2004

Courts as Forums for Protest

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COURTS AS FORUMS FOR PROTEST

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For almost half a century, scholars, judges and politicians have debated two competing models of the judiciary's role in a democratic society. The mainstream model views courts as arbiters of disputes between private individuals asserting particular rights. The reform upsurge of the 1960s and 1970s led many to argue that courts are not merely forums to settle private disputes, but can also be used as instruments of societal change. Academics termed the emerging model the "public law" or "institutional reform" model.

The ongoing debate between these two views of the judicial role has obscured a third model of the role of courts in a democratic society. This model has been largely ignored by legal scholars and viewed as illegitimate by some courts. The third, alternative perspective views courts as forums for protest. Under this model, courts not only function as adjudicators of private disputes, or institutions that implement social reforms, but as arenas where political and social movements agitate for, and communicate, their legal and political agenda.

The courts as forums for protest model differs from the traditional, private dispute model and the institutional law reform model, the two models traditionally described by legal scholars. The reduced emphasis on winning or losing and the lesser role of the judge are two features that distinguish this model from the others. Our nation has seen a long tradition of litigators and movements using the courts as platforms for arguing controversial positions and garnering public support for them. From the Revolutionary period, through this country's struggle with the issues of slavery and women's suffrage, up until modern instances where private citizens and public officials have attempted to challenge governmental actions, our system's courts have been used as forums to stir debate by the citizenry.

Because of the importance of encouraging people to engage in discussion about current social issues, and because of the implications for freedom of speech, courts should not allow sanctions under Federal Rule of Civil Procedure 11 or other similar rules to stifle popular debate stirred by lawsuits that may be considered

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* Professor of Law, University of Pittsburgh Law School. I want to thank my research assistants, Jason Hess and Maggie Schuetz, for their research help, and the University of Pittsburgh Document Technology Center for invaluable assistance in preparing this Article. The feedback I received from my presentations at faculty colloquia at Stanford Law School, Boston University School of Law and New York Law School also was incredibly helpful. I also want to thank Karen Engro, Jeffrey Fogel, Susan Koniak, Staughton Lynd, John Parry, Michael Ratner, and Rhonda Wasserman for their helpful comments on a draft of this Article, and Dean David Herring of the University of Pittsburgh Law School for his generous support. Portions of this Article draw upon my previous work, *Success Without Victory: Lost Legal Battles and the Long Road to Justice in America*.

"frivolous" because they argue against precedent or are viewed as losing cases. Bringing a lawsuit to generate publicity for one's cause should not be viewed as an improper or frivolous purpose under Rule 11.

Under the courts as forums for protest model, judges will often find themselves in a difficult position: They will be faced with a situation where legal precedent and social and political reality collide. Though articulating a legal principle while deciding a case without enforcing that principle may seem problematic, judges should feel comfortable doing so when it is necessary in order to encourage society and governmental actors to remedy an injustice that will otherwise continue unchecked.

Finally, progressive attorneys should adapt to this model as well. Realizing that litigation is part of an overall strategy that should include publicity and other forms of political action, they should become involved with the groups and movements they represent, and shape their litigation strategies so that they will dovetail with the overall goals of those movements.

INTRODUCTION

For almost half a century, scholars, judges and politicians have debated two competing models of the judiciary's role in a democratic society. The mainstream model views courts as arbiters of disputes between private individuals asserting particular rights.[1] As former Reagan Administration Solicitor General Charles Fried wrote, "[c]ourts should be the impartial tool for doing justice between man and man."[2]

The reform upsurge of the 1960s and 1970s witnessed a transformation in the role of the judiciary, particularly the federal judiciary. Courts were now often viewed not merely as forums to settle private disputes, but as instruments of societal change. Harvard Professor Abram Chayes termed the emerging model one of "public law litigation."[3] This new model emphasized the court's power to remedy structural, constitutional or statutory violations; as Professor Chayes put it: "[t]he centerpiece of the emerging public law model is the decree."[4] The difference in relief between the two models was not itself decisive; what was fundamental to the new conception was the judiciary's role in implementing social change and not simply ordering private relationships. One prominent critic perceived that the new model urged that lawsuits "be recast so they would not just be disputes between individuals over their particular grievances but political struggles in which judges could reorder whole institutions and change the fundamental nature of society."[5]

The ongoing debate between these two views of the judicial role has obscured a third model of the role of courts in a democratic society. This model has been largely ignored by legal scholars and viewed as illegitimate by some courts. The third, alternative perspective views courts as forums for protest. Under this model, courts not only function as adjudicators of private disputes, or institutions that implement social reforms, but as arenas where political and social movements agitate for, and communicate, their legal and political agenda.

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1. *See, e.g.*, MORRIS RAPHAEL COHEN, LAW AND THE SOCIAL ORDER 251–52 (1933); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

2. CHARLES FRIED, ORDER AND LAW 57 (1991).

3. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); *see also* Owen M. Fiss, *The Supreme Court 1978 Term Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

4. Chayes, *supra* note 3, at 1298. *But see* Abram Chayes, *The Supreme Court 1981 Term Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 58 (1982) (noting that it is "the nature of the controversy, the sources of the governing law, and the consequent . . . impact of the decision—rather than the form of relief—[that] differentiate public law from private law adjudication").

5. FRIED, *supra* note 2, at 16.

While victory is the important index of success in the first two views of the role of litigation, winning in court is not as essential in the forums for protest model. Of course, the litigators and their clients certainly hope, and at times expect to win in court, but their objective is broader than courtroom victory. They seek not merely the damages awarded to private litigators under the traditional model, nor the injunction of the public law model, but rather to use the courtroom struggle to build a political movement. The litigation can serve a variety of roles: to articulate a constitutional theory supporting the aspirations of the political movement, to expose the conflict between the aspirations of law and its grim reality, to draw public attention to the issue and mobilize an oppressed community, or to put public pressure on a recalcitrant government or private institution to take a popular movement's grievances seriously. What is crucial is that judicial relief not be viewed as all-encompassing; such relief is important but is not the sole goal of the litigation.

The forums for protest model thus breaks down the traditional barrier between law and politics, but in a fundamentally different way than the law reform model. The traditional model attempts to shield the judicial process from the supposedly unsavory influence of politics, while the law reform model views politics as a necessary predicate to the courtroom drama. In the third model, the relationship between law and politics is reversed; a significant point of many of the cases is to inspire political action. The legal struggle is thus a part of a broader political campaign, not the engine of change itself. Courts are not the prime movers of social change; instead, they are one forum in which the struggle for societal change occurs. Even when public interest lawsuits prevail in court, often their most lasting legacy is not the relief ordered by the court, but the lawsuit's contribution to the ongoing community discourse about an important public issue.

Some courts have questioned whether litigation brought for the purpose of provoking public dialogue and debate is legitimate. For example, the Court of Appeals for the District of Columbia imposed Rule 11 sanctions on the attorneys for fifty-five Libyan citizens and residents who sued for damages resulting from the 1986 United States air strike on Libya.[6] Although the district court found that plaintiffs' counsel, including the former United States Attorney General Ramsey Clark, "surely knew" that "[t]he case offered no hope whatsoever of success," and that it had been "brought as a public statement of protest" against President Reagan's actions,[7] it declined to impose Rule 11 sanctions because federal courts "serve in some respects as a

6. Saltany v. Reagan, 886 F.2d 438 (D.C. Cir. 1989) (per curiam).
7. Saltany v. Reagan, 702 F. Supp. 319, 322 (D.D.C. 1988).

forum for making such statements, and should continue to do so."[8] The court of appeals, however, held that Rule 11 sanctions were warranted because "[w]e do not conceive it a proper function of a federal court to serve as a forum for 'protests.'"[9]

Commentators have criticized the decision of the court of appeals.[10] Yet even some forceful critics agree that "courts do not exist as public forums."[11] But, as this Article demonstrates, from the early history of the American Republic onward, political movements have used courts to further public debate on important constitutional issues. Indeed, as one commentator has noted, "a considerable amount of civil rights litigation is in some sense a 'public statement of protest.'"[12]

In recent years, groups at both ends of the legal and political spectrum have used courts as arenas to educate the public. The lawsuit recently decided by the United States Supreme Court challenging the Bush Administration's detention of prisoners at Guantanamo Bay, Cuba, had as an important goal sparking national and international outcry against these unlawful detentions.[13] African American activists have filed reparations lawsuits against corporations, as well as the U.S. government, whose histories are entangled with slavery, seeking to generate "societal discussion" about the role commercial entities and the U.S. government played in the slave trade and slavery.[14] Lawyers for Haitian

8. *Id.*

9. 886 F.2d at 440.

10. *E.g.*, Carl Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 VILL. L. REV. 105, 118–19 (1991); Anthony D'Amato, *The Imposition of Attorney Sanctions for Claims Arising From the U.S. Air Raid on Libya*, 84 AM. J. INT'L L. 705 (1990).

11. D'Amato, *supra* note 10, at 706.

12. Tobias, *supra* note 10, at 118.

13. Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd sub nom.* Rasul v. Bush, 124 S. Ct. 2686 (2004); Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002), *aff'd sub nom. Al Odah*, 321 F.3d 1134. I am the Vice President of the Center for Constitutional Rights, the organization that represents the plaintiffs in the *Rasul* case, and have been involved in that case.

14. *See* Matthew Kauffman & Kenneth R. Gosselin, *Suits Certain to Stir Debate on Reparations*, PITT. POST-GAZETTE, Apr. 7, 2002, at A10 (discussing the educative value of the reparation lawsuits); Tony Pugh et al., *First Suit by Slave Descendant Seeks Reparations*, PITTS. POST-GAZETTE, Mar. 27, 2002, at A10 (noting that lawsuits are important for providing a forum for plaintiffs' political and historical arguments); *see also* Cato v. United States, 70 F.3d 1103, 1105 (9th Cir. 1995); Johnson v. United States, No. C 94-1474 BAC, 1994 WL 225179 (N.D. Cal. May 6, 1994); Obadele v. United States, 52 Fed. Cl. 432 (2002); Scott v. Comptroller of the Treasury, 659 A.2d 341 (Md. Ct. Spec. App. 1995); Van B. Luong, Recent Development, *Political Interest Convergence: African American Reparations and the Image of American Democracy*, 25 U. HAW. L. REV. 253, 262 (2002) (citing plaintiffs' complaint in *Farmer-Paellmann v. Fleetboston Financial Corp.*, No. CV-02-1862 (E.D.N.Y.) (filed Mar. 26, 2002) and other reparations cases, and arguing that the complaints play a valuable role to "invite discussion and debate"); Note, *Bridging the Color Line: The Power of African-American Reparations to Redirect America's Future*, 115 HARV. L. REV. 1689 (2002) (describing the importance of the reparations lawsuits).

refugees challenged various aspects of the Coast Guard's interdiction and return of Haitian refugees,[15] with an objective of keeping the refugee issue alive politically.[16] During the Vietnam War, countless lawsuits were filed with an aim to focus the public on the unconstitutional nature of the U.S. war in Indochina,[17] and more recent wars have inspired similar lawsuits.[18]

Conservative political groups and individuals have also attempted to use the courts as forums to draw public attention to particular issues. The backers of the Paula Jones case undoubtedly brought and continued that litigation to advance conservative political causes and to embarrass President Clinton.[19] Antiabortion activists have supported pro-life legislation, concluding that even if they lose the ensuing court challenge over its constitutionality, the battle is valuable in educating the American people regarding their stance on abortion.[20] Gun owners have used the courts to garner public attention for their Second Amendment concerns.[21]

Recognizing the legitimacy of litigation brought to spark public debate on an issue, to galvanize a political movement, or to spotlight social injustice would have three important consequences for courts, lawyers, and social movements. First, it would require narrowing the judicial definition of frivolous or improper litigation subject to Rule 11 sanctions. More importantly, accepting this perspective would require litigants and lawyers to assess the appropriateness of a given legal strategy not solely by the likelihood of success in court, but also by the role it plays in advancing a popular movement.[22] Most fundamentally, it would require looking at law reform litigation, and

15. *See* Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391, 2401 (1994); Michael Ratner, *How We Closed the Guantanamo HIV Camp: The Intersection of Politics and Litigation*, 11 HARV. HUM. RTS. J. 187, 193 (1998).

16. *See* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 208 (1993) (Blackmun, J., dissenting) ("The refugees attempting to escape from Haiti . . . demand only that the United States, land of refugees and guardian of freedom, cease forcibly driving them back to detention, abuse, and death.").

17. *See, e.g.*, Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973).

18. *See, e.g.*, Doe v. Bush, 323 F.3d 133 (1st Cir. 2003) (soldiers and members of Congress litigated the constitutionality of the 2003 war against Iraq); Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000) (members of Congress challenged war in Kosovo as violative of the War Powers Resolution); Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990) (congressional challenge to the constitutionality of President George Herbert Walker Bush initiating war again in Iraq in 1990 without congressional authorization).

19. *See* Carol Rice Andrews, Jones v. Clinton: *A Study in Politically Motivated Suits, Rule 11, and the First Amendment*, 2001 B.Y.U. L. REV. 1. President Clinton alleged that it was a "politically inspired lawsuit." Jones v. Clinton, 36 F. Supp. 2d 1118, 1123 (E.D. Ark. 1999).

20. *See* Richard W. Stevenson, *Bush Signs Ban on a Procedure for Abortions*, N.Y. TIMES, Nov. 6, 2003, at A1; Robin Toner, *For G.O.P., It's a Moment*, N.Y. TIMES, Nov. 6, 2003, at A1.

21. *See* Michael Janofsky, *Gun Owners Take Their Concerns to Court*, N.Y. TIMES, May 20, 2002, at A10.

22. *See* ARTHUR KINOY, RIGHTS ON TRIAL 71 (1983).

often even private litigation, in terms of its interaction and interface with political movements and not as an isolated legal struggle. This perspective not only brings politics into the courtroom; it also drags the courtroom into politics.

Part I of this Article contrasts the traditional and structural reform model of litigation with what I term the courts as forums for protest model. Part II demonstrates that this type of litigation has a lengthy pedigree in American history. Part III focuses on the First Amendment values promoted by this type of litigation and the protection it should be accorded. Part IV addresses the implications of this analysis on how judges might address the tensions between judicial articulation of norms and the enforcement of those norms that are ever-present in law reform litigation. Part V will assess the broader implications for lawyers and their clients of using courts as forums for protest, and evaluate the pitfalls and advantages of this type of litigation, as well as the possible tensions it raises between law and politics.

I. LAW REFORM LITIGATION AND THE COURTS AS FORUMS FOR PROTEST MODEL

The successful law reform litigation of the 1950s and 1960s spawned an ongoing debate among scholars over the legitimacy and efficacy of judicially imposed reforms. Legal scholars focused on the legitimacy of this litigation. In seminal articles, Professor Abram Chayes and Professor Owen Fiss argued that structural, public law litigation was displacing the traditional dispute resolution lawsuit as the dominant form of adjudication in the late twentieth century.[23] The traditional model of adjudication posited a bipolar conflict between individual private parties before a neutral, detached, mostly passive judge to determine whether a legal right had been violated and whether damages should be awarded. The point of such a lawsuit was to decide a concrete grievance or dispute, not to address some general problem of public policy.

The public structural lawsuit, on the other hand, contained a multiplicity of parties and interests, often taking the form of a class action. It was not a dispute about private rights, but rather a dispute over issues of public policy. The fact inquiry was not simply retrospective, but predictive and thus quasi-legislative. Most important, the judge was not a passive, detached arbiter, but rather an active agent who shaped and organized the litigation to ensure a just and workable outcome. The relief imposed typically was not damages, but an injunctive decree that often required ongoing judicial supervision.[24]

23. Chayes, *supra* note 3; Fiss, *supra* note 3.
24. Chayes, *supra* note 3, at 1302; Fiss, *supra* note 3, at 18–28.

The function of this structural, public lawsuit was not to accord damages for a discrete private wrong, but rather to change the behavior of a large bureaucratic organization.

Both Professors Chayes and Fiss viewed the rise of the structural lawsuit as linked to the development of a regulatory, administrative bureaucratic state. The dispute resolution model was based on a system of autonomous, individual entrepreneurs operating in the largely unregulated marketplace, while the structural reform lawsuit reflects a world in which the state, corporations and large bureaucracies play dominant roles. In this modern world, the role of federal courts was transformed from primarily solving private disputes, to policing the interface between large state institutions, such as schools, prisons, child welfare systems, and the citizenry.[25]

The legitimacy of the court's role in restructuring institutions has come under persistent attack. Some criticize the federal judiciary's move away from concrete "grievance answering" to more generalized problem solving.[26] Alexander Bickel complained that "[a]ll too many federal judges have been induced to view themselves as holding roving commissions as problem solvers, and as charged with a duty to act when majoritarian institutions do not."[27] Many viewed judges as thwarting the will of the more democratic organs of government.[28]

The courts and Congress have also battled over the propriety of reform litigation. Justice Powell's influential concurrence in *United States v. Richardson*[29] reflects the concerns of the Burger and Rehnquist Courts regarding structural reform litigation:

> Due to what many have regarded as the unresponsiveness of the Federal Government to recognized needs or serious inequities in our society, recourse to the federal courts has attained an unprecedented popularity in recent decades. Those courts have often acted as a major instrument of social reform. . . . [W]e risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest suits brought by litigants who cannot distinguish

25. Chayes, *supra* note 3, at 1304; Fiss, *supra* note 3, at 44.

26. DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 7–9 (1977).

27. ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 134 (1970).

28. *See generally* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 314 (1977) (surveying competing views of judicial review and stating that "I cling to faith in the ultimate good sense of the people; I cannot subscribe to the theory that America needs a savior . . . in the shape of . . . nine—of times only five—Platonic Guardians." (citation omitted)).

29. 418 U.S. 166 (1974).

> themselves from all taxpayers or all citizens. . . . It merits noting how often and how unequivocally the Court has expressed its antipathy to efforts to convert the Judiciary into an open forum for the resolution of political or ideological disputes about the performance of government.[30]

Congress has fought over a host of proposals to limit federal courts jurisdiction to hear and remedy institutional reform cases, and has enacted legislation to limit prison litigation[31] and to restrict the ability of Legal Services Lawyers to engage in class action or other structural reform cases.[32]

While the traditional dispute resolution model of adjudication and its more recent structural reform competitor are widely divergent, they have some basic similarities. Both are jurocentric, meaning they focus on the judge as the central actor in resolving disputes. Professor Fiss' "conception of adjudication starts from the top—the office of the judge—and works down."[33] "At the core of structural reform is the judge, and his effort to give meaning to our public values."[34] While the dispute resolution model accords the judge a more passive role, it is also fundamentally concerned with defining the role of the judge.[35] In addition, both models see the judicial grant of relief as critical to the lawsuit, whether it be the award of damages or the implementation of a decree.

Important, recent work by social scientists raises questions about both the traditional legal model and its structural reform competitor. In the 1970s and 1980s, political and social scientists engaged in a debate parallel to the legal dispute over the legitimacy of law reform litigation. The social science discussion did not, however, focus primarily on the proper role of the courts, or the competence of the judiciary to restructure political or social institutions. Rather, social scientists debated the question of whether the judiciary's decisions really had the effect of changing society.

The publication of Gerald Rosenberg's *The Hollow Hope* sparked the debate. Rosenberg argued that the federal courts—even in such celebrated cases as *Brown v. Board of Education*[36] and *Roe v. Wade*[37]—were largely ineffectual,

30. *Id.* at 191–92 (Powell, J., concurring).

31. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, tit. VIII, § 802, 110 Stat. 1321, 1321-66 (codified as amended at 42 U.S.C. § 1997e (2000)).

32. *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001).

33. Fiss, *supra* note 3, at 41.

34. *Id.* at 17.

35. *See* Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 58 (2001) ("The jurocentric approach to legal scholarship is best exemplified by the legal process school."); Anthony J. Sebok, *Reading* The Legal Process, 94 MICH. L. REV. 1571, 1584 (1996) (reviewing HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS (1994)).

36. 347 U.S. 483 (1954).

