focus on racial injustice [for example] while building particular struggles? . . . How can work with community activists give depth to those demands and mobilize residents in ways that strengthen their position locally as well as coordinating legal and political battles? . . . How can a longstanding form of oppression be rendered so socially and politically unacceptable that courts and legislatures become convinced they must act to end it? . . . . If a lawsuit is settled, will the community be organized enough to know whether promises are being kept — and, if they are not kept, to respond appropriately?[13]

These questions present a daunting background of issues that must be addressed if far-reaching and sustainable transformation is the goal. As

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11. *Id.* at 763.

12. In presenting this framework for discussion, I want to stimulate consideration of how social justice lawyers and community activists can work in collaboration to make transformation mean more than simply legal reform. Three focal points are suggested: (1) consciousness about power as a goal of legal practice, (2) the connection between community empowerment and the role of lawyers, and (3) empirical examples of community empowerment in practice. *See, e.g.*, 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); Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775 (1998); Julie A. Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry*, 1 J. GENDER, RACE & JUST. 405 (1998).

13. MAHONEY ET AL., *supra* note 10, at 763-64.

legal advocates, or social justice lawyers, we particularly need to evaluate the best use of our expertise and, in part, this suggests that we need to discern when it is most effective to turn to courts to seek legal change and when our main role is to defend and support, perhaps in extralegal ways, the ability of our clients, constituencies, and communities to work for social and political change that translate into social justice that is alive — that is experienced.

Against these backdrops, the following presents snapshots of some of the lessons I teach and learn in a course at the University of North Carolina, which is called Social Justice Lawyering. I will discuss, in turn, Reva Siegel's description of "preservation-through-transformation," Lucie White's three dimensions of lawyering, and Herbert Eastman's "thick" pleading in federal court complaints.[14] Siegel presents a problem that reinforces status hierarchy. White and Eastman, respectively, present an advocacy orientation for lawyers and a tool of legal pleading that have the potential to overcome the phenomenon Siegel describes. The work of Siegel shows that "transformation" is a heavy-duty word, a quite complex process of social change. In discussing the work of White and Eastman, I hope to highlight the fact that for rights to be useful, we must re-imagine how to assert them and how to complement that assertion through collaboration and elevated consciousness along numerous lines.

## II. PRESERVATION-THROUGH-TRANSFORMATION

Reva Siegel describes the historical process of what she calls "preservation-through-transformation."[15] Overcoming this phenomenon — this primary challenge — directs this Essay. As Siegel explains, during the Nineteenth and Twentieth Centuries, the legal system in the United States responded to demands for the equality of women and colored people with modifications — call it "law reform," perhaps — that began to treat them as equal under law. For most members of these groups, they appeared historically and formally in law as holding low status in hierarchical relationships, women to men and colored people to white people. According to Siegel, "In gender, race, and class relationships, the legal system continued to allocate privileges and entitlements in a manner that perpetuated former systems of express hierarchy. Analyzed from this vantage point, the rise of liberal and capitalist systems of socia

14. Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigatc* 104 YALE L.J. 763 (1995).

15. Siegel, *supra* note 1, at 1116.

organization did not result in the dismantlement of status relationships, but instead precipitated their evolution into new forms."[16] In effect, Siegel describes an empirical phenomenon as well as a theory of preservation-through-transformation whereby status hierarchies are preserved not in spite of "transformation" efforts, but in part because of the justificatory rhetoric that explains and legitimates them. As injustice is challenged, social institutions disassociate themselves from the prior regime and repudiate that rhetoric. The reality of the status hierarchy, however, has not changed as significantly as the new rhetoric would suggest. As Kenji Yoshino observes, "[t]o the contrary, the status hierarchy may be preserved precisely because the rhetoric has changed, permitting social actors to tell a progress narrative that legitimated the status quo."[17] He thus likens the process to a virus — "the status hierarchy mutates to ensure a longevity that would not have been possible if it had remained static."[18] While preservation-through-transformation neither forecloses the possibility of significant change, nor assumes a constancy of bad intentioned actors, "it does, however, caution that progress narratives about status hierarchies should be approached with intense skepticism."[19] Finally, given the material stakes at issue, those in dominant positions of power or privilege who benefit from status hierarchy resist the very changes that social justice claims raise. Under these circumstances, the contestation over status hierarchy is "much more likely to effect rhetorical rather than substantive revision."[20]

This "virus" continues to be manifested in the United States in varied contexts of anti-subordination movements.[21] Legal changes have been significant, at least in formal senses, and those changes have produced real

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16. *Id.*

17. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 825 (2002).

18. *Id.*

19. *Id.* at 826.

