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Catalytic Agent or Counter-Revolutionary

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THE LAWYER IN THE CIVIL RIGHTS MOVEMENT—CATALYTIC AGENT OR COUNTER-REVOLUTIONARY?

Leroy D. Clark*

The usefulness of law in the process of reform and especially radical change is currently a much debated issue, both within and without the legal profession. The discussion by laymen is often not truly designed to explore and analyze but rather to reinforce adherence to a status quo, often by the use of crude signals ("law and order") or conversely to "radicalize" or politicize liberals to reject the notion that serious change can be achieved by working with a well-manipulated system. Law students today (probably more than average practicing lawyers) are quite close to the controversy as it presents itself in the profession. Many students are having professional "identity" problems because they are more anxious than previous generations of students not to ignore or perpetuate injustices.

Critics assert that law is a conservative force designed to impede and obstruct change and that it is a major instrument of coercion used by special interests in the society (read owners and managers of capital) to reinforce their control over institutions. Under this thesis, judges, legislators, administrators, and even "independent" lawyers spend the major part of their time preserving the status quo and preventing new or unusual demands from being supported or implemented. Proponents of this view conclude that meaningful change can be achieved only by working outside "the system" and by engaging in a continuous assault on all traditional institutions and practices. The contrary view characterizes law as an effective instrument for change for those lacking resources or who are outnumbered because only a few, dedicated, creative lawyers with persistent plaintiffs is required. Under this view the law is a catalytic agent that minority groups and the poor can use to alter conditions and publicize grievances. An analysis of the functioning of lawyers within the older and traditional civil rights movement is an excellent means of exploring the major criticisms of the two opposed positions.

The argument that law is a political instrument, used to reinforce the status quo, is well illustrated by the role that it played in controlling and maintaining an exploitative relationship between blacks and the majority society of white Americans. The institution of slavery was ringed with a set of laws designed to strengthen the master-slave relationship. As an operational matter, the disposi-

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2 This position is most excellently explored by J. Greenberg, RACE RELATIONS AND AMERICAN LAW ch. 1 (1959).

3 Slavery rarely was explicitly recognized in statutory law between the first importation of blacks to America in 1619 to the 1660's. There is even some evidence that they were seen as servants, but the key features of life-long service and inherited slave status were in practice. See Handlin, Origins of the Southern Labor System, WM. & MARY Q. (3d series) 199 (April 1950). From 1640 onward, the slave status was increasingly a part of statutory law. Dregler, Slavery and the Genesis of American Race Prejudice, II COMPARATIVE STUDIES IN SOCIETY AND HISTORY 49-62, 65-66 (October 1959).
tion of the slave was almost totally within the discretion of his owner. Where there were special tribunals to deal with public offenses, the slave was not protected by the general law that applied to others. Often, one of his judges would be a slave-owning master. In 1857, the Supreme Court in the Dred Scott decision put its stamp of approval on the concept that blacks, even those who had escaped to free territory, could not be accorded the status of citizens since they were property. After emancipation, the South responded with the Black Codes, which severely limited the rights of newly freed slaves and, in effect, attempted to restore them to the status of serfs.

The first Civil Rights Act passed in Congress in 1866, designed to nullify the Black Codes, had its constitutionality seriously questioned in the Civil Rights Cases. The Supreme Court did, at one moment in its post-Civil War history, strike down a West Virginia law that excluded blacks from serving on juries; in 1896, however, the Court substantially undercut this ruling by announcing in Plessy v. Ferguson that the rash of Jim Crow statutes adopted by the South throughout the 1880's were constitutional where “separate but equal” public educational facilities were provided. Here is a perfect example of the latitude the law allows the judiciary and how it was used to accommodate the extant social and political forces by reinforcing an educational caste system. A close analysis of the origin of many such “doctrines” of law would show judges often took advantage of their capacity to make interstitial law to cloak a status quo philosophy in legal trappings and achieve perpetuation of their racial or class biases through the doctrine of stare decisis. The continued use of such doctrines is facilitated by the fact that superficially logical propositions need not be buttressed by empirical data for they are presumed to be intellectually impeccable conclusions that any “reasonable man” could reach. Therefore, “equal” facilities are, ipso facto, equal facilities. It is interesting to note, however, that social science data was subsequently introduced in Brown v. Board of Education (which reversed Plessy) to show that within the context of a previously slave-owning society with all the attendant post-slavery social stigmata, the separation of the races could never be seen or responded to by black children neutrally but rather was received as a reaffirmation of their societally defined inferiority.