37. 410 U.S. 113 (1973).

and perhaps even counterproductive, in producing social change. Rosenberg concluded that "U.S. courts can *almost never* be effective producers of significant social reform."[38] To Rosenberg "courts act as 'fly paper' for social reformers who succumb to the 'lure of litigation.'"[39]

Rosenberg's conclusions have been challenged by a host of social scientists. Most of these academics agree with Rosenberg that judicial decisions by themselves rarely lead to social change, and that reliance on courts and judges often proves counterproductive for political and social movements. These social scientists focused, however, on the indirect effects of litigation. For scholars such as Michael McCann, Stuart Schiengold, and Joel Handler, who all studied social movements, the indirect effects and uses of litigation may be its most important aspects for social movements seeking change.[40] Social movements' use of litigation to mobilize political struggles, to gain favorable publicity, to build a political movement, to generate support for political and constitutional claims, and to provide leverage to supplement other tactics and force the opposition to settle is the central thrust of these scholars' research. Their body of work takes the position that "although the litigation by itself may not always produce immediate and sweeping results, it can function as part of an effective political strategy for achieving social reform."[41] Empirical studies in such disparate areas as pay equity reform litigation,[42] disability rights cases,[43] school financial reform litigation,[44] environmental and consumer litigation,[45] and civil rights organizing[46] have demonstrated the significant indirect benefits that litigation can achieve for plaintiffs who use courts to mobilize public sentiment or to provide leverage for their claims. This social science research must be integrated into the debate among legal scholars over the proper role of the federal judiciary.

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38. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 338 (1991).

39. *Id.* at 341.

40. JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM 210 (1978); MICHAEL MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 10 (1994); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 96 (1974).

41. SUSAN GLUCK MEZEY, PITIFUL PLAINTIFFS: CHILD WELFARE LITIGATION AND THE FEDERAL COURTS 5–6 (2000).

42. *See* MCCANN, *supra* note 40, at 46–47.

43. *See* Susan M. Olson, *The Political Evolution of Interest Group Litigation*, *in* GOVERNING THROUGH COURTS 225, 239 (Richard A.L. Gambitta et al. eds., 1981).

44. *See* Richard A.L. Gambitta, *Litigation, Judicial Deference and Policy Change*, *in* GOVERNING THROUGH COURTS, *supra* note 43, at 259.

45. *See* HANDLER, *supra* note 40, at 69, 97.

46. *See* Francesca Polletta, *The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961–1966*, 34 LAW & SOC'Y REV. 367, 385–86 (2000).

A. The Courts as Forums for Protest Model

The work of these social scientists requires that legal scholars conceptualize an alternative, third model of litigation not to displace, but to exist alongside the traditional dispute resolution and law reform models. If the most important effect of winning law reform cases potentially does not lie in the judicial relief awarded, but in the indirect effects of the litigation on society, than a reconceptualization of the Chayes/Fiss law reform paradigm is necessary.

What I term the courts as forums for protest model would have several key characteristics that would distinguish it from both of the other two prominent paradigms.

1. Winning or Losing in Court is Not as Important as Influencing the Public Debate

The lawyers' and plaintiffs' interest in the lawsuit is not solely winning or losing in court, but in getting their message out to the broader public or a particular group. The lawsuit serves as a means for the plaintiffs and their counsel to transform the court into a forum to broadcast their point of view. While the plaintiffs do have a legal claim that they believe is valid and want the court to decide, they also seek to use the litigation as a vehicle for their protest, and as a catalyst for aiding or developing a broader social movement.

The efficacy of lawsuits in generating publicity has been well documented. Social scientists have observed "that litigation is one of the most effective ways to win publicity for a cause."[47] Public interest litigators and organizations have come to view litigation as a vehicle for attracting the media. Reflecting this recognition, it is now a common practice to announce a pending or filed public interest lawsuit at a press conference.[48] Often, litigation attracts the media's attention in a way that nothing else does.[49] Professor Joel Handler concludes that in general "a 20-page complaint and a temporary injunction are worth more than a 300 page report in the media."[50] Professor Handler discusses a category of litigation he studied where

> [t]he tactic that distinguishes these cases is that the law reformers do not expect to achieve results through a court or administrative order; such proceedings will take too long or become too costly . . . . Rather, they

47. MCCANN, *supra* note 40, at 58; *see also* HANDLER, *supra* note 40, at 216.

48. A LEXIS search of a six-month period between July 1 and December 31, 2003 revealed at least forty-five lawsuits that were announced by way of a press conference.

49. *See* MCCANN, *supra* note 40, at 58–62.

50. HANDLER, *supra* note 40, at 216.

> use legal proceedings to generate harmful publicity that will force the discriminator into a settlement.[51]

The educational value of litigation is often substantial even where the case does not result in a legal victory. Professor Michael McCann demonstrates that pay equity advocates used lawsuits as "a crucial organizing tool," and that for many of the activists "[w]hether you win or lose [in court], awareness rises through this type of action."[52] For Professor McCann, while the pay equity litigation resulted in only modest policy reforms, "perhaps *the single most important achievement* of the movement has been the transformations in many working women's understandings, commitments, and affiliations."[53] Similarly, Professor Richard Gambitta studied the impact of the school finance case, *San Antonio Independent School District v. Rodriguez*,[54] which challenged the constitutionality of financing education by means of local property taxes on the ground that it produced substantial disparities in per pupil expenditures between rich and poor school districts.[55] Although the plaintiffs lost in the Supreme Court,[56] Gambitta concluded that the litigation nevertheless influenced the legislative agenda. Thus, even ultimately defeated litigation "can recast the nature of a debate," and "facilitate debates that otherwise may not occur, thus setting in motion, at times, the process of policy change."[57]

This social science research is buttressed by the experience of the bar. For example, William Colby, the Cruzan family's attorney in their famous "right-to-die case"[58] that lost in the Supreme Court, explained:

> [T]he public discourse surrounding the cases quickly took on a life of its own. The true legacy of the two cases is that they caused [the country] to talk about death, dying, living wills, hospital ethics committees, and the withdrawal of futile medical treatment and who should make that decision. This nationwide discussion very quickly

51. *Id.* at 214.

52. MCCANN, *supra* note 40, at 70–71 (quoting CSA activist Sharon Krachunis) (alteration in original).

53. *Id.* at 230.

54. 411 U.S. 1 (1973).

55. Gambitta, *supra* note 44.

56. *Rodriguez*, 411 U.S. 1.

57. Gambitta, *supra* note 44, at 277. Professor John Denvir demonstrated that ineffective litigation against racial discrimination in voting spurred Congress to enact the 1965 Voting Rights Act. John Denvir, *Towards a Political Theory of Public Interest Litigation*, 54 N.C. L. REV. 1133, 1140 (1976).

58. Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990). The parents of Nancy Cruzan, a young woman who was in a vegetative state after an automobile accident, challenged the hospital's refusal to withdraw life-sustaining treatment from her as violative of the due process clause of the U.S. Constitution. *Id.*

> outgrew the individual lawsuits of two young girls involved in car accidents.[59]

Similarly, Yale Professor Harold Koh's experience in transnational public law litigation led him to view such litigation "as a development whose success should be measured not by favorable judgments, but by practical results: the norms declared, the political pressure generated, the government practices abated, and the lives saved."[60] For Professor Koh, even "adverse Supreme Court decisions are no longer final stops, but only way stations, in the process of 'complex enforcement.'"[61]

The recent litigation involving the suspected Taliban and Al Qaeda prisoners indefinitely detained by the Bush Administration at the U.S. military installation at Guantanamo Bay without any legal process is but another example. The lower courts uniformly rejected the prisoners' petitions for habeas corpus relief. Nonetheless, the litigation received a significant amount of press attention and helped keep the issue in the public eye for almost two years. That public pressure undoubtedly contributed to the Supreme Court's decision to hear the case, and eventually reverse the judgment of the court of appeals.

2. A Non-Jurocentric Model of Litigation

As already noted, both the traditional dispute resolution model and the Chayes/Fiss structural or reform model of litigation focus on the role of the judge. The recent social science research has concentrated not on the top-down model of judges dispensing decisions to the litigants, but on a more bottom-up, decentralized model that analyzes the interaction between the parties to the litigation and their interface with society. From this perspective, the judge and judicial decision or judicial decree are not the epicenter of litigation from which all else radiates. Rather "[s]ocial struggles themselves thus define the center of analysis, and nonjudicial actors are viewed as practical legal agents rather than as simply reactors to judicial command."[62]

The diminished role of the judge in this decentralized, bottom-up model is inextricably connected to the lessened concern over winning and losing in

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59. William H. Colby, *Media and the "Right to Die": A Personal Reflection*, 14 REV. LITIG. 619, 622 (1995), *quoted in* Erwin Chemerinsky, *Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 870–71 (1998).

60. Koh, *supra* note 15, at 2399; *see also* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2371–72 (1991).

61. Koh, *supra* note 15, at 2406.

62. Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715, 731 (1992).

court. If the role of the court is reconceptualized from authoritative law givers to that of a forum whereby grievances and complaints can be aired and argued, the critical question for the litigation is not what the eventual decree or decision states, but how the litigation affects the various actors in the policy arena—whether those actors are the public in general, interest groups, legislative bodies, a group the litigants are seeking to organize, or the defendants whom the plaintiffs are seeking to force to the bargaining table. As one commentator has argued, the question for many areas of litigation is not "[h]ow do judges make policy," but rather "[h]ow do courts function as an arena of policy disputation?"[63]

Even when plaintiffs win in court, it is a mistake to view the judge as the central actor in the implementation of relief. Rather, one must recognize "the interdependence" of the courts, the media, activists, and other branches of government "to achieve meaningful reform."[64]

Legal scholars focus primarily on analyzing judicial decisions: critiquing, rationalizing, legitimating, and deconstructing them. Yet, by focusing so extensively and centrally on judicial decisions and the role of the judge, legal scholars risk missing the larger picture. That broader view is that judicial decisions represent only one incident in what is a rich, variegated and lengthy process of resolving a grievance or public dispute. By focusing narrowly on the judicial decision instead of the entire legal process, legal scholars fail to understand the broader landscape within which the decision is situated.

Often real cases will present elements of both the forum for protest and institutional reform models, for as with any model, reality is always more complex and intricate than any theoretical or doctrinal formulation. Thus, in many cases, litigants who seek to utilize courts to educate the public and mobilize their social and political movements will also be demanding strong judicial intervention to remedy an egregious constitutional violation. Moreover, while certain cases may present the forum for protest model in its pure form, much public interest litigation has as a purpose furthering public education and discourse, and in many cases the courtroom battle is but one aspect of a broader political struggle. That many public law litigants have interests in the litigation that extend beyond winning or losing in the courtroom has important implications for lawyers' strategies and tactics in litigating those cases and for judicial responses to the litigation as part of a multifaceted political struggle.

63. Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2000 (1999).

64. Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 655 (1993).

B. The Legitimacy of the Courts as Forums for Protest Model

The model proposed here, however efficacious and widespread in public law litigation, raises the question whether these kind of cases and legal strategies are legitimate uses of the courtroom. Several types of problems appear immediately. The first is whether a litigation strategy that seeks favorable publicity to further a social movement is an ethical and legitimate use of the courts. The second, and related problem is whether such a litigation strategy poses an improper purpose under Rule 11.

For the past century lawyers and judges have debated the proper role of the lawyer in obtaining favorable media publicity. For example, in 1966, a committee of the American Bar Association concluded that the proper role of the lawyer "is to present his case in the courtroom, not . . . attempt[ ] to build a favorable climate of public opinion."[65] Various courts have also opined at times that obtaining publicity is not a legitimate function of litigation. For example, the Fourth Circuit recently denied attorney fees for public relations work by attorneys in concluding a successful civil rights action, stating that "[t]he legitimate goals of litigation are almost always attained in the courtroom, not in the media."[66]

The same unease over the use of publicity in connection with litigation has also affected some law reform organizations. Felix Frankfurter, then a member of the ACLU's Executive Committee, criticized ACLU Executive Director Roger Baldwin's distribution of a circular criticizing the government's impending prosecution of a communist labor leader. Frankfurter "objected to this . . . attempt to influence public sentiment," arguing that the case "must be tried in the courts, not in the press or in a publicity campaign."[67] "The ACLU Executive Committee eventually adopted Frankfurter's position, 'both from a standpoint of effective tactics and general principle.'"[68]

Federal courts have also at times imposed Rule 11 sanctions on attorneys who have used the courtroom as a forum for public protest. The D.C. Circuit's imposition of sanctions in *Saltany v. Reagan*[69] against former Attorney General

65. AM. BAR ASS'N, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 92 (1966).

66. Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169, 176 (4th Cir. 1994). Even courts that have allowed attorney fees for public relations work have articulated a narrow standard that only permits attorney fees for media work that contributes "directly and substantially, to the attainment of [the client's] litigation goals." Davis v. City of San Francisco, 976 F.2d 1536, 1545 (9th Cir. 1992).

67. David M. Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History*, 45 STAN. L. REV. 47, 102–03 (1992).

68. *Id.* at 103 (quoting Minutes of ACLU Executive Committee Meeting (Mar. 18, 1923), *in* Felix Frankfurter Papers Container 125 (Manuscript Division, Library of Congress)).

69. 886 F.2d 438 (D.C. Cir. 1989).

Ramsey Clark for what it termed his attempt to use the federal court as a forum for protest in bringing claims on behalf of Libyans killed or injured during the 1986 bombing is but one example.[70] Another is the sanctions imposed in *In re Kunstler*[71] by the Fourth Circuit against the prominent civil rights attorney William Kunstler and other attorneys. The circuit affirmed a district court imposition of Rule 11 sanctions because Kunstler had filed a civil rights lawsuit with a primary purpose of seeking publicity and embarrassing the defendant. The court found that sanctions are appropriate even where a complaint is filed to vindicate rights in court, as long as the litigant's central purpose in bringing the lawsuit is "improper," such as seeking publicity.[72]

Commentators have criticized *Saltany* and *Kunstler*,[73] other courts have disagreed that political education is an improper purpose,[74] and Rule 11 was amended in 1993 to make it more difficult to impose sanctions on litigants and their attorneys. Nonetheless, the present Rule 11 still bars pleadings filed for "*any* improper purpose." That text suggests that a court could sanction a complaint filed for the purpose of seeking publicity, even if the primary

70. In *Saltany*, Clark sought damages for his client resulting from tortious violations of international law, including the United Nations Charter, committed by the United States and United Kingdom in the 1986 U.S. air strike on Libya. Many commentators argued that those air strikes were illegal under international law. *See, e.g.*, D'Amato, *supra* note 10. However, the district court and court of appeals held that U.S. law accorded immunity from suit for the U.S. and British governments, President Reagan, Prime Minister Thatcher, and other senior civil and military U.S. officials. Clark undoubtedly was attempting to raise the question of whether U.S. courts should continue to grant immunity to the United States and other governments which commit egregious violations of the laws of war and international law prohibiting aggressive war. He hoped to stir both public debate and judicial consideration of the contradiction between the United States' actions at Nuremberg imposing liability on the Nazi leaders for launching an aggressive war in violation of international law and committing war crimes, and the United States' continued refusal to apply those same international norms to its own conduct.

71. 914 F.2d 505 (4th Cir. 1990).

72. *Id.* at 520. Subsequently, in *Ballentine v. Taco Bell Corp.*, 135 F.R.D. 117 (E.D.N.C. 1991), the district court imposed sanctions against the plaintiff in a sex discrimination case for filing a claim to harass the defendant, despite concluding that the discrimination claim was arguably colorable and filed with the legitimate motive of seeking to remedy the alleged discrimination. The court found that the plaintiff had a dual motive in filing the lawsuit: the legitimate purpose of seeking relief for the loss of his job and the improper purpose of harassing defendants which was evidenced by plaintiff's remarks at a deposition that he sought to have one defendant fired from his job. *Id.* at 125. More recently, the Fifth Circuit Court of Appeals has imposed sanctions against an attorney who filed what the court assumed was a nonfrivolous claim solely because his purpose was improper. Whitehead v. Food Max of Miss., Inc., 332 F.3d 796 (5th Cir. 2003) (en banc) (imposing sanctions on the plaintiff's lawyer because the lawyer's non-frivolous motion to enforce a judgment had as a purpose to embarrass and harass defendant and to promote himself through the media).

73. *E.g.*, D'Amato, *supra* note 10; Tobias, *supra* note 10.

74. Sussman v. Bank of Is., 56 F.3d 450 (2d Cir. 1995); Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986); Auen v. Sweeney, 109 F.R.D. 678, 680 (N.D.N.Y. 1986).

purpose of the litigation were to vindicate rights.[75] The Rule 11 cases, such as *Saltany* and *Kunstler*, the text of the Rule, and the controversy over the ethical propriety of lawyers obtaining favorable media publicity for their clients, illustrate the deep-seated doubts by some members of the legal community about the propriety and legitimacy of the role for courts proposed in this Article.

II. THE HISTORY OF LITIGATION AS A FORUM FOR PROTEST IN AMERICA

Legitimacy is fundamentally a function of several interrelated inquiries. The first is historical: have courts played a role as forums for protest within our historical tradition? The second is theoretical and doctrinal: does such a function of courts and litigation fit comfortably within our constitutional structure? This part will discuss the first inquiry.

Unlike structural reform litigation, which is a relatively new mid-twentieth century phenomenon, the tradition of using litigation as a forum for protest to obtain favorable publicity for a political cause dates back to before the American Revolution. During the nineteenth century, abolitionists, civil rights activists, and the early women's movement used the courts to further their political agendas. In the eighteenth-century colonial struggle against the British culminating in independence, lawyers used the courts to publicize American grievances against the Crown. James Otis Jr.'s arguments both in and outside of the courtroom using the case challenging the writs of assistance to denounce England's whole policy toward the colonies were widely publicized, including his famous speech, of which John Adams later wrote, "[t]hen and there was the child Independence born."[76] Similarly, when Adams represented John Hancock and others in the tax protests in Boston, he and his legal colleagues worked closely with the press to publicize the abuses of the British. Adams' contentions, and later a text of his argument, were thoroughly aired

75. Andrews, *supra* note 19, at 23. Indeed, the Advisory Committee that wrote the 1983 Amendments to Rule 11 considered, but ultimately rejected inserting the word "primarily" into the Rule to qualify the improper purpose clause. *See* Letter from Walter R. Mansfield, Chairman, Advisory Committee on Civil Rules, to Judge Edward T. Gignoux, Chairman of the Standing Committee on Rules of Practice and Procedure (Mar. 9, 1982), *reprinted in* 97 F.R.D. 190, 191 (1983). That part of Rule 11 was not affect by the 1993 amendments.

76. *See* JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772, at 51–57, 469–82 (1865); 2 LEGAL PAPERS OF JOHN ADAMS 107 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965); NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 58–59 (1937); *see also* Draper v. United States, 358 U.S. 307, 317 (1959) (Douglas, J., dissenting) (Otis' eloquent argument lost the case but "rallied public opinion").

by the press, along with commentaries on the important legal issues.[77] Indeed, the evidence strongly supports the conclusion that Adams intended his argument in that case "to serve a purpose beyond mere advocacy in court."[78] Both the content and use "of the draft argument suggest that it was as much a political as a legal document."[79] These revolutionary lawyers were using their cases not merely to defend their clients, but also to help build a political movement for American independence.

The revolutionary tradition of using the courts as forums for protest was continued by the abolitionist movement in the early nineteenth century. Historian Hendrik Hartog has noted that the "contest over slavery did more than any other cause to stimulate the development of an alternate, rights conscious interpretation of the federal constitution."[80] Much of the fugitive slave litigation was geared not merely to winning in court, but to galvanizing Northern public opinion against slavery. The lawyer who best used litigation to further a political agenda and spark public debate over slavery was Salmon Chase. Chase engaged in such political litigation on behalf of fugitive slaves and their Underground Railroad supporters for more than a decade, eventually using it as a springboard to become a U.S. Senator, Secretary of the Treasury under Lincoln, and ultimately Chief Justice of the United States Supreme Court.

In the mid-1830s both Chase and the abolitionist movement were at turning points. Until then, abolitionism had been mainly a moral and religious crusade that sought to abolish slavery by means of moral persuasion, not legal or political action. Antislavery societies often resolved to use "no weapon but reason and truth" in their campaign against slavery.[81] Antislavery litigation was utilized mainly as a "practical necessity" to defend abolitionists against mobs and riots, "not as an ideological opportunity."[82] But reason and truth had not worked. Southerners had not been moved by moral persuasion to end slavery, and by the 1830s, political abolitionists like James Birney

77. Brief of Petitioner at 17, Gentile v. State Bar of Nev., 501 U.S. 1030 (1991); 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 76, at 173–210; *Panel Discussion: What to Do When Your Case Is Front Page News*, 14 REV. LITIG. 595, 608 (1995) (comments of Michael E. Tigar).

