Chapter 10

LAW AND SOCIAL MOVEMENTS FOR RACIAL JUSTICE

“Those who profess to favor freedom, yet deprecate agitation, are men who want crops without plowing up the ground. They want rain without thunder and lightning. They want the ocean without the awful roar of its many waters. This struggle may be a moral one; or it may be a physical one; or it may be both moral and physical; but it must be a struggle. Power concedes nothing without a demand. It never did and it never will.”—Frederick Douglass

“All we have to do in life is save our souls.”—Alice Walker

On April 24, 1990, Professor Bell announced that he would take an unpaid leave from his position at Harvard Law School until at least one woman of color was appointed to the faculty on a permanent basis.¹ He had been the first Black professor tenured at Harvard Law school. With the exception of a short stint as the Dean of the University of Oregon law school in the early 80’s, he had spent essentially his entire career in academia at Harvard up to that point, beginning the in the Spring of 1969. Professor Bell had the right to exercise two years of unpaid faculty leave and still return to his position, according to Harvard’s faculty manual. Two years passed. Since no woman of color had been hired, Bell refused to return, and he was then summarily fired on June 30th, 1992. For the remainder of his career, he taught in a visiting professor’s role at New York University Law School.

Professor Bell would later describe how he found inspiration by reflecting on the much more courageous stands taken by famous forerunners like Ida B. Wells, Paul Robeson, and Muhammad Ali, all of whom used their platforms as prominent African Americans to express dissent from the regnant racial hierarchy.² Ida B. Wells, a triple threat teacher, writer, and activist who rose to prominence in the late 19th century, Robeson, a Rhodes scholar and graduate of Columbia Law School who became perhaps the first Black mega celebrity as a world class singer and actor in the 1930’s and 40’s, and Ali, in all likelihood “The Greatest” boxer of the 20th century who changed his name and announced his membership in the Nation of Islam after he became the Heavyweight Champion of the World, all had their primary sources of livelihood stripped from them after they decided to publicly take stands against racial injustice. Wells lost her prominent position as a teacher, Robeson was blackballed from appearing on radio and television, as his salary plummeted from $100,000 per year to $6,000, and Ali had his championship belts stripped from him, and was barred from boxing during what should have been the prime years of his career.

When political dissent threatens the racial hierarchy, positive and negative, foreseeable and unforeseeable, glorious and infamous outcomes can transpire. Although all of these figures endured personal sacrifice, their contributions inspired people around the world to oppose racial subordination throughout the 20th century. In the case of Professor Bell’s protest against the

¹ Derrick Bell, Confronting Authority 3 (2004).
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exclusion of women of color from Harvard’s faculty, the downstream impact of his intervention perhaps outstripped his own expectations. Whether or not they acknowledged the role of Professor Bell’s actions in their change of heart, law faculties around the country slowly made space for women of color, as word of Professor Bell’s protest spread over the years, racial justice activists inspired by his example saw space for themselves in the world of legal academia, and legal academics saw space for themselves in the world of racial justice activism.

Conversely, Bell had hoped that his protest would result in students and faculty joining him so as to apply sufficient pressure for the Harvard faculty to hire a woman of color that year, but that larger group solidarity never happened. Few were willing to risk losing the prestige that came along with a Harvard diploma or professorship, or the opportunity to have an impact on influential Harvard law students. Bell also received criticism from allies who, perhaps unbeknownst to Bell, were seeking to build towards a consensus around a collective protest action in which Black women would be central. They felt that Bell’s protest short-circuited their strategy.

Bell’s protest invites a series of provocative questions. What is the importance of the collective in movements for racial justice? What is the proper role of allyship? What is the role of the lawyer in a social movement, and how do the dynamics of civil disobedience complicate these questions?

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The analysis of previous nine chapters mean little without the willingness to fervently advocate for the insights to translate into concrete changed material conditions, or as another has said more eloquently, “Faith without works is dead.” The above examples of celebrity activism notwithstanding, community solidarity often provides the most feasible path to legitimacy and visibility for advocates, especially lawyers, who may seek to publish articles and books, provide testimony and draft legislation, and use other traditional tools to promote racial equity. This solidarity becomes more integral when the movement turns to extraordinary methods, like protest, to promote social change. Nevertheless, history has suggested that such action is perhaps more likely to fail than succeed, unless embarked upon after theoretically and strategically sound reflection. To that end, this chapter describes the reoccurring dilemmas faced by those who have engaged in political dissent against racial subordination, whether through protest, civil disobedience, legal advocacy or rebellion. We have provided these sources based on the belief that exposure to past efforts to address longstanding racial justice issues might provide guidance that will assist in confronting the toxic combination of governmental hostility, intra and inter-movement conflict, and lack of strategic analysis, all of which have proven to be formidable barriers in the past.

**A] What do we mean when we say “Political Dissent” and “Civil Disobedience?”**

In the previous chapter, we explored the contours of freedom of speech in the context of symbols of subordination. It is perhaps an idea honored more in the breach in the United States when concerning issues of race. The examples of Ida B. Wells, Robeson, Ali, and Bell demonstrate that the legality of a racial protest action often is not determinative in measuring the prospect of

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3 *Id.* at 4.
violent or painful retaliation. That pain can manifest in economic deprivation and professional deprivation, and that violence can escalate into a physical threat. And often, the legality of the painful ramifications inflicted upon the protester does not become an issue until the retaliation has already had its impact.

With this understanding in mind, the capacity to frame a protest action as civil disobedience and legitimate political dissent, while not a precise legal exercise, may still provide a measure of solace to the racial justice protester who must justify his or her actions in the face of stigmatization and criminalization. The term “Civil Disobedience” was coined by the title of the 1948 Essay by Henry David Thoreau in which he describes his refusal to pay state poll taxes in Massachusetts, protesting against the government’s complicity in enslavement and the imperialist Mexican War. The theme of the essay is that, when the democratic process fails to govern in accord with the dictates of conscience, a citizen is morally justified in breaching the law.4

Thoreau’s conscientious condemnation of the country’s foundational racial sins of enslavement and colonial expansion led him to seek action that would shield him from complicity in the great evil through disobedience of the poll tax. He reasoned that by refusing to contribute to a government that engaged in enslavement, he would do less evil. This is similar to how Bell’s resignation and Ali’s refusal to enter the draft manifested a desire to avoid personal complicity in racial injustice. This landed Thoreau in jail. In the process, Thoreau elevated the status of individual conscience—to him, while laborers and soldiers make contributions with only their bodies, and “most legislators, politicians, lawyers . . . serve the state chiefly with their heads; and, as they rarely make any moral distinctions, they are as likely to serve the devil, without intending it, as God,” only people who actively use their consciences can become “heroes, patriots, martyrs, reformers in the great sense.”5 This framed the person of conscience not only as a person seeking to adhere to high moral standards, but also seeking to contribute to the edification of the larger nation-state by communicating the dictates of his own conscience to the public.

The most common understanding of conscience, an infallible or omniscient practical wisdom and understanding of one’s own mental and emotional states, emerges from Christian moral tradition.6 This is conscience represented “almost like a body part . . . a guide, prompt, inner voice, inner policeman, critic, judge . . . [that] holds us to account when we go astray, and that lets us know when we can rest easy . . . with a ‘clear conscience.’”7 Another more empirically supported understanding of conscience is as a “combination of skills, knowledge, experience, understanding, attitude, and effort” that can be “better developed in relation to some types of problems than others.”8 Regardless of the precise definition, to Thoreau, the individual moral duty to follow one’s conscience did not mandate the attempt to engage in reform:

4 Henry David Thoreau, Civil Disobedience (1848).
5 Henry David Thoreau, Civil Disobedience (1848).
7 Kimberley Brownlee, Conscience and Conviction 54 (2012).
8 Id.
“It is not a man's duty, as a matter of course, to devote himself to the eradication of any, even the most enormous wrong; he may still properly have other concerns to engage him; but it is his duty, at least, to wash his hands of it, and, if he gives it no thought longer, not to give it practically his support. . . . If I devote myself to other pursuits and contemplations, I must first see, at least, that I do not pursue them sitting upon another man's shoulders.”