The radical view of the law, on the other hand, is somewhat undercut by the Brown case, for the same institution, interpreting the same amendment to the Constitution, abolished the separate but equal concept and ended the right of southern states to segregate their public schools. Civil rights lawyers, working with black middle class plaintiffs anxious to have the access-prerogatives that normally attached to persons with their income, utilized the decision to outlaw racial segregation in all publicly owned institutions such as parks, golf

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5 Dred Scott v. Sandford, 60 U.S. 393 (1857).
6 109 U.S. 3 (1883).
7 Strauder v. West Virginia, 100 U.S. 303 (1880).
8 163 U.S. 537 (1896).
courses, hospitals, and even private institutions where substantial federal or state funds were involved.

Although the Constitution is theoretically a permanent document and the Court itself indulges the rhetoric that it is not the instrument for changing it, *Brown* confirms that a substantial power is lodged in the Court in the exercise of its option to reverse a "permanent" interpretation and establish a new "precedent." A serious study should be made of the instances in which the Court has done this, even beyond civil rights matters, for some general principles might emerge. The now unanalyzed concept of "precedent" is antithetical to social change. It should be frankly recognized that courts, especially the United States Supreme Court, are law-making institutions. We should, by examining the occasions on which cases have been overruled, develop a set of rational criteria for promoting lower courts to suggest, and higher courts to adopt, a reversal of precedent where it would achieve social justice. We would then see fewer opinions in which a court bemoans the inequity it must perpetuate because it is bound by previous decisions. If this were done explicitly, the capacity for judge-made law to respond to the need for rapid change would be greatly enhanced, and the radical view that the law is inherently bound to the *status quo* would be undercut.

The Supreme Court in *Brown*, by making the entire arrangement of publicly supported segregation illegal, set in motion the process of changing the social structure of the South. The counter charge that the Court really did not construct a setting for change usually proceeds from an analysis of the extent to which segregated schools still exist in the South. As of 1966, only 16.9 percent of the black students attended school with whites in 11 Southern states, and an overwhelming majority of schools that were all black at the
time of the Brown decision were still all black. The correctness, however, of the radical criticism really depends on whether the glass is described as half-empty or half-full; to some extent, it is a question of perspective. Radicals today, both black and white, are at odds with liberals, because their conception of serious change does not entail simply making present institutions function more efficiently; rather, they seek fundamental structural changes that require altering the sources of control over institutions and having them pursue wholly different goals. This phenomenon of conflict between radicals and liberals has intensified recently. In the civil rights movement the conflict usually concerned the pace of reform; the layman-activist working in the South felt more frustrated by the slowness of change and by the high costs in brutality and retaliation than did the Northern liberals who financed the movement or the lawyers who serviced it (the lawyer was at best a liberal, for his education rarely encouraged him to go beyond that framework in his analysis). It was the perception of the American society as indifferent or viciously resistant that produced the angry response of many of the young people in organizations like the Student Nonviolent Coordinating Committee (SNCC), simultaneously with the self-congratulation of the liberal community on the success of the civil rights effort. These young people may have lacked a sense of the conditions for historical change, but activism that spurs social change does not emerge from those, like lawyers, who are too impressed with history.

Moving 17 percent of the black school population into integrated education over a 12-year period may be described as miniscule or as a start. It may also be criticized, as the black community is now doing, in terms of whether the placing of black children next to white children has a high priority in the quantum of energy the community has to expend. But it is necessary to go further and clearly describe the radiations of the prohibition on official segregation. National consciousness of the race question was increased even if the full commitment of federal resources to end local segregation did not follow; more importantly, it gave blacks in the South a context within which to organize. A minority group with the limited resources of a few plaintiffs and lawyers was able to use the law to symbolically state the injustice of its condition. This was a small but efficient step. One query, however, is whether the Supreme Court decided Brown as it did because of the lawyers' expertise and the appropriate timing of their actions (there has always been an over-rating of the extent to which civil rights lawyers controlled the nature and pace of