20. *Id.*

21. *See* Sally F. Goldgarb, *Applying the Discrimination Model to Violence Against Women: Some Reflections on Theory and Practice*, 11 AM. U. J. GENDER SOC. POL'Y & L. 251, 270 n.36 (2003) (citing Reva B. Siegel, *"The Rule of Love": Wife Beating as Perogative and Privacy*, 105 YALE L.J. 2117 (1996)); Darren Lenard Hutchinson, *"Unexplainable on Grounds Other than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 698 (2003); Kapila Juthani, *Police Treatment of Domestic Violence and Sexual Abuse: Affirmative Duty to Protect vs. Fourth Amendment Privacy*, 59 N.Y.U. ANN. SURV. AM. L. 51, 55 (2003); Rachel F. Moran, *The Elusive Nature of Discrimination: Pervasive Prejudice? Unconventional Evidence of Race and Gender Discrimination*, 55 STAN. L. REV. 2365, 2410 (2003) (book review); Robert Westley, *Reparations and Symbiosis: Reclaiming the Remedial Focus*, 71 UMKC L. REV. 419, 428 (2002).

progress in improving the lives of people. Yet, because the legal changes have not gone far enough, have not been sustainable enough to resist backlash and retrenchment, those changes have not been fully transformative. That is, they have not eradicated foundational status structures and systems. Sometimes, we have a tendency to focus too narrowly on the legal issue and, consequently, law reform efforts are reduced to stopgap or, increasingly, hold-harmless measures.

This year, 2004, marks the fiftieth anniversary of the landmark Supreme Court decision of *Brown v. Board of Education.* It marks the fortieth anniversary of the landmark legislation, the Civil Rights Act of 1964, and it approaches the fortieth anniversary of other landmark legislation, the Voting Rights Act of 1965. As truly monumental as the changes brought by the civil rights movement in the United States, the dynamics of social justice claims producing right-wing, reactionary backlash have placed civil rights advocates on a virtual treadmill, running in place to preserve prior gains from being turned back. The quest for racial justice presents a salient illustration of Siegel's concept of "preservation-through-transformation." Almost twenty-five years ago, Derrick Bell wrote the following in the second edition of his path-breaking textbook on race, racism, and American law:

> We have witnessed hard-won decisions, intended to protect basic rights of black citizens from racial discrimination, lose their vitality before they could be enforced effectively. In a nation dedicated to individual freedom, laws that never should have been needed face neglect, reversal, and outright repeal, while the discrimination they were designed to eliminate continues in the same or a more sophisticated form. In many respects, the civil rights cases and laws of the 1950s and 1960s are facing a fate quite similar to civil rights measures fashioned to protect the rights of blacks during an earlier racial reconstruction period more than a century ago.[22]

Although this was written in 1980, the fact that it resonates so well today among those who are familiar with racism in the United States — especially those whose lived experience is racism — reinforces the difficulty of overcoming the phenomenon of law's preservation-through-transformation. As Siegel observes, "In the tug and haul of politics, the

22. DERRICK BELL, RACE, RACISM AND AMERICAN LAW (2d ed. 1980).

process of dismantling an entrenched system of status relations may well transform the regime without abolishing it."[23]

Recently, in the case of *United States v. Morrison*, the Supreme Court held that federal legislation providing a civil rights remedy for victims of gender-based violence was unconstitutional because Congress lacked the authority under the Commerce Clause or the Fourteenth Amendment's enforcement provisions to enact the statute's civil remedy.[24] The case arose out of the rape of Christy Brzonkala, a student at Virginia Tech University. As a result of the Court's holding, her civil remedies were limited to state court adjudication. This case is another manifestation of preservation-through-transformation. As Catharine MacKinnon states bluntly,

> Read substantively, *Morrison* is not an abstract application of neutral institutional priorities, but a refusal to allow Congress to redress violence against women — a problem the Court declined to see as one of economic salience or national dimension. In *Morrison*, the Court revived and deployed against women the odious "state's rights" doctrine, the principal legal argument for the maintenance of slavery that was used to deny equality rights on racial grounds well into [the twentieth] century. Combined with the Court's equal protection jurisprudence — the "intent" requirement of which has made it increasingly difficult to hold states responsible for equal protection violations committed by state actors — *Morrison* leaves women who are denied the equal protection of criminal laws against battering and rape without legal recourse.[25]

Does any dimension of lawyering described below by Lucie White improve Christy Brzonkala's chances of success?

## III. THE PRAXIS OF THIRD DIMENSION LAWYERING

As social justice praxis, Lucie White presents three ideal types of activist lawyers engaged in social transformation.[26] I want to examine her analysis as one possible response to the preservation-through-transformation problem Reva Siegel describes. In the image of the first

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23. Siegel, *supra* note 1, at 1116.

24. United States v. Morrison, 529 U.S. 598 (2000).

25. Catharine A. MacKinnon, *Disputing Male Sovereignty: On* United States v. Morrison, 114 HARV. L. REV. 135, 136-37 (2000) (citations omitted).