However, Thoreau’s essay would later influence others who in the twentieth century would base their moral justification for disobedience not simply on the desire to have clean hands in relation to the racial unfairness of the time, but also to uplift society in a broader sense. Lawyer turned activist Mahatma Gandhi and Rev. Dr. Martin Luther King Jr. would go beyond safeguarding “individual innocence . . . in opposition to state decree,” transitioning instead to embrace the desire to remake the world and create a more just and beloved community, beginning with their own nations.9

Gandhi’s philosophy of “Satyagraha,” which means “holding on to the Truth,” included among its basic precepts commitment to truthfulness, non-violence and self-suffering.10 Adhering to these concepts, Gandhi led resistance to British rule in India by advocating for and participating in the violation of a number of laws. He also intentionally spent time in jail for these violations, dramatizing the racial injustice inherent in the British colonialist regime in India and increasing the “self-suffering” and moral force of the disobedience by facing legal retribution. However, he felt that civil disobedience was only effective within the context of collective action and within the framework of strict rules:

Civil disobedience is not absolutely necessary to win freedom through purely non-violent effort, if the co-operation of the whole nation is secured in the constructive programme. But such good luck rarely favours nations or individuals. Therefore, it is necessary to know the place of civil disobedience in a nationwide non-violent effort. It has three functions: 1. It can be effectively offered for the redress of a local wrong. 2. It can be offered without regard to effect, though aimed at a particular wrong or evil, by way of self-immolation in order to rouse local consciousness or conscience. Such was the case in Champaran when I offered civil disobedience without any regard to the effect and well knowing that even the people might remain apathetic. That it proved otherwise may be taken, according to taste, as God’s grace or a stroke of good luck. 3. . . . Civil disobedience can never be directed for a general cause such as for independence. The issue must be definite and capable of being clearly understood and within the power of the opponent to yield. . . . It should be clear to the reader that civil disobedience in terms of independence without the co-operation of the millions by way of constructive effort is mere bravado and worse than useless.11

Civil disobedience threatens the status quo because of its celebrated history as a cradle of truth and courage in society. After figures like Thoreau and Gandhi, a major watershed in the history of civil disobedience came when A. Phillip Randolph provided testimony before the Senate Armed Services Committee in 1948, the year Gandhi was assassinated, advocating for disobedience in response to segregation in the armed forces. Randolph invokes natural law to justify the law breaking, while casting his ideas in secular and political terms:

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9 David R. Weber, Civil Disobedience in America: A Documentary History
In resorting to the principles of direct-action techniques of Gandhi, whose death was publicly mourned by many members of congress and President Truman, Negroes will be serving a higher law than any passed by a national legislature in an era when racism spells our doom . . . a recent survey . . . revealed an overwhelming belief among these experts that enforced segregation on racial or religious lines has serious and detrimental psychological effects both on the segregated groups and on those enforcing segregation . . . . Negro youth have a moral obligation not to lend themselves as world-wide carriers of an evil and hellish doctrine.\[12\]

The disobedience of laws for moral purposes that extend beyond religion and conscience, to sociological pragmatism and theories of justice, continued to add preeminence to the story of protest. Opponents of racial reform determined to squelch racial dissent have in turn framed the breaking of a law not as a Thoreau or Gandhian act of conscience, but as sufficient to brand protesters “criminal,” no matter how trivial the law broken.

Protest actions are also denigrated when presented as ad hoc, or spontaneous. For example, this issue has arisen in contemporary understandings of the disobedience performed by Rosa Parks in 1955 which helped to spark the Montgomery Bus Boycott. In the traditional rendition of the Parks story, she is presented as acting almost on a whim, in isolation, deciding not to sit in the back of the bus when asked. In reality, Parks didn’t make an on the spot decision. This telling of her story completely misrepresents the gravity of her intention. Parks had been active for twelve years in her local NAACP chapter.\[13\] The summer before her arrest, she had attended a ten-day training session at Tennessee’s labor and civil rights organizing school, the Highlander Center, where she discussed Brown v. Board and learned about other bus boycotts in the past. She also learned that the previous spring, a young Montgomery woman named Claudette Colvin had also refused to move to the back of the bus, causing the NAACP to consider a legal challenge until they learned that she was unmarried and pregnant, and therefore in the ethical lens of the time, not respectable enough to serve as a symbol for the campaign.\[14\]

The traditional rendition erases Park’s deep intention and separates her from her community’s strategic thinking and determination. Taking away her intention also makes her story less inspiring (remember her courage was not momentary, she overcame fears during a long period of planning and in community with other activists). By mystifying her stance, that traditional narrative serves to dissipate the power of the protest, making it seems to be an impossible model for organizers and activists today to aspire to emulate.

Although the construction of Blackness as a crime has deep resonance in American society, the efforts to paint racial justice protesters in particular as criminals has a long history as well, beginning in during enslavement with efforts to paint runaways as both mentally ill and thieves of their own bodies so the speak, on through until the 1960’s as political conservatives sought to frame themselves as defenders of “Law and Order” and to conflate street crime,

\[12\] Id. at 27; “Testimony of A. Phillip Randolph . . . before the Senate Armed Services Committee, Wednesday, March 31, 1948,” in Black Protest Thought in the Twentieth Century, ed. August Meier 177 (1971).
\[14\] Randall Kennedy, Lifting as We Climb
protests, and uprisings into an overall unhealthy crisis of authority in American society.  
Conservatives like Presidents Richard Nixon and Ronald Reagan linked criminal justice policy with race in order to attain national prominence.  
This has continued until the present, where President Donald Trump began his campaign by not only by demonizing people of Mexican descent and Muslims, but by branding Black Lives Matter protesters as and “anti-cop,” and in 2017 as the National Rifle Association published an ad that hoped to raise money for itself by portraying protesters on the left, including Black Lives Matters racial justice protesters, as people who “scream racism and sexism and xenophobia and homophobia” and “smash windows, burn cars, shut down interstates and airports, bully and terrorize the law-abiding until the only option left is for the police to do their jobs and stop the madness.”

The Lawful Protester’s Dilemma

Every constitutional law student knows that judicial determinations of what "free speech" activities are protected under the First Amendment resemble the shifting sands of a desert.  
Attempting to predict in advance how courts will rule requires consideration of many factors that are not likely to be acknowledged in the decisions, particularly when the speech involves protest for racial justice.

Blacks and other minority groups in this country, lacking economic and political power, and subject to continuing racial domination, have often turned to protests in one form or another as the only available mechanism for airing their grievances. And during each "direct action" campaign, racial justice leaders have wrestled with the dilemma of how to structure demonstrations that will dramatize their plight to the majority community so as to spur action that will improve rather than worsen conditions for the black community. Protest actions clearly entitled to protection, such as a non-disruptive speech at an appropriate time and place, a petition properly filled with a governmental body, or a parade that conforms with all rules and regulations, are likely to gain little attention when they are not ignored entirely.  
On the other hand, more vigorous protests—those

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18. U.S Free Speech concepts emanate from the First Amendment, which holds that “Congress shall make no law [abridging] the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”
19. For example, few if any are aware of the many legal interventions attempted and petitions submitted in Ferguson outside of protest. For more information on one particular human rights strain of these legal interventions, see Justin Hansford, Meena Jagannath, Ferguson to Geneva: Using the Human Rights Framework to Push Forward a Vision for Racial Justice in the United States Post Ferguson, 12 Hastings Race and Poverty Law Journal 101 (2015). Great—can you briefly describe it.
that cannot be ignored—are likely to contravene either existing laws or laws that are promptly enacted or interpreted to transform what was arguably legal protest into criminal activity.²¹

The move to criminalize protest both allows and encourages those in policymaking positions to separate reform from protest activity even when the latter was fairly clearly the major motivation for the former. Thus, officials have seen nothing inconsistent in proceeding with disciplinary action against protesters at the same time as steps are taken to reform the conditions about which the protest was mounted,²² further complicating the relationship between legal outcomes and notions of success in protest.

For example, one would have thought that when then Federal Judge A. Leon Higginbotham, serving as a member of the National Commission on the Causes and Prevention of Violence in 1969, indicated that the sit-ins and other nonviolent protests paved the way for the elimination of Jim Crow practices throughout the South, he would have been stating the obvious. But he was speaking as one of the minority in a seven-to-six decision by the Commission when he wrote:

Recent advances in the field of civil rights have not come about and could never have come about solely through judicial tests "by one individual" while all others in the silent black majority waited for the ultimate constitutional determination.

Rather, the major impetus for the Civil Rights Acts of 1957, 1960, 1964 and 1965, which promised more equal access to the opportunities of our society, resulted from the determination, the spirit and the nonviolent commitment of the many who continually challenge the constitutionality of racial discrimination and awakened the national conscience.²³

The Commission majority had expressed the view that the constitutionality of a law could be effectively challenged in a test case brought by one individual or a small group. "While the judicial test is in progress," the majority urged, "all other dissenters should abide by the law involved until it is declared unconstitutional." And yet, without the drama and confrontation of direct action protest, the basic mandate of Brown, ending the "separate but equal" doctrine of Plessy v. Ferguson, might never have been implemented. Certainly, there had been little voluntary compliance from 1954 until the sit-in era in the early 1960s. So, while the majority of the President's Commission on the Causes and Prevention of Violence was not ready, even in 1969, to accept Judge Higginbotham's assessment of the limitations of litigation as an effective challenge to racial discrimination, thousands of blacks had reached Higginbotham's conclusion that the long awaited promise of Brown v. Board of Education would not be self-executing.

Even President John F. Kennedy admitted to civil rights leaders privately in June 1963 "that the demonstrations in the streets had brought results, they had made the executive branch act faster

²² A good example would be protesters who are prosecuted for taking down confederate monuments, even when city leaders have voiced their disagreement with the monuments (as a result of civil disobedience and protest).
and were forcing Congress to entertain legislation which a few weeks before would have had no chance.”

It should be noted that Kennedy's statement was "off the record." Violence, as H. Rap Brown once said, may be as American as cherry pie, but few boast of the centrality of violence in American history.