14 Unfortunately, the issues get confused because the rhetoric of the struggle in a black community that must adopt one direction gets imported to other communities that should adopt a contrary direction because of their peculiar local conditions. For example, it may be impossible to racially "integrate" elementary schools in New York City because of segregated living patterns and the distance of black communities from "white" schools. Here, concentration on local control of all black schools may be the only feasible effort. In small towns in the South, however, where segregated living patterns are not as developed and all black schools are allotted poorer facilities and a limited curriculum, integration is the most efficient way to avoid these deprivations. The politics of "power and control" may also obscure the evidence that it may be difficult to provide quality education to children in low-income groups (into which most blacks fall) who are isolated from children from higher socio-economic levels. See U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966); U.S. COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS (1967).
litigation) or whether the Court was more influenced by social forces such as America's image before newly independent African states and the fact that a war against Nazism had just ended. The Supreme Court, supposedly a neutral institution in an objective search for the law, is really a political institution, responsive to domestic and international currents. The objective civil rights lawyer was always aware of the political limitations on the Supreme Court and of the fact that decisions against which the public might have reacted strongly were deferred. It was known that the Court avoided confrontation or mass resistance in order to keep its decisions from being undermined. Although Brown was decided in 1954, Loving v. Virginia, which prohibited the state from making inter-racial marriages criminal, was not decided until 1967, despite the fact that the Court had had the issue before it previously. The serious problem of de facto school segregation in the North has not yet been fully dealt with by the Supreme Court, although civil rights lawyers and many scholars have made persuasive arguments that Brown requires a decision that segregation in northern schools, due in part to segregated neighborhoods, is also unconstitutional.

The civil rights movement was almost exclusively Southern, and the earliest, most visible victories were achieved by lawyers. Before the major breakthrough of Brown, lawyers had successfully assaulted segregation in interstate travel and property covenants prohibiting sales to black people. Around 1960, however, with the advent of the sit-in technique, the movement took a different direction. It is difficult to assess the causative impact of civil rights litigation on the start of this activity. Clearly, there must have been some link because the court cases achieved a publicity that kept alive the debate not only about the unconstitutionality of racial segregation but also its immorality. One scholar has offered an argument supporting the strategy of civil rights lawyers concentrating on the Supreme Court, even though its pronouncements may be symbolic, ceremonial, and unavailing in rapidly changing the social order. He stated that the most fundamental questions of constitutionality are essentially questions of morality, and that it is through the Constitution that the ideals of the society are stated; he was less disturbed by the discrepancy between what the Supreme Court says should happen and what in fact is practiced, because there usually is some distance between ideals and behavior.

However, the mere publicity that was focused on racial segregation because of legal activity did nothing to inform the creators of the direct-action tech-
nique that the civil rights movement had to be transformed into a people's movement. In fact, if the movement had continued to rely solely on legal action, the pace would have been much slower. Furthermore, although some lawyers ultimately argued that the sit-in activity could not constitutionally be punished as a crime, there were many lawyers in the South who were shocked at the use of the sit-in and who counseled against it on the grounds that it was illegal trespass. This is why the sit-in was a sharp break with court-room directed civil rights activity and even with the boycott of segregated buses led by Dr. Martin Luther King in the mid-1950's. Although some litigation and the protests led by Dr. King met with Southern efforts to ban them as illegal, both lawyer and laymen participants had a strong sense that their activity was clearly protected by the Federal Constitution. The sit-in, from the participants' view, had more the quality of civil disobedience than did King's demonstrations since it was much less certain that the Constitution prohibited a state from lending its enforcement machinery to discrimination practice by private entrepreneurs. The core issue of the adjustment between private property rights and the right to be free from a conviction based on race was never decided squarely by the Supreme Court because a few civil rights lawyers knew the Court would not want to deal with this issue; consequently, they creatively developed arguments that permitted decisions to be made on narrower grounds. But the lay participants did not know the full range of the legal arguments that their activity was protected against punishment by the Constitution, and in any event most of them would not have been deterred by the knowledge that at some future time the Supreme Court might affirm convictions. It appears that some civil rights lawyers thought the demonstrators shared their framework and were acting in reliance on their activity being arguably protected by the Constitution. The activist protest, however, was directed against inhumane treatment rather than the unconstitutional administration of state law. As the sense of injustice heightened for Southern blacks, obedience to laws, even valid laws, became progressively less relevant. Most participants in the sit-in cared little whether what they did was civil disobedience. This readiness to subordinate law to other goals has important implications for the civil rights lawyer and others who hope to have legal

22 See NAACP v. Button, 371 U.S. 451 (1963) (state efforts to label as "capping and running" the usual way in which a civil rights lawyer received a case through laymen working with the NAACP). Dr. King was also subjected to arrest for leading the Montgomery protest.