26. White, *supra* note 2, at 754. For an insightful analysis of White's article and critiques of it, see Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427 (2000).

dimension lawyering, we have the lawyer who contests litigation — a pretty straight-ahead rights-based, litigation form of advocacy.[27] Test case litigation and law reform litigation are illustrative. Broad, sweeping and innovative remedies are sought. This is more a reform goal than transformation goal. The courtroom is the principal venue. According to White, "[w]ithin this image, the lawyer assumes that client groups perceive their suffering as injuries that can be redressed, and stand willing to share these perceptions with their lawyers. It is not the lawyer's role to question the structure of the law itself, asking whether it sometimes prevents the lawyer from translating his clients' grievances into good legal claims. Nor is it his role to question the judicial system, asking whether it sometimes prevents him from securing remedies that really work."[28]

In the second dimension the lawyer uses litigation as public action with political significance. The law and its practice have cultural meaning; they constitute a discourse — not merely a discussion — about social justice. The advocacy seeks to influence public consciousness. Here, law is "a public conversation." As White explains, "the lawyer is not indifferent to victory in court. If a claim prevails, so much the better. But the measure of the case's success is not who wins. Rather, success is measured by such factors as whether the case widens the public imagination about right and wrong, mobilizes political action behind new social arrangements, or pressures those in power to make concessions. To accomplish these goals, the lawyer must design the case with the audience — the subordinated group and the wider public — in mind."[29]

Finally, collaborative work with the client community marks third dimension lawyering. Drawing on the work of Paulo Friere and the parallel feminist method of consciousness raising, this dimension challenges subordination at the level of consciousness of the client community.[30] The third dimension of lawyering involves helping a group learn how to interpret moments of domination as opportunities for resistance. Thus, the lawyer must engage not only in dialogue and mutual education, but also in strategic work:

> The lawyer must help the client-group devise concrete actions that challenge the patterns of domination that they identify. This strategizing is also a learning process. Through it, the group learns to interpret their relationship with those in power as an ongoing

27. White, *supra* note 2, at 755 (citations omitted).
28. *Id.*
29. *Id.* at 758-59.
30. *Id.* at 760-61.

> drama rather than as a static condition. They learn to interpret the particular configurations that the oppressor's power takes on over time and to respond to those changing patterns with pragmatism and creativity. They learn how to design context-specific acts of public resistance, which work, not by overpowering the oppressor, but by revealing the wrongness and vulnerability of its positions to itself and to a wider public.[31]

White's analysis of the three dimensions of lawyering grows out of a context in South Africa where members of a small farming community struggled against forced relocation under the oppression of apartheid, so the article is really about a concrete instance of resistance and organizing against subordination. I ask the students, "How has legal training prepared you regarding any of White's dimensions of lawyering?"

This third dimension image, of course, is foreign to the traditional image of the lawyer. Indeed, one does not really need a law degree or an attorney's license to practice this dimension of advocacy. White claims that "fluency in the law — that is, a deep practical understanding of law as a discourse for articulating norms of justice and an array of rituals for resolving social conflict — will greatly improve a person's flexibility and effectiveness at 'third dimensional work.'"[32] I recently was following a car with a bumper sticker that read: "Question the Answers." Given the danger that law will shape work against subordination conservatively, is "fluency in the law" really an advantage in organizing? My students, as do I, struggle with this question.[33]

In the next part, I describe an advocacy tool, the Eastman thick complaint, a tool that certainly facilitates second dimension lawyering and may facilitate third dimension lawyering as well. Before I describe it, however, I want to be very clear that second dimension lawyering is high order advocacy and, in spite of the limitations, many of us never get past this dimension and that is quite okay. For example, White points to second dimension lawyering in Nelson Mandela's 1962 trial for terrorism: "He and the other defendants decided to use the event to speak out to white South Africans and the world about the injustice of apartheid. This proved

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31. *Id.* at 763.

32. White, *supra* note 2, at 765.

33. The issue of law and organizing simply adds another significant layer of complexity. *See* Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001); William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455 (1994).

inconsistent with the traditional strategy of raising technical defenses to defeat the state's claim."[34]

While one should certainly aspire to the third dimension in some contexts, we should not be hypercritical of second dimension lawyering. Third dimension lawyering really requires a certain set of circumstances that facilitate a joint project with clients to translate felt experience into understandings and actions that can increase their power. There are groups ready to go — groups whose consciousness about oppression is well developed and who will advance their cause very well within second dimension advocacy. They may need a third dimension response as well as a second dimension response — a sort of hybrid response.[35]

## IV. HERBERT EASTMAN AND THE THICK COMPLAINT IN SOCIAL JUSTICE LAWYERING

According to Peter Gabel and Paul Harris: "A first-principle of a 'counter hegemonic' legal practice must be to subordinate the goal of getting people their rights to the goal of building an authentic or unalienated political consciousness."[36] Thus, while rights strategies are important to social justice practice, as Gabel and Harris note, "the lawyer should always attempt to reshape the way legal conflicts are represented in the law, revealing . . . the true socioeconomic and political foundations of legal disputes."[37]

Consistent with this view, as an exercise in my social justice lawyering class I require the students to draft a federal court complaint on the Herbert Eastman model of pleading.[38] He provides an example of a "thick complaint" that contrasts with traditional notice pleading.[39] Although to date, most of my students over the last two classes have identified (at their "progressive best") with second dimension lawyering, I intend the

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34. White, *supra* note 2, at 759 n.217.

35. *See generally* PENDA D. HAIR, LOUDER THAN WORDS: LAWYERS, COMMUNITIES AND THE STRUGGLE FOR JUSTICE, A REPORT TO THE ROCKEFELLER FOUNDATION (2001).

36. Peter Gabel & Paul Harris, *Building Power and Breaking Images, Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 375 (1982).

37. *Id.* at 376.