78. 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 76, at 192 (editorial note) (Adams' argument was probably never delivered).

79. *Id.* at 193.

80. Hendrik Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All,"* 74 J. AM. HIST. 1013, 1017 (1987).

81. JACOBUS TENBROEK, EQUAL UNDER THE LAW 33 (1964).

82. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 160 (1975).

were developing constitutional theories that would provide legal and political means for challenging slavery.

In 1837, Chase agreed to represent a twenty-year-old slave, Matilda Lawrence, who had run away from her master and father while on a trip to Cincinnati.[83] She found refuge with James Birney, who hired her as a maid. Her father hired a slave catcher, John M. Riley, who had located the runaway and had her arrested pursuant to the federal Fugitive Slave Act of 1793.[84]

Chase's decision to represent Matilda Lawrence would begin a long crusade earning him the nickname "Attorney General for Runaway Slaves,"[85] and, although Chase lost most cases and freed very few slaves, both Chase and the slavery issue catapulted to national prominence as a result of his decision. In time, Chase would become the antislavery leader most responsible for the successful transition from moral outrage to political action. As the *New York Tribune* later would write, "To Mr. Chase more than any other one man belongs the credit of making the anti-slavery feeling, what it had never been before, a power in politics. It had been the sentiment of philanthropists; he made it the inspiration of a great political party."[86] A significant part of that effort was Chase's use of the courts as a forum for presenting his antislavery views.

Chase's main strategy in his argument before Ohio Common Pleas Judge David E. Estes seems to have been to use Matilda's case to challenge the constitutionality of the Fugitive Slave Act of 1793. While he did raise a number of technical, legal arguments, he discussed those briefly. Chase focused instead on broader constitutional points of natural rights, federalism, and the Fourth and Fifth Amendments. He did so over the objection of opposing counsel and clear signals from the judge that Chase's discourse was not pertinent. His opening and closing arguments were attempts to infuse the U.S. Constitution with broad natural rights and an egalitarian moral perspective. He "perceived" the court's responsibility as not merely to the individual and community, "but to conscience and to God."[87]

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83. *See* STEPHEN MIDDLETON, OHIO AND THE ANTISLAVERY ACTIVITIES OF ATTORNEY SALMON PORTLAND CHASE 1830–1849, at 96 (1990); JOHN NIVEN, SALMON P. CHASE: A BIOGRAPHY 50 (1995).

84. MIDDLETON, *supra* note 83.

85. NIVEN, *supra* note 83, at 50.

86. ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 74 (1970).

87. SPEECH OF SALMON P. CHASE IN THE CASE OF THE COLORED WOMAN, MATILDA, WHO WAS BROUGHT BEFORE THE COURT OF COMMON PLEAS OF HAMILTON COUNTY, OHIO BY WRIT OF HABEAS CORPUS, MARCH 11, 1837 (Pugh & Dodd 1837).

Judge Estes listened patiently to Chase, but quickly ruled against him based on the current state of the law. Slave catcher Riley quickly rushed Matilda across the Ohio River to Covington, Kentucky and eventually to New Orleans, where Lawrence had arranged for her sale.

The historian William Wiecik has termed Chase's Matilda argument "a noble failure."[88] Chase was saddened by the outcome of the case and felt that his legal position had been "treated with ridicule or disregard."[89] Yet, despite Matilda's personal tragedy, Chase's mentor, the abolitionist James Birney, believed that the case had "done much for the cause in this city."[90] The litigation had stirred considerable debate over fugitive slaves and slavery in Cincinnati. Chase's focus on broad political arguments seems to have been designed not merely to win before Judge Estes, but to help spur a political, constitutional movement against slavery. In the Matilda case, Birney and Chase had worked out the legal theory that, while losing in court, was eventually to become the constitutional platform of the Republican Party.

The Matilda case did not vanish with the unfortunate woman's return to slavery. Birney was prosecuted for harboring a fugitive slave, and was found guilty and fined. Birney decided not to pay the fine, and Chase filed an appeal. Chase quickly realized that Judge Estes had made a technical error when he charged the jury to consider only whether Birney had harbored Matilda and not whether he did so knowing that she was a slave. However, both he and Birney agreed not to raise that issue on appeal, even though they knew they would win if they did. Their interest lay in arguing the broad constitutional issue of whether Matilda became free the moment she entered Ohio with her master, not in "winning" the case and avoiding the fine.

The Ohio Supreme Court's decision disappointed Chase. The court reversed Birney's conviction, but only on the technical grounds not argued by Chase that the jury had not considered whether Birney had known Matilda was a slave. Nonetheless, the Ohio Supreme Court took the unusual step of ordering the publication of Chase's arguments in the case. In all likelihood, the court agreed with Chase's arguments, but was unwilling to adopt them in Ohio's political climate of the late 1830s. Thus, the court signaled its leanings by having the argument printed and widely publicized.[91]

88. WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848, at 193 (1977).

89. FONER, *supra* note 86, at 74.

90. MIDDLETON, *supra* note 83, at 102.

91. *See* ALBERT BUSHNELL HART, SALMON PORTLAND CHASE 74 (1899); J.W. SCHUCKERS, THE LIFE AND PUBLIC SERVICES OF SALMON PORTLAND CHASE 43–44 (1874). Chase's argument is printed in *Birney v. Ohio*, 8 OHIO 230, 231–38 (1837).

For the next decade, Chase actively represented fugitive slaves in Ohio courts. His cases usually drew large crowds to the courtroom. He mostly lost, although he occasionally was able to win his client's freedom. Most important to Chase, however, was that his arguments were reaching a wider national audience, and were touching a chord with Northerners who wanted to dissociate free states from slavery.[92]

Chase's most famous case stemmed from his representation of an abolitionist involved in the underground railroad. His representation of John Van Zandt, particularly his appeal to the Supreme Court, might be termed frivolous or baseless in modern parlance. Yet, this case may have done more than any other of Chase's cases to publicize the theories and positions that were to motivate Northern public opinion to support a political movement that eventually became the Republican Party.

On April 21, 1842, John Van Zandt, an old, stooped farmer who had left Kentucky because of his hatred of slavery, was conducting nine fugitive slaves north when his wagon was stopped by two slave catchers. The slave driving the wagon fled, but the other eight were captured and rushed across the Ohio River to Covington, Kentucky where their owner, Wharton Jones, reclaimed them and paid the slave catchers $450.

Jones then sued Van Zandt for harboring fugitives in violation of the Fugitive Slave Act. Chase agreed to take Van Zandt's case and—as usual in his antislavery litigation—accepted no fee. He asked former U.S. Senator Thomas Morris to aid him in the defense.

Chase was optimistic about the Van Zandt case. He recognized that whatever the outcome in court, the case would get wide publicity for his antislavery constitutional views. Moreover, he thought he could win in court despite the substantial evidence that Van Zandt was transporting slaves he knew to be fugitives.

Chase had some good reasons to be optimistic about the Van Zandt case. The case would be tried in federal court before Supreme Court Justice John McLean, who was assigned to the Ohio District. Justice McLean, an impressive looking man whose features and reserved demeanor resembled those of George Washington, had strong antislavery views. Justice McLean had ruled in favor of fugitive slaves when he was an Ohio Supreme Court

92. For example, in the 1845 case of the *State v. Hoppess*, 1 Ohio Dec. Reprint 105 (1845), Chase represented a slave named Sam Watson who Chase argued became free when the boat on which he and his master were traveling docked in Cincinnati. Chase argued that since slavery was against natural law, a slave was automatically freed when brought to a free state. Judge Read accepted Chase's contentions, but held that Watson had not been brought into Ohio since the boat had only docked in port. *Id.* at 117.

Justice, and in 1842 had set forth his antislavery views in the U.S. Supreme Court case of *Prigg v. Pennsylvania*.[93] Moreover, Justice McLean was Chase's friend and soon to be uncle-in-law. It seemed that it would be difficult to find a better federal judge to try the Van Zandt case.

Nevertheless, Justice McLean rejected Chase's motion to dismiss the case, and a jury ultimately awarded Jones $1200 in damages. Justice McLean believed that the duty to obey the law overrode natural rights, his antislavery views, and individual conscience. He charged the jury: "[I]n the course of this discussion much has been said of the laws of nature, of conscience, and the rights of conscience. This monitor, under great excitement, may mislead, and always does mislead, when it urges any one to violate the law."[94]

Chase moved for a new trial, continuing his increasingly futile constitutional challenge to the fugitive slave law. Justice McLean again decided against Chase. While he agreed with Chase's view of slavery and the presumption in Ohio that every person was free, Justice McLean's view of the Constitution's compromise permitting slavery made him object to Chase's natural law argument and his appeal to conscience. To Justice McLean, the immorality of slavery was irrelevant, and he repeated his charge to the jury stating: "The law is our only guide."[95]

Chase however remained undaunted and appealed to the United States Supreme Court. Even Chase must have recognized that the chance of winning Van Zandt's appeal in the Supreme Court was minuscule. The Court's 1842 *Prigg* decision rendered a constitutional attack on the Fugitive Slave Act futile.[96] The only Supreme Court Justice with antislavery views was Justice McLean, and he had already ruled against Chase. Although Justice McLean had urged the Court to hear oral argument in the Van Zandt case, Chief Justice Taney objected to hearing oral argument, for he thought the constitutional question was already settled. Chief Justice Taney persuaded the rest of the Court, except Justice McLean, and Chase was relegated to submitting only a written brief, an ominous sign. Perhaps Chase subconsciously recognized that he could not win, for his *Van Zandt* brief comes close to adopting a pure, natural law theory. His brief straddled the fine line between "urging disregard of positive law and urging incorporation of natural law within it."[97] Chase's argument was designed to test the limit of law, to put before the country and the Court the conflict between humanity and prevailing law.

93. 41 U.S. (15 Pet.) 539 (1842).
94. Jones v. Vanzandt, 13 F. Cas. 1040, 1045 (C.C.D. Ohio 1843) (No. 7501).
95. Jones v. Vanzandt, 13 F. Cas. 1047, 1048 (C.C.D. Ohio 1843) (No. 7502).
96. *Prigg*, 41 U.S. 539.
97. COVER, *supra* note 82, at 173.

The brief opened by tacitly admitting that current legal precedent might be against him. Chase argued, however, that such "authority may stand for law," but does not always represent the law. Reason and truth "will ultimately prevail."[98] Chase noted that other well-established legal doctrines have been overturned in time, and thus urged the Court to consider his arguments dispassionately and openly. Fifty pages of technical legal argument followed to prove that Van Zandt could not be liable unless the slave owner actually notified him that the persons he was transporting were fugitive slaves. Chase's argument was logical, well-researched and persuasively argued; but his interpretation of the law would have made it virtually impossible to prosecute underground railroaders, which was a result neither the South nor the Supreme Court was willing to countenance.

If the first part of Chase's argument was technically sound but clearly judicially unattainable, the second half descended into utter futility. His argument that the Fugitive Slave Act was unconstitutional defied legal precedent and current political reality. Yet, the brief brilliantly sets forth Chase's antislavery constitutional philosophy. Future Massachusetts Senator Charles Sumner considered Chase's *Van Zandt* brief to be the best he had ever read and borrowed Chase's arguments when he condemned the Fugitive Slave Act in the Senate a few years later. "It is a triumph of freedom," said retired Justice Story of Chase's argument, and accurately predicted that "his points will seriously influence the public mind and perhaps the politics of the country."[99]

And that was Chase's aim. As one biographer argues, Chase's point "was simply to put before the country a solemn protest against making the free States share in slavery."[100] Chase reprinted the brief as a pamphlet and widely distributed it to every member of Congress, as well as to other leading politicians, irrespective of their views on slavery. The case attracted national attention: Chase used the forum to publicize the antislavery cause. He had astutely secured the prominent Governor of New York, William Henry Seward, to act as co-counsel in the Supreme Court, in order to help the case achieve national prominence. Seward's argument to the Court was also published, in the *New York Tribune*.

Chase's argument, which eventually became the constitutional bedrock of the Republican Party, was that the Constitution intended the U.S. government "to be kept free from all connection" with slavery, and to exclude slavery

98. SALMON PORTLAND CHASE, RECLAMATION OF FUGITIVES FROM SERVICE: AN ARGUMENT FOR THE DEFENDANT, SUBMITTED TO THE SUPREME COURT OF THE UNITED STATES, AT THE DECEMBER TERM, 1846, IN THE CASE OF *WARTON JONES VS. JOHN VANZANDT* 5 (1847).

99. HART, *supra* note 91, at 77.

100. *Id.*

from the territories.[101] Slavery was a local institution, confined to the slave holding states.

Chase drew on several key principles to support his constitutional position, and those principles were to undergird civil rights litigation throughout the 19th century. First, he drew on the Declaration of Independence and other extraconstitutional sources such as the Northwest Ordinance to inform his view of the Constitution. To antislavery advocates like Chase, the Declaration's self-evident truths were not "empty flourishes of rhetoric,"[102] but proof that slavery was not constitutionally "to be fostered or sustained by national authority."[103] Chase believed that either the "Declaration of Independence [is] a fable," or the Constitution must recognize all inhabitants of the U.S. as persons with rights.[104] Chase also relied on a rule of interpretation that the Constitution must be interpreted consistently with natural, God-given rights, and that slavery was a violation of a natural right. Reaching its highest rhetorical note, Chase's brief argued that

> No Legislature can make right wrong; or wrong, right. No Legislature can make light, darkness; or darkness, light. No Legislature can make men, things; or things, men. Nor is any Legislature at liberty to disregard the fundamental principles of rectitude and justice. Whether restrained or not by constitutional provisions, there are acts beyond any legitimate or binding legislative authority . . . .[105]

The Court is obligated therefore to avoid interpreting the U.S. Constitution in a manner, "which will bring its provisions into conflict with that other CONSTITUTION, which, rising, in sublime majesty, over all human enactments . . . finds its 'seat in the bosom of God.'"[106]

Chase's real plea in *Van Zandt*, as in many of his other cases, was not to the Court but to the public and history. For Chase, the final arbiter in cases of a "moral and political nature" is not the Court's judgment, but public "opinion . . . not of the American People only, but of the Civilized World."[107]

Antislavery lawyers like Chase, and their southern counterparts, understood that an appeal to the Constitution had the same kind of force on public opinion as the equally common appeal to the Bible, and they therefore tried to read into the Constitution self-evident, natural rights. As the son of one

101. CHASE, *supra* note 98, at 82.
102. *Id.* at 76.
103. *Id.* at 77.
104. *Id.* at 82–83.
105. *Id.* at 93.
106. *Id.* at 107.
107. *Id.*

of Chase's friends later recounted, the appeal to fundamental rights, "however little it might convince a court, was the most effective of all the antislavery arguments, because it brought back the discussion to the absolute incongruity of democracy and slavery, and emphasized both the question of moral right and the social expediency of upholding the moral law."[108]

Nobody was surprised—except possibly Chase—when the Supreme Court unanimously ruled against Van Zandt, holding the Fugitive Slave Act constitutional despite its "supposed inexpediency and [the] invalidity of all laws recognizing slavery or any right of property in man."[109] But despite losing, Chase wrote that he was "thankful" to have brought the case.[110] His arguments were widely publicized, and he was "satisfied" with the public discussion the case generated.[111] Abolitionists praised his arguments, and the respect he won in *Van Zandt* and other fugitive slave cases helped Chase to be elected to the U.S. Senate in 1849 and to the governorship of Ohio in 1855 and 1857. Lincoln appointed him Secretary of the Treasury in 1861, and when Chase could not contain his presidential ambition, and quietly tried to run against Lincoln in 1864, Lincoln recognized his dedication and legal skills honed in his fugitive slave litigation, and nominated him to be the Chief Justice of the Supreme Court.

The main long-term legacy of Chase and other fugitive slave litigators was their contribution to a culture that encourages political movements to use courts as vehicles of political protest. That litigation aided the rising tide of Northern public opinion against slavery. As the prominent Wisconsin newspaper editor Rufus King wrote in 1855, the judicial controversy over the

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108. HART, *supra* note 91, at 72. Chase was one of the most effective antislavery constitutional advocates. He grounded his constitutional theory both in moral principle and practical politics. One of his biographers notes that:

> Hundreds of men on both sides liked to make the Constitution a partner in their speeches; hardly any other rendered such services as Chase in defending the victims of slavery who got across the line into the free States. . . . It was his courage as counsel in those cases, his use of all possible legal technicalities and expedients in behalf of his client, and his fearless and widely circulated speeches, which have made him best known as an anti-slavery man.

Id. at 73.

109. Jones v. Van Zandt, 46 U.S. (5 How.) 215, 231 (1847).

110. Letter from Salmon Portland Chase to Lewis Tappan (Mar. 18, 1847), *reprinted in* SCHUCKERS, *supra* note 91, at 65–66. Disappointed with the result, Chase recognized that the deck had been stacked against him. In a letter to future Senator Charles Sumner of Massachusetts, he stated, "I do not suppose that the judges of the Supreme Court regarded the arguments as worth much attention. I have reason to believe that the case was decided before they received it." MIDDLETON, *supra* note 83, at 127.

111. SCHUCKERS, *supra* note 91, at 66.

constitutionality of the Fugitive Slave Act "must provoke, everywhere, discussion and agitation, and Liberty and Right must profit by these."[112]

Chase was not the only antislavery advocate who used the courtroom for political ends prior to the Civil War. Another group of abolitionists waged a more utopian battle to constitutionally extinguish slavery everywhere in the United States. Like Chase, these abolitionists also read the Constitution to conform to the Declaration of Independence and the natural right to freedom, but these abolitionists drew the much more radical conclusion that the Constitution required the abolition of slavery both in the North and in the South. They did so in the belief that Northern reverence for the Constitution required the abolitionist movement to develop an antislavery constitutional interpretation in order to gain adherents and spur antislavery sentiment. However, like Chase and the more moderate antislavery movement, the utopian constitutionalists used test-case litigation as one means of publicizing their constitutional doctrines.

In 1844, the utopian constitutionalists created an opportunity to litigate their broad constitutional theories in court. That year, New Jersey ratified a new constitution that included a declaration of rights providing that "All men are by nature free and independent, and have certain natural and unalienable rights . . . ."[113] Although the framers of the New Jersey Constitution had ignored the continued, although dying existence of slavery in that state, the New Jersey Anti-Slavery Society nevertheless resolved to initiate a test case to "settle the question of the existence of slavery under the new constitution."[114] "[T]hey genuinely hoped to win" in court, but the abolitionists' primary goal was "to focus the attention of an indifferent public on their cause."[115]

The New Jersey abolitionists realized that their constitutional challenge to the remnants of slavery in New Jersey would be difficult, and their leader, John Grimes, was openly dubious.[116] Alvan Stewart, who argued the case for the abolitionists, eschewed legal formalism in favor of a broad political-moral argument. While he purported to be arguing a dry legal question,[117] his argument reads like a political speech or religious sermon. In his request for relief, he asked that the "[c]ourt set the nation the shining example of doing

112. FONER, *supra* note 86, at 136.
113. N.J. CONST. art. I, § 1 (amended 1947).
114. Daniel R. Ernst, *Legal Positivism, Abolitionist Litigation, and the New Jersey Slave Case of 1845*, 4 LAW & HIST. REV. 337, 343 (1986).
115. *Id.* at 337–38.
116. *See id.* at 343.
117. *See id.* at 356.

right, on this question, by acting up to the full measure of their judicial and moral power."[118]

The New Jersey Supreme Court, by a 3–1 vote, rejected Stewart's plea.[119] The justices chose to follow the formalistic reasoning of the defense counsel, Joseph Bradley.[120] According to one member of New Jersey's highest court, Stewart's arguments were "rather addressed to the feelings than to the legal intelligence of the court."[121] Only the antislavery Justice Joseph Hornblower dissented, and he did so without writing an opinion.[122]

While losing in court, the New Jersey Slave Cases did accomplish the abolitionists' aim of initiating a political debate on slavery, which culminated in the New Jersey legislature's formal abolition of slavery in that state several years later.[123]

Similarly, in Boston, black and white abolitionists waged a concerted campaign in the 1840s to end segregation, which included litigation as one component of the broader political effort. The litigation lost in court, but helped place the issue of segregation on the legislative agenda. In 1841, a number of black abolitionists, including Frederick Douglass, attempted to ride the "white" cars of various segregated Massachusetts railroads.[124] When physically removed, the abolitionists often sued; yet the lower courts ruled in favor of the railroads. The abolitionists turned to the legislature, and the resulting

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118. ALVAN STEWART, A LEGAL ARGUMENT BEFORE THE SUPREME COURT OF THE STATE OF NEW JERSEY, AT THE MAY TERM, 1845, AT TRENTON, FOR THE DELIVERANCE OF 4,000 PERSONS FROM BONDAGE (1845), *reprinted in* ABOLITIONISTS IN NORTHERN COURTS 441, 470 (Paul Finkelman ed., 1988).