23 The Supreme Court moved from unanimous reversal of sit-in convictions in Garner v. Louisiana, 368 U.S. 157 (1961), to a 5-to-4 reversal of such convictions in Hamm v. City of Rock Hill, 379 U.S. 306 (1964). During this same period of time, the Court also refused to grant certiorari in convictions of persons demonstrating against racial segregation in churches, which presented even more serious constitutional problems. See Ford v. Tennessee, 377 U.S. 994 (1964); Jones v. Georgia, 379 U.S. 935 (1964).

24 In Hamm v. City of Rock Hill, 379 U.S. 306 (1964), it was successfully argued that the federal statute prohibiting racial discrimination in public accommodations barred prosecution of persons who had tried to use private restaurants on an integrated basis before the act was passed. The technique of "removing" masses of criminal cases from state to federal courts often gave the necessary delay to negotiate their dismissal and permitted hundreds of cases to be handled by a few attorneys. See Heebe, Removal of State Criminal Prosecutions to Federal Courts, 13 Loyola L. Rev. 57 (1966-67).

25 See, e.g., Greenberg, The Supreme Court, Civil Rights and Civil Disobedience, 77 Yale L.J. 1520, 1521 n.3 (1968), for an argument that civil disobedience is not defined by the view of the actor, but rather, more objectively, by whether or not appellate courts define the activity as legal or illegal.
institutions control and manage protest activities. Friction often developed when the lawyer sought to impose his idea of a structured and orderly approach to a problem concerning activists, whose mood and motivations he failed to understand. Activists frequently disparaged lawyers who had discouraged modes they regarded as effective organizing tools; they often ignored or avoided a lawyer's advice on policy matters that they felt transcended subsidiary questions of legality. The lawyers understandably thought of "winning" cases; the activists did not care if a case was "lost" if the movement was advanced. The lawyers had experienced a progressive series of court victories and thus did not see the law as ultimately antagonistic to social change. The activists had known jails, beatings, and coercion—even when their cases were "won." The belligerent and militant tone that later emerged was predictable, because the federal establishment had not accorded the activists the personal protection they felt necessary and local laws were viewed as a mere series of obstacles to overcome or skirt.

This is but speculation about the interpretation the two groups derived from their experiences as time passed, but it is clear that on a day-to-day basis the civil rights lawyer was crucial to the momentum of direct-action techniques, for he devised ways to quickly secure the release of demonstrators from jail so that they could continue demonstrating and keep the political and moral pressures on. It was really these two groups, lawyers and activists working together, who were the catalytic agents for much of the federal civil rights legislation passed after 1960; the operation was mutually supportive. The lawyers framing the issue publicized the race problem, and the demonstrators dramatized it as television made their confrontation visible to all. The lawyers kept the demonstrators on the street, and the desire of Congress either to buy off or respond legitimately to the demonstrations (again it depends on perspective) led to federal remedial legislation. The consequences of joint action did not end here, however, for the civil rights lawyer was now freed to use the legislation in beginning the legal attack on segregation in the private sector. Once again, he started with little money and only a few determined plaintiffs.

The more militant and radical today demean those early efforts. They ask, what was so momentous about subjecting people to violent attacks by white segregationists in order to get legislation to force them to accept blacks' money and presence in their business premises? On a practical level the criticism is appropriate, but it misses the point that the civil rights activity, although largely symbolic, strengthened the determination of Southern blacks to struggle against injustice beyond the insignificant segregated hamburger stand. The movement was designed to provide a legal as well as a moral framework for mobilizing the attack on systemic and pervasive racism. Demands for integration were strategic and propitious for that time. Integration need not be accepted as a terminal goal, but one to be raised where it will ultimately lead to raising more basic issues. Integrating schools has generated questions about the quality of public education and the terms of control. Furthermore, good
organizers know that problems that a large number of people can see as immediate and on which they can concertedly act to resolve are best for community mobilization. Only much later do people arrive at the more complicated and significant tasks; people become self-educated because the problem has been resolved, or more importantly, because it has not. From these efforts, a sense of some progress through law and a feeling of shared community grew among Southern blacks. Social distance due to class lines between blacks diminished as professionals worked closely with laymen on integration problems. The Southern black lawyer engaged in civil rights work was not regarded with the suspicion his northern counterpart met in black clientele, who view lawyers as tricky manipulators. Also, decreased despair created a sense of impending change that was lacking in the disorganized and leaderless Northern ghettos that were destined to explode.