38. Eastman, *supra* note 14, at 836-49. In the past students have filed complaints against the federal government, seeking "spatial reparations"; against local police for failing to respond adequately to instances of domestic violence; and against local school boards for failing to protect gay and lesbian youth from violence and harassment in high school.

39. Pleading rules present an apparent, but not real, constraint. FED. R. CIV. P. 8 (requiring a short and plain statement of the claim. This would encourage a "thin" complaint.).

complaint drafting assignment to enable them to use the complaint as part of third dimension lawyering. Third dimension lawyering is very hard to do: How does the lawyer get invited into the client community and how does she legitimate her presence beyond mere invitation? Is it enough simply not to be regnant? How can advocates move beyond the first and second dimensions? Even with consciousness raising and collaboration galore, how do you achieve the transformation that can only result from the elimination of institutional domination and oppression? For students, I think the process of professional re-socialization simply does not reorient them enough or in time to move beyond the second dimension lawyering stage. The complaint assignment, however, has proven to be a very good, reflective, and self-critical start for most of them.

Eastman was a civil rights lawyer for many years before he began to teach law school. He writes of "the recurring disappointment and frustration I have felt after consultation with clients in cases presenting outrages that . . . cried out to heaven."[40] In reviewing the inadequacy of simple, notice pleading he observes:

> I could barely see over the chasm separating what those clients told me about their lives and what I wrote to the court as factual allegations in the complaint—sterile recitations of dates and events that lost so much in the translation. [What is missing?] Details, of course. Passion certainly, but more than that. We lose the identity of the person harmed, the story of [the clients' lives]. But even more is lost. This was a class action aimed at remedying a systemic problem harming thousands, over generations. The complaint omits the social chemistry underneath the events normally invisible to the law—events that create the injury or compound it. In this complaint, we lose the fullness of the harm done, the scale of the deprivations, the humiliation of the plaintiff class members, the damage to greater society, the significance of it all.[41]

Before I began law teaching I was a legal services lawyer, practicing in federal court from 1974-1985. During that period, I also spent a couple of years as the Director of Litigation for the Legal Aid Foundation of Los Angeles (1982-1984). Yet, as I recall my own pleadings, those of the attorneys I supervised, and those with whom I was co-counsel, I am almost ashamed to admit how inadequately thin the complaints were. They were

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40. Eastman, *supra* note 14, at 766. Eastman's article contains his original set of pleadings and a thick complaint he would have filed if he had to it over again.

41. *Id.*

inadequate precisely for the reasons Eastman cites. Where, indeed, was the social chemistry that underlay the injury causing events? Where were the descriptions of the full harm done and the significance of it all? Moreover, as I recall again my own years of practice, I regret that the simple pleadings offered a complaint that left intact the wall between my clients and the federal court and, worse, between my clients and me as their lawyer. In Eastman's view, he correctly notes, "In a strange way, it even effaces the lawyer by denying her the dynamic and creative role of responding to the tragedy witnessed."[42]

In teaching social justice, I hope to help the next generation of lawyers avoid having to voice similar laments, and the Eastman complaint exercise helps. The Eastman complaint is written as a journalist or historian would, even borrowing sometimes from the style a novelist might employ.[43] The lawyer must intertwine language that is both legal and nonlegal, with the clients' stories kept central. The Eastman complaint, moreover, "offers the language of voices rather than of concepts."[44]

Central to thick pleading is the client narrative. While the familiar endorsement of client stories is incorporated here — to concretize abstract values like justice and equality and to add context — in the complaint client narratives do more than bid for sympathy or empathy. In the context of the complaint, client narratives enliven, drive, and shape the legal argument. As Eastman notes, "It is the dynamic role of the narrative within a legal argument — rather than the narrative standing alone, perhaps unheard — that gives it persuasive force."[45]

As Eastman acknowledges, "the most unconventional aspect of the pleading is the use of photographs."[46] For my students, the appearance of photographs in the complaint was certainly the most startling aspect of the assignment. Yet, once they bought into this method of pleading, they used photographs to tremendous effect. One student filed a complaint against the hypothetical Anytown Police Department for failing to respond effectively to battered women. She alleged, as in too many cases, that the husband had not only battered his wife, but also the children. He ended up killing three children under the age of ten. Along with the expected photographs of the battered spouse, the complaint included photographs of three small caskets in which the children were to be buried. The pleading noted how tragically ironic it is to see caskets that are "not full grown."

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42. *Id.* at 767.
43. *Id.* at 834.
44. *Id.*
45. Eastman, *supra* note 14, at 813.
46. *Id.* at 835.