119. *See* Ernst, *supra* note 114, at 356.

120. Bradley was appointed to the U.S. Supreme Court by President Grant in 1870. Justice Bradley's most famous civil rights decision was his opinion in *The Civil Rights Cases*, 109 U.S. 3 (1883), in which he articulated a formalistic reading of the Fourteenth Amendment to deny Congress the power to prohibit segregation in public inns, accommodations, and transportation.

121. State v. Post, 20 N.J.L. 368, 369 (Sup. Ct. 1845).

122. The abolitionists appealed to the New Jersey Court of Errors and Appeals, which affirmed the decision of the Supreme Court by a 7–1 vote without issuing written opinions. State v. Post, 21 N.J.L. 699 (1848).

123. In Massachusetts, Charles Sumner litigated and lost the Boston school desegregation case *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849). In both New Jersey and Massachusetts, abolitionists eventually obtained politically through legislative action what they failed to win in the courts. *See* HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835–1875, at 96–97 (1982) (racial segregation in schools prohibited in Boston by statute in 1855); Ernst, *supra* note 114, at 364 (explaining that abolitionists won a partial victory in 1846 when the New Jersey legislature formally abolished slavery but declared the slaves to be apprentices for life.).

124. *See* LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860, at 107–08 (1961); J. Morgan Kousser, *"The Supremacy of Equal Rights": The Struggle Against Racial Discrimination in Antebellum Massachusetts and the Foundations of the Fourteenth Amendment*, 82 NW. U. L. REV. 941, 954 (1988).

pressure forced the railroads to voluntarily end segregated cars.[125] The Boston abolitionist community then challenged school segregation. In the 1849 case *Roberts v. City of Boston*,[126] the Massachusetts Supreme Court, in a unanimous opinion written by the prominent antislavery Judge Lemuel Shaw, upheld segregated schools in Massachusetts.[127] Yet, despite their loss in the courts, the abolitionist community continued its political struggle, and, five years later, the Massachusetts legislature outlawed segregation.

Likewise, New York City blacks in the 1850s formed the Legal Rights Association and, represented by future President of the United States Chester A. Arthur and other lawyers, staged a series of sit-ins against segregated streetcars, losing in court but succeeding in pressuring a number of railroads to end segregation.[128] In each of these cases, the litigation was brought not merely to prevail in court, but as one method to spur debate in both the public at large and in the legislature.

After the Civil War, African Americans continued this abolitionist tradition, waging an impressive campaign in the courts against racial discrimination in schools. Between 1865 and 1903, more than seventy challenges to discriminatory schools were litigated throughout the United States.[129] Blacks overwhelmingly lost the cases that were decided on Fourteenth Amendment grounds, although they were often successful on narrower state law claims.[130] Moreover, even lawsuits that lost in court often led to legislative victories. For example, New York blacks lost all six cases that they brought challenging school segregation in the nineteenth century, but the judicial battle was a springboard to victory in the local political arena; the state legislature enacted legislation securing integration. Illustrative of the New York experience, Professor J. Morgan Kousser has written: "the failures of success and the ultimate success that stemmed from those failures . . . all would be missed by observers concerned only with the abstract principles embodied in printed court opinions."[131]

125. *See* Kousser, *supra* note 124, at 955–57.

126. 59 Mass. 198.

127. *Id.*; *see also* JIM CROW IN BOSTON: THE ORIGIN OF THE SEPARATE BUT EQUAL DOCTRINE, at xxiii (Leonard W. Levy & Douglas L. Jones eds., 1974).

128. *See* Donald G. Neiman, *The Language of Liberation: African Americans and Equalitarian Constitutionalism, 1830–1950*, *in* THE CONSTITUTION, LAW AND AMERICAN LIFE: CRITICAL ASPECTS OF THE NINETEENTH-CENTURY EXPERIENCE 67, 71 (Donald G. Nieman ed., 1992).

129. *See* J. MORGAN KOUSSER, DEAD END: THE DEVELOPMENT OF NINETEENTH CENTURY LITIGATION ON RACIAL DISCRIMINATION IN SCHOOLS 5, 56–58 (1986).

130. Only one judge out of the thirty-three cases involving the Fourteenth Amendment "squarely ruled that school segregation *per se* contravened the Fourteenth Amendment." *Id.* at 9, 61.

131. *Id.* at 14.

The early women's movement also used the courts for the purposes of political agitation. At an 1869 women's suffrage convention, a husband and wife team of Missouri suffragists, Francis and Virginia Minor, argued that instead of agitating for a new constitutional provision granting women the right to vote, feminists should assert that women already had the constitutional right to vote under the Fourteenth Amendment's privileges and immunities clause. The Minors urged women to attempt to vote and, if prevented, to sue the officials who had denied them that right. The Minors viewed litigation as a means not only of vindicating rights, but also of educating the public. Francis Minor urged that a test case be brought because, "in no other way could our cause be more widely, and at the same time definitely brought before the public. Every newspaper in the land would tell the story, every fireside would hear the news. The question would be thoroughly discussed by thousands, who now give it no thought . . . ."[132]

Susan B. Anthony agreed with the Minors' radical new approach. She and Elizabeth Cady Stanton printed the Minors' argument in their newspaper and published 10,000 extra copies, sending it to all members of Congress.[133] The National Women's Suffrage Association, led by Anthony and Stanton, adopted the argument, and it became the cornerstone of the organization's work for the next half decade.

The strategy urged by the Minors and accepted by the NWSA became known as the New Departure Movement and represented a turn toward a rights-conscious women's movement.[134] Several test cases were brought by as the New Departure Movement. The case that stirred the most political debate and controversy was initiated when Susan B. Anthony convinced the Republican poll inspectors to allow her to vote in the 1872 election.

Anthony and her comrades created an immediate sensation around the country, earning both cheers and attacks. The *New York Times* boldly declared that "[t]he act of Susan B. Anthony should have a place in history," and the *Toledo Blade* praised her for keeping "the public mind agitated upon

132. Letter from Francis Minor to *The Revolution* (Oct. 14, 1869), *reprinted in* 2 HISTORY OF WOMAN SUFFRAGE 408 (Elizabeth Cady Stanton et al. eds., Ayer Co. 1985) (1882).

133. 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 132, at 411.

134. *See* JOAN HOFF, LAW, GENDER AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 146–50 (1991); *see also* Ellen C. DuBois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage and the United States Constitution, 1820–1878*, *in* A LESS THAN PERFECT UNION 104 (Jules Lobel ed., 1988); Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the "Living Constitution,"* 76 N.Y.U. L. REV. 1456 (2001).

the women's rights question." Yet, the hometown Rochester *Union and Advertiser* condemned her for "[f]emale [l]awlessness."[135]

But, Susan B. Anthony saw voting as a mere precursor to the main event. Encouraged by the response to her dramatic action, she hoped to launch a test case on behalf of the registered women who had been turned away from the polls. For Anthony, as for the abolitionists Chase and Stewart, litigation was both a means to win concrete rights and an opportunity to convert the courtroom into an arena for protest. She believed a courtroom battle would provide a dramatic forum for publicizing the cause. To her friend, the feminist leader Elizabeth Cady Stanton, she wrote about the exhilaration of casting a vote in a national election, and her expectation of the ensuing litigation: "[W]e are in for a fine agitation in Rochester on this question."[136]

Anthony could not have foreseen the course of events that was to result in one of the great state trials of the nineteenth century. On Thanksgiving Day, a federal marshal asked the women voters of Rochester to turn themselves in to be prosecuted under an 1870 federal statute, grandly titled "An Act to Enforce the Right of Citizens of the United States to Vote." Designed to prevent former Confederates from voting illegally, and to prevent Ku Klux Klan intimidation of black voters, the statute had ensnared as its first victims a respectable group of Northern housewives who had voted for the Republican ticket.

The women did not surrender. As Anthony reported, "[t]he ladies refusing to respond to this polite invitation, Marshal Keeney made the circuit to collect the rebellious forces."[137] For dramatic effect, Anthony even demanded that the courteous and embarrassed marshal take her to jail in handcuffs. Eventually, all the women voters and the three election inspectors who had permitted them to vote were indicted. The stage was thus set for a courtroom battle that would be even more dramatic than the test case Anthony had originally hoped to bring.[138]

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135. *See* ALMA LUTZ, SUSAN B. ANTHONY: REBEL, CRUSADER, HUMANITARIAN 200 (1959); *see also* 1 IDA HUSTED HARPER, THE LIFE AND WORK OF SUSAN B. ANTHONY 424–25 (Ayer Co. 1983) (1898).

136. Letter from Susan B. Anthony to Elizabeth Cady Stanton (Nov. 5, 1872), *reprinted in* 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 132, at 934.

137. *Id.* at 628.

138. Of course, resort to test-case litigation had its critics, even among supporters of women's suffrage. The famous abolitionist orator, Wendell Phillips, agreed with the New Departurists' claim that the Fourteenth Amendment's protection of citizens' privileges and immunities required women's suffrage, but believed that the legal argument was "too good a handle for agitation to be risked by a speedy contest in the courts." As Phillips prophetically argued, "[a]n adverse decision would destroy its value as a new means of attack." *Woman Suffrage Before the Courts*, REVOLUTION, May 11, 1871. *The Nation* opined that the change the New Departurists hoped for was too momentous to occur through judicial resolution; women's suffrage, the paper editorialized, could not be achieved "by

After her indictment in December 1872, Anthony launched a broad speaking campaign to educate the people of Rochester on the right of all citizens to have equal access to the ballot. Over the course of the next several months, Anthony spoke in twenty-nine different post office districts in the county, hoping "to make a verdict of 'guilty' impossible."[139] Her campaign was obviously having an impact, for the district attorney's motion to change the trial's venue to another county was granted by the court.

The change of venue did not stop Anthony's agitation. In the twenty-two days before the opening of the trial, Anthony made twenty-one speeches in the new county to which the action had been transferred. Another suffrage leader, Matilda Joslyn Gage, spoke in an additional sixteen townships. Together they covered the entire county, taking the offensive and declaring that "[t]he United States [is] on trial, not Susan B. Anthony."[140] Anthony publicized her argument that she had committed no crime, but simply exercised her citizen's right to vote as guaranteed by the U.S. Constitution.

Anthony clearly was successful in generating nationwide publicity. Her use of the pending court proceeding as a forum on women's suffrage set off a lively debate in the press. The Syracuse *Standard* wrote that "Miss S. B. Anthony . . . is conducting her case in a way that beats even lawyers," while the New York *Commercial Advertiser* admired the "regular St. Anthony's dance she leads the District Attorney . . . in spite of winter cold or summer heat, [Anthony] will carry her case from county to county precisely as fast as the venue is changed. One must rise very early in the morning to get the start of this active apostle of the sisterhood."[141] Other papers excoriated Anthony's attempt to influence public opinion. A Rochester *Union & Advertiser* letter from a reader was headlined, "Susan B. Anthony as a Corruptionist," and the paper angrily declared that "United States Courts are not stages for the enactment of comedy or farce."[142] The reader wrote that Anthony was committing "a law offense known as embracery," defined as "such practices as lead to affect the administration of justice, *improperly working upon the minds of jurors*."[143]

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anything short of deliberate popular consent." 16 NATION, 426 (1873). The American Women's Suffrage Association viewed the litigation effort as foolhardy, and even though Elizabeth Cady Stanton admired much about the approach, she was never enthusiastic about a court test.

139. 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 132, at 630.

140. *Id.*

141. *Id.* at 936.

142. *Id.*

143. *Id.* at 937.

Anthony's trial opened on June 18, 1873, before U.S. Supreme Court Justice Ward Hunt.[144] The packed courtroom included such notables as former President Millard Fillmore, Senator Charles Sedgwick, and former Congressman E. G. Lapham.

Justice Hunt immediately made it clear that he was determined to limit Anthony's use of the case for political protest. He refused to permit Anthony to be a witness in her own behalf, ruling that she was incompetent, although he allowed the Assistant U.S. District Attorney to submit hearsay evidence of Anthony's testimony at pretrial hearings.

Anthony's lead attorney was retired New York State Appellate Judge, and former New York Lieutenant Governor, Henry Selden. After Selden's three-hour argument and the district attorney's rebuttal, Judge Hunt read his prepared opinion. Written before the trial had commenced, it stated that Anthony had no right to vote under the Constitution and that any mistaken belief she may have had about such a right did not excuse her criminal action. As a matter of law, he directed the jury to find Anthony guilty and then discharged the jury.

The court then fined Anthony $100 and the costs of the prosecution, to which Anthony replied that she would not pay a penny and would exhort women that "[r]esistance to tyranny is obedience to God."[145] But Anthony was not sent to prison for refusing to pay her fine. In an unusual move for such a case, Justice Hunt said that he would not order Anthony imprisoned until the fine was paid. As Anthony's lawyer John Van Voorhis later commented, it was an adroit move, intended to deny Anthony the ability to use a writ of habeas corpus to take her case directly to the Supreme Court of the United States, where she would have had an excellent argument that her right to trial by jury had been denied.[146] Anthony never paid the fine, the government never proceeded to enforce the fine or to jail her, the other women voters' cases were not prosecuted, and Anthony lost her chance for Supreme Court review.

Anthony's case did, however, generate substantial public controversy. Virtually every newspaper in the country reported and commented on the trial, and several reprinted Anthony's arguments about women's right to vote.[147]

144. *Id.* at 647.

145. KATHARINE ANTHONY, SUSAN B. ANTHONY: HER PERSONAL HISTORY AND HER ERA 299 (1954).

146. *See* Godfrey D. Lehman, *Susan B. Anthony Cast Her Ballot for Ulysses S. Grant*, AM. HERITAGE, Dec. 1985, at 25, 27.

147. The women voters were largely portrayed with sympathy: one newspaper described the "lawbreakers" as "elderly matronly-looking women with thoughtful faces, just the sort one would like to see in charge of one's sick room, considerate, patient, [and] kindly." Lehman, *supra* note 146, at 27. "The

More than one thousand dollars and scores of letters of support poured in to Anthony after Hunt's verdict. She used most of the money to publish a pamphlet containing a full report on the trial. Three thousand copies were sent out to libraries and newspapers all over the country, and five thousand copies of Selden's argument were also distributed.[148] The next year, one newspaper called Anthony "America's best-known woman."[149] She had used litigation successfully to protest women's inequality, speaking to thousands of people about the case, engaging prominent figures in the dialogue about her case including the president of the United States, and initiating debate in legal journals, as well as in the popular press of the day.

Susan B. Anthony's case is now remembered as a noble, legitimate and useful attempt to enlist the courts and country on behalf of women's right to vote. Supreme Court Justice Sandra Day O'Connor, reflecting on the significance of Anthony's case, stated: "[i]n another respect, Susan B. Anthony was the clear victor. Her treatment at the hands of the judicial system won for her the sympathy even of those who had been opposed to her original act."[150] Anthony was denied a jury trial precisely because she had successfully used her case as a forum for public agitation and protest.

The New Departurists brought a number of other test cases, all of which lost in court. The decisive loss came when the Supreme Court unanimously ruled, in a case brought by the Minors, that the Constitution did not guarantee women the right to vote.[151] Despite their losses, the New Departurists were not primarily "outcome-oriented" litigants, but rather activists who believed that the real success of their strategy "must be measured in terms of the amount and kind of publicity it was able to generate."[152]

Civil liberties organizations in the first part of the twentieth century, well before the highly publicized law reform movements of the 1950s and 60s, also used litigation as a means for publicizing their cause. The Free Speech League viewed the early 1900s free speech fights and the resulting court cases as a means of publicizing its radical First Amendment views.[153] Even the more conservative ACLU, despite Felix Frankfurter's early objections, used

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New York *Sun* attacked Hunt for violating 'one of the most important provisions of the Constitution,'" while "[t]he *Utica Observer* approved Hunt's interpretation of the Fourteenth Amendment but nonetheless condemned his seizure of jury power." *Id.* at 30.

148. *See* ANTHONY, *supra* note 145, at 301.

149. *See* Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 VAND. L. REV. 657, 662 (1996).

150. *Id.*

151. Minor v. Happersatt, 88 U.S. 162 (1875).

152. KAREN O'CONNOR, WOMEN'S ORGANIZATIONS' USE OF THE COURTS 43 (1980).

153. *See* Rabban, *supra* note 67, at 88–89.

litigation in tandem with other means of publicizing its views. In the famous *Scopes* case, involving the prosecution of a teacher for violating an anti-evolution statute, both the ACLU and its opponent, the World Christian Fundamentals Association, perceived their major goal to be using the judicial forum to influence popular opinion, not the jury.[154] In the 1939 watershed case of *Hague v. CIO*,[155] establishing the right to use public forums to publicize one's views, one chronicler of the ACLU notes:

> The ACLU did not simply run to the courthouse; it sent speakers like Norman Thomas to Jersey City to protest the Hague regime's discrimination against labor organizers. It consciously sought out publicity in the media, including more conservative establishment newspapers. It persuaded influentials like Walter Lippman and Dorothy Thompson to speak out. And it solicited the assistance of organizations like the CIO. While litigation was critical, it was nevertheless only a single element in a well-orchestrated campaign of resistance.[156]

To summarize, these examples illustrate that throughout American history, political movements and organizations have resorted to the courts, and the federal courts in particular, not simply to win favorable court decisions, but in order to publicize their views. Even when this litigation lost in court, as in Chase's or Anthony's cases, the litigation often generated substantial publicity and sympathy for the plaintiffs. Lawyers like Chase were viewed by respected legal observers, such as Justice Story and Charles Sumner, as being engaged in legitimate litigation and using appropriate strategies, and Chase's legal work on behalf of fugitive slaves was an important qualification that supported his appointment as Chief Justice of the United States Supreme Court.

III. FIRST AMENDMENT PROTECTION FOR USING COURTS AS FORUMS FOR PROTEST

Protest movements' use of the courts as forums to express and publicize their views is protected by the First Amendment. On many occasions, the Supreme Court has proclaimed that litigation is a "form of political expression"

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154. *See* EDWARD J. LARSON, TRIAL AND ERROR: THE AMERICAN CONTROVERSY OVER CREATION AND EVOLUTION 63 (3d ed. 2003). The ACLU viewed the trial as an ideal chance to promote public acceptance of academic freedom for evolutionary teaching and assembled a publicity-conscious defense team, while the World's Christian Fundamentalist Association leaders viewed the trial as "the greatest opportunity ever presented to educate the public and will accomplish more than ten years' campaigning." *Id.* at 61, 62–63.

155. 307 U.S. 496 (1939).

156. Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 212 (1976).

protected by the First Amendment.[157] In 1972, the Court held that "[t]he right of access to the courts is indeed but one aspect of the right of petition."[158] The Court has reiterated that "filing a complaint in court is a form of petitioning activity," protected by the First Amendment.[159]

The Supreme Court has also specifically noted the difference between private litigation to resolve disputes and public interest lawsuits, which are at the core of the First Amendment's protective ambit and are thus entitled to greater protection. In *NAACP v. Button*,[160] for example, the Court noted that:

> In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. . . . Resort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain.[161]

The *Button* Court felt that "regulations which reflect hostility to stirring up litigation have been aimed chiefly at those who urge recourse to the courts for private gain, serving no public interest."[162]

Justice Powell, writing for the Court in *In re Primus*,[163] also relied on the distinction between public interest litigation and litigation undertaken primarily for pecuniary gain in determining the constitutionally permissible scope of a state's proscription of solicitation. The Court noted that:

> [Primus'] actions were undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU, rather than to derive financial gain. The question presented in this case is whether, in light of the values protected by the First and Fourteenth Amendments, these differences materially affect the scope of state regulation of the conduct of lawyers.[164]

157. *E.g.*, NAACP v. Button, 371 U.S. 415, 429 (1963).
158. Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).
159. Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus. Inc., 508 U.S. 49, 56 (1993); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 896–97 (1984); McDonald v. Smith, 472 U.S. 479, 484 (1985); *see also* Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 743 (1983).
160. 371 U.S. 415.
161. *Id.* at 429, 443.
162. *Id.* at 440.
163. 436 U.S. 412 (1978).
164. *Id.* at 422.