Despite ultimate cooperation between lawyers and activists in the civil rights movement, it is misleading to convey the impression that the lay groups were engaged in a monolithic effort and were working in a concerted fashion towards a common goal. There have always been sharp differences of opinion—less about ends than about strategies. In the early 1960’s, for example, the top staff of SNCC argued that symbolizing the movement in one person like Dr. Martin Luther King, Jr., was dangerous because it was inevitable that he would be assassinated and that disorientation would beset his organization. They argued further that an organization with such a dominant personality would not generate the local leaders needed to carry on the struggle. The majority of the white public was not privy to these early internal battles, and their tendency to see all black persons as a single group facilitated an effort by black leaders and lawyers to convey the impression that they spoke for an entire black community. The newsmakers, despite the general notion that they report “neutrally,” assisted the lawyers and the movement by not publicizing the internal fractionalization. One reason newsmen were able to have this kind of common cause was that the issues at that time were very simple and therefore engaged the allegiance of whatever white liberal elements there were in the press. Soon, however, the facts that blacks were discriminated against or that a new desegregation suit had been filed were no longer “news,” and the movement took a more complicated turn that the press did not understand and could not interpret to a public long reared on oversimplifications.

From the period of sit-ins, freedom-rides, and voter-registration campaigns emerged civil rights legislation allowing the lawyer to deal not only with the symbolic signs of second-hand citizenship but also with some more practical and immediate problems attributable to segregation. In 1964 and 1965, federal legislation was enacted prohibiting racial discrimination in voting and suspending registration standards used discriminatorily. A combination of community organization and intervention by attorneys of the Justice Department secured substantial increases in black registration. In Mississippi alone, nonwhite
registration went from six to 60 percent over a three-year period. Community efforts have since translated these increases in registration into the election of 300 blacks to various local public offices, including that of mayor, city council membership, and school board membership. Civil rights lawyers fought the attempted subversion of the electoral process by white candidates who dumped the votes of blacks and invited white persons from adjoining counties to enter a given county to vote in the names of long deceased whites. The fruitful combination of grass roots community organizing and litigation has caused whatever success there has been in Southern electoral politics.

A more practical and immediate activity of civil rights lawyers occurred after the passage of the federal act prohibiting discrimination in employment. The absence of widespread concerted community efforts here, however, illustrates the difficulty of civil rights lawyers moving alone, particularly when the problem, like employment, is not basically one of new legal theories, but one of systematic and sustained enforcement. In 1965, while the civil rights organization that had done most of the legal work in the South turned its efforts to the area of employment discrimination, and while the civil rights movement was occupied with consolidating gains in the voting area, there was a lay feeling that more effort should be directed towards the North and its more subtle racisms. By this time, the Northern ghettos had experienced at least two summers of bitter rebellion. The more conservative civil rights organizations temporarily lacked direction because they were suddenly confronted with the immensity and complexity of the Northern ghetto situation. They were caught off guard primarily because they had narrowly limited their role to opening up opportunities for individual advancement and to obliterating the formal vestiges of racial segregation. The civil rights lawyers were now moving against employment discrimination, for the first time without a well-organized community base; equally as important was the concomitant absence of the federal commitment that had been in evidence in attacking discrimination in voting rights. It should be noted, however, that the aggressiveness of the federal government in voter registration was conducted by a Democratic administration whose party was the primary beneficiary of increased registration. The Federal Equal Employment Opportunities Commission was given authority to enforce the federal employment discrimination act, but it lacked the one necessary tool—enforcement powers. It can investigate and attempt to conciliate, but the only enforcement route of the aggrieved employee is private litigation. The Justice Department may institute litigation only in cases where there is a major pattern and practice of discrimination. By mid-1969, despite the evidence of massive employment discrimination, the federal

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27 NAACP Legal Defense and Educational Fund, Inc. Comprised solely of lawyers, this is an organization that has serviced many civil rights groups. It is separate from the NAACP headed by Roy Wilkins.
government had brought only about 40 suits, and the major private civil rights
litigating office, only about 90.28