In Eastman's thick complaint against the City of Cairo, Illinois, black plaintiffs challenged the discriminatory reality of at-large city council elections.[47] In one paragraph, the complaint cites the facts that the median income for blacks is less than half that of white families, that Cairo businesses would rather hire whites from out of state than hire blacks who live in Cairo, and that labor unions exclude blacks from membership.[48] The complaint then alleges: "Predictably, this forces African-Americans onto welfare rolls. The welfare office has conspired with the local cotton growers so that while they are on welfare, African-Americans are forced to choose between picking cotton at substandard wages or forfeiting their welfare payments."[49] This allegation is followed with a dramatic photograph with the simple caption, "African-Americans picking cotton near Cairo."[50] There is no further allegation or elaboration, but the photograph invites engagement. This is not Mississippi, but Illinois. This is not "way back when," but today. Later, the complaint quotes newspaper stories where white leaders claim that blacks prefer to live in a shanty.[51] The complaint reads, "Pictured below is Riverlore, the [mansion] home of William Wolters, a businessman owning one of Cairo's major employers, and next to that is a photograph of those shanties, which Mr. Wolters described to a *Chicago Tribune* reporter as 'those nigger shacks.'"[52] The juxtaposition helps to explain, in a way that notice pleadings simply cannot, the imbalance in power, the inequality, and the attitude of a white leader in the community. I often see the negative ways in which public housing projects are represented in the media and popular culture and, now, I think these representations mask the real meaning that so many attribute to black housing — "those nigger shacks."

In the Eastman thick complaint, the photographs are an important part of the effort to incorporate the client's voice. Indeed, one of the named plaintiffs, Preston Ewing, Jr., is a photographer who uses his photographs "to express his view of the world" and they were placed in the pleading at his suggestion.[53] As the two illustrations above indicate, the photographs express aspects of the problem that extend beyond words and often their full significance goes unexplained, but is left to the audience's perceptive

47. Cairo, Illinois presents, historically, one of the most difficult contexts in which to practice social justice lawyering. *See generally* Michael P. Seng, *The Cairo Experience: Civil Rights Litigation in a Racial Powder Keg*, 61 OR. L. REV. 285 (1982).

48. Eastman, *supra* note 14, at 838.

49. *Id.*

50. *Id.*

51. *Id.* at 845.

52. *Id.*

53. Eastman, *supra* note 14, at 835.

powers. An example of this is seen on a photograph of a white citizens council sign that reads "racial integrity."[54] Photographs also personalize and humanize the plaintiffs, as where the complaint includes "Hattie Kendrick today," dignified, smiling, and dressed in her Sunday best.[55]

Before requesting redress in the Prayer for Relief, the complaint quotes a member of the plaintiff class, Rosie O'Bryant, described as "an 84-year-old welfare recipient who had to mortgage her mule" to survive: "I don't see a bit of difference now than I did way back in '51 or '52 in the civil rights. It hasn't reached us. I reckon it's on its way, but it ain't got here yet."[56] In the next paragraph of the complaint, the pleading declares, "This Court possesses the authority to bring civil rights and the Constitution to Cairo."[57] Amazingly, in today's world, this claim of simple justice is now a radical declaration.

The Eastman complaint is an important tool that is not only linked to our panel's topic of putting law and justice in social context, but also with another panel's topic of justice systems at work: comparative critiques and accounts. From the presentations of both sets of panelists, we know that around the world many clients and communities of marginalized, subordinated, and underrepresented people "can resist, do resist and have a rich and full history of resistance" to injustice.[58] Resistance is no silver bullet and is often romanticized. Yet, client narrative must incorporate this resistance as part of the client story that educates judges, the bar, and the public. More importantly, that resistance can bear on strategic planning and advocacy. This, as well, potentially links the Eastman complaint to effective second dimension lawyering if not to third dimension lawyering. As Michelle Jacobs explains:

> As lawyers and students, we must now find ways to understand and to use the client's resistance on their behalf. We can do this by using their resistance to reframe legal issues and to assist in developing legal strategy. We can use their resistance to challenge stereotypical characterizations made by the courts and administrative agencies of our clients and their lives. We must also begin to understand the causes of clients' resistance to their lawyers,

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54. *Id.*
55. *Id.* at 842.
56. *Id.* at 847.
57. *Id.*
58. Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 401 (1997).

and where possible, eliminate the lawyer-created causes of resistance. . . .

. . . I am struck by the notion that so frequently we excuse lawyer distortion of client narrative, claiming we are constrained to represent the client in a particular doctrinal way. We claim we are forced to distort the narrative because the court will only recognize and value our clients' legal claim if it is presented in the right doctrinal form. And, yet, we admit at the same time that courts are not seeing our clients in the proper light, nor hearing their stories correctly. We need to begin educating the courts about our clients' lives and stories, outside of the adversarial context, so that our attempts to "empower" our clients do not become empty rhetoric. We need to help the bench and bar recognize that the indigent clients we serve are not just rich clients dressed in cheaper clothes, but are people who have problems that are uniquely their own, problems which until now the legal system has refused to acknowledge.[59]

The Eastman thick complaint carries a lot of baggage and one could argue that the thickness of stories and photographs ought to come later — in motion papers, at trial, at the closing argument. Eastman makes eight arguments for placing so much in the complaint, however.[60] First, when seeking an injunction, in a civil rights case there is no access to a jury.[61] Second, in most cases there will be no trial.[62] Third, even if a trial occurs, it will probably take years to reach that point in the litigation.[63] Fourth, the court's initial recognition of the problem will set the stage for how it will be considered.[64] Fifth, because federal judges tend to sit in economic and social isolation from clients raising social justice claims, they need "more vivid and complete pictures painted for them if they are to understand the problems sufficiently, to care about them enough to guide the litigation, and ultimately, to remedy those problems."[65] Sixth, the complaint can be an excellent constituency-developing device, especially for those lawyers who perceive themselves to be representing a cause or constituency beyond