Justice Powell held that those differences were material.[165] He noted that for the ACLU, like the NAACP, litigation is a form of political expression and political association. Most importantly, Justice Powell argued that "[t]he ACLU engages in litigation as a vehicle for effective political expression and association, *as well as a means of communicating useful information to the public*."[166] In *Primus*, as in *Button*, the Court recognized that litigation can be a form of "cooperative, organizational activity,"[167] which is part of the "freedom to engage in association for the advancement of *beliefs and ideas*"[168] protected by the First Amendment.

The Court has also relied on the First Amendment to severely limit the applicability of federal statutes to sanction litigation undertaken in "bad faith." In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*,[169] the Court invoked the First Amendment right of petition to interpret the Sherman Act as immunizing a litigant from antitrust liability even where the litigant was motivated solely by an anticompetitive intent and not by an expectation of a successful outcome to the litigation. Such litigation was entitled to immunity unless it was *also* "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits."[170] Moreover, subjectively "bad faith," anticompetitive litigation, presenting a "novel" claim without any supporting authority, was nonetheless entitled to antitrust immunity, "as long as a similarly situated reasonable litigant could have perceived some likelihood of success."[171]

165. The Court on other occasions has noted that the difference between public interest litigation and litigation for pecuniary gain is significant in determining the constitutionality of bar rules. Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995) (upholding the Florida Bar's thirty-day restriction on attorney's direct mail solicitation of accident victims and their relatives). The American Bar Association has also recognized that the rules for professional conduct cannot ignore the differences between public interest and purely private litigation. In deciding that a National Lawyers Committee opposed to New Deal legislation could, consistent with the rules of professional ethics, offer counsel without fee or charge to anyone financially unable to retain counsel to challenge such legislation, the ABA's Committee on Professional Ethics and Grievances held that "[t]he question presented, with its implications, involves problems of political, social and economic character that have long since assumed the proportions of national issues, on one side or the other which multitudes of patriotic citizens have aligned themselves. These issues transcend the range of professional ethics." ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 148 (Nov. 16, 1935).

166. *Primus*, 436 U.S. at 431 (emphasis added).

167. *Id.* at 438 n.32 (quoting *Button*, 371 U.S. at 430).

168. *Id.* (emphasis added) (quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958)).

169. 508 U.S. 49 (1993).

170. *Id.* at 60.

171. *Id.* at 65.

Similarly, in *Bill Johnson's Restaurants, Inc. v. NLRB*,[172] the Court held that First Amendment and federalism concerns prevented "a well-founded lawsuit" from being "enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the [National Labor Relations Act]."[173] "The right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in the court is to enjoin employees from exercising a protected right."[174] The Court recognized in *Bill Johnson's Restaurants*, as in *Primus*, that it is legitimate to petition the judiciary not merely for compensation and the psychological benefits of vindication, but also for the "public airing of disputed facts."[175] The Court relied on its antitrust jurisprudence to determine that the Board could only enjoin suits brought with a retaliatory motive that were also baseless.[176]

In its most recent holding, *BE&K Construction Co. v. NLRB*,[177] the Court further articulated the protection the First Amendment affords litigation. There, the question was whether the NLRB may impose liability on an employer for a retaliatory lawsuit that turned out to be unsuccessful. The Court first suggested that baseless or frivolous lawsuits might not be completely unprotected by the First Amendment. Analogizing baseless litigation to false statements, the majority noted that "[t]he First Amendment requires that we protect some falsehood in order to protect *speech that matters*."[178] Baseless litigation may be protected "to ensure that 'the freedoms of speech and press [receive] that "breathing space" essential to their fruitful exercise.'"[179] This protection is analogous to the protection articulated in *New York Times Co. v. Sullivan*[180] that a public official seeking damages for defamation prove "that false statements were made with knowledge or reckless disregard of their falsity."[181] Justice O'Connor's majority opinion stated that these "breathing space" principles were consistent with the Court's prior cases limiting regulation of litigation to "suits that were both objectively baseless *and* subjectively motivated by an unlawful purpose."[182] Ultimately, the Court did not decide

172. 461 U.S. 731 (1983).
173. *Id.* at 743.
174. *Id.* at 741 (quoting Peddie Buildings, 203 N.L.R.B. 265, 272 (1973)).
175. *Id.* at 743.
176. *Id.* at 744 (citing Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972)).
177. 536 U.S. 516 (2002).
178. *Id.* at 531 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974)).
179. *Id.* (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)) (alteration in original).
180. 376 U.S. 254 (1964).
181. *BE&K Constr.*, 536 U.S. at 531 (citing *New York Times*, 376 U.S. at 279).
182. *Id.*

the scope of First Amendment protection for frivolous litigation, since the case involved the class of "reasonably based but unsuccessful lawsuits" that had a retaliatory, antiunion motive.[183]

Justice O'Connor stated that the First Amendment protects all genuine petitions and not merely those that are successful. The "genuineness of a grievance does not turn on whether it succeeds."[184] Equally important, the Court articulated the First Amendment interests advanced by an unsuccessful but reasonably based suit. "[U]nsuccessful suits allow the 'public airing of disputed facts' . . . and raise matters of public concern. They also promote the evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around."[185]

Those values—public airing of disputes, raising issues of public concern, promoting a community's own narrative of the law, which may not be accepted by the state immediately but which is later adopted—are values not usually associated with litigation. The Court in *BE&K* thus recognizes that litigation has legitimate and important purposes apart from winning damages or injunctive relief in court.

Despite its broad invocation of First Amendment values and principles, the Court's actual holding was quite narrow. The Court avoided deciding the difficult constitutional issue of the extent to which the First Amendment protects reasonable, but unsuccessful litigation brought with a retaliatory purpose, by adopting a limiting construction of the relevant National Labor Relations Act (NLRA) provision. Nor did the Court decide whether the NLRB could sanction an unsuccessful but reasonably based lawsuit that was filed solely to impose the costs of the litigation process. Finally, the Court specifically included the caveat that "nothing in our holding today should be read to question the validity of common litigation sanctions imposed by courts themselves—such as those authorized under Rule 11 of the Federal Rules of Civil Procedure."[186]

Taken individually, each of these cases invoking the First Amendment to determine the permissible scope of state or congressional regulation of litigation may stand for relatively narrow propositions. But as a whole, these cases have profound implications for the role of litigation that seeks not only or even primarily to obtain a favorable reply from the government official petitioned—whether it be an executive official or judge—but rather to

183. *Id.*
184. *Id.* at 532.
185. *Id.* (quoting Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 743 (1983)).
186. *Id.* at 537.

provoke public debate and discourse on the subject of the petition. Notwithstanding Justice O'Connor's caveat concerning Rule 11 and other litigation sanctions imposed by courts, the *BE&K* opinion appears to call into constitutional question the use of sanctions against lawyers such as Ramsey Clark or Bill Kunstler for bringing litigation to educate the public about important issues.

A. Sanctions and the First Amendment

The use of courts as forums to spark political protest and debate throughout American history, and the Supreme Court's more recent explicit recognition of the First Amendment values and protections of litigation, support the legitimacy of litigation brought to achieve these purposes. Courts must analyze Rule 11 and other similar state court sanctions in light of the First Amendment protection afforded litigation. Yet many court decisions, including a recent Fifth Circuit Court of Appeals ruling, pay no heed to First Amendment principles when imposing sanctions on attorneys.[187]

Rule 11(b)(1) provides that a litigant or lawyer can be sanctioned where a case or motion is brought "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."[188] Rule 11(b)(2) requires the attorney to certify that the claim or defense or other legal contention is not baseless in that it is "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."[189] The requirement that a lawsuit or motion not be presented for an improper purpose raises two First Amendment questions. The first is what is an improper purpose; more specifically, is a

187. Whitehead v. Food Max of Miss., Inc., 332 F.3d 796 (5th Cir. 2003) (en banc). In *Whitehead*, the plaintiffs won a $3.4 million judgment. Three days after the defendant's post-trial motions were denied, the plaintiff's attorney obtained a writ of execution for the judgment and notified the media. The defendant claimed that a stay of execution of judgment was in effect, but the en banc court of appeals assumed that the plaintiff's attorney had an objectively reasonable belief that no stay was in effect and therefore did not violate subpart (b)(2) of Rule 11. The court found that subpart (b)(1) provided an independent basis for sanctions because the plaintiff's attorney had requested the writ for the improper purpose of embarrassing and harassing the defendant and to gain publicity for himself. The critical evidence of the attorney's improper purpose was a media event he orchestrated. *Id.* at 807. The court of appeals summarily rejected the sanctioned attorney's First Amendment arguments because (1) he raised it for the first time on appeal and (2) the media event was not itself sanctionable but was only evidence of the attorney's improper purpose to embarrass the defendant. *Id.* at 807–08. But the Court in *BE&K Construction* held the First Amendment considerations require that the NLRA be read as not permitting sanctions for nonfrivolous actions that a court finds were undertaken with an improper purpose—a holding that the *Whitehead* court simply ignored in its Rule 11 analysis.

188. FED. R. CIV. P. 11(b)(1).

189. FED. R. CIV. P. 11(b)(2).

lawsuit that has as either a purpose or primary purpose obtaining publicity for a plaintiff's cause improper? Second, can a lawsuit that is nonfrivolous nonetheless be sanctioned because it was brought in whole or in part for political purposes? The questions are important because, as the social science research explored at the beginning of this Article demonstrates, many public interest cases, whether successful or unsuccessful, are brought with an aim of seeking favorable publicity for a plaintiff's cause. Yet Rule 11 can be read to render such litigation illegitimate and sanctionable.

The authority of judges to sanction attorneys who present frivolous claims, or bring nonfrivolous claims for what a court terms an improper motive, or seek publicity for their clients or causes, is the power to determine that certain legal arguments or strategies are illegitimate and to use the state's power to stifle and curtail their articulation and development. During the past two decades, public interest attorneys such as prominent civil rights advocates Ramsey Clark and Bill Kunstler have been sanctioned for what courts termed frivolous claims or improper motives. In other cases, defendants have sought sanctions in an effort to chill litigation, as occurred in the litigation challenging the U.S. policies towards Haitians fleeing persecution in that country. In that case, the government responded to the plaintiffs' lawsuit by moving to impose Rule 11 sanctions against the plaintiffs' lawyers for bringing a frivolous lawsuit.[190] That motion was obviously an attempt to chill the lawyers, and it gave them "considerable concern," although it became moot when the district court granted the plaintiffs the relief they sought.[191] Many lawyers were so chilled in the 1980s and early 1990s: A 1980s American Judicature Society study found that almost one-third of lawyers representing civil rights plaintiffs reported that they had declined to present a claim they believed to be meritorious.[192] While the 1993 Amendments to Rule 11 have significantly ameliorated the problem,

190. *See* Victoria Clawson et al., Essay, *Litigating as Law Students: An Inside Look at* Haitian Centers Council, 103 YALE L.J. 2337, 2343 (1994); Anthony Lewis, *Abroad at Home; Mockery of Justice*, N.Y. TIMES, May 21, 1992, at A29. One aspect of the litigation, alleging that the INS screening procedures did not adequately protect the Haitians' statutory and treaty rights to apply for refugee status was eventually decided by the U.S. Supreme Court. Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993).

191. Harold Hongju Koh, *The Human Face of the Haitian Interdiction Program*, 33 VA. J. INT'L L. 483, 485 (1993).

192. *See* Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 971 (1992) (citing an American Judicature Society study that found that lawyers who spent most of their time representing plaintiffs in civil rights suits were "far more likely to be affected by Rule 11 than other lawyers"); *see also* Margaret L. Sanner & Carl Tobias, *Recent Work of the Civil Rules Committee*, 52 MONT. L. REV. 307, 313 (1991). *But see* Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 IND. L.J. 171 (1994).

the text of Rule 11 and its interpretation by some courts still may create a chilling effect on public interest litigation. Moreover, Congress continues to debate an increase in the authority of judges to sanction litigation deemed frivolous or otherwise improper.[193]

1. Publicity as an Improper Purpose

The courts have divided on whether a litigant who files an action or a motion seeking publicity has an improper purpose under Rule 11(b)(1). The Second and the Ninth Circuits have held that seeking publicity is not an improper purpose—at least for claims that are nonfrivolous.[194] The Second Circuit recently overturned a district court's imposition of sanctions against litigants who had brought an action with the purpose of obtaining publicity to put pressure on defendants:

> The district court held that the filing of the complaint with a view to exerting pressure on defendants through the generation of adverse and economically disadvantageous publicity reflected an improper purpose. To the extent that a complaint is not held to lack foundation in law or fact, we disagree. It is not the role of Rule 11 to safeguard a defendant from public criticism that may result from the assertion of nonfrivolous claims. Further, unless such measures are needed to protect the integrity of the judicial system or a criminal defendant's right to a fair trial, a court's steps to deter attorneys from, or to punish them for, speaking to the press have serious First Amendment implications.[195]

Similarly, the Ninth Circuit rejected sanctions against plaintiffs whose motives were arguably to delay and defeat a recall attempt against a city councilman rather than merely obtaining the specific voting rights sought in the complaint.[196] The court held that such a political purpose would not be improper under the Rule.[197] "[T]he political inspiration for the federal lawsuit does not necessarily mean that the action is 'improper' within the meaning of Rule 11. Much of the redistricting litigation under the Equal Protection Clause has been inspired by those with a transparent political interest."[198]

193. For example, the House of Representatives recently enacted legislation designed to increase the imposition of Rule 11 sanctions. Marcia Coyle, *Congress Takes Up* Rule 11 *Sanctions*, NAT'L L.J., Sept. 20, 2004, at 1; Carl Hulse, *Bill to Require Sanctions on Lawyers Passes House*, N.Y. TIMES, Sept. 15, 2004, at A20.

194. Sussman v. Bank of Isr., 56 F.3d 450, 459 (2d Cir. 1995); Zaldivar v. City of Los Angeles, 780 F.2d 823, 834 (9th Cir. 1986).

195. *Sussman*, 56 F.3d at 459.

196. *Zaldivar*, 780 F.2d at 831.

197. *Id.*

198. *Id.*

Other courts, however, disagree with the holdings of the Second and Ninth Circuits. The Fifth Circuit has recently held that an attorney can be sanctioned because he had an improper purpose of embarrassing his adversary by obtaining adverse publicity.[199] That the attorney "orchestrated" a media event was strong evidence of his improper purpose that was sanctionable even if the action the attorney took was not frivolous. Some district courts have also concluded that plaintiffs seeking publicity by filing a reasonable complaint constitutes an improper purpose.[200] Moreover, the Fourth Circuit suggested in *Kunstler* that holding a press conference and seeking publicity was an improper purpose if that was the plaintiff's *central* or *primary* purpose in filing the complaint.[201]

These cases illustrate the confusion surrounding the definition of an improper purpose. Litigation that has the purpose of sparking public debate or promoting greater public awareness of an issue, or obtaining publicity to put pressure on a defendant, should not be viewed as improper. Nor can the filing of complaints or motions through press conferences be viewed as either in "poor taste" or evidence of improper purpose; public interest lawyers who file pro bono litigation frequently announce their suits in press conferences for the purpose of drawing broad public attention to their grievances.[202] This type of litigation falls within the core First Amendment protection articulated by the Court in *Button*, *Primus* and *BE&K*, and cannot be sanctioned simply because the petition is directed at the public and not only at the court.

2. Sanctioning Nonfrivolous Lawsuits That Have an Improper Purpose

The circuit courts are split on the issue of whether a finding of any improper motive alone is sufficient for the court to award sanctions. The text and history of Rule 11 suggest that any improper motive is sanctionable.[203] A

199. Whitehead v. Food Max of Miss., Inc., 332 F.3d 796, 802 (5th Cir. 2003) (en banc).

200. Bryant v. Brooklyn Barbeque Corp., 130 F.R.D. 665, 670 (W.D. Mo. 1990).

201. *In re* Kunstler, 914 F.2d 505, 520 (4th Cir. 1990) (emphasis added). *Kunstler* and some other cases suggesting that seeking publicity constitutes an improper purpose (but not the Fifth Circuit's decision in *Whitehead*) occurred in the context of cases the court also found to be frivolous. Therefore those cases are not necessarily inconsistent with the Second and Ninth Circuit's finding that seeking publicity or some other political goal does not constitute an improper purpose in the context of nonfrivolous litigation.

202. *See* Brief of Amici Curiae ACLU et al. at 6, Gentile v. State Bar of Nev., 501 U.S. 1030 (1991) (No. 89-1836); *see also supra* note 48.

203. The text of Rule 11 permits sanctioning a pleading filed for *any* improper purpose and the committee that drafted the 1983 version rejected an attempt to insert the word "primarily" into the Rule to qualify the improper purpose clause. *See supra* note 75.

number of circuits, however, have departed from the text of Rule 11(b)(1) and will not sanction a plaintiff for filing a nonfrivolous complaint, even if the plaintiff's purpose is improper.[204] The Seventh Circuit, on the other hand, has repeatedly ruled that sanctions are appropriate where a party has filed a nonfrivolous complaint for an improper purpose,[205] and the Fifth Circuit has recently followed that approach.[206] Other circuits, in dictum, have suggested that an improper purpose alone can support Rule 11 sanctions even where a complaint is nonfrivolous.[207] A number of district courts have sanctioned plaintiffs based solely on a finding of improper purpose independent of an analysis of whether the complaint was nonfrivolous.[208]

It seems inconsistent that the First Amendment right of access to Article III courts requires that the federal antitrust statute be read to allow regulation only of suits that are both objectively baseless and subjectively motivated by an unlawful purpose, yet Rule 11 can sanction lawsuits that are either objectively baseless *or* undertaken with an improper purpose. Justice O'Connor suggests that sanctions imposed on litigants by the courts themselves are different than sanctions created by federal law. However, it is unclear why the First Amendment should afford less protection against

204. *E.g.*, Sussman v. Bank of Isr., 56 F.3d 450, 458–59 (2d Cir. 1995); Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1362 (9th Cir. 1991) (en banc); Burkhart v. Kinsley Bank, 852 F.2d 512, 515 (10th Cir. 1988); Nat'l Ass'n of Gov't Employees, Inc. v. Nat'l Fed'n of Fed. Employees, 844 F.2d 216, 223–24 (5th Cir. 1988) (adopting Ninth Circuit rule distinguishing filing a complaint from filing subsequent papers in applying improper purpose clause of Rule 11); *see also* Barbara Comninos Kruzansky, Note, *Sanctions for Nonfrivolous Complaints?* Sussman v. Bank of Israel *and Implications for the Improper Purpose Prong of Rule 11*, 61 ALB. L. REV. 1359 (1998).

205. *E.g.*, Kapco Mfg. Co. v. C & O Enters., Inc., 886 F.2d 1485, 1491 (7th Cir. 1989); Mars Steel Corp. v. Cont'l Bank N.A., 880 F.2d 928 (7th Cir. 1989) (en banc); Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987).

206. Whitehead v. Food Max of Miss., Inc., 332 F.3d 796 (5th Cir. 2003) (en banc).

207. For example, when Justice Breyer sat on the First Circuit, he joined an opinion stating that Rule 11 has been read "to reach groundless but 'sincere' pleadings, as well as those which, while not devoid of all merit, were filed for some malign purpose." Lancellotti v. Fay, 909 F.2d 15, 18–19 (1st Cir. 1990). The Third and Eleventh Circuits have also suggested that sanctions are appropriate for a complaint filed with improper purpose alone. *See* CTC Imports & Exports v. Nigerian Petroleum Corp., 951 F.2d 573, 578 (3d Cir. 1991); *see also* Didie v. Howes, 988 F.2d 1097, 1104 (11th Cir. 1993) (Rule 11 requires sanctions for filing of a frivolous pleading or "a pleading in bad faith for an improper purpose"). *See generally* Andrews, *supra* note 19, at 30–31 nn.122–25.