The difficulties of litigation as a remedial tool without the black commu-
nity independently generating its pressure are readily apparent. First, persons
must know how to make a complaint and, at least initially, they may risk
discharge from employment. The attorney must have sufficient facts about
the internal operation of the plant in order to judge whether a violation of
the act has occurred. Such information is difficult to ascertain; whereas in
school desegregation suits the discriminatory pattern in one school district
resembled the pattern in another, employment discrimination patterns differ
from industry to industry. Also, the typical voting rights suit involved a
Southern state agency with mediocre attorneys; the defendants in employment
cases were the largest companies in the country, retaining highly paid, compe-
tent counsel who offered vigorous opposition and were extremely adept at
delay. With the added ingredient of a hostile federal Southern judiciary,29 a
single suit could last two years or more. In the interim, the plaintiffs may
have lost faith in the efficacy of litigation, moved to other jobs, or accepted
inadequate settlements. It is in this kind of trench warfare, with limited staff,
limited financial resources, and the inherent capacity in the law for delay, that
civil rights attorneys will face serious difficulties in having a major impact on
employment discrimination.

Civil rights lawyers, as hereinbefore indicated, are in danger of being in-
effective as they become divorced from the stronger social currents moving
the client population. These lawyers have been aware of the deepening dif-
fferences in strategies and goals of various civil rights groups, and although
they generally represented all civil rights groups, legal support was more
readily available to those groups that continued to advocate concepts and
modes of action more acceptable to the public. Civil rights lawyers thus be-
came less and less involved in support for the more “militant” wing of the
movement, which had announced a “black power” thrust. The unfortunate
result has been an isolation of civil rights attorneys from the younger and
more aggressive sector of the movement, which has ultimately dominated and
set the tone for the current scene, even where the pioneering organizations
themselves collapsed or lost strength.

Two explanations appear. Lawyers, like other people, are prone to want
to continue doing those things that have worked in the past; because lawyers
may be more “success-oriented,” they want to handle cases with a potential
for “winning.” The winning case, however, entails a kind of neatness and
control by activists over their situation, which increasingly does not characterize
those in the movement. Moreover, we may now have reached the stage where

28 Letter from Robert Belton, formerly chief litigator of employment discrimination cases for the
29 One federal district court judge who had been elevated to the Fifth Circuit Court of Appeals and
who was subsequently rejected for appointment to the Supreme Court was reversed in 7 out of 8 civil
rights cases over a period of 8 years in which he ruled against the black plaintiffs.
the winners will be limited to peripheral and insignificant issues or where judicial victories will be undermined because they encounter stronger social and economic resistance. The lawyer must then be involved in the political education of his clients with respect to the strength and weakness of the litigation process.\(^9\)

In fairness, it is necessary to state that it was extremely difficult for civil rights lawyers (and probably most others) to plow through the angry activist rhetoric toward concrete programatic ideas that could be generated around the new concepts. Given the more political analysis of black oppression now emerging, a failure to supplement the traditional role of the lawyer could only mean irrelevance and a waste of the activists' limited resources. However, a new role is hard to fashion because the lawyer may see many concrete, discreet legal actions that could be undertaken, but which lay persons in the movement seem to ignore. In this situation, if the lawyer cannot convince the client about the "right" direction, he must simply follow the direction they are taking. The lawyer at this stage is more likely to find that activists will resort to him not for leadership, as was true in the early civil rights phase, but solely for technical information.

The second cause for isolation of civil rights attorneys from the more activist wing of the movement is that there are two "clients" the civil rights lawyer must satisfy: (1) the immediate litigants (usually black), and (2) those liberals (usually white) who make financial contributions. An apt criticism of the traditional civil rights lawyer is that too often the litigation undertaken was modulated by that which was "salable" to the paying clientele who, in the radical view, had interests threatened by true social change. Attorneys may not make conscious decisions to refuse specific litigation because it is too "controversial" and hard to translate to the public, but no organization dependent on a large number of contributors can ignore the fact that the "appeal" of the program affects fund-raising. Some of the pressure to have a "winning" record may come from the need to show contributors that their money is accomplishing something socially valuable. The radical criticism is therefore formidable and has been a perennial problem for the movement. However, the radical lawyer also faces similar problems, along with the confusion or hostility of financial supporters. This tension between ideology and financing accounts for the small number of radical attorneys; some seem to be devising ways of limiting salaries and of subsidizing nonpaying cases with ordinary commercial work.\(^{11}\)

\(^{9}\) Using these losses or illusory victories to sharpen political analysis presents serious ethical questions for the lawyer. Should he be engaged in "frustration" litigation to make a political point? Is he the one to decide the content of his client's political education? On the other hand, is it possible to convey, outside of the concrete experience, the severe limitations of the legal process, and is he not the only one who can do that?