59. *Id.* at 401-02.
60. Eastman, *supra* note 14, at 769-72.
61. *Id.* at 769.
62. *Id.*
63. *Id.* at 770.
64. *Id.*
65. Eastman, *supra* note 14, at 771.

the immediate plaintiff or plaintiff class.[66] Seventh, through the strategic use of the media, the complaint triggers a conversation with the greater community.[67] Eighth, "the complaint offers the litigator the only chance to tell the client's story — a dramatic, compelling story — in a literary way."[68]

The Eastman complaint assignment offers a number of opportunities to help students recognize the many constraints they must overcome to engage in social justice lawyering. In one sense, a constraint is the repression of one's own feelings, behavior, or actions. Constraints tend to force us into being directed by a narrow compass, to check, block or detour our behavior or action, and to limit our sense of the possible. Here are some of the constraints I have found to hamper students in developing a legal persona that reflects social justice lawyering: (1) legal education itself; (2) dominant expectations associated with professional role and socialization; (3) convention and tradition associated with being a lawyer; (4) professional standards of practice; (5) self-preservation (conformity, "don't rock the boat" syndrome); (6) laws and rights as tools of advocacy; (7) liberalism; (8) right-wing politics of conservatives, neoconservatives, and reactionaries (opposition, retrenchment, backlash); (9) establishment inertia; (10) unhelpful power centers (corporations, the Republican Party, the judiciary, such as some of the Supreme Court justices and the judges who sit on the Fourth Circuit Court of Appeals, city hall, the department of public social services, the housing authority, the local police); (11) limited opportunity structure for jobs, pay, and development; (12) psychology (excessive identification with Don Quixote and/or Sisyphus); (13) self-righteousness and hubris; (14) the geographic environment (the South beyond Chapel Hill); and (15) oppressive discursive hegemony.

Throughout the course, I ask that the students keep this list in mind as illustrative, not exhaustive. They are free to modify it. They are to think about these constraints as they think about where and how they fit operationally within the systems of lawyers, laws, and politics. One transcending constraint is simply the profound difficulty of representing a constituency of marginalized, subordinated, and underrepresented individuals, groups, and communities. This, in turn, leads to having to approximate one's full vision of social justice lawyering — being opportunistic, looking for openings, and being strategic in their advocacy. Perhaps I put more baggage on the Eastman complaint assignment than it can really carry, but I use it to test student's ability to deal with all of these

66. *Id.* at 772.
67. *Id.*
68. *Id.*

constraints. For some, it is overwhelming. For many, however, it ranks as one of their best experiences in law school.

Before describing the assignment further, I want to elaborate a bit on the first constraint noted above, that of legal education. Three respected professors of professional responsibility state:

> Criticism of legal education has been constant and repetitious for many years. The four principal categories of criticism. . . are: (1) law school does not adequately prepare its graduates for the practice of law; (2) the educational experience has a destructive effect upon the character or values of students; (3) law school fails to produce public spirited and socially responsible lawyers; and (4) legal education is not accessible to all sectors of American society.[69]

It is terribly important, I think, that students test how well they can, or have, overcome critiques 1-3. Building on the ability to do so, the course in social justice lawyering generally and the Eastman complaint exercise particularly have given students new opportunities to engage in critical reflection in broader and deeper ways than they are used to.

Though not a clinician, I take a page from their book here. Drawing on the insights of two clinical professors, I offer their views of the value of moving the students beyond the traditional realms of "thinking like a lawyer." Lisa Lerman observes, "Student externs can cultivate their skills as reflective practitioners. Even if students become busy lawyers who have little time to ruminate, they will carry with them the skill of reflective observation."[70] According to Jane Aiken, "Clinical legal education has long valued reflection as a key to effective teaching. Our supervisory questions should be directed to fostering reflection rather than eliciting information. As teachers, we must deviate from system-reinforcing behaviors and challenge the students to examine and reflect upon the prevailing social, political, and cultural realities that affect their own and their clients' lives."[71] Without the real consequences and responsibilities that are associated with representing real clients, this assignment allows a simulated representation that allows my students the freedom to go to the end of their thoughts and to envision themselves pushing the envelope of legal practice. Perhaps, afterward, they will be better students, in and

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69. GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 971 (3d ed. 1999).

70. Lisa G. Lerman, *Professional and Ethical Issues in Legal Externships: Fostering Commitment to Public Service*, 67 FORDHAM L. REV. 2295, 2299 (1999).

71. Jane H. Aiken, *Provocateurs for Justice*, 7 CLINICAL L. REV. 287, 298 (2001).

outside of clinics, and better lawyers in and outside of the courtroom. Thus, as the students undertake this exercise, I explain that they are not just drafting a complaint strictly as an academic exercise. To a degree this assignment is a simulation where they are playing the role of a social justice lawyer. Both their complaint and background memorandum that explains and justifies this extraordinary form of pleading should demonstrate a sophisticated understanding of that role in this context.