208. In *Ballentine v. Taco Bell Corp.*, 135 F.R.D. 117, 122 (E.D.N.C. 1991), the district court imposed sanctions even though the plaintiff had made a reasonable inquiry and had a legitimate purpose of seeking relief, Rule 11 sanctions were warranted solely because his improper purpose of harassing defendant outweighed the proper one. In *Bryant v. Brooklyn Barbeque Corp.*, 130 F.R.D. 665, 670 (W.D. Mo. 1990), the court found that the plaintiff had not made a proper factual inquiry, but even had a reasonable basis existed for the filing of the complaint would still have imposed sanctions because the complaint was filed solely for publicity and harassment.

judicially imposed sanctions,[209] since both antitrust and Rule 11 sanctions may only be imposed by a court after it concludes that a lawsuit is "improper." Certainly the legislature's interest in preventing anticompetitive or antiunion lawsuits is as important, if not stronger, than the judiciary's interest in preventing frivolous or otherwise improper litigation.

3. Frivolous Claims

The Rule 11 requirement that a litigant certify that his or her claims are warranted by existing law, or by a nonfrivolous argument for the extension, modification or reversal of existing law, or the establishment of new law, is equally problematic. Ironically, the replacement of the old subjective, bad faith test with an objective reasonableness test has made the amended Rule 11 much more unpredictable.[210] Empirical research conducted by the Federal Judicial Center found that when judges were presented with a number of hypothetical cases, they most often divided almost equally as to whether a case was legally frivolous.[211] Experience in actual litigation is consistent with the Center's research. District court and appellate judges have been unable to agree on whether a case is frivolous. Circuit courts have held that claims that district court judges sanctioned as frivolous were not merely reasonable but winning,[212] and held that claims district courts judges upheld were legally frivolous.[213] Supreme Court Justices and circuit court panels have found a

209. *Cf.* Saltany v. Reagan, 886 F.2d 438, 440 (D.C. Cir. 1989) (per curiam) (imposing Rule 11 sanctions on plaintiff's counsel where case "was brought as a public statement of protest" with no chance of legal success).

210. *See* Byron C. Keeling, *Toward a Balanced Approach to "Frivolous" Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067, 1081 (1994); Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. REV. 1467, 1483–84 (1996).

211. SAUL M. KASSIN, FEDERAL JUDICIAL CENTER, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 17 (1985).

212. *E.g.*, Warren v. City of Carlsbad, 58 F.3d 439, 444 (9th Cir. 1995); Locomotor USA, Inc. v. Korus Co., No. 93-56032, 1995 U.S. App. LEXIS 401, at *23–*24 (9th Cir. Jan. 6, 1995); *In re* Edmonds, 924 F.2d 176, 181–82 (10th Cir. 1991); Cooper v. City of Greenwood, 904 F.2d 302 (5th Cir. 1990); Operating Eng'rs Pension Trust v. A-C Co., 859 F.2d 1336, 1343–44 (9th Cir. 1988); Trident Ctr. v. Conn. Gen. Life Ins. Co., 847 F.2d 564, 570 (9th Cir. 1988); Stevens v. Lawyers Mut. Liab. Ins. Co., 789 F.2d 1056, 1059 (4th Cir. 1986); Goldman v. Belden, 754 F.2d 1059, 1070–71 (2d Cir. 1985).

213. *E.g.*, Dilley v. United States, No. 93-4225, 1995 U.S. App. LEXIS 4480, at *5 (10th Cir. Mar. 6, 1995); Oil & Gas Futures, Inc. v. Andrus, 610 F.2d 287, 288 (5th Cir. 1980); *see also* Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?*, 24 OSGOODE HALL L.J. 353, 370–71 (1986) (commenting on the circuit court's opinion that the plaintiff's argument was "quite incredible," but that the district court had apparently accepted it and the circuit had to reverse him); Meyer, *supra* note 210, at 1484 & n.48 (the court agreed with sanctions argument, but found the controversy to be moot).

claim to be so frivolous that no reasonable litigant could believe it meritorious, even though strong opinions by their presumably reasonable brethren find that the litigant had stated a valid claim.[214]

Most commentators concur that despite Rule 11's attempt to create an "objective" standard of frivolous litigation, courts have been unable to develop a principled line for determining whether a complaint is so baseless as to be frivolous.[215] Indeed, some scholars have argued that the definition of frivolous is fundamentally indeterminate,[216] or as Professor Sanford Levinson has put it: "[i]t is, I suspect, no coincidence that writers on frivolousness have tended to adopt versions of Justice Stewart's famous (or is the correct word 'notorious'?) test of pornography, that is '[P]erhaps I could never succeed in intelligently [defining it] . . . [b]ut I know it when I see it.'"[217]

Indeterminate or vague legal standards chill speech, and that has been the effect on public interest lawyers asserting novel or cutting-edge claims. The vagueness or indeterminacy of the test for frivolousness is evident in cases where a court imposes sanctions upon a finding that "the case offered no hope whatsoever of success."[218] But the "no chance of success" standard

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214. For example, in *Hughes v. Rowe*, 449 U.S. 5 (1980), the Court reversed a dismissal of a prisoner's petition and the lower court's award of attorney's fees against the prisoner. Justice Rehnquist dissented, arguing that the prisoner's claim was totally meritless and therefore the "award of attorney's fees was entirely proper." *Id.* at 23 (Rehnquist, J., dissenting). As Mark Tushnet wrote, "[I]t seems that, in Justice Rehnquist's view, a claim can be 'meritless' even though six members of the Supreme Court found that it stated a claim on which relief could be granted." Letter from Mark Tushnet to Sanford Levinson (June 13, 1986), *quoted in* Levinson, *supra* note 213, at 377; *see also* Hyde v. Van Wormer, 474 U.S. 992, 993 (1985) (damages awarded for frivolous petition for certiorari where three Justices believed petition was not frivolous); Tatum v. Regents of Univ. of Neb.-Lincoln, 462 U.S. 1117 (1983) (same); Gullo v. McGill, 462 U.S. 1101 (1983) (three Justices would have awarded damages for frivolous appeal); cases cited in Meyer, *supra* note 210.

215. *See* Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 287–90 (1995); George Cochran, *Rule 11: The Road to Amendment*, 61 MISS. L.J. 5, 8–9 (1991); Keeling, *supra* note 210; Levinson, *supra* note 213, at 370; Meyer, *supra* note 210; Melissa L. Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383, 384 (1990); William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1016–17 (1988); Charles M. Shaffer, Jr., *Rule 11: Bright Light, Dim Future*, 7 REV. LITIG. 1, 11 (1987) ("No matter what words are used as the objective yardstick, the application of the Rule to different facts by different judges inevitably will yield inconsistent results.").

216. *See, e.g.*, Meyer, *supra* note 210.

217. Levinson, *supra* note 213, at 370; *see also* Robert Hermann, *Frivolous Criminal Appeals*, 47 N.Y.U. L. REV. 701, 705 (1972) ("Frivolousness, like madness and obscenity, is more readily recognized than cogently defined."); N.Y. State Bar Ass'n, *Report of the Special Committee to Consider Sanctions for Frivolous Litigation in New York State Courts*, 18 FORDHAM URB. L.J. 3, 12 (1990) ("The circularity of the [objective test's] definition, however, inevitably leads to and invites subjective decisionmaking.").

218. Saltany v. Reagan, 886 F.2d 438, 439 (D.C. Cir. 1989) (per curiam); *see also* BE&K Constr. Co. v. NLRB, 536 U.S. 516 (2002); Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60–61 (1993) (articulating that test). One commentator asserts that the

inherently mixes law and politics indeterminately, forcing attorneys to decide whether an argument is legally reasonable based on whether anybody believes, in the contemporary political environment, that any court would adopt it. This suggests that the frequent litigation brought by black litigants in the early 1900s attacking *Plessy v. Ferguson*[219] would have been sanctionable since surely any "reasonable" observer would agree that there was no chance of success whatsoever.

Northwestern Law School Professor Anthony D'Amato has argued that the Libyan plaintiffs in *Saltany* had a legitimate legal argument that the bombing of Libya by the United States and Great Britain constituted a war crime that should not be accorded immunity under the Nuremberg precedent established by the United States after World War II.[220] The reason that a reasonable observer could determine that the *Saltany* litigation was hopeless was not because of the unreasonableness or frivolousness of the plaintiffs' legal argument. Rather, it was the political and legal reality that U.S. courts have refused to apply the Nuremberg precedent, and more generally international law norms, against U.S. officials in U.S. courts. Similarly, Salmon Chase should not have been sanctioned for appealing the *Van Zandt* case to the Supreme Court, and the Women's Suffrage Movement should not have been sanctioned for continuing the Minor litigation in the Supreme Court, despite the certainty in both cases that they would lose.[221] Both cases presented arguable legal theories that resonated with a substantial sector of the American public, if not with the contemporary court to which they argued.

The 1993 Amendments to Rule 11 sought to blunt the criticism that the threat of sanctions had discouraged novel litigation.[222] The Advisory Committee on Civil Rules made clear the broad latitude to be given novel legal claims, stating that courts should consider whether the litigant "has support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys."[223] Similarly, some courts have discarded the approach that looks at the objective frivolousness of plaintiffs'

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test of "absolutely no chance of success" is the "prevailing approach" of many courts to frivolousness. Schwarzer, *supra* note 215, at 1015–16.

219. 163 U.S. 537 (1896); *see also* Gladys Tignor Peterson, *The Present Status of the Negro Separate School as Defined by Court Decisions*, 4 J. NEGRO EDUC. 351 (1935).

220. D'Amato, *supra* note 10.

221. *See supra* Part II.

222. The Advisory Committee found support for the criticism of the rule that "it occasionally has created problems for a party which seeks to assert novel legal contentions." Tobias, *supra* note 192, at 180 (citing Advisory Committee Report).

223. FED. R. CIV. P. 11 advisory committee notes, *reprinted in* 146 F.R.D. 583, 586–87 (1992).

claims in favor of an approach that analyzes whether the attorney's research and preparation of the litigation or motion was objectively reasonable.[224]

Read properly, the Rule immunizes litigators who bring reasonably researched and thought-out claims on issues of public importance. That is because a colorable argument can be constructed for virtually any proposition.[225] As one commentator has noted, "it is extremely difficult in practice, if not impossible in principle, to devise an 'extension, modification or reversal' exception that does not devour the 'unwarranted by existing law' rule."[226]

Remarkably, many court decisions have not even recognized the applicability of the First Amendment in the Rule 11 context. For example the court of appeals' decision in *Saltany* never mentioned the First Amendment when it held that sanctions were required because federal courts do not properly "serve as a forum for 'protests.'"[227]

The determination of whether a claim is objectively frivolous requires a recognition that the First Amendment protects lawyers who make losing arguments about real harms and important values in order to promote public dialogue. The First Amendment requires some protection or "breathing space" for frivolous lawsuits, particularly those that reflect the core First Amendment value of presenting important issues of public concern, just as the First Amendment precludes public officials from recovering damages for defamation unless they can prove actual malice.[228] For a court to sanction a legal argument as "objectively frivolous" is to determine that it is beyond the pale, beyond discussion in the courtroom.[229] But the law, like truth, is not static, and arguments that in one era have been deemed frivolous or unreasonable have been adopted as the law by later generations. The recognition of the ever-changing nature of the law requires that the remedy for a legal petition deemed "frivolous" is to respond to it, not sanction it.

As a New York Bar Association Committee eloquently stated:

> Access to the court system is a basic tenet of the American legal and historical tradition. A sanctions provision which exerts a chilling influence on creative counsel does violence to this tradition. The sanction of dismissal or the denial of relief by the court is a sufficient

224. *See* Meyer, *supra* note 210, at 1487–91; *see, e.g.*, Mars Steel Corp. v. Cont'l Bank N.A., 880 F.2d 928, 932–33 (7th Cir. 1989) (en banc); *see also* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 401–02 (1990) (suggesting that key inquiry is reasonableness of investigation).

225. *See* Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 22–23 (1984).

226. Atkinson, *supra* note 215, at 288.

227. Saltany v. Reagan, 886 F.2d 438, 440 (D.C. Cir. 1989) (per curiam).

228. BE&K Constr. Co. v. NLRB, 536 U.S. 516, 531 (2002).

229. Meyer, *supra* note 210, at 1492.

> safeguard. Indeed, in our common law tradition, it is bad public policy to provide judges with a tool that would permit them not only to dismiss an action, but also to sanction the losers when in their view the claims or theories were frivolous.[230]

B. The Appropriate Role of Lawyers in the Court of Public Opinion: Sanctions for Attorneys' Speech

A model that views litigation as a forum for educating the public also raises questions as to the appropriate role of lawyers as advocates outside the courtroom. "That a lawyer should not argue her case outside the courtroom" has long been articulated by some as a basic obligation of the legal profession.[231] That view ignores the long tradition in American law recounted above, of prominent lawyers arguing important law reform cases not merely in the courts of law, but in the court of public opinion.

The explosion in the media's attention to the law, particularly in such high-profile, high-publicity trials as the murder trial of Sam Sheppard in the 1960s and the O.J. Simpson trial in the 1990s, has sparked a vigorous debate over the circumstances in which a lawyer may engage in extrajudicial advocacy. Some courts, commentators and leaders of the Bar have urged that a lawyer's proper function is to "present his case in the courtroom, not . . . to build a favorable climate of public opinion," and would permit rules narrowly limiting the circumstances in which a lawyer may present his or her client's case to the public.[232] Other judges and commentators conclude that an attorney's advocacy for his client outside the courtroom is both legitimate and strongly protected by the First Amendment. They would strictly limit the restrictions the Bar and judiciary may place on such speech as those necessary

230. N.Y. State Bar Ass'n, *supra* note 217, at 8–9. The committee recommended a standard that would impose sanctions only for abusive conduct, not frivolous claims. *Id.* at 9. It defined abusive conduct as conduct "undertaken or omitted primarily to delay or prolong unreasonably the resolution of the litigation or to harass or maliciously injure another." *Id.* at 12. That recommendation has not been adopted by the New York courts.

231. Jonathan M. Moses, Note, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811 (1995); *see, e.g.*, CANONS OF PROF'L ETHICS Canon 20 (1908), *reprinted in* AM. BAR ASS'N, SELECTED STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION 237 (1990) ("Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned.").

232. AM. BAR ASS'N, *supra* note 65, at 92; *see also* Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169, 176 (4th Cir. 1994); State v. Van Duyne, 204 A.2d 841, 852 (N.J. 1964).

to protect against a clear and present danger to the administration of justice.[233]

Rule 3.6 of the ABA *Model Rules of Professional Conduct*, adopted in 1983 and amended in 1994, attempts to weave a compromise between the competing views, yet is significantly more protective of lawyers' speech than the rules contained in the older *Model Code of Professional Responsibility*.[234] While the *Model Code* sees little public value in attorneys' extrajudicial speech, the commentary to the *Model Rules* recognizes that "there are vital social interests served by the free dissemination of information about events having legal consequences and about the legal proceedings themselves."[235]

Both lawyers' use of the media and restrictions on lawyers' speech have become increasingly common in the last few decades.[236] The battle has become particularly intense over restrictions on criminal defense attorneys' speech in the context of an ongoing or pending criminal trial. In *Gentile v. State Bar*,[237] the Supreme Court narrowly divided 5–4 on the First Amendment standard to be applied to attorney speech. The majority upheld a Nevada Supreme Court Rule that was based on Model Rule 3.6, which prohibited a lawyer from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding."[238] The Court held that the First Amendment did not require the state to meet a "clear and present danger" standard before disciplining an attorney for public pronouncements about a pending criminal trial, but permitted such discipline upon a lesser showing of "substantial likelihood of material prejudice."[239]

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233. *See* AM. BAR ASS'N, *supra* note 65; Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 249 (7th Cir. 1975); *see also* Gentile v. State Bar, 501 U.S. 1030, 1035 (1991) (Kennedy, J.); Chemerinsky, *supra* note 59, at 881–84 (arguing that current rules and gag orders limiting attorneys' speech fail strict scrutiny); Joel H. Swift, *Model Rule 3.6: An Unconstitutional Regulation of Defense Attorney Trial Publicity*, 64 B.U. L. REV. 1003 (1984).

234. For example, the *Model Code of Professional Responsibility* stated that it is the duty of a lawyer not to release information or opinion "if there is a *reasonable likelihood* that such dissemination would interfere with a fair trial," MODEL CODE OF PROF'L RESPONSIBILITY DR 7-107 (1988), while the newer *Model Rules of Professional Conduct* provide that the lawyer shall not make an extrajudicial statement if it "will have a substantial likelihood of materially prejudicing an adjudicative proceeding," MODEL RULES OF PROF'L CONDUCT R. 3.6 (2004).

235. *Compare* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-33 (1988), *with* MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. 1 (1994).

236. *See* Chemerinsky, *supra* note 59, at 859–60; Moses, *supra* note 231.

237. 501 U.S. 1030.

238. *Id.* at 1060 (quoting NEV. SUP. CT. R. 177(1) (1999)).

239. *Id.* at 1070–76.

The Court balanced the general First Amendment interests in information about criminal trials against "the basic premise of our legal system . . . that lawsuits should be tried in court, not in the media."[240] Writing for four Justices, Justice Kennedy would have applied the First Amendment "clear and present danger" test to state prohibitions on attorney speech, and not the more deferential balancing test of the majority. Justice Kennedy rejected the state's argument that attorney contact with the press during the pendency of a trial somehow "is inimical to the attorney's proper role," and pointed out that the State's disciplinary rules did not posit any inconsistency between an attorney's role and discussions with the press.[241] Moreover, Justice Kennedy recognized the legitimacy, value, and even necessity in some circumstances of attorneys' commentary to the press because attorneys hold "unique qualifications as a source of information about pending cases," and in some circumstances, an attorney's "press comment is necessary to protect the rights of the client and prevent abuse of the courts."[242]

Despite the majority's view that a lawyer's speech about pending cases can be regulated under a less demanding First Amendment standard, the Court nonetheless reversed the state's discipline of the lawyer for his comments to the press. A majority of the Court, including Justice O'Connor, who had joined Chief Justice Rehnquist's opinion on the First Amendment standard to be used, found the safe harbor provision of the Disciplinary Rule, as interpreted by the Nevada Supreme Court, void for vagueness. Attorney Gentile had carefully researched the rule and had attempted to comply with its safe harbor immunity for a lawyer to "state without elaboration the general nature of the . . . defense."[243] In its vagueness determination, the Court held that the First Amendment required the state to regulate lawyers' speech clearly enough to avoid the suppression of speech critical of those who enforce the law, a requirement particularly relevant to the regulation of "the criminal defense bar, which has the professional mission to challenge actions of the state." In a sense, the Court's vagueness holding in *Gentile* is similar to court opinions in the Rule 11 arena that would not sanction well researched complaints because they meet the standard of objective reasonableness, even if a court might find that the claims they presented had no chance of success.[244]

240. *Id.* at 1080 n.6 (Rehnquist, C.J., dissenting).
241. *Id.* at 1056 (Kennedy, J.).
242. *Id.* at 1056, 1058.
243. *Id.* at 1061 (quoting NEV. SUP. CT. R. 177(3)(a) (1991)).
244. *Id.* at 1051; *cf.* Mars Steel Corp. v. Cont'l Bank N.A., 880 F.2d 928, 932–33 (7th Cir. 1989).

The Supreme Court's *Gentile* decision thus reflects the deep division within the Bar about the legitimacy of, and protection to be afforded, attorney speech. While *Gentile* and most other attorney speech cases occur in the context of a criminal case, Model Rule 3.6 at issue in *Gentile* is also applicable to civil cases,[245] and there have been attempts to sanction or gag attorneys or litigants in conjunction with public interest civil litigation such as environmental litigation.[246]

Sanctions have generally been rejected in the civil litigation context. Attorneys who bring and speak publicly about civil litigation with the purpose of furthering public education and public debate are protected by the First Amendment and not subject to sanction under the Rules of Professional Conduct. The civil litigation problem presents an analytically different balancing than the tension described by the *Model Rules* and cases such as *Gentile*. The *Model Rules* and other state rules are premised on a balance of the Sixth Amendment interests in the fair administration of justice versus the First Amendment interests of the lawyers and public in speech directed at, or likely to influence, juries. But frequently, particularly in the litigation model described in this Article, attorney publicity is not directed at the court at all. Rather, it is aimed at influencing nonjudicial actors, general public opinion, executive officials, defendants, or industry officials.[247] This type of speech simply does not raise the same type of concerns that speech by lawyers aimed at helping their clients win a jury verdict does.