**B] Political dissent as a Revelation of Law**

Over half a century later, a similar dynamic unfolded during the #BlackLivesMatter movement. For over six years the Obama administration had dutifully avoided the subject of race. However, once mass protests began in the aftermath of George Zimmerman’s acquittal for the killing of Trayvon Martin, the President spoke out about the issue in personal terms. When after the killing of Mike Brown, and the acquittal of the officer who shot him, mass protests coincided with rioting and the destruction of property, more than words were shared—commissions were convened, including the Ferguson Commission on the local level, and the President’s Task Force on 21st Century Policing on the national level. Local local reforms followed, the Department of Justice produced the Ferguson report, and the police chief and city manager in Ferguson were replaced.

In spite of this reality, the use of disruptive tactics continues to provoke great condemnation in general mainstream discourse. The absence of an effective alternative gains only minimum sympathy for protests with disruptive potential, particularly if they are mounted by blacks.

A politics of dissembling seems involved here. The tenor of the legal establishment’s opposition to protests and boycotts suggests that more is at stake than just the weighing of First Amendment rights and limits. Also at stake could be the status of protesting as a form of political expression (opposition to which would contradict a fundamental element of Americans’ self-image, given that it was often violent protest against England that led to the American Revolution), or perhaps an unconscious rejection of the potential inherent in protests and boycotts. At some level, protest actions place in issue the relationship of "the law" to peace and social order.

In a seminal essay by the legal scholar Robert Cover called “Violence and the Word,” the author clarifies how legal interpretation by its nature operates in a field of “pain and death.”

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24 Arthur Schlesinger, A Thousand Days 970 (1965). Kennedy was not the first President who "got religion" on racial issues in the face of a massive civil rights protest in the nation's capital. Maybe want to include reference to Selma here? In 1941, Franklin D. Roosevelt feared his effort to gear up the nation for war would be disrupted by a march on Washington by 100,000 blacks under the leadership of A. Philip Randolph, head of the Brotherhood of Pullman Car Porters. To get the march called off, Roosevelt agreed to issue an Executive Order barring discrimination in war industries and apprenticeship programs. Using similar tactics, Randolph later pressured President Truman to issue two Executive Orders. One provided for "equal treatment and equal opportunity" in the armed services and the other sought to abolish "racial discrimination in federal employment." Lerone Bennett, Before the Mayflower 366-370 (5th ed. 1982).

25 http://www.huffingtonpost.com/entry/ferguson-protests-municipal-court-reform_us_55a90e4be4b0c5f0322d0cf1

explains how all legal pronouncements are enforced either by the imposition of pain (e.g. imprisonment or fine), death (e.g. the death penalty) or the ability of legal institutions to effectively instill fear of the imposition of these sufficient to convince people that it is useless to physically resist. If coercion is defined as the ability to achieve compliance by force or the threat of force, than any law that is enforceable, by definition, is coercive. Without the ability to conduct violence without hesititation and fear of reprisal, legal interpretation would have the same effect as simple literary commentary—it could persuade, but not coerce. To be sure, Cover would have it no other way, unless we lived in a world of angels where people could no longer be violent towards each other. But the point to remember, according to Cover, is that the nature of law is violence, that “A Judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.”

Jacques Derrida went even farther in asserting that the law is violence. It is through the imposition of "order" that law functions as authority. Derrida wrote that "law is always an authorized force, a force that justifies itself or is justified in applying itself, even if this justification may be judged from elsewhere to be unjust or unjustifiable." "Enforceability," Derrida indicates, is not a second order condition; it structures the very possibility of law. We are trained to think about law as referencing itself for authority (precedent, and so on). Initially, however, law had to install itself without its own prior approval. Consider the declaration of independence. That interpretive act in the form of an essay was unapproved; it constituted treason in the eyes of the British Crown, a crime which carried with it a horrible and degrading death and forfeiture of estate. The document also establishes a new government with the exclusive monopoly on the use of violence against citizens. Derrida refers to this installation as an "originary violence."

Thus, according to Derrida, to categorically equate law with justice and “law and order” is to participate in the elaboration of a fiction that posits the law as the dyadic opposite of violence. It is a fiction to which the courts are committed. To quote Montaigne, who referred to this phenomenon as the "mystical foundation" of the authority of laws, "[L]aws keep up their good standing, not because they are just, but because they are laws: that is the mystical foundation of their authority, they have no other."

Legal and philosophical analysis of protests would have to change if the law was recognized as a kind of violence and coercion rather than as the antithesis of violence. It should come as no surprise that the rhetorical labeling of racial justice protests as "violent" or potentially "violent" simultaneously insulates powerful institutions in general and the judiciary in particular from similar interrogation. Many of the protests discussed in this chapter were aimed at challenging inherently violent, institutionally sanctioned racist practices—whether at the level of the university, the state, or private industry. To call protests against these policies “violent” is to simultaneously

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27 Id. at 1601.
29 Cover, at 209.
30 Derrida, at 6.
31 Id. at 12.
(albeit, implicitly) position the practices being challenged, if not the institutions themselves, as non violent in nature, or to frame institutions themselves as the passive victims.

**Civil Disobedience and Acquiescence to Law**

Martin Luther King, in his famous "Letter from Birmingham City Jail," justified the deliberate lawbreaking inherent in civil disobedience by distinguishing between just and unjust laws. He would obey the former because they are consistent with moral law or the law of God, but he would disobey the latter because they are out of harmony with moral law. In King's view, segregation laws are immoral for they distort the soul and damage the personality of both the segregator and the segregated. Segregation laws are also evil, King said, because the majority inflicts on a minority standards it would not impose on itself. Dr. King provided additional examples, but his key distinction was made at that point where he said:

> In no sense do I advocate evading or defying the law as the rabid segregationist would do. This would lead to anarchy. One who breaks an unjust law must do it openly, lovingly (not hatefully as the white mothers did in New Orleans when they were seen on television screaming "nigger, nigger, nigger") and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and willingly accepts the penalty by staying in jail to arouse the conscience of the community over its injustice, is in reality expressing the very highest respect for law.

Impressive, but many legal commentators were troubled by Dr. King's philosophy. Professor Charles Fried expressed concern that the protestors expected others to abide by the law but were

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32 Martin Luther King, Why We Can't Wait (1963).
33 Id. at 84-86. The famous Montgomery bus boycott, which brought Dr. King to national prominence, provided a definitive model for combining a committed community protest action with effective litigation. According to Dr. King, the months of walking and the constant harassment of local officials had taken their toll, and the boycott was about to collapse. Martin Luther King, Stride Toward Freedom 151-153, 157-160 (1958). The Supreme Court then affirmed a three-judge court order that voided the state and local laws requiring segregation on Montgomery's motor buses. Browder v. Gayle, 142 F. Supp. 707 (N.D. Ala.), aff'd per curiam, 352 U.S. 903 (1956). The Supreme Court's decision came on the same day that an Alabama judge enjoined the protestors from operating an alternative car pool system to replace bus services—a ruling which may have marked the end of the boycott. For an extensive discussion of the Montgomery bus boycott, see Randall Kennedy, Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott, 98 Yale L.J. 999 (1989). And even after the decision, Alabama officials continued vehemently to enforce segregation. Mayor Gayle's response to the decision that carried his name was typical of this reaction: "The recent Supreme Court decisions...have seriously lowered the dignified relations which did exist between the races in our city and in our state....The difficulties [which the segregation laws were] meant to prevent and the dignities which they guard are not changed here in Alabama by decisions of the Supreme Court....To insure public safety, to protect people of both races, and to promote order in our city we shall continue to enforce segregation." Quoted in Kennedy, supra, at 1056-1057.
unwilling to contribute like sacrifice by abiding to the principle of "institutional settlement" of claims determined against them by some fair procedure.34 Moreover, Professor Fried claimed, if the demonstrators get the law changed to suit them, their tactics would enable those who think the former law justified to resist the "remedial" laws. Standing ready to pay the penalty for civil disobedience does, he concedes, evidence an affirmance of law in general, and he emphasized his belief that the law protested against here, segregation law, is not simply disadvantageous, but wrong. "This is a gamble," he concludes, "but civil disobedience is a risky, maybe a desperate course."35

Professor Fried speaks of the resolution of differences by a fair procedure, but this hardly fits the history of segregation laws enacted at a time when most blacks were disenfranchised, and enforced by a legal structure from which blacks were almost entirely excluded through jury selection procedures and subjected via effective segregation of the bar to a general rule of white domination of the legal process.

Perhaps in today’s environment, with mass incarceration and felon disenfranchisement combining to deny a large cross section of people of color from the franchise, a similar argument could be made? As DNA tests and other measures have subsequently demonstrated, procedurally fair conclusions can also result in error and should not necessarily go unchallenged. Fried may was correct, however, that the “remedial” laws designed to end segregation would be resisted thorugh the practice of interposition throughout the south. This southern wave notwithstanding, few would argue that it was a mistake to embark upon the movement for this reason. The feared “domino affect” of civil rights protests leading to mass lawlessness nationwide did not manifest.

