MICHAEL E. TIGAR

LAWYER'S ROLE IN RESISTANCE

I want to talk about the movement of resistance to the war and the draft, and how the Guild has become relevant to it and can become important to its eventual direction.

There is no question that the scope of resistance has broadened and the content of resistance politics has deepened. The rate of in-service conscientious objection goes up and up, and new doctrines of judicial review are being developed to deal with the problem, most recently in *Crane v. Hedrick* (ND Cal 1968) 284 F.Supp. 250, 1 SSLR 3051, and *Hammond v. Lenfest* (2d Cir. 1968) 398 F.2d 705, 1 SSLR 3108, and in the significant court martial Board of Review case of *Sigmon v. United States* (Army Bd. of Review 1968) 1 SSLR 3054. In *Cooper v. Barker* (D. Md. Civ. No. 19817, Oct. 29, 1968), the court not only granted the discharge on grounds of conscientious objection, but had held up a court martial for desertion long enough to permit the Court to act.

The Guild has taken a position of leadership in this sphere. Acting under only the loosest guidance and with little administrative and financial support, the Guild National Staff has nonetheless programmed, organized and developed techniques of counselling and counselor-training that are the most advanced in the country. Guild publications on the war and the draft are among the finest in the United States.

What worries me, though, when I consider the long-run prospects for important change, is the politics of this resistance, and its relationship to an understanding of the broader issues posed by Vietnam, and by the one, two, three, many Vietnams which the impenitent interventionists and foiled aggressors of our military establishment promise to create. I think that for our political selves, we ought to hope that out of a posture of resistance would come an appreciation of the forces in the United States and the world that create Vietnams and the American military response to them.

The question is, what can we or should we, as a guild of lawyers, seek to do about the gulf between action and understanding. What can or should we do to bring about the realization that alienation is only a middle and temporary position, and that, in order to be effective, there must come a realization that some systematic critique is necessary. What is the relationship of the lawyer to the movement in these times of strife and change?

I am highly skeptical of affirmative litigation strategies as a focus of movement concern. I think in the context of today's politics, the large law-

---

Michael E. Tigar is Editor-in-Chief of the Selective Service Law Reporter and is a member of the District of Columbia Bar. This is an abridged version of a speech to the 1968 National Lawyers Guild Convention.

suit may tend to lead the movement into the courthouse never to be seen again. Litigation, in short, cannot be permitted to take precedence over the task of organizing for direct action. If it is so used, it blunts the offensive which the movement is trying to mount, and concedes the legitimacy of procedures and institutions whose claim to legitimacy is now increasingly attenuated.

The task of the litigator, therefore, is a combination of offense and defense designed to protect the movement against attack and to use the rules of the courtroom game to keep its leaders out of jail and to prevail in particular confrontations which circumstances dictate must take place in the courtroom. In this class of useful litigation, I would place the affirmative suit in which the prospective criminal defendant becomes a civil plaintiff to secure a more favorable forum for disposition of his claim.

The lawyer's task is more complex than litigating. It is to support and assist the movement for important goals and values, not to lead or direct that movement.

True, if a draft registrant comes to you, you can and should advise him of what the courts are likely to do in response to any given claim or action on his part, and you have the highest of duties not to sell him on the idea that the courts will do more for him than your experience tells you they will. But does not your lawyering, your counselling function go farther? I submit that it does. I would say that registrants are entitled to our judgment as lawyers and as a bar association that the system which administers justice to alleged draft law violators is itself compromised.

And more, they are entitled to our judgment that the war in Vietnam, and indeed the entire military policy of the United States, violates norms of written and customary international law.

That is, our function as interpreters and declarers of the law must include the task—the largely political task—of assisting young men bent on resistance in finding out about the legal rationale for the action they have decided upon. WE MUST NOT MAKE DECISIONS FOR THEM. Our role is to suggest means for rationalizing their commitment.

The law we declare in this, our role as counselors, is clearly not judge-made, and Justices Douglas and Stewart's solitary dissents from denial of certiorari on the issue of the war give precious little hope that we shall be able to make it the subject of effective litigation. The law we declare is rather in the nature of a claim for justice. It is the systematization and expression of principles of order which arise from the experience of the movement in this country and the struggle for social change the world around.

I believe that the Guild must not only applaud the efforts of lawyers and counselling groups which take this position and play this role, but must itself begin to work out in practice the difficult theoretical and prac-

tical problems which such an approach creates. One important problem, of course, is that the lawyer dwells in two worlds, the world of the law as it is and as it is declared by the judges, and the law as it would be and will be in a social system not yet born in this country.

Now, the Guild has declared itself upon the subject of Vietnam, and the work of Guild members and others associated with them has been largely responsible for the development of a broad consensus that our adventure in Vietnam violates traditional principles of international law.

But the course of American politics poses the danger of other Vietnam-type adventures: in Thailand, in Latin America, and in the whole of the underdeveloped world, wherever an expansive view of American "interest" sees the possibility of disturbing social change.

Therefore, we must seek to discover what, if any, relevance concepts of "law" may have to a situation in which the United States threatens a series of interventions around the world.

In the international order we have, as we have had for sometime, a set of institutions devoted to deciding disputed questions of law and policy. There are a series of rules concerning sovereignty and territorial integrity, and the respect that must be given to treaties. But they have come aground upon the fundamental difference in outlook between the capitalist and socialist states among the great powers.