More fundamentally, the increasing recognition of the role of litigation in furthering public debate and shaping public opinion requires that lawyers be accorded the strongest First Amendment protection in commenting on

245. Rule 3.6 speaks of prejudice to any adjudicative proceeding, including civil trials. However, the commentary makes clear that the nature of the proceeding is relevant to a determination of prejudice, with a prejudicial effect of a statement much less likely in civil and non-jury trials. The older *Model Code* specifically precluded a lawyer from making an extrajudicial statement that would be disseminated relating "to [h]is opinion as to the merits of the claims or defenses of a party, [or a]ny other matter reasonably likely to interfere with a fair trial . . . ." MODEL CODE OF PROF'L RESPONSIBILITY DR 7-107(G) (1988).

246. *See* Colo. Sup. Ct. Grievance Comm. v. Dist. Ct., 850 P.2d 150 (Colo. 1993) (attorney for an environmental group was investigated by the Colorado Office of Disciplinary Counsel in connection with the attorney's speaking at a press conference about a lawsuit the group had filed and his giving interviews to the press); Jennifer L. Johnson, *Empowerment Lawyering: The Role of Trial Publicity in Environmental Justice*, 23 B.C. ENVTL. AFF. L. REV. 567, 590–93 (1996) (describing the Colorado case: the attorney was not sanctioned and the Colorado rule was changed to make it more difficult to sanction attorneys); *see also* Bailey v. Sys. Innovation, Inc., 852 F.2d 93 (3d Cir. 1988); Ruggieri v. Johns-Manville Prods. Corp., 503 F. Supp. 1036 (D.R.I. 1980) (sanctions sought for attorneys' extrajudicial comments concerning asbestos litigation); Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Visser, 629 N.W.2d 376 (Iowa 2001).

247. *See* Moses, *supra* note 231, at 1834–41.

civil litigation. In the 1975 case of *Chicago Council of Lawyers v. Bauer*,[248] the Seventh Circuit held the *Model Code*'s Disciplinary Rule governing lawyers' extrajudicial statements in civil trials unconstitutional. The court noted numerous differences between civil and criminal cases with respect to the likelihood of lawyers' extrajudicial speech prejudicing the trial. The court also found the "nature of certain civil litigation" important:

> As plaintiffs indicate, in our present society many important social issues became entangled to some degree in civil litigation. *Indeed, certain civil suits may be instigated for the very purpose of gaining information for the public.* Often actions are brought on behalf of the public interest on a private attorney general theory. Civil litigation in general often exposes the need for governmental action or correction. Such revelations should not be kept from the public. Yet it is normally only the attorney who will have this knowledge or realize its significance . . . . Therefore, we should be extremely skeptical about any rule that silences that voice.[249]

The Fourth Circuit and other courts have been unanimous in reaching the same conclusion.[250]

Advocacy in the court of public opinion has become a norm of the legal profession.[251] Many high-powered criminal defense and civil litigators engage in what one attorney calls "political litigation," in which they rely on a public relations strategy to protect their clients' interests.[252] As one commentator notes, "for a public figure, the real concern from the legal action may not be the legal result but the press coverage."[253] The Bar's reaction to *Gentile* was to further amend the professional rules to ensure that lawyers' speech would not be chilled.[254] Chief Justice Rehnquist's opinion discounting the need for

248. 522 F.2d 242 (7th Cir. 1975).

249. *Id.* at 258 (emphasis added).

250. *See, e.g.*, Hirschkop v. Snead, 594 F.2d 356, 373 (4th Cir. 1979). The court stated:

> Civil actions may also involve questions of public concern such as the safety of a particular stretch of highway, the need of the government to exercise its power of eminent domain, or the means of racially integrating schools and colleges. The lawyers involved in such cases can often enlighten public debate.

Id.; *see* Wachsman v. Disciplinary Counsel, No. C-2-90-335, 1991 U.S. Dist. LEXIS 20899, at *29 (S.D. Ohio Sept. 30, 1991); *Ruggieri*, 503 F. Supp. at 1038–39; *see also Bailey*, 852 F.2d 93 (vacating order that applied local rule restricting defendants in a civil case from commenting).

251. *See* Moses, *supra* note 231, at 1830.

252. This comment was made by Leonard Garment, a high-powered Washington lawyer. *Id.* at 1838 n.148 (quoting Susanne A. Roschwalb & Richard A. Stack, *Litigation Public Relations*, COMM. & L., Dec. 1992, at 3, 12).

253. *Id.* at 1833.

254. For example, in 1994, the *Model Rules* were significantly amended to permit more attorney speech. *See* Catherine Cupp Thiesen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 838–39 (1996) (asserting the new Rule to be an improvement);

extrajudicial advocacy has been strongly criticized by commentators for failing to recognize the realities of modern practice.[255]

These developments suggest that a model that views as an important function of litigation the education of the public on matters of important social concern has gained legitimacy in recent decades. Judicial acceptance of this function should lead to a recognition that lawyers' extrajudicial speech in both civil and criminal matters is legitimate and must be governed by the strict First Amendment "clear and present danger" test and not by some lesser standard. A lawyer's speech on pending litigation performs an important social and political function protected by the First Amendment, and only when it can be demonstrated that there is some serious and imminent threat to the fair administration of justice should that speech be constrained.

IV. THE COURTS AS FORUMS FOR PROTEST AND THE TENSION BETWEEN THE ARTICULATION OF NORMS AND THEIR ENFORCEMENT

One important difference between the courts as forums for protest model and the public law litigation model set forth by Abrams Chayes is the diminished role that judicial relief plays in the former. The judicial role required by the courts under the forums for protest model is often significantly less intrusive than that presented by the institutional or structural law reform model. While the centerpiece of the institutional law reform model

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Comm. on Prof'l Responsibility, Ass'n of the Bar of the City of N.Y., *The Need for Fair Trials Does Not Justify a Disciplinary Rule That Broadly Restricts an Attorney's Speech*, 20 FORDHAM URB. L.J. 881 (1993) (calling for a rule that applies only a short time before trial). A number of states tried to protect the ability of lawyers to speak to the press without fear of discipline. *See* Esther Berkowitz-Caballero, Note, *In the Aftermath of* Gentile: *Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. REV. 494, 501 (1993). Colorado changed its rule from "substantially likely" to "likely to create a grave danger of imminent and substantial harm." *See* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, TRIAL PUBLICITY 181 (1994) [hereinafter ABA/BNA LAWYERS' MANUAL]. Illinois, North Dakota and Oregon also adopted language requiring imminent harm. *See id.*; *see also* Alberto Bernabe-Riefkohl, *Silence is Golden: The New Illinois Rules on Attorney Extrajudicial Speech*, 33 LOY. U. CHI. L.J. 323, 347–48 (2002). California, in adopting its first trial publicity rule, set a "clear and present danger" test. *Id.* at 325 n.11, 326, 348.

255. *See, e.g.*, Chemerinsky, *supra* note 59, at 872; Berkowitz-Caballero, *supra* note 254, at 499; L. Cooper Campbell, Note, Gentile v. State Bar *and* Model Rule 3.6: *Overly Broad Restrictions on Attorney Speech and Pretrial Publicity*, 6 GEO. J. LEGAL ETHICS 583, 588 (1993); Lynn S. Fulstone, Casenote, Gentile v. State Bar of Nevada: *Trial in the "Court of Public Opinion" and Coping With* Model Rule 3.6—*Where Do We Go From Here?*, 37 VILL. L. REV. 619, 621–22 (1992); Michael W. McTigue, Jr., Case Comment, *Court Got Your Tongue? Limitations on Attorney Speech in the Name of Federalism:* Gentile v. State Bar, 72 B.U. L. REV. 657, 668–71 (1992); Lester Porter, Jr., Note, *Leaving Your Free Speech Rights at the Bar*—Gentile v. State Bar, 111 S. Ct. 2720 (1991), 67 WASH. L. REV. 733, 744–46 (1992); Andrew Blum, *Left Speechless*, NAT'L L.J., Jan. 18, 1993, at 1; Monroe Freedman, *Silencing Defense Lawyers*, LEGAL TIMES, May 6, 1991, at 22.

was the decree that attempts to restructure or change institutions, judges can and do utilize a variety of much less assertive mechanisms to aid litigants who seek to utilize courts as forums for protest.

The judiciary's intervention in restructuring or supervising institutions such as schools, prisons, or mental hospitals has been one focus of the scholarly and legislative criticism regarding or surrounding law reform litigation. Indeed, Professor Fiss claimed that the core dilemma of structural reform litigation was the tension between the "declaration" of a norm and its "actualization" in a decree.[256] Plaintiffs' use of courts as forums to further public debate and dialogue presents relatively unexplored and underutilized alternatives for judges grappling with that dilemma.

There is an inherent dialectic tension between the court's roles of creating legal meaning and exercising its power.[257] I define the creation of legal meaning to be the court's articulation of norms, within the context of particular narratives or stories that give those norms context and texture. Conversely, the court exercises its power by ordering or failing to order those brought before it to do something.

These dual functions of the judiciary are both distinct yet inextricably connected. Normally the court creates constitutional meaning and articulates constitutional principle in the context of exercising its power to either grant or deny relief, whether it be in the form of an equitable decree or an award of damages. There are, however, judicial decisions where the connection between the court's dual functions are radically separated: A court may issue an order with no rationales articulating its reasoning, or a court may abstractly articulate norms with no interest in ever enforcing them. Between these two poles lies a multitude of gradations.

Plaintiffs who use courts to further a public dialogue or political movement draw the legal system directly into the political arena, and by doing so strain the connection between the articulation of meaning and the exercise of power. These cases lend themselves to the possibility of a court articulating a constitutional principle, but refusing to act on that principle in the particular case before it. The court would do so to further the plaintiffs' goal of increasing the public's understanding of the constitutional principles involved, to lend its weight and prestige to the public dialogue on the

256. Fiss, *supra* note 3, at 53; *see also* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1053–56 (2004) (describing tension between rights and remedies in public law litigation).

257. Constitutional theorists have often described the tension to which I refer between meaning and power as one between rights and remedies. *See, e.g.*, Fiss, *supra* note 3, at 52–53; Daryl L.J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 861–74 (1999).

constitutional values at issue, and to put pressure on executive officials or other defendants to comply with its constitutional vision. Yet, at the same time the court would yield to a complex assortment of political, social, ethical, practical and legal conditions and refuse to order the defendant to comply with the constitutional principle the court invokes.

I admit that articulating and exploring this potential schizophrenic or dialectical judicial role in cases wherein the court's jurisdiction has been invoked at least in part as a forum for protest leaves me deeply troubled and conflicted. It raises a host of practical and theoretical questions that go to the heart of our most basic constitutional doctrines about the role and function of Article III courts and the role of judges more generally. Does this judicial mechanism allow judges to avoid their own struggle between the myriad of social, psychological, ideological and jurisprudential factors that are involved in making difficult decisions such as whether to allow the government to execute a prisoner, initiate a war, or prohibit gay marriage? If used more often, will it provide judges with a justification to avoid confronting the government's unconstitutional actions? Does it constitute an advisory opinion, something forbidden by two centuries of judicial "case or controversy" doctrine? Will it lead to judicial denunciation of government action in principle while permitting such action in practice, which as Professor Laurence Tribe has noted is inconsistent with "an Anglo-American legal system that has long insisted that law be composed of *enforceable* norms" and "seems to teach mostly hypocrisy."[258]

Illustrative of the conflict I feel in proposing this judicial role as a "teacher to the citizenry," is that one of its most articulate and eloquent expositions came from Alexander Bickel, who argued that the Court must recognize the "passive virtues" of refusing to decide certain cases. For Bickel,

> Even when it is ultimately constrained to yield to necessity, however—to yield, this is to say, to the judgment of the political institutions—the Court can exert immense influence. It may be unable to wield its ultimate power as an organ of government charged with translating principle into positive law; but it need not abandon its concomitant role of "teacher to the citizenry." The power to which Marshall successfully laid claim is not the full measure of the Court's authority in our day. And the Court's arguments need not be compulsory in order to be compelling. Many of the devices of not doing engage the Court, as I have shown, in colloquies with the political institutions . . . .

258. LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 73–74 (1992).

> But the Court . . . can see to it that the political judgment of necessity is undertaken with awareness of the principle on which it impinges.[259]

A court's use of the political question doctrine and similar prudential and jurisdictional devices to avoid reaching difficult constitutional questions is a device that should be minimized, and not affirmed. Cases presenting deeply felt protests against important government or corporate policies often present courts with difficult dilemmas and choices between the demands for justice and the judges' perceived limitations on their role, function or ability to confront that injustice. These cases require a court to carefully negotiate the ever-changing fault line between what the law is and ought to be, and not retreat behind formalistic or other jurisprudential rationales to avoid seriously grappling with the moral and legal issues the cases present.

Yet often the cultural, legal, and political milieu of a judge makes such an approach difficult, if not impossible, for a judge freighted with the baggage of his or her era. As Robert Cover discussed in his book *Justice Accused*, prominent antislavery judges felt constrained by their era's jurisprudential tools, or what he termed their "juristic competence," which severely limited their range of responses to the moral dilemmas presented by slavery.[260] Judges, such as John McLean, when confronted by ideological advocates like Salmon Chase, who challenged the dissonance between their antislavery ideology and their judicial support for a system that returned runaway slaves to their owners, sought refuge in a set of mainly formalistic rationales.

While Cover's study is a careful analysis of the specific historical, cultural, and legal environment facing these judges, it obviously has broader implications. Cover's study itself stemmed from an analogy he had made between judicial complicity in slavery and judicial acquiescence in the crimes of the Vietnam War.

The twentieth century witnessed many similar judicial articulations of powerlessness when confronted by claims of injustice: the Supreme Court's affirmance of the internment of Japanese Americans during World War II,[261] the Court's refusal to decide the legality of sending American soldiers to kill and be killed in Vietnam,[262] and the Court's formalistic disposition of

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259. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 187–88 (1962) (citation omitted).

260. COVER, *supra* note 82, at 258–59.

261. Korematsu v. United States, 323 U.S. 214 (1944).

262. *See, e.g.*, Mitchell v. United States, 386 U.S. 972 (1967) (Douglas, J., dissenting from denial of certiorari to 369 F.2d 323 (2d Cir. 1966)); Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd sub nom. without opinion*, Atlee v. Richardson, 411 U.S. 911 (1973); Rodric B. Schoen, *A Strange Silence: Vietnam and the Supreme Court*, 33 WASHBURN L.J. 275 (1994); Warren F. Schwartz

challenges to injustice in such cases as *DeShaney v. Winnebago County*,[263] *McClesky v. Kemp*,[264] *San Antonio Independent School District v. Rodriguez*,[265] or *Harris v. McRae*.[266] Nor has judicial deference to, and acquiescence in, the unjust assertion of power by the political branches been confined to judges who articulate positivist, formalist jurisprudence; judicial deference has also plagued judges steeped in legal realism, such as Justice Felix Frankfurter. The perceived need to defer to power overwhelmed even those Supreme Court Justices, such as Justice Brennan and Justice Marshall, who normally fought against narrow, mechanistic legal perspectives, when they were confronted with a great intractable national issue such as Vietnam.

In *Justice Accused* and other works, Cover suggested some approaches that judges could apply to the dilemmas faced by the antislavery judges.[267] Similarly, Professor Richard Abel's study of South African judges' responses to litigation challenging aspects of the South African apartheid system illustrates that even in time of great repression, in which a nation's legal structure supported an unjust social structure, judges do have choices and can creatively and flexibly work within the fissures and contradictions of the legal system to undermine, and not prop up, the unjust regime.[268] Might one such creative and flexible solution to the dilemmas judges face lie in a court's use of whatever fissure exists between its power to order compliance with rules, and its authority to set forth the principles upon which the government and private organizations ought to act? When is it appropriate for a court to speak truth to power, yet not directly confront power with its own power? Can a court sidestep a direct confrontation with authority, but nonetheless broadcast its message to the public and the government?

A case that illustrates the potential usefulness and pitfalls of this approach is *Dellums v. Bush*.[269] That case involved a challenge by fifty-four

& Wayne McCormack, *The Justiciability of Legal Objections to the American Military Effort in Vietnam*, 46 TEX. L. REV. 1033, 1036–37 (1968).

263. 489 U.S. 189 (1989).

264. 481 U.S. 279 (1987).

265. 411 U.S. 1 (1973).

266. 448 U.S. 297 (1980).

267. For example, in *Justice Accused*, Cover argued:

> [I]n a dynamic model, law is always becoming. And the judge has a legitimate role in determining what it is that the law will become. The flux in law means also that the law's content is frequently unclear. [T]his frequent lack of clarity makes possible "ameriolist" solutions. The judge may introduce his own sense of what "ought to be" interstically, where no "hard" law yet exists. And, he may do so without committing the law to broad doctrinal advances . . . .

COVER, *supra* note 82, at 6.

268. RICHARD ABEL, POLITICS BY OTHER MEANS (1995).

269. 752 F. Supp. 1141 (D.D.C. 1990).

Democratic members of Congress to enjoin President George H.W. Bush from waging war against Iraq in order to expel Iraq from Kuwait without the congressional authorization required by Article I, Section 8, Clause 11 of the Constitution.[270] The lawsuit was filed by Congressman Ron Dellums and the other Congressional Representatives because they believed such a war would violate the Constitution, and thought that a court might agree. But win or lose, they were sure the lawsuit would shake people up and provide an opportunity to educate the public. Congressman Dellums later recounted his conversations with members of Congress who were unsure whether they wished to join the lawsuit as plaintiffs: "I told them even if we don't win in court, maybe we'll win in the courtrooms and living rooms of America, where this case will eventually be tried."[271]

The case was assigned to Judge Harold Greene of the District Court of the District of Columbia. The son of a German-Jewish jeweler, Greene escaped from the Nazis with his family in 1939 and came to the United States. After the war and his service in Army Intelligence, Greene attended law school and joined the Justice Department. A strong advocate of civil rights, his most lasting contribution at the Justice Department was his role in drafting the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Appointed to the federal bench in 1978 by President Carter, Greene was considered an excellent judge—smart, fair and in control of the courtroom.

A month after his appointment to the federal bench, Greene was assigned his first, and probably most important case, *United States v. AT&T*.[272] For the next six years, Greene presided over litigation that led in the end to the breakup of the AT&T monopoly over the telephone industry. He masterfully handled the complex case, which some antitrust experts thought was too difficult for any single court, rising to the challenge and dominating the courtroom. Greene was undaunted by a big political case and unlikely to slavishly defer to the government.

The pressures and tensions Judge Greene faced in the *Dellums* case were enormous. At oral argument, Judge Greene was clearly troubled by his inclination that the formal law—the Constitution's text and the framers' intent—strongly supported the plaintiffs' position that the Executive did not have the unilateral power to initiate a major armed conflict, which under any plausible definition was a war. As a judge and strong advocate of fidelity to the Constitution, Judge Greene clearly did not want to evade his obligations

270. The author was the lead counsel for plaintiffs in *Dellums*.
271. Interview with Congressman Ronald V. Dellums, in Washington, D.C. (Oct. 1996).
272. 461 F. Supp. 1314 (D.D.C. 1978).

to enforce what he viewed as a clear constitutional provision. "What I am interested in finding out," Judge Greene calmly asked the Justice Department attorney arguing the case, "is whether a clause in the Constitution, not some blank space in the Constitution or some interpretation but an actual clause in the Constitution, can be enforced, or is it simply up to the President either to ignore it or abide by it?"[273]

Despite Judge Greene's apparent view that the Executive's position was inconsistent with the Constitution's command, the practical, political and constitutional realities must have pressed on him. The case was argued against a backdrop of a deeply divided Congress, and nation where neither the congressional Democratic leadership nor the President was willing to call a special session to vote on authorization for war. The U.N. Security Council had voted 12-2, with China abstaining, to authorize the United States and its allies to use "all necessary means," a euphemism for force, to expel Iraq from Kuwait.[274] Less than a week before the argument, President Bush dropped a diplomatic bombshell. At a news conference, the President announced that he had invited Iraq's foreign minister to Washington, and offered to send Secretary of State Baker to Baghdad "to reach a peaceful solution" to the Persian Gulf crisis.[275] While Congressman Dellums and other observers saw the diplomatic maneuverings as mostly show, a judge would be reluctant to issue an injunction while diplomatic efforts were under way. A judge would have to consider whether the issuance of an injunction would stiffen the resolve of Iraq's Saddam Hussein and lead to the breakdown of negotiations. Any judge deciding the case would shoulder a heavy burden.