King also argued that a protester must “willingly accept the penalty by staying in jail” in order to properly arouse the conscience of the community. Is this correct, or can the protester plead innocent and try to evade punishment? In a prominent essay published at the time, Supreme Court Justice Abe Fortas supported King’s position not only as an effective means “to make propaganda” but also as a way of testing the law. Fortas, like King, would have disoboyed the segregation laws, and Fortas also apparently approved of others who disobeyed the court injunction limiting King’s right to freedom of assembly, only on the condition that they, like King, “without complain or histrionics,” accept the penalty and go to jail after appeal, because “this is what we mean by the rule of law.”36

In a direct response, scholar Howard Zinn wrote a book that questioned Justice Fortas’ entire line of reasoning. Zinn argued that although a Supreme Court ruling concludes a question of law, it does not conclude the question of justice and morality, especially when the rule emanates from a Supreme Court that has in its past committed fundamental miscarriages of racial justice, including ruling that sanctioned enslavement all the way through Dred Scott v. Sanford.37 According to Zinn, King’s acceptance of an unjust injunction might have merely perpetuated the notion that “transgressions of justice by the government must be tolerated by citizens,” when

35 Id. at 1269.
36 Abe Fortas, Concerning Dissent and Civil Disobedience 53, 53 (1968).
37 Howard Zinn, Disobedience and Democracy: Nine Fallies on Law and Order (1968).
instead Zinn believes that protest against unjust conditions and laws cannot simply stop when legal appeals do: “If a protest is morally justified (whether it breaks a law or not) it is morally justified to the very end, even past the point where a court has imposed a penalty.” Outside of the protests based primarily on democratic deficit and disenfranchisement (the dissenter already rejects majoritarianism—the law would not exist if the democratic process did not allow for it) the protestor should feel no qualms about evading punishment, as no mechanism exists for adjudicating moral law—the law that the protestor respects and seeks to assert. Perhaps if the dissenter believes in the injustice of the law, he or she continues to be duty bound to not to obey but to disobey, even after a legal proclamation and punishment has been assigned. Other dissenters, including Nelson Mandela, have pled not guilty and sought to obtain their freedom while simultaneously engaging in vehement argument against immoral Apartheid laws.

"CREATIVE DISORDER" AND THE COURTS

Reviewing the civil rights protests against the often blatantly biased litigation practices of prosecutors and courts provides an experiential background enabling contemporary protesters and those who provide them with legal counsel to understand which tactics are likely to prove effective and which may garner judicial approval. These are often two unrelated questions. With the rise of plea bargaining as the central site of legal dispute resolution, the proclivities of the prosecutor often are just as important as those of the judges. Even so, or perhaps especially because of this fact, and as a result of literally hundreds of conservative federal judges appointed during Republican administrations, and the overwhelmingly white conservative nature of the prosecutorial bar, racial protesters are likely to receive little sympathy and mostly adverse treatment in the courts.

Unfortunately, history shows that, even if protesters do reach trial, the courts are as likely to decline as to provide relief when blacks involved in protest activity seek judicial protection from white retaliation. Justices of the Supreme Court have been motivated less by their conceptions of First Amendment guarantees than by their sympathy with the underlying goals of protest activity. During the first half of the 1960s, when the civil rights movement sought the most basic civil rights and liberties, demonstrators were protected against the frequently violent challenges of white groups and white governments. But after 1965, weary of the tactics of the civil rights movement

38 Id.
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40 http://www.npr.org/sections/itsallpolitics/2015/07/08/420913118/does-it-matter-that-95-of-elected-prosecutors-are-white
41 Davidson Douglas suggests that the more "moderate" southern states (North Carolina, Tennessee, and Texas) were more successful in evading integration than were those that defiantly resisted the Brown ruling. The white political establishment in the "moderate states," he contends, identified the question not as one of whether to desegregate, but how much. By rhetorically accepting and making tokenistic steps toward integration, these states more successfully limited court orders for extensive pupil desegregation than did their more "defiant" counterparts. While focusing on school desegregation, Davidson’s article discusses how business leaders utilized the rhetoric of moderation to attract out-of-state business and
and ambivalent about its goals, the Court began to withdraw its support from protest demonstrations.

Even though demonstrations can lead to fairly dramatic change, racial justice demonstrations, particularly those involving serious risk of arrest or reactionary violence, are not easy to mount. Frances Fox Piven and Richard A. Cloward put it well:

However hard their lot may be, people usually remain acquiescent, conforming to the accustomed patterns of daily life in their community, and believing those patterns to be both inevitable and just. Men and women till the fields each day, or stoke the furnaces, or tend the looms, obeying the rules and rhythms of earning a livelihood; they mate and bear children hopefully, and mutely watch them die; they abide by the laws of church and community and defer to their rulers, striving to earn a little grace and esteem. In other words, most of the time people conform to the institutional arrangements which enmesh them, which regulate the rewards and penalties of daily life, and which appear to be the only possible reality.  

The human tendency to hope for a better day rather than working and risking for it is particularly strong when the injustice involves racial violence. James Weldon Johnson, the NAACP Field Secretary, reportedly suggested in a 1919 speech that "the negroes in a city like Jacksonville, Florida could send a committee representing 10,000 negroes to the city government and tell them that if they did not receive protection [against white violence] they would not cook or work in any way....Such a course," Johnson emphasized, "would be a method more effective than the shotgun." There is no indication that blacks in Jacksonville were ready to follow Johnson's suggestion in a year when 76 blacks were lynched and hundreds more were killed or wounded in race riots. It would be many years before tactics such as Johnson's "creative disorder" would seem feasible. Blacks in the North had utilized sit-in tactics for years in their efforts to desegregate facilities that usually excluded blacks more for business policy reasons than in compliance with local law.

Frustrated by the seeming determination of most southern whites to retain segregation in all its forms, black students in February 1960, launched a sit-in movement in a Greensboro, North Carolina, lunch counter. The protest tactic already exhibited a history of success, at least as far back as the “ride-ins” designed to protest against segregation in trains and public transit in the late 19th century in the run up to Plessy v. Ferguson. Seeking service where they had never been served, and denied it, the 20th century version of the sit-in protesters refused to leave. They attracted shouted curses and whispered support from white bystanders. Arrests and prosecutions facilitate economic growth. Davidson M. Douglas, The Rhetoric of Moderation: Desegregating and the South during the Decade after Brown, 89 Nw. U. L. Rev. 92, 93-97 (1994).

42 Frances Fox Piven & Richard A. Cloward, Poor People's Movements: Why They Succeed, How They Fail 6 (1977).
43 Arthur Waskow, From Race Riot to Sit-in, 1919 and the 1960s, 226-228 (1967).
followed, but the sitting-in tactic was expanded to every imaginable public facility that refused to serve blacks on a basis of racial equality.\textsuperscript{46} Within a year, the sit-ins caused restaurants in 108 southern or border cities to end racial segregation, but in other areas, particularly in the Deep South, resistance remained strong.\textsuperscript{47}

Fortunately for hundreds of sit-in protesters who were arrested and convicted of trespass, disorderly conduct, breach of the peace, or various other "neutral laws," the first sit-in case to reach the Supreme Court, Boynton v. Virginia,\textsuperscript{48} presented a sympathetic set of facts and was resolved on an extension of existing law that, while it offered little help for most sit-in cases, did set the tone of "legal innovation" that found methods of reversing convictions on a range of procedural grounds. Boynton involved a black law student who had been convicted for trespass when he refused to leave the white section of a restaurant in the Richmond, Virginia, Trailways Bus Terminal. The record was slim; Boynton had been arrested under the state's trespass statute, not a segregation measure; whatever his right to ride an interstate bus on a desegregated basis, he was arrested in a privately operated restaurant which merely leased the premises from Trailways. Indeed, as two Justices pointed out in dissent, Boynton's attorneys had at no point challenged the trespass conviction as in violation of the Interstate Commerce Act.

The sit-in protests raised the question of whether civil disobedience must be limited to laws which are themselves wrong. In the debate mentioned above, Justice Fortas argued that civil disobedience “is never justified in our nation where the law being violated is not itself the focus or target of the protest.” Accordingly, Fortas would have violated segregation laws in the South, but not have been willing to “sit in” and trespass in a restaurant that maintained segregated seating not by law but by custom. Howard Zinn, in a response, noted that “Fortas is left in the position of failing to distinguish between important and unimportant laws, between trivial and vital issues, because the distinction between legal and illegal seems far more important to him.” Also, Zinn points out, “what if some terrible grievance is represented not by an evil law, but by a failure on the part of the government to enforce a good law,” such as the enforcement of civil rights regulations or laws against police brutality? Or what if an immoral situation, like housing segregation, continues to exist without an immoral law being used to enforce it? “If a law has been passsed registering what is wrong, you may violate it as a protest; if no law has been passed, but the same condition exists, you are left without recourse . . .”\textsuperscript{49} To Zinn, Fortas’ is as preverse a position as a doctor who fails to inject a needle in an uninjured portion of the patient’s body in

\textsuperscript{46} Waskow, supra note 3. For extensive, more recent histories of the civil rights movement, see also Taylor Branch, Parting the Waters: America in the King Years 1954-63 (1988); Eyes on the Prize: America's Civil Rights Years–A Reader and Guide (Clayborne Carson et al. eds., 1987); David J. Garrow, Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference (1986).