I ask the students, "What if, during the first week of class, I assigned you the task of drafting an Eastman complaint, due the second week of the course?" I surmise they would be overwhelmed most likely. If not, they certainly would not be able to get into their roles very well. As the students place themselves in the distance from the early weeks of the course, I ask them to see how much more they should be able to bring to the task. I ask them to think back to the point in the text where we wrote:

> This book portrays the dynamic development process that involves professionals, communities, and law. Lawyers and activists seeking social justice operate within systemic constraints, while seeking to push the boundaries of those constraints. Social justice lawyering envisions the practice of law both on behalf of and alongside of subordinated peoples, with the efforts and achievements of members of the community a crucial aspect of the work.[72]

So, in drafting the complaint and thinking through its advocacy value, students should assume a situated role, not a formal or abstract role. The advocacy value of the complaint must be placed within a vision and framework of lawyering. I instruct my students that vision is vitally important; without it, conviction, commitment, and solidarity can be directionless attempts to invent, discover, and found the required social transformation. I share the words of Gary Bellow:

> Social vision is part of the operating ethos of self-conscious law practice. The fact that most law practice is not done self-consciously is simply a function of the degree to which most law practice serves the status quo. . . . "[V]ision-making" work is fundamental to the activist strategies political lawyering inevitably embodies.[73]

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72. MAHONEY ET AL., *supra* note 10, at 5.

73. Gary Bellow, *Steady Work: A Practioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 301-02 (1996).

I believe that Lucie White, as just one of many possible examples, presents an effective example of "vision-making" work that helps one to militate against Reva Siegel's described process of "preservation through transformation" — that is, work to make transformation mean more than mere legal reorganization by adopting a social justice practice that reflects either second or third dimension lawyering. I think the Eastman thick complaint facilitates both dimensions.

Thus, in order for the Eastman complaint to have advocacy value, the students must think on many levels: analytical, creative, critical, reflective, and strategic. They must extend themselves beyond the narrow formality of legalism that constricts the meaning of thinking like a lawyer. They must situate themselves, strategically, within the adversary process without allowing it to foreclose options that can take them outside the narrow bounds of filing a complaint in court. William Quigley has analyzed various themes in community empowerment lawyering, including the primary goal of building up the community and preventing it from becoming dependent on lawyers.[74] He suggests that the community must be involved in everything that the lawyer does and that the lawyer must learn community organizing and leadership development. The lawyer must never become the leader for the group, be wary of speaking for the group, understand how much the lawyer is taking as well as giving, and she must be willing to confront the lawyer's own comfort with an unjust legal system. For my students, I think the most basic theme deals with their social distance from marginalized, subordinated, and underrepresented clients and communities. Quigley correctly points to the necessity to be willing to "journey with the community."[75] This means that the lawyer must learn to join rather than lead, to listen rather than to speak, "to assist people in empowering themselves rather than manipulating the levers of power for them."[76] Quigley takes this notion from Barbara Major, an African-American organizer, who works with a number of low-income women's organizations in the southern United States. Major argues that "empowerment" is "when a person or group of people know who they are, accept who they are, and refuse to let people make them anything else."[77] She notes, moreover, that rather than working "in community," we should think more about working "with community."[78] Working with the community is what she means by "journeying with the community":

74. Quigley, *supra* note 33, at 456.
75. *Id.* at 462.
76. *Id.* at 479.
77. *Id.* at 461.
78. *Id.* at 462.

> This journey has to involve the community really getting a sense of who they are, in the sense of beginning to understand their own power. In working with community the wisdom or the knowledge of the lawyer does not outweigh the wisdom and the knowledge of the community, about itself especially.[79]

Here is a context or opening to engage in collaborative work along lines of third dimension lawyering. I ask the students: "How does your filing an Eastman complaint fit within these themes?" "Do you have reservations about these strategies of empowerment?" "What are the risks of filing a complaint in court — especially a complaint that takes the radical form of an Eastman complaint?" "What advantages and disadvantages accompany a focus on the courtroom?" "How can lawyers be part of a process of exploration and empowerment?"

*Caveat Emptor*: In trying to be progressive in forging collaboration with marginalized, subordinated, and underrepresented clients and communities, I think it is important not to romanticize the potential for group empowerment. The lawyer *qua* lawyer has a distinct expertise and advocacy role to play. Filing an Eastman type complaint is one example. Just developing the mindset that will enable one to file a thick complaint involves overcoming many forces that would inhibit filing thicker, more realistic complaints. In the memoranda the students write for my social justice lawyering class, this difficulty comes out pretty clearly. Like experienced lawyers, the students worry about their own self-preservation. They fear the sanctions of judges, the ridicule of their peers and superiors, and the disapproval of people who count on them. In short, they feel the pressures to adapt to mainstream lawyering and they fear the backlash from the Establishment. Eastman puts the point well:

> Perhaps we write like lawyers to avoid responding as people. In fulfilling our mission, we stand on the horns of a dilemma: How should we speak truth about a social injustice to the powers that can remedy that injustice? The truth is a terrible one — hard to comprehend, hard to imagine. The truth not only implicates legal rights but also challenges the legitimacy of the social order. When a lawsuit is filed, we ask, "What kind of society would permit such things to happen?" The lawyer who pledges to seek a remedy must acknowledge her privileged position in a social order that allowed, encouraged, or even insisted upon the injustice. The lawyer might

79. Quigley, *supra* note 33, at 462.

feel shame inside the outrage — shame that blurs the lawyer's vision.[80]