In two fields we can see the change dramatically. The first is the international law of expropriation. There is coming into being a consensus that uncompensated takings may be justifiable. And the Supreme Court's affirmation of the Act of State doctrine in *Banco Nacional de Cuba v. Sabbatino* (1964) 376 U.S. 398, at least concedes the principle of national self-determination in this sphere. Fifty years ago such a view was unthinkable in international law. But the change of the objective situation has led to a different view. And today, as lawyers, we should have little difficulty in sustaining particular uncompensated takings and in building a theoretical model to accommodate this problem, which really is a competition between claims for justice made by the exploiter and his victim.

Today, a number of third world countries are ruled by client or comprador governments which do not represent their people and which are indeed legitimating the robbery of national wealth and the degradation of the local citizenry by foreign economic interests. This circumstance produces revolutionary movements.

Let us take one example. Traditional international law, of course, says that intervention on behalf of a constituted government is permissible in the early stages of such a conflict, and only becomes impermissible if the revolutionary group begins to obtain large blocks of territory within the country. At that point, the rule provides, there comes into being a real "struggle for power," and "outsiders" are supposed to stay neutral.

First, it should be said that this rule militates against social change for it defines "outsiders" in terms of nation-states, a concept at war with the transnational community of interests among the peoples of the third world. Second, the rule is in practice ignored by the United States which has its military and paramilitary forces in dozens of countries.

Finally, the rule no longer represents the consensus among the majority of the world's political groups. The organization of African Unity, for instance, has said time and again that it would give aid to the black people of South Africa in the initial stages of a conflict there.

But the old rule remains, and the institutions of international governance—the UN and the World Court—are not equipped to deal with challenges to it. Largely, this inability has nothing to do with the interests which the members of the leading bodies of these organizations represent, but rather with the inability of the formal apparatus of international law to deal at all with these kinds of problem, and we, I fear, are in danger of straying into affirmation of the old rule as a handy stick with which to beat United States policy in Vietnam.

As lawyers, expounding and explaining the law, we should take a more radical position. We should extend into the international community our judgment that violation of the practical right to political and economic self-determination, and of the basic human rights of the peoples of the third world, is, by the common consent of a majority of civilized states, unlawful.

We can say that we oppose imperialism not just as citizens, or as armchair theorists, but as lawyers, because it violates elementary principles of international order in the second half of the Twentieth Century.

In the field of foreign policy, that is, we can make judgments about the validity of claims for justice which rest upon our professional background and expertise. Our role, then, in relationship to the movement of resistance, is in this context to find, explore and develop the legal notions which grow out of the struggle for self-determination. If we put forward that model of thought, we help in the task of building an alternative frame of reference for the war resister, and for others in the movement for social change.

Consider now the problem of racism in America. We are indebted to Arthur Kinoy, the most thoughtful and relevant constitutional scholar in America today, for eloquently exposing the legal implications of racism in his article in Rutgers Law Review a year or so ago. We fought a Civil War in this country over the institution of chattel slavery. We vowed as a nation, in the Civil War amendments and the legislation passed in their wake, to wipe every vestige and every trace of slavery from the land.

A most telling example of that pledge, perhaps its most perfect expression, was the Reconstruction statute construed by the Supreme Court in *Jones v. Alfred H. Mayer Co.* (1968) 392 U.S. 409, which dealt with the commercial rights of the freedmen.

The promise, to repeat, was that we would end the system of chattel slavery and put the black American in the same position as the white. Both, of course, still subject to 19th century capitalism—for the freedom to make contracts is nothing more than shorthand for making the laboring black a member of the same working class as the white, and for making the black entrepreneur a member of the same owning class as the white entrepreneur. That, however, is a different enquiry.

But we have cruelly and cynically betrayed that promise, the promise that President Lincoln himself said must be fulfilled if the nation were to have a right to exist.

The statement that slavery and every one of its hallmarks were to be eradicated was a proposition of law. But the courts and the Congress and every agency of government—particularly after the compromise of 1872—ignored and diluted its words and mocked its plain teaching.

Thus, the claim of black America is today being pressed upon two levels. At the first level, the courts and the Congress are asked to intercede in extensions of traditional ways of legislating and deciding to reinstate the promise. At another and far more significant level, black America is organizing independent centers of power with the object of conducting an assault upon the bastions of white racism in the United States. This form of organization rests its assertion of legitimacy upon a claim for justice of the type I spoke of earlier.

This claim for justice is a species of law. Some of its aspects can be the subject of litigation and legislative action. But the social institutions which have the power to decide and to legislate are themselves part of the system which must be dismantled, and therefore are objectively limited to deciding questions in rather traditional frames of reference. Therefore, a part of the claim must find validity in a frame of reference larger than the courtroom. And we as a guild of lawyers have put our own commitment into writing that the claim is worthy of being honored.

By making these judgments, we assist in the main task which confronts those in America today who want to preserve and extend democracy here and around the world. That task is to build a movement for social change rooted in a sound sense of history and in a profound analysis of what must be done to change things as they are. Let us face it that we are, as a result of brilliant and dedicated organizational work, looked to by a large segment of the movement for social change as a group with a sense of responsibility. If we shirk that responsibility by retreating into conventional means of doing the lawyer's work, we will submit our case for existing, unargued, to the judgment of a history now in the making—a history which will determine whether America will be liberated from within or from without, or whether, indeed, the process of liberation will be stayed for all time in a last long nuclear rapture.