\textsuperscript{47} Waskow, supra note 3. For an extensive examination of a protest movement which, because of strong resistance, failed to achieve most of its goals, see John Hart Ely, Negro Demonstrations and the Law: Danville as a Test Case, 27 Vand. L. Rev. 927 (1974).

\textsuperscript{48} 364 U.S. 454 (1960).

\textsuperscript{49} Howard Zinn, Disobedience and Democracy: Nine Fallacies on Law and Order 35-36 (1968).
order to cure a severe illness, on the unreasonable ground that medicine should only be applied directly to the injury or not applied at all.

The majority evaded this ethical discussion but, evidencing the sympathy for blacks convicted in nonviolent efforts to use public facilities on a nonsegregated basis that was to prevail for five years in the 1960’s, decided the case under §316(d), the nondiscrimination clause of Part II of the Interstate Commerce Act, dealing with motor carriers. Although the Act, by its express wording, includes only terminal facilities owned, operated, or controlled by interstate carriers—seemingly excluding the privately leased restaurant in Boynton—the Court reasoned pragmatically to extend the statute to facilities made available by carriers. Justice Black, speaking for the majority, wrote, "if the bus carrier has volunteered to make terminal and restaurant facilities and services available to its interstate passengers as a regular part of their transportation, and the terminal and restaurant have acquiesced and cooperated in this undertaking, the terminal and restaurant must perform these services without discriminations prohibited by the Act."  

Justice Black, whose ambivalence about the legality of sit-in protests grew with the passing years, indicated in Boynton the mixed blessing that the Court provided in decisions reversing sit-in convictions. As in Boynton, the Court's uncertainty was manifested by quite narrow decisions that offered little precedent or encouragement for future protest.

C | The Role of Lawyers in Movements for Social Change

As a communictions major in film and broadcasting, I . . . [made a film] based on the lyrics, “You’re my lawyer, you’re my doctor, yeah, but somehow you forgot about me,” from the song by Gil Scott Heron and Brian Jackson. These lyrics spoke to me of professionals who forget their communities or at least their communities’ perspectives, needs, and sometimes their own roots. In turn, they are not respected and become despised for their indifference by those people who had different hopes and aspirations for what these professionals could do to help the general conditions of others in the community.

At the time I produced the student film, I had no idea I would eventually become a lawyer, but I did know that whatever I did do, that I would consider working apart from or without relation to the Indian community and my own tribal community, in particular, as unconscionable.

Lawyers seeking to play a role in racial justice movements have a diversity of role models to choose from, from Charles Hamilton Houston to Michelle Alexander, Bill Kunstler to Lynn Stewart. The benefits that lawyers enjoy as a profession, including state protection from competition via unauthorized practice of law and unique access to self regulation, is theoretically justified by the public service nature of legal work, exemplified by public interest lawyers, but by no means limited to them. In reality, social movement lawyers have become icons in a

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50 364 U.S. at 460. The Boynton decision marked the end of a long series of efforts to utilize the Interstate Commerce Commission to specifically prohibit all racial segregation on interstate carriers. Later that year, the ICC issued an order (49 C.F.R. § 180(a)) that specifically prohibited motor carriers from in any way utilizing terminal facilities that segregate on the basis of race, color, creed, or national origin.

profession which, putting the public interest bar to the side, has had a difficult time persuading the public of its virtue, to put the matter gently.

Aspiring attorneys might ask themselves, how can I ensure that my work as a lawyer fits into the story of resistance told by the first 9 chapters? Upon closer examination, “Public Interest” lawyering that has an affect on racial subordination follows many different patterns and conceptions, straddles many practice areas, and raises a plethora of ethical and strategic issues ripe for analysis. One thread of scholarship has identified called these types legal practitioners who engage in supporting social movements as “Cause Lawyers.”

**Understanding the lawyer’s role as “Cause Lawyer”**

In the vacuum of classroom instruction on identity, many law students learn the definition of what it means to be a lawyer through popular understanding. Perhaps the most popular understanding of the lawyer’s role is the “neutral partisan” approach, colloquially known as the lawyer as “hired gun.” Partisanship in this context involves a lawyer’s belief that the proper functioning of our legal system depends on the advocate’s commitment to represent a client “zealously within the bounds of the law.” This prescribes that the lawyer will even go so far as to “employ means on behalf of his client which he would not consider proper in a non-professional context even to advance his own ends.” This includes the ancient dictate that “An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client . . . in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.” “Neutrality” here means that a lawyer will agree to represent a client “regardless of [the lawyer’s] opinion of the justice of [the client’s] ends.” As long as the client’s goals fall within the bounds of the law, the “neutral partisan” lawyer should not stand in moral judgment of the client. One could infer from this second principle a third—non-accountability. As long as the lawyer acts within the bounds of the law to fulfill his role as a legal advocate, the lawyer’s actions should not be evaluated as unethical, even if the actions inflict damage on innocent third parties in the broader community.

Proponents of this theory justify their approach because of a third idea, the principle of procedural justice. This principle holds that a lawyer is not ethically accountable for the consequences of extreme neutral partisan advocacy because the adversarial system, which depends on it, is the most effective system of truth seeking that we have. Scholars

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52 Model Code of Prof’l Responsibility Canon 7 (1980).
54 Id.
55 The Trial of Queen Caroline 8 (J. Nightingale ed. 1820-21).
56 Id.
describe this as “role morality,” meaning lawyers have ethical duties in their role as lawyers that exempt them from duties they might have in the same situation if they were not a lawyer.59

In sharp contrast, others argue that role morality in this context should not apply, and lawyers should be held to the standards of ordinary morality.60 Because other systems of justice could help our society seek truth in effective ways as well, “the adversary system is too weakly justified to support a role morality that diverges widely from non-professional morality.”61 Pursuant to the rejection of role morality, for example, if intimidating injured women into dropping legitimate lawsuits by forcing them to answer humiliating questions about their personal affairs is wrong for a non-lawyer to do, it is wrong for a lawyer to do as well.62

A rejection of the standard conception could involve the embrace of a “moral activist” role, allowing the lawyer to actively engage his or her own moral capacities when representing and selecting clients.63 Lawyers who actively engage as principled moral activists and who identify with a particular political cause often call their approach “cause lawyering.”64 Cause lawyers make their moral commitments the animating factors of their professional lives. They do not confine themselves to the more limited conception of the lawyer’s role imposed by the standard conception. They tend to reject the principle of non-accountability, and their moral commitment to the broader community often manifests itself through political or policy positions that their legal work supports. For most of their peers at the bar, commitment to a higher cause plays at best a marginal role in their sense of what it means to do their day to day job as a lawyer.65 For cause lawyers, “lawyering is … attractive precisely because it is a deeply moral or political activity, a kind of work that encourages pursuit of their vision of the right, the good, or the just.”66 Cause lawyering can be understood as a specific genre of morally activist lawyering, one that focuses on moral commitments that affect the broader polity.67 The traditional cause lawyer is a person with

60 David Luban, Legal Ethics and Human Dignity at 63 (2007).
61 Id.
62 See Deborah Rhode, David Luban, Legal Ethics 179 (2009).
64 This discussion of Cause Lawyering Builds off of Justin Hansford, Cause Judging, 27 Georgetown Journal of Legal Ethics 1 (2014).
65 STUART SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 2 (2004).
66 Id.
a pre-existing commitment to a cause who brings that commitment to their legal work from the outset. However, this can also include situations where “a lawyer’s ideals are awakened by service undertaken for other reasons,” including passions awakened by work on a case or through exposure to causes through volunteer work. 68

Whether a lawyer decides to take a neutral partisan or cause lawyer approach to law practice influences how that lawyer will approach many ethical problems in legal practice, including problems which the model rules fail to provide guidance for. However, regardless of how the lawyer defines their duties to the client, the court, or the opponent, the larger question remains—why become a lawyer to begin with?

To an extent, these approaches have ready answers for the social good that they can provide—the neutral partisan lawyer promotes the public good by extending the autonomy of the client, and the cause lawyer promotes the public good by supporting the social cause in question.

**The Cause Lawyer’s Role in Political Struggle**

Embarking on the work of a lawyer committed to promoting a social movement often entails an initial barrier of role confusion. In *Am I My Client?: The Role Confusion of a Lawyer Activist*, 69 Nancy Polikoff describes herself as a lesbian activist who engages in “a variety of activities designed to change the fundamental way in which American society views homosexuality” with some work that “entails changing the law” and other work that falls “outside of the legal system, including organizing and attending demonstrations and conferences, public speaking, fundraising for groups involved in cultural change and political and economic empowerment, and writing for nonlegal audiences.” 70 In this article, she articulates some of the internal tensions that a lawyer faces when involved in politicized cases that revolve around a cause that the lawyer believes in.