\(^{11}\) The lack of a source for financial support probably accounts for the absence of black attorneys in radical defense. They are generally amongst the lowest rung of the profession with respect to income, and it is doubtful that the approximately 200 black attorneys in the South could have handled nonfee-generating civil rights work were it not subsidized. See NAACP v. Button, 371 U.S. 415 (1963) for a description of the process. A new organization, the National Conference of Black Lawyers, may find the vehicle for drawing black attorneys into today's "unpopular" causes.
As the movement redefined the problem as one of either power or poverty, lawyers began to frame their legal moves in such terms. The federal government began financing a host of offices to extend legal services to the poor. These offices are now experiencing the same problems peculiar to civil rights litigation in the South: highly sophisticated opposing counsel, a hostile judiciary, clients with few resources and little time, and a deluge of cases coupled with an incapacity to move towards the institutional roots of the problem. Furthermore, these law offices, like the civil rights attorney, will be truly effective only when there is a better articulation of lawyer services and new, creative forms of community-based action. Class action litigation designed to affect the rights of large numbers of persons can be undermined in the implementation process if no mechanism exists for informing the community at large that new rights have been created.

For lawyers now, one of the major pitfalls besetting legal work in civil rights is that litigation like Brown appears to address a major problem fully. Laymen expect the suit to adequately contain, clearly define, and promptly ameliorate deep-rooted social and economic conditions. The layman's belief in the total efficacy of litigation is precisely one of the factors that prevented the growth of people-controlled techniques from developing to really effect greater school desegregation in the South. Only when it became clear many years after Brown that a court-ordered desegregation plan was not achieving integration did communities organize school boycotts to force it. Civil rights lawyers were partly responsible for this unwise reliance solely on the law because they had studied "cases" in which the conflict involved easily identifiable adversaries, a limited number of variables, and a resolution that could be stated and managed by a court. A good lawyer who seeks to be useful to the movement today must attempt to make clear that the major social and economic obstacles are not easily amenable to the legal process and that vigilance and continued activity by the disadvantaged are the crucial elements in social change.

At this point it is important to return to an analysis of the success of the lay-directed sit-in and the lawyer response. That relationship may provide the most important model for future action that can be extracted from the civil rights phase. An institution may be described as a physical site with financial and material resources (from pens and typewriters on up to missiles), but more importantly, an institution comprises internally structured status relationships (e.g., the boss and the worker) evidenced in set behavioral patterns and accompanying attitudes that reinforce and repeat these patterns. In part, the institution runs smoothly because those outside its operating force who are affected or ignored by it acquiesce in its uninterrupted operation. It becomes apparent that various activities can be engaged in to reform, redirect, or stop the operation of an institution. The activity may range from the blatantly illegal (e.g., bombing the buildings of institutions) to the clearly legal (e.g., letters to Congressmen, protest marches). Each of these routes
can be highly ineffective; tame and traditional prerogatives of free speech are easily ignored, and physical destruction, although dramatic, subjects the participants to detection and imprisonment and is easily absorbed because the cost simply shifts to the public through increased taxes if government property is damaged or higher prices if private property is damaged. The replacement of destroyed objects is a simple matter; workers merely continue producing, and the fear, shock, and potential threat to themselves only reinforce their commitment to the institution. More fruitful, as illustrated by the sit-in, is mass action by those affected by the institution (e.g., housewives who boycott stores because of increasing prices), or, even better, mass activity by those who work in the institution, beginning with their observable grievances. The hope is that the demand for larger institutional reforms can be shown to be necessary. In these terms, the auto union, instead of asking simply for increased wages, should demand a right to have some say about the setting of prices, since a rise in prices can effectively nullify an increase in wages; the union’s lawyers can use their imagination to deal with the issue of whether or not price-setting is a mandatory subject of collective bargaining.

The best and most humane type of institutional reform entails the education of those people involved in an institution to adopt practices that challenge its operation and that achieve a reform (or even a temporary halt) in its operation; the absence of violence is clearly preferable to its use. The development and use of such people-practices causes conflict because activity directed at institutional reform usually produces opposition. At some point the conflict appears in a form appropriate for intervention and resolution by the legal process.