## V. CONCLUSION: KEEPING HOPE ALIVE!

Enlarging the lawyer's vision and sense of the possible are two crucial benefits that my students have derived from the social justice course generally and Eastman exercise specifically. When the vision and enlarged sense of the possibilities of direct commitment and social justice benefit them in the real world, it is gratifying. It keeps hope alive. For instance, one of my former students in the critical race theory seminar, Katie Guest, read the Eastman article in that class. While clerking for another former student, a local civil rights lawyer, Alan McSurely, she convinced him to try this form of pleading in court proceedings and administrative hearings. They came to my social justice lawyering class to describe their experiences with this advocacy tool. "Real people doing the real work" — their appearance gives credibility to my teaching and inspiration to the students.[81]

In a recent case, McSurely used "a thick pleading" when he filed a grievance with the Town of Chapel Hill to protest the demotion of the town's highest-ranking African-American police officer from captain to police officer III, a decision that cut his pay by $14,000 to $50,861.[82] McSurely alleged racial discrimination and requested reinstatement, back pay, and monetary damages for humiliation and emotional distress. Beyond the parameters of the private dispute, however, he told a thicker story as well, one that implicated the system and impacted the community. It is a story that raises community consciousness, "helping a group learn how to interpret moments of domination as opportunities for resistance."[83] The grievance militates against the narrowing of the lawyer's strategic imagination. Hence, beyond the traditional claims and remedies, McSurely argued that it would be difficult to make the captain whole, because "there is no way to siphon the poison that has been injected into his system and

80. Eastman, *supra* note 14, at 801-02 (citations omitted).

81. Michael Avery, who heads the National Lawyer's Guild and teaches at Suffolk University Law School, conducted a social justice lawyering class during the spring of 2003 and gave an inspiring talk.

82. Beth Velliquette, *Town's Top Black Cop Files Grievance*, HERALD-SUN (Durham, N.C.), Dec. 20, 2003, at D1.

83. White, *supra* note 2, at 763.

the system" of the Chapel Hill Police Department.[84] The Town of Chapel Hill promotes its reputation as one of the most liberal local governments not only in the South, but also the nation. Along with that reputation, there is a self-righteous complacency about its history and current practice of race relations. Consequently, McSurely asked officials to give the police captain two years of paid leave so he can

> gain a broader perspective on the . . . racially discriminatory context in which law enforcement agencies in the 21st century must be reformed and how some agencies have successfully exposed and broken down the white "secret societies" that remain so powerful, replacing them with human beings who have mutual respect for each other.[85]

Finally, continuing in the Eastman complaint mode, McSurely argued that the town was on notice that it must "engage in a deep-cleaning of . . . racially discriminatory attitudes and practices."[86] Accordingly, "one-day workshops won't do it. Tough-sounding zero tolerance policies won't do it. There must be strong anti-racist leadership from all the command staff as well as the town administration. This case is a wake-up call to the town."[87]

This illustration presents an example of an attempt to engage in a hybrid of second and third dimension lawyering, using a thick complaint to generate a potential consciousness raising not only among the black community, but also the larger public. It places the ultraliberal Town of Chapel Hill on the defensive, because it associates it with other local governments where racism exists and is identified as such. It challenges the town's preservation-through-transformation method of home rule.

This advocacy is particularly gratifying to me. So often the lessons we teach are like trial balloons and we seldom know where they land or if they benefit anyone. In 1986, Alan McSurely was one of my law students in a course on civil rights when I began law teaching at North Carolina Central University School of Law, the predominantly black counterpart to the flagship University of North Carolina at Chapel Hill where I now teach.

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84. Velliquette, *supra* note 82, at D1.

85. *Id.*

86. *Id.*

87. *Id.* Ultimately, Captain Johnson settled his case, resigning at the rank of captain in good standing and receiving pay for his accumulated vacation and sick time. Beth Velliquette, *Police Promote Black to Captain*, HERALD-SUN (Durham, N.C.), Mar. 26, 2004, at D1 (discussing the promotion of Bobby Smith to replace Johnson).

Contrary to the expected presumption, McSurely is a white lawyer. In 2001, Katie Guest, his clerk, was a student I taught and she was able to translate theory into practice and serve as my link from the academy to the streets. As I mentioned, Ms. Guest was a student in a seminar on critical race theory and, also contrary to expected presumption, she too is white. It is not just a black thing.

I close by recalling that at the 2002 celebration of Martin Luther King, Jr.'s birthday, Cornel West came to UNC Chapel Hill and spoke of how Dr. King was able to stay the course, maintain his high aspirations. Given the difficulty of what Dr. King was doing, West explained that Dr. King could not be an optimist — how could he be? Instead, however, West characterized Dr. King as "a prisoner of hope." No matter how bad the predicament or the prospects, Dr. King remained hopeful. He could no more escape from hope than he could from the Birmingham jail. I feel the same way. The concern for social justice is real, it is growing, and it is spreading. It brought me from Chapel Hill, North Carolina to Buenos Aires. In the spirit of the colloquium, I hope this writing will cultivate that growth, advance the spread of its vision and commitment, and enable us all to remain imprisoned by hope.