The first problem arises from the sense of internal displacement she feels when she must represent her comrades who have engaged in civil disobedience. Their protest and their disruptive presence frames them as outsiders, and her profession frames her as an insider—more specifically, she (and her protester clients) feel that she is most effective in her role as representative for the accused when seen as an insider. However, she feels that the protesters “may not treat me as a trusted comrade” as a result of her professional role, and the police, judges and other legal workers will not discuss the political merits with her but only the procedures, treating her not as a member of the protest group but as a legal worker, an outsider just doing her job. This causes her not only pain but a feeling of lost integrity. She explains that she feels “disintegrated, sometimes dishonest, unable to be seen by those in authority for all of me, never both a lawyer and a lesbian and a lesbian activist at the same time.” She concludes “Civil disobedience activists misbehave: they break the law, breach decorum, and disregard order.

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70 *Id.*
Lawyers behave: they uphold the law, maintain decorum, and cooperate in preserving order. I cannot be in both groups at the same time.”

Her second dilemma comes from her shared identity and belief with the protesters; as a lesbian attorney representing LGBT activists, she asserts that “although as a lawyer I represent them, through their actions, they represent me. They speak for me and advocate the changes that would improve my life and the lives of those I love.” This creates a problem when, as a client-centered attorney, she approaches her practice from the perspective that the client should make key decisions in the representation. In these LGBT protest cases, however, she also will bear the consequences of the outcome of the case. In one instance, her partner and her close friends were the clients, and as a result, she was torn over whether she had a right to provide more input into the decision making process than she normally would. Because her friends trusted her on the basis of their friendship (they would not have trusted a different lawyer similarly), they displayed a willingness to give her more power in the process than she would normally have received. However, because she is the type of lawyer who seeks to empower her clients as a point of principle, she wanted to give them more power over the process than they would normally receive from a less attentive attorney.

Ultimately, Polikoff answers “No” to her core question, “Am I My Client?” concluding that a lawyer should “periodically engage in political activism outside of the lawyer role,” as opposed to believing that the lawyer can safely navigate the muddled conundrums that she identifies throughout her article. Do you agree?

**Serving Two Masters**

Professor Bell contributed one of the iconic examinations of cause lawyering in his 1976 article *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*. In this article, he explores the risk of racial justice law to result in a conflict between “the cause” and client interest. Here’s an excerpt:

> How should the term “client” be defined in school desegregation cases that are litigated for decades, determine critically important constitutional rights for thousands of minority children, and usually involve major restructuring of a public school system? How should civil rights attorneys represent the diverse interests of clients and class in school suits? Do they owe any special obligation to class members who emphasize educational quality and who probably cannot obtain counsel to advocate their divergent views? Do the political, organizational, and even philosophical complexities of school desegregation litigation justify a higher standard of professional responsibility on the part of civil rights lawyers to their clients, or more diligent oversight of the lawyer-client relationship by the bench and the bar?

As is so often the case, a crisis of events motivates this long overdue inquiry. The great crusade to desegregate the public schools has faltered. There is increasing opposition to desegregation at both local and national levels (not all of which can now be simply condemned as “racist”). . . inflation makes the attainment of racial balance more expensive, the growth of black populations in urban areas renders it more difficult, an increasing number of social science studies question the validity of its educational assumptions.

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Civil rights lawyers dismiss these new obstacles as legally irrelevant. Having achieved so much by courageous persistence, they have not waivered in their determination to implement Brown using racial balance measures developed in the hard-fought legal battles of the last two decades. This stance involves great risk for clients whose educational interests may no longer accord with the integration ideals of their attorneys. Indeed, muffled but increasing criticism of “unconditional integration” policies by vocal minorities in Black communities is not limited . . . Now that traditional racial balance remedies are becoming increasingly difficult to achieve or maintain, there is tardy concern that racial balance may not be the relief actually desired by victims of segregated schools . . . Low academic performance and large numbers of disciplinary and expulsion cases are only two of the predictable outcomes in integrated schools where the racial subordination of blacks is reasserted in, if anything, a more damaging form.

The literature in both law and education discusses the merits and availability of educational remedies in detail. The purpose here has been simply to illustrate that alternative approaches to “equal educational opportunity” are possible and have been inadequately explored by civil rights attorneys.

Civil rights lawyers have long experience, unquestioned commitment, and the ability to organize programs that have helped bring about profound changes in the last two decades. Why, one might ask, have they been so unwilling to recognize the increasing futility of “total desegregation,” and more important, the increasing numbers of defects within the black community? A few major factors that underlie this unwillingness can be identified.

1. Racial Balance as a Symbol
   For many civil rights workers, success in obtaining racially balanced schools seems to have become a symbol of the nation’s commitment to equal opportunity—not only in education, but in housing, employment, and other fields where the effects of racial discrimination are still present . . . For them the busing debate symbolizes a major test of the country’s continued commitment to civil rights progress. Any retreat on busing will be construed as an abandonment of this commitment and a return to segregation.

2. Clients and Contributors
   The hard line position of civil rights groups on school desegregation is explained in part by pragmatic considerations. These organizations are supported by middle class blacks and whites who believe fervently in integration. At their socioeconomic level, integration has worked well . . . Many of these supporters either reject or fail to understand suggestions that alternatives to integrated schools should be considered, particularly in majority-black districts.

Jack Greenburg, LDF Director-Counsel, acknowledges that fund-raising concerns may play a small role in the selection of cases. Even though civil rights lawyers often obtain the clients, Greenberg reports, “there may be financial contributors to reckon with who may ask that certain cases be brought and others not.” He hastens to add that within broad limits lawyers “seem to be free to pursue their own idea of right . . . affected little or not at all by contributors.” This reassurance is double edged. The lawyers’ freedom to pursue their own ideas of right may pose no problems as long as both clients and contributors share a commonsocial outlook. But when the views of some or all of the clients change, a delayed recognition and response by the lawyers is predictable.

NAACP General Counsel Nathaniel Jones denies that school suits are brought only at the behest of middle class blacks, and points out what he considers to be the absurdity of attempting to pool the views of every black before a school desegregation suit is filed. But at the same time he states that his responsibility is to square NAACP litigation with his interpretation of what Supreme Court decisions require.

3. Client Counsel Merger
   The position of the established civil rights groups obviates any need to determine whether a continued policy of maximum racial balance conforms with the wishes of even a minority of the class. This position represents an extraordinary view of the lawyer’s role. Not only does it assume a perpetual retainer authorizing a lifetime effort to obtain racially balanced schools. It also fails to reflect any significant change in representational policy from a decade ago, when virtually all blacks assumed that integration was the best means of achieving a quality education for black children, to the present time, when many black
parents are disenchanted with the educational results of integration. Again, Mr. Jones would differ sharply with my evaluation of black parents’ educational priorities, but his statement indicates that it would make no difference if I were correct. The Supreme Court has spoken in response to issues raised in litigation begun and diligently pursued by his agency. The interpretation of the Court’s response by him and other officials has then determined NAACP litigation policies.

This malady may afflict many idealistic lawyers who seek, through the class action device, to bring about judicial intervention affecting large segments of the community. The class action provides the vehicle for bringing about a major advance towards an idealistic goal. At the same time, prosecuting and winning the big case provides strong reinforcement of the attorney’s sense of his or her abilities and professionalism. Dr. Andrew Watson has suggested that “[c]lass actions . . . have the capacity to provide large sources of narcissistic gratification . . .” the psychological motivations which influence the lawyer in taking on “the fiercer dragon” through the class action may also underlie the tendency to direct the suit towards the goal of the lawyer rather than the client.

Bell’s rich description of a fundamental dilemma of racial justice lawyering overflows with potential for even more provocative questions. What if, when representing an individual client with a racial justice case that has political and social movement implications, the client’s interests conflict with the interests of the cause? For example, what if a mother of a young person of color killed by police wants to agree to a settlement that will provide her with some much needed financial stability, but that includes a confidentiality clause that will leave the community’s wound unresolved as they may never uncover the complete truth about the interaction? Or, how should a lawyer handle the representational role when client goals change during litigation?

**The Law and Organizing approach to racial justice law practice**

As the radical imaginaries that conclude this chapter indicate, many burgeoning struggles for racial justice do not conceptualize their victories in terms of political rights, nor do they hope primarily to achieve legal victories through the shifting of constitutional law. They seek outcomes that envision societal transformation in a more holistic sense. To do that, the movements need access to power. Can lawyers build power for their clients?

Peter Gabel and Paul Harris, in *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, have taken the position that:

> 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. This obviously does not mean that one should not try to win one’s cases; nor does it necessarily mean that we should not continue to organize groups by appealing to rights . . . A legal strategy that goes beyond rights-consciousness is one that focuses upon expanding political consciousness through using the legal system to increase people’s sense of personal and political power.

As an example, Gabel and Harris reviewed the methods used by Leonard Weinglass and Bill Kunstler in their representation of the defendants in the conspiracy trial of the Chicago Eight.

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The issue, as defined by the prosecutor, was whether Black Panther leader Bobby Seale and the other defendants had conspired to cross state lines with the intent to incite a riot. The political issue that the demonstrations sought to address was the morality of the Vietnam War and the political process that served to justify it. Of course this political meaning was legally irrelevant to the disposition in the eyes of the court, but Weinglass and Kunstler worked alongside the clients to “openly flaunt the hierarchical norms of the courtroom and ridicule the judge, the prosecutor, and the nature of the charges themselves,” in effect successfully rejecting “the very forms of authority upon which the legitimacy of the war itself depended,” and providing inspiration to millions of supporters.