Much of the current fractionalization and confusion in the movement is a failure to develop people-practices that large numbers of persons can identify with and engage in. The sit-in was readily conceived because the institutional practice of racial exclusion could be directly countered by blacks—and their essential white allies—by simply including themselves. ²² It is clearly much more difficult to create techniques that directly confront problems with sources less visible and more complex. Except for discrimination against females, present forms of oppression are not so ritualistic and easily perceived that an effective counter-practice leaps to mind. Careful study of the nature of the institution is necessary; indeed, the major reason for blacks to continue their demands for integration, especially with respect to governmental and economic institutions, is that it is the only way to gain information towards the development of appropriate people-practices. For example, there is evidence that white jurors silently discriminate against black criminal defendants (in Mississippi, 64 defendants recently received the death penalty for rape: 63 were black

²² Note, however, that the response to the sit-ins and freedom rides was very intense and almost hysterical on the part of many white Southerners, who beat and attacked the demonstrators. This was because the practice of racial segregation in restaurants, waiting-rooms, etc. was, in its substance, symbolic and ritualistic, and thus its center was under attack by the adoption of counter-symbolic and ritualistic acts.
If the Supreme Court ever decides that the prosecutor's practice of peremptorily striking all potential black jurors is unconstitutional, a "Project Justice" set up in the black community could encourage blacks not to use ruses to avoid jury duty and educate them that it is a legitimate function of jurors to temper the operation of the law with their sense of "mercy" and their particular understanding of the social pressures that may have induced "the brother" (the black defendant) to break the law. To the claim that this is "reverse discrimination" comes the reply that until white prejudice is demonstrably abated, this type of people-practice is necessary to neutralize it. This approach need not be limited to potential black jurors, but could also include the receptive younger generation. Note also that the fact that black jurors might be in the minority would not lessen their power. In criminal cases, the result might be acquittal (if the black juror is eloquent enough), a hung jury, or conviction on lesser offenses. The worry that this would "undermine" the whole system of criminal justice is artificial because blacks, as a small minority, would have only a limited impact; they would simply be a small brake on the racially-biased convictions now occurring. There are problems with this suggestion. Could one get the message across in a form that would not subject the juror to challenge for cause? Would the black community respond to such a program? Prosecutors who systematically strike potential black jurors apparently already believe that they will function by introducing their biases into the legal process.

The anti-war phase of the movement has generated a number of interesting practices to widen involvement of people against the war institution; lawyers enter into this conflict because those with establishment control sometimes over-react or because the anti-war practices have the cast, as did the sit-ins, of civil disobedience and require legal defense. The tactics yet to be developed will probably seem initially to be on this order, and although much has been written about the undesirability of civil disobedience, it usually is treated abstractly and is unrelated to the particular conditions in America today.

Some of the grievances in our society are so deep that their expression will inevitably push against the structures of what we deem to be "legal." It is hard to expect that after 300 years of slavery and another 100 years of persistent

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Data from a survey done by the NAACP Legal Defense and Educational Fund, Inc.


Sheila Rush, Assistant Director of Community Law Offices, Inc., in New York City, who has been involved in criminal defense for 2 years, indicates that blacks often try to get out of jury duty. Perhaps the low compensation (in New York State, a statutory maximum of $12 per day) and the fact that one's employer can cease paying wages accounts for this. The figure should at least approximate the $25 per day available in the federal system.

This is not a novel suggestion, for the argument was made in British courts as early as the American Revolutionary War that the jury should return verdicts ignoring the breach of law by British subjects who opposed the war, if they could conscientiously conclude the defendant should not be punished. See 57 YALE REV. 481, 484-85 (1968).

See N.Y. Times, March 26, 1970, at 41, col. 4. The New York legislation made the reading of the names of dead soldiers at anti-war demonstrations criminal, obviously raising serious first amendment issues.

One of the most typical and superficial is former Justice Abe Fortas' Concerning Dissent and Civil Disobedience (1968).
and pervasive discrimination, social stability between blacks and whites would not be subject to periodic breakdown. In addition, the young today are beginning to challenge for structural changes in American society, but the blockages to rapid social change are formidable; hence, the move by the young to the twilight zone beyond traditional and acceptable modes of dissent.

There are in our society serious imbalances in political and economic power, and the usefulness of the lawyer in the context of massive social inequity is in serious doubt. Previous approaches toward altering the patterns of racism in American life through constitutional litigation or attempts to enforce federal or state statutes prohibiting discrimination have had limited effect. This is where the radical criticism of the civil rights or reformist lawyer is accurate. Hopefully, however, lawyers will increasingly devise ways to make the legal process responsive to the demands that gross injustices end, for America will not be an orderly, less conflict-ridden society until that happens.