Gabel and Harris also cite the the 1971 trial of a “Brown Power” organization in San Francisco named “Los Siete.” While selling newspapers which exposed police brutality against Latinos in the Mission district, the members of the organization experienced the issue first hand. Police called them racial slurs, arrested them for tresspass on a nearby store owner’s request even though they were selling papers on the street, and accused the woman newspaper seller of prostitution, which resulted in a mandatory quarantine while she was examined for veneral disease at the City Jail. The prosecutors offered a plea deal which an apolitical lawyer might have felt professionally bound to recommend. However, in this context the plea deal would have supported the state’s strategy to “break the spirit and [limit] the options of the community movement . . . vindicating the police, legitimating the store owner’s property rights, and making the community activists feel powerless and humiliated.” The state also offered a two year probationary period, seemingly designed to inhibit any future activism by the group.

However, the lawyers in this case were movement oriented cause lawyers. They understood that the newspapers were a source of political power for the Latino community. The person to person contact was an effective organizing tool; the information in the newspaper itself, *Basta Ya*, gave crucial knowledge to community members which they would not have otherwise had access to; and the sight of young Latinos passing out their radical paper propagated a tangible sense of power in residents. It was worthwhile, then, for these clients to risk trial.

Although this case was less famous than the case of the Chicago 8, the politicization of the trial also worked to the advantage of the defendants here as well. It was not in the interests of the state to send the activists to jail and risk angering and politicizing the community. The lawyers used strategic voir dire questions, opening statement references, and cross examination to suggest the political nature of the trial to the jurors. Although they would have lost arguing on the facts, or hoping to win on First Amendment grounds, they instead exposed the racism of the police department, gaining the sympathy of the jury. Instead of feeling that they had won by disguising their politics or giving in to a plea deal, after the trial the defendants went back with other members of Los Siete and distributed newspapers in the same location, while the police and storeowner were forced to looked on helplessly.

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In the classic article *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, Lucie White explores scholar Steven Lukes’ explication of his three dimensions of power to the practice of law, elucidating yet another approach to a community empowerment based law practice that might help to undermine racial subordination. The first part of White’s article is a case study describing how two white outsiders, herself and a community organizer, helped a small farming community in rural South Africa successfully fight an Apartheid era attempt to raze their community and relocate the people to a township. Without any meaningful capacity to vindicate rights in a courtroom setting, White and the South Africans had to engage in lawyering practice that engaged both their skills as advocates and critical theories of power analysis.

White categorized the different approaches to lawyering as dimensions. The first dimension is the framework where opposing interest groups enter an arena, such as a courtroom, as a contest of power. One of the limitations of this approach is that it fails to account for the dynamics of exclusion at work in the political and legal system that keep people of color from fully asserting their interests in these types of venues. The second dimension focuses on the social practices and institutional barriers that keep issues important to people of color out of the courtroom and the political sphere altogether. It focuses on “the suppression of conflict, rather than overt political defeat.” This includes fear of backlash, the failure of prevailing norms to identify a particular experience of subordination as a legitimate political or cognizable legal claim, and the reality that formal rulings often don’t lead to defacto solutions because of the lack of fair administration of justice. Instead of focusing on who wins, which the 1st dimension does, in the 2nd dimension “success is measured by such factors as whether the case widens the public imagination and [sense of] right and wrong, mobilizes political action behind new social arrangements, or pressures those in power to make concessions.

Even this second dimension “has no analysis, however, for the more vexing case of apparent absence of grievance from consciousness altogether.” The third dimension involves engaging in Paulo Friere’s model of pedagogical engagement with communities, hoping to facilitate reflection that “that transforms fatalism and passivity into “a common recognition of the skills that people already possess and into a shared willingness to risk change.” By learning to interpret the problems of subordination as fundamentally social and not individual, a community can learn to “interpret their relationship with those in power as an ongoing drama rather than as a static condition,” and a lawyer can perform less like a traditional litigator and more like a teacher or organizer.

As the 1990’s progressed, the work of Lucie White, along with that of Gerald Lopez and others, led many progressive lawyers to seek alternative models that held out the work of organizing as a critical component. The critiques of using traditional approaches to lawyering

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85. *Rebellious Lawyering*
began to build and critics found that, when successful, lawyers tended to create dependency in social movement actors, inadvertently disempowering communities because they often “more want to create law than create power.” Scholars began to help fully articulate the “fusion of law and organizing” approach that 21st century progressive law practitioners often embrace today. An entire field of study became dedicated to debates around the finer points of how lawyers should engage in this law and organizing approach, whether that includes explaining technical aspects of the law to communities, researching how other jurisdictions have dealt with issues, or drafting legislation, or engaging in representation for a community organization.

Longtime Law and Organizing practitioner Bill Quigley provided perhaps one of the more prominent explanations of the method in Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations. In this article, he teaches lawyers how to work with organizers by presenting the insights of community organizers themselves. The organizers take the position that law and organizing practitioners should focus on some core principles. For example: seek to build up the community (rather than win on an issue); approach the community in the spirit of leadership development; involve the community in everything you do; understand how much you are gaining from the interaction; confront one’s own comfort with the system as a lawyer; be wary of speaking on behalf of the community; and be willing to “journey with the community.”

Another Scholar has made a chart of different models of Social Justice Lawyering [Include Chart Here]

All law and organizing proponents agree, however, that if lawyers can integrate organizing into their day to day practice, transformative, progressive social change is more likely to happen, because organizing (especially local organizing) is the centerpiece of movements for social change. The following section previews some of the issues that have challenges organizers for racial justice that law and organizing practitioners may find informative.

D] SPECIAL ISSUES IN ORGANIZING IN RACIAL JUSTICE MOVEMENTS

“Whether mass mobilizations are spearheaded by high-profile leaders or are propelled by people who go unheralded and unnamed in the history books, they can have a transformative impact on those who experience them. When

people discover momentum-driven organizing as a new mode of action, it can fundamentally change how they approach some of the most basic questions of politics . . .”

Organizing for social change is a separate field of study that matured throughout the twentieth century. Two central approaches to organizing have gained ascendancy in recent years—direct organizing for immediate impact, and institution building for long range impact. Although protest is an available tactic that movements mobilize for both strategic objectives, social movements engage in much more than protest activity alone. From the perspective of direct action organizing, two core principles include the ability to win real, immediate, concrete improvements in people’s lives: the ability to give people a sense of their own power, and ambition to alter the relations of power.

The list of “strategic hurdles” that social movements must overcome in order to be successful is long and highly contested. In the context of racial justice movements, two reoccurring issues are coalition building and engagement with white allies.

Coalition Building

“You don’t go into a coalition because you just like it. The only reason you would consider trying to team up with somebody who could possibly kill you, is because that’s the only way you figure you can stay alive.”

Political victories are rarely won by any actor who attempts to mobilize resources in isolation. Even when groups have a numeric advantage, they still must mobilize through coalition—for example, a Spanish language ballot initiative in Miami would still need to bring together Cuban exiles, Dominican veterans, and other affinity groups to form a solid Latino bloc. On a larger scale, political parties are in essence coalitions of disparate groups that have agreed to coalesce for electoral purposes. In this regard, one could consider coalition building to be one of the first rules of politics. This does not mean that political coalition work is for the faint of heart.

Viable coalitions stem from four preconditions: (a) the recognition by the parties involved of their respective self-interests; (b) the mutual belief that each party stands to benefit in terms of that self-interest; (c) the acceptance of the fact that each party has its own independent base of power and does not depend for ultimate decision-making on a force outside itself; and (d) the realization that the coalition deals with specific and identifiable—as opposed to general and vague—goals. On the issue of racial justice, Eric Yamamoto presents in his book Conflict and Reconciliation in Post-Civil Rights America a four-step framework for successful coalition building. “First, groups must recognize each other’s history and feelings, including any

90 Mark Engler and Paul Engler, This is an Uprising: How Nonviolent Revolt is Shaping the 21st Century xviii (2016).
91 Id.
grievances they bring to the table. Next, they must take responsibility for their own part in oppressing their neighbor. Subsequently, they must reconstruct and heal the relationship, usually through atonement and apology. Finally, they must make reparation for the harms done.”

As Dr. King arrived at the Lorraine Motel in Memphis, Tennessee, he was spending his final moments before his assassination preparing for a project called the Poor People’s Campaign. Designed to be “a concerted attempt by [the Southern Christian Leadership Conference] to address broad economic issues with a class-based, cross-racial alliance of poor [B]lacks, whites, Hispanics, and Native Americans,” the campaign would have served as Dr. King’s signature coalition based campaign. The campaign would have sought to mobilize around Dr. King’s “Economic and Social Bill of Rights” which included the right of every citizen to a minimum income, the right to a decent house and the free choice of neighborhood, the right to an adequate education, and the right to participate in the decision-making process. This type of translation of demands into the language of rights, one of the contributions that law can provide for social movements attempting to form coalitions, can help mobilize discrete interests around the idea that the institutional forum of the law can provide a political context to advance each separate group’s interest through the mechanism of the coalition.

Law does not solve many of the barriers of coalition, however. If the social movement attempts to use the courtroom as a tool for social change through law reform, litigation may deepen mistrust between coalition members and open up vulnerability to betrayal. For example, in the racial hierarchy Asians have been stereotyped into the model minority, conferring onto them an assumption of competence, while relying on the perpetuation of stereotypes of other racial groups such as Black or Latinx people as lazy and welfare queens. In Fisher v. University of Texas, the white plaintiff’s main brief to the Supreme Court argued that Asian-Americans are victims of a race-based affirmative action system that favors admission of Black and Latinx people. Five Asian-American groups filed amicus briefs in support of plaintiff Abigail Fisher, the plaintiff who sought to end affirmative action. However, more than 160 Asian-American and Pacific Islander groups filed amicus briefs to uphold affirmative action policies. In other contexts, however, immigrants have sought to avoid identifying with Black Americans through a process that scholar Paula McClain has terms “racial distancing.” Common examples include Latino and Arab Americans who aspire to whiteness, or who engage in distancing by adopting a combative antipathy to Blacks. Finally, the process of translating initially vague and aspirational demands into concrete legal policy can often cause the sensitive areas where coalition member

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95 Linking Arms at 859 (citing Eric K. Yamamoto, Interracial Justice: Conflict and Reconciliation in Post-Civil Rights America 10–11 (1999))
98 Id.
101 Black and Brown Coalition Building at 481.
interests diverge to become no longer inchoate.\textsuperscript{102} For these reasons and others, Bernice Johnson Reagon has expounded on the discomfort of true coalition work:

\begin{quote}
Coalition work . . . is some of the most dangerous work you can do. And you shouldn’t look for comfort. Some people will come to a coalition and they rate the success of the coalition on whether or not they feel good when they get there. They’re not looking for a coalition; they’re looking for a home! . . . In a coalition you have to give, and it I different from your home. You can’t stay there all the time.\textsuperscript{103}
\end{quote}

In spite of the difficulties, the necessity of coalition, which exists in all political space, takes on an even greater urgency in racial justice work. In \textit{Beside my Sister: Facing the Enemy: Legal Theory Out of Coalition},\textsuperscript{104} Mari Matsuda argues that oppressive structures are so interdependent that none can be successfully eradicated unless they all are. One way to recognize these interdependencies is to “ask the other question,” Matsuda says:

\begin{quote}
The way I try to understand the interconnection of all forms of subordination is through a method I call “ask the other question.” When I see something that looks racist, I ask, “Where is the patriarchy in this?” When I see something that looks sexist, I ask, “Where is the heterosexism in this?” When I see something that looks homophobic, I ask, “Where are the class interests in this?” Working in coalition forces us to look for both the obvious and non-obvious relationships of domination, helping us to realize that no form of subordination ever stands alone.\textsuperscript{105}
\end{quote}

\textbf{White Allyship}

The politics of coalition becomes most complex when Whites seek to engage in racial justice activism. Be that as it may, in the United States, because the the locus of power has trended so heavily towards the white community, the need for white allyship has always existed.

An ally is as “A member of an oppressor group who works to end a form of oppression which gives him or her privilege.”\textsuperscript{106} The classic example is the solidarity shown by Peter Norman, the olympic sprinter who came in second place during the 200 meter race in the 1968 Olympics in Mexico City. After the race, he mounted the podium to receive his medals along with John Carlos and Tommie Smith, who had just won the race in a world record time. During the star spangled banner, Carlos and Smith famously raised their Black leather gloved hands in a Black Power salute, creating a historic image that would electrify people all over the world. Less known is the story of Norman, later retold in the 2008 movie \textit{Salute}. Norman expressed solidarity by wearing a badge for the Olympic Project for Human Rights, as did Smith and

\begin{footnotes}
\item[102] Cite to example of the controversy over the BLM demands and the Palestinian issue, calling Israeli policy “genocide.”
\item[103] Id. at 1189.
\item[105] Id. at 1189.
\item[106] Anne Bishop, \textit{Becoming an Ally: Breaking the Cycle of Oppression} 152 (2002)
\end{footnotes
Carlos. But unbeknownst to many, Norman faced severe backlash when he returned home after the race to his native Australia, a country that had Apartheid laws in place that were almost as strict as those in South Africa. Although he ran qualifying times for the 200 meters thirteen times and the 100 meters five times, he was not part of the 1972 Australian Olympic team. He was ostracized and had difficulty finding work for the rest of his life, until his untimely death in 2006. If at any point in time over that interceding 28 years he had condemned the other two athletes, he would have received a pardon in the form of a stable job through the Australian Olympic Committee and a role in the 2000 Sydney Olympic games. Instead, he never condemned Smith and Carlos. While his image is rarely included in the picture or the narrative surrounding the protest, as a White ally, perhaps this was his intent. At his funeral Smith and Carlos were among his pallbearers, and they considered Norman to be a hero.

Arielle Newton of the activist group Black Millennials also provides key steps that white allies should follow: 1) know what racism is (prejudice + privilege + power), 2) understand white privilege, 3) become familiar with intersectionality, 4) take ownership over your own education, 5) respect Black and Brown spaces, 6) do not tell Black and Brown folk what they must or must not do, and 7) mobilize other white people.

A core principle of White allyship involves understanding White privilege, because otherwise, Whites can enter social movement spaces and do more damage than harm. Webster’s dictionary defines a “privilege” as “a special advantage, immunity, permission, right, or benefit granted to or enjoyed by an individual, class, or caste.” Scholar Peggy McIntosh created perhaps the most famous metaphor for white privilege when she described it as:

An invisible package of unearned assets which [she] can count on cashing in each day, but about which [she] was “meant” to remain oblivious. White privilege is like an invisible weightless knapsack of special provisions, assurance, tools, maps, guide, codebooks, passports, visas, clothes, compass, emergency gear, and black checks.

McIntosh identified 46 conditions available to her as a white person that her African American coworkers, friends, and acquaintances could not count on. This includes “If a traffic cop pulls me over or if the IRS audits my tax return, I can be sure I haven’t been singled out because of my race,” “I did not have to educate our children to be aware of systemic racism for their own daily

109 A common complaint of allyship is that allies often make the struggle of people of color about themselves, and often center their own feelings when they enter these discussions.
110 https://blackmillennials.com/2014/10/16/how-to-be-a-white-ally/
physical protection,” and “I can be sure that if I need legal or medical help, my race will not work against me.”  

The popular understanding of racism grounded in the legal understanding of a violation of the 14th Amendment mandate against discrimination on the grounds of race does much work to conceal the existence of white privilege by individualizing racist behavior, and placing all of the moral condemnation and focus on the speaker or actor who manifests racial intent, a focus that “hides the existence of specific, identifiable beneficiaries of oppression (who are not always the actual perpetrators of discrimination).”  

Scholar Andrienne Davis likens our system of race to a two-headed hydra—one head consists of outright racism, the other consists of white privilege—and “like a mythic double headed-hydra, which will inevitably grow a second head if both heads are not slain, discrimination cannot be ended by focusing on subordinaton.”

White privilege is a threatening concept that often causes consternation amongst whites, including among white allies. Because systems of white privilege often transform access to racial power into what appears to be individual merit, acknowledgement of privilege may also involve acknowledgment that one’s accomplishments, employment, and other identity forming attributes were not in fact “self made.” Others may dispute the existence of white privilege on the grounds that they too have experienced hardship in life. The concept of white privilege does not deny that all people, including white people, experience suffering in life, however—it challenges the existence of oppressive structures that one experienced on the basis of one’s membership in a group, whether that grouping entails sexual orientation, gender, class, or race. Oppressive structures entail more than a simple obstacle, but often present a structural “double bind” where a members of a group are reduced to few options, and all of them expose one to penalty, censure, or deprivation. For example, the privilege to avoid the discussion of race altogether is a choice that Blacks don’t have; and often, when faced with situations like racial profiling by police, one faces the prospect of humiliating submission on the one hand, or violence or even death on the other, leaving the victim of racialized police violence the no choice expect perhaps the ability to choose one’s preferred form of annihilation.

White Americans live in a social environment that insulates them from these double binds on the issue of race. Indeed they can avoid discussions of race all together, as they often inhabit an environment that builds expectations of protection from race-based stressors. Inhabiting that privileged environment simultaneously lowers their ability to tolerate racial stress, a phenomenon called White fragility. Because of this reason, true and effective white allyship is

117 Id.
perhaps less common that popularly understood, even though some may argue that the success of a social movement for racial justice may depend on such allyship.

[discuss safety pin box organization?]

**Hypo:** Imagine a Russian Jewish girl, orphaned at the age of two, who immigrates to the United States at the age of fifteen without a penny or knowledge of English. She attends night school while working as a supermarket bagger during the day and plans to attend community college and major in premed studies.

The person is white with blue eyes and blond hair. Is she privileged? Unprivileged? Privileged in some respects but not others?

Divide into small groups and argue this question. Then ask yourselves whether white privilege has any application beyond a narrow circle of elite prep-school products.\(^{121}\)

\(^{121}\) Richard Delgado and Jean Stefancic, Critical Race Theory: An Introduction 92 (2017 3\(^{rd}\) ed.)