Moreover, Judge Greene must have felt some conflict as to the underlying substantive policy to be followed toward Iraq. Judge Greene, while liberal in domestic affairs, was, according to a former law clerk who knew him well, an admirer of former Senator Henry "Scoop" Jackson's hawkish views on foreign policy.

Most important was the reality that judges have been virtually unanimous in refusing to interfere with U.S. military operations. At oral argument, Judge Greene demonstrated an awareness of that reality when he asked whether any court at any point in American history had ever enjoined

273. Hearing Transcript at 14 (Dec. 4, 1990), *Dellums* (No. 90-2866 (HHG)). Portions of the Transcript are reprinted in THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 667–73 (2d ed. 1993).

274. U.N.S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg. at 1–2, 27–28, U.N. Doc. S/RES/678 (1990).

275. *The MacNeil/Lehrer News Hour* (PBS Television Broadcast, Nov. 30, 1990).

United States military action.[276] The answer is no, with one exception; that of Judge Orrin G. Judd who enjoined the U.S. bombing of Cambodia in 1973.[277] That injunction was stayed within hours by the Second Circuit Court of Appeals, which eventually reversed Judd's decision a few months later.[278]

A similar decision by Judge Greene in the *Dellums* case would certainly have suffered the same fate. Moreover, he no doubt worried about its effect on the ongoing drama then unfolding in the Middle East.

Judge Greene came up with a creative solution. His decision, announced a month before the deadline set by the U.N. for Iraq to withdraw from Kuwait, rejected the government's constitutional arguments and most of its jurisdictional and prudential arguments.

Judge Greene decisively rejected the Justice Department's political question defense, stating:

> If the Executive had the sole power to determine that any particular offensive military operation, no matter how vast, does not constitute war-making but only an offensive military attack, the congressional power to declare war will be at the mercy of a semantic decision by the Executive. Such an "interpretation" would evade the plain language of the Constitution, and it cannot stand.[279]

Judge Greene held that a U.S. assault on Iraq would be war, within the meaning of Article I, Section 8, Clause 11, and announced that "the Court is not prepared to read out of the Constitution the clause granting to the Congress, and to it alone, the authority to 'declare war.'"[280] He went on to hold that the plaintiffs had standing, that the court had the equitable power to grant relief, and concluded that a court could, in principle, issue an injunction at the request of members of Congress to prevent the conduct of a war that was about to be launched without congressional authorization.

Nonetheless, Judge Greene held that the plaintiffs were not entitled to injunctive relief because the controversy was not ripe. He found that the President was not so clearly committed to military action against Iraq to make the case ripe for injunctive relief. More importantly, Judge Greene said that the judicial branch should not decide issues affecting the allocation of power between the president and Congress if only a minority of Congress seeks relief. Only where a majority of Congress has disapproved a president's

276. Hearing Transcript at 5 (Dec. 4, 1990), *Dellums* (No. 90-2866 (HGG)).
277. Holtzman v. Schlesinger, 361 F. Supp. 553 (E.D.N.Y. 1973), *rev'd*, 484 F.2d 1307 (2d Cir. 1973).
278. 484 F.2d 1307.
279. *Dellums*, 752 F. Supp. at 1145.
280. *Id.* at 1146.

claim to use force does a ripe controversy exist, for only then are the president and Congress in such deadlocked conflict that a court should intervene.

Judge Greene did not dismiss the case; he only denied plaintiffs' motion for a preliminary injunction. He seemed to invite congressional action disapproving President Bush's move to war and stated that, should Congress take such action, the plaintiffs could come back to court.

Both sides claimed victory. On *Nightline*, Dellums praised Judge Greene's rejection of the Justice Department's sweeping war powers claims.[281] Yet, the government correctly pointed out that technically Judge Greene's decision imposed no limit on the President's prerogatives. "The bottom line," said the Justice Department attorney Stuart Gerson, "is we won."[282]

The academic community reacted positively to Judge Greene's decision. Harold Koh, the author of a brief filed on behalf of the plaintiffs by a group of prominent law professors, termed the decision an "unappealable declaratory judgment *against* the government."[283] John Hart Ely, a signer of that brief, wrote an essay entitled "Two Cheers For Judge Greene."[284]

The media could not declare a clear winner in the *Dellums* case, juxtaposing headlines like "Judge Finds Bush Can't Go to War Alone" with subtitles, in smaller type, reading "But Says It's Premature to Order President to Get Congressional OK."[285] The *Los Angeles Times* reversed the captions, starting with "U.S. Judge Refuses to Block Bush From Starting a War" and then adding "But He Also Says Only Congress Can Authorize an Attack on Iraq."[286] The *New York Times* noted that while Judge Greene had rejected the legislators' request for an injunction, "his ruling was also a significant rejection of the Bush Administration's position that it need do nothing more than consult with Congress before going to war."[287]

For Ron Dellums, however, the lawsuit was a clear success. He focused on the political climate the case helped to create. Dellums was "convinced

281. *Nightline: Persian Gulf Peace/War See-Saw* (ABC Television broadcast, Dec. 14, 1990). For other news commentary on Greene's rejection of the Justice Department's war powers claims, see Ethan Bronner, *Judge Turns Back Bid to Force Bush to Consult Congress Before Attack*, BOSTON GLOBE, Dec. 14, 1990, at 17; and David G. Savage & Michael Ross, *U.S. Judge Refuses to Block Bush From Starting a War*, L.A. TIMES, Dec. 14, 1990, at A22.

282. Harry Stoffer, *Judge Finds Bush Can't Go to War Alone*, PITT. POST-GAZETTE, Dec. 14, 1990, at 3.

283. Harold Hongju Koh, *The Coase Theorem and the War Power: A Response*, 1991 DUKE L.J. 122, 123.

284. John Hart Ely, *Kuwait, The Constitution, and the Courts: Two Cheers for Judge Greene*, 8 CONST. COMMENT. 1 (1991).

285. Stoffer, *supra* note 282.

286. Savage & Ross, *supra* note 281.

287. Neil A. Lewis, *Lawmakers Lose a Suit on War Powers*, N.Y. TIMES, Dec. 14, 1990, at A15.

that the main reason Bush eventually came to Congress was because of our lawsuit. The lawsuit brought our struggle front and center, brought the Constitution front and center, and brought the Persian Gulf buildup front and center." Judge Greene's holding that "the Court is not prepared to read Congress' war powers out of the Constitution" gave us momentum to force Bush to come to Congress. "Everyone felt buoyed by the decision." The congressman's aide, Lee Halterman, felt that a "sea change" took place in Congress after Judge Greene's opinion was announced. While Dellums had not stopped the war, Bush was forced to come to Congress, and Congress, as required by the Constitution, debated and voted on whether to go to war. And for Dellums, "[t]hat was a victory."[288] The main purpose in bringing the lawsuit had been to spur political action. Thus, from that perspective, Judge Greene had written a masterful decision, probably the best he could have rendered.

Judge Greene had told the president that he couldn't go to war alone. But his decision also took Congress to task for avoiding its responsibility and for contributing to the constitutional crisis through its refusal to vote on President Bush's war. In effect, Judge Greene was telling Congress to show some backbone of its own if it wanted him to enjoin the president. The whole decision put political and legal heat on both Congress and the president to act, and the fact that Judge Greene had not dismissed the case meant that if Congress did show some courage and voted to stop President Bush, the plaintiffs could be back in court. Dellums decided not to appeal the district court decision.

I remain troubled and conflicted by Judge Greene's approach. Certainly his approach was preferable to that of District Court Judge Royce Lamberth, who heard a soldier's objection to the pending Persian Gulf War at the same time and who broadly dismissed his claim as presenting a nonjusticiable political question.[289] Moreover, had Judge Greene enjoined the president from going to war without congressional authorization, his decision would have certainly been appealed and undoubtedly reversed. But that might have been preferable. Such an injunction certainly would have raised the constitutional issue to the foreground of the public debate, and in a manner where the meaning of the Executive's constitutional violation was clearer. It would have placed the court's money where its mouth was, and the court's commitment to its constitutional ruling would have been apparent. Perhaps the best answer is that the acceptability of Judge Greene's approach is dependent

288. All the foregoing quotes are from Interview with Ronald V. Dellums, *supra* note 271.
289. Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990).

on the factual circumstances confronting the court. Given the circumstances Judge Greene faced, I cannot say, in hindsight, that he reached a bad result.

Judge Greene's approach in *Dellums* has a long pedigree in American history. Certainly the most famous and celebrated use of this technique was utilized by Chief Justice Marshall in his opinion in *Marbury v. Madison*[290] where he first held that the Jefferson Administration had unconstitutionally deprived Marbury of his judicial commission and that the Court could remedy that violation by issuing a mandamus against high Executive officials. Only then did the Court determine that it was without the jurisdiction to do so because the statute providing such jurisdiction was unconstitutional. President Jefferson firmly believed that the Court's discussion of Marbury's right to a commission and the propriety of a court-issued mandamus against cabinet officials was obiter dissertation,[291] and it was this part of the opinion that provoked the greatest attack by Republicans.[292] Indeed, it was Chief Justice Marshall's dicta condemning President Jefferson's actions, and not his assertion of the principle of judicial review of legislative acts, that received the most press attention at the time.[293] Chief Justice Marshall certainly intended to send the message that the President was acting unlawfully, at the very time he was avoiding a direct confrontation with the political branches. His opinion has aptly been termed "a masterwork of indirection, a brilliant example of Chief Justice Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another."[294] Like Judge Greene's opinion, Chief Justice Marshall's tactical brilliance in *Marbury* lay at least in part in his taking advantage of the always potential tension between the Court's role in creating meaning and its function of exercising power.[295]

These are other examples where courts articulate the Constitution's meaning while declining to exercise judicial power. While the initial

290. 5 U.S. (1 Cranch) 137 (1803).

291. Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), *reprinted in* 15 THE WRITINGS OF THOMAS JEFFERSON 276 (Andrew A. Lipscombe ed., 1905).

292. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 244 (1922).

293. Representative was the *New York Evening Post*'s editorial headed "Constitution violated by President." *Id.* at 247; *see generally id.* at 247–55.

294. ROBERT MCCLOSKEY, THE AMERICAN SUPREME COURT 25 (3d ed. 2000).

295. Chief Justice Marshall's opinion is different from Judge Greene's opinion in that by denying jurisdiction Chief Justice Marshall cleverly asserted the enormous power to hold congressional statutes unconstitutional. But what if Chief Justice Marshall had simply resorted to a less powerful device to deny jurisdiction, such as a technical reading of the Judiciary Act, so as not to provide the Court with original mandamus jurisdiction over Marbury's claim? Chief Justice Marshall's decision, which was dicta, that the President had acted unconstitutionally and a court could order Madison to appoint Marbury would still have been an important decision in American constitutional law.

Vietnam War cases simply dismissed soldier or citizen complaints as posing broad political questions or on other jurisdictional grounds, as the war dragged on, a few courts, such as the D.C. Circuit, spoke out clearly against the constitutionality of the war, while still dismissing the lawsuit. In *Mitchell v. Laird*,[296] the respected jurists Judge Wyzanski and Chief Judge Bazelon held the Vietnam War to be unconstitutional, despite congressional funding for the war, writing "this court cannot be unmindful of what every schoolboy knows: that in voting to appropriate money or to draft men a congressman is not necessarily approving of the continuation of a war no matter how specifically the appropriation or draft act refers to that war."[297] The court nonetheless refused to enjoin the continuing war, holding that the question of whether President Nixon was proceeding in good faith to promptly end that unconstitutional war was a nonjusticiable political question. The court's statement of what "every schoolboy knows," was shortly thereafter written into the War Powers Resolution when Congress enacted that law over President Nixon's veto later in 1973.[298]

Courts have also, at times, introduced changes in legal doctrines by articulating legal limitations without granting the relief sought by the particular party before the court.[299] Similarly, the Supreme Court has in a variety of different contexts recognized the validity and necessity of ignoring the general rule that a court should avoid deciding difficult constitutional questions when the decision can rest on alternative grounds, and instead encouraged lower courts to decide a constitutional issue that may even be irrelevant to the disposition of a case in order to instruct the citizenry and public officials as to the Constitution's meaning.[300] Another situation that contains traces of the same approach is what my colleague Arthur Hellman terms "oppositive

296. 488 F.2d 611 (D.C. Cir. 1973).

297. *Id.* at 615.

298. 50 U.S.C. § 1547 (2000).

299. *See, e.g.*, Stovall v. Denno, 388 U.S. 293, 302 (1967) (establishing the rule that unfairness in a criminal lineup can lead to a due process violation, but refusing to apply the rule in that case). Some of the courts that created exceptions to the common law employment-at-will doctrine did so by recognizing the existence of a public policy exception, but construing it narrowly to deny relief to the party before the court. *See* Larsen v. Motor Supply Co., 573 P.2d 907, 908–09 (Ariz. Ct. App. 1977); Geary v. United States Steel Corp., 319 A.2d 174, 180 (Pa. 1974); Roberts v. Atl. Richfield Co., 568 P.2d 764, 770 (Wash. 1977).

300. *See* Saucier v. Katz, 533 U.S. 194, 201–02 (2001) (reasoning that a court should determine whether a constitutional right has been violated even if it then determines that defendant has qualified immunity); United States v. Leon, 468 U.S. 897, 925 (1984) (emphasizing that Fourth Amendment claim can be adjudicated even though good faith exception may be dispositive of the suppression issue); Coleman v. Alabama, 399 U.S. 1, 10–11 (1970) (remanding to determine whether Constitution requires assistance of counsel at preliminary hearing can be litigated even though no relief may be available).

dictum," where a court denies relief, but states that under a different set of circumstances, it might, or would, reach a different result.[301]

There are a multitude of mechanisms a court can use to indicate support for a legal norm to the broader legal and political community, yet still refuse to enforce such a rule. One historical example, discussed above, is the Ohio Supreme Court's refusal to rule on Salmon Chase's broad constitutional claim that a slave became free the moment her master brought her to Ohio, while signaling its agreement with his argument by having it printed and widely publicized.[302] The Court's decision in *Brown v. Board of Education* contains aspects of the same tension between norm articulation and norm enforcement.[303] This dichotomy is evident in the *Brown* Court's strong and unanimous rejection of segregation as a constitutional norm, yet its refusal to order any relief for the individual black plaintiffs, instead simply requiring the southern states to desegregate "with all deliberate speed."[304] Supreme Court decisions since *Brown* have sometimes "attached as much significance, or more, to the symbolism of laws as to their more tangible or material consequences."[305]

Yet a fundamental problem inheres in the separation between legal meaning and the commitment to live by and enforce that meaning. As Robert Cover notes, law cannot exist apart from both a legal narrative and a commitment to that law.[306] To Lon Fuller, unenforced norms strain the concept of the "rule of law," because "[c]ongruence between [o]fficial [a]ction and [d]eclared [r]ule" is an essential part of "the internal morality" of law.[307] Similarly, Professor Laurence Tribe argues that the articulation of norms for symbolic purposes that are not enforced breeds a hypocrisy and cynicism that undermines the rule of law in the Anglo-American tradition.[308] Professor Owen Fiss rejected an approach that would resolve the core dilemma in structural reform litigation by confining the judge to the declaration of rights without

301. Arthur D. Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court*, 23 ARIZ. ST. L.J. 915, 927–28 (1991); Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 558–60 (1989).

302. *See* Birney v. State, 8 OHIO REPORTS 230, 231 (1837); HART, *supra* note 91, at 74; SHUCKERS, *supra* note 91, at 43–44.

303. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

304. *See* Brown v. Bd. of Educ., 349 U.S. 294 (1955). The "all deliberate speed" formulation turned out to be an illusory effort to avoid using the full force of the Court's coercive power to compel compliance.

305. Steven D. Smith, *Rethinking Abortion: Equal Choice, the Constitution, and Reproductive Politics*, 13 CONST. COMMENT. 357, 370 (1996) (reviewing MARK A. GRABER, RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS (1996)).

306. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 5 (1983).

307. LON FULLER, THE MORALITY OF LAW 81 (Yale Univ. Press rev. ed. 1969).

308. TRIBE, *supra* note 258.

their enforcement because it "would require a detachment or an indifference to this world."[309] Less philosophically and more doctrinally, the law pronouncement approach is in tension with Article III courts' rejection of advisory opinions and their avoidance of deciding difficult constitutional issues unless absolutely necessary.[310]

The answer to the doctrinal problem is fairly straightforward. The advisory opinion doctrine prevents a court from adjudicating hypothetical or moot issues or controversies between adverse parties not before the court.[311] It does not prevent the court from articulating the law governing an issue, or from deciding an issue in the plaintiff's favor while denying relief on other grounds. The rule does not mandate any particular order of deciding issues; it merely requires that the issues be presented by adverse parties alleging an actual dispute.[312]

Nor does the principle, developed in the context of statutory interpretation, of not deciding difficult constitutional questions unless it is necessary to do so, preclude the articulation of the principle approach suggested here. The Supreme Court has recognized the propriety of sometimes addressing an important constitutional question before turning to another, potentially dispositive issue.[313] The value of avoiding difficult constitutional questions is not absolute and must be balanced against the competing value of providing guidance to the other branches of government. For example, in its decision to create a good faith exception to the exclusionary rule, the Court held that "[t]here is no need for courts to adopt the inflexible practice of always deciding whether the officers' conduct manifested objective good faith before turning to the question whether the Fourth Amendment has been

309. Fiss, *supra* note 3, at 57–58.

310. *See* Zadvydas v. Davis, 533 U.S. 678, 689 (2001) ("[I]t is a 'cardinal principle' of statutory interpretation . . . that when an Act of Congress raises a 'serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932))); Pub. Citizen v. United States Dep't of Justice, 491 U.S. 440, 466 (1989); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

311. *See* Princeton Univ. v. Schmid, 455 U.S. 100, 103 (1982) (per curiam); Muskrat v. United States, 219 U.S. 346, 357–58 (1911); *see also* Letters from John Jay, Chief Justice of the Supreme Court, to President George Washington (July 20, 1793 & Aug. 8, 1793), *reprinted in* 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486–89 (H. Johnston ed., 1981) (setting forth Jay's view of the advisory opinion doctrine).

312. *See* United States v. Leon, 468 U.S. 897, 924–25 (1984).

313. *E.g.*, Saucier v. Katz, 533 U.S. 194, 201 (2001) (in order to protect the process of the law's elaboration, a qualified immunity claim first requires a determination of whether a constitutional right was violated, before turning to the issue of whether the right is clearly established); *Leon*, 468 U.S. at 925–27 (explaining that Fourth Amendment claim can be adjudicated even though good faith exception may be dispositive of the suppression issue).

violated."[314] Noting that "courts have considerable discretion in conforming their decision-making processes to the exigencies of particular cases," the Court stated that "[i]f the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before turning to the good faith issue."[315]

The more troubling problem is, therefore, the objection that by articulating a rule without enforcing it in the particular case, the Court states "no more than the proclamation of an admittedly unworkable moral ideal."[316] Professor Fritz Scharpf captures the essence of the quandary inhering in the Court's lack of commitment to the principle it articulates:

> What would be the persuasiveness of an interpretation of the Constitution which the interpreter himself could not wish to see put into practice? From what revelation should the Court derive authority to proclaim moral postulates—or have its judgments any legitimacy beyond that of an intellectual honesty disciplined by its responsibility for the disposition of the concrete case?
>
> . . . It would sacrifice that realism of constitutional interpretation which is the necessary condition of its effectiveness. Interpretation which would no longer be answerable to the real conditions and exigencies of community life would transform constitutional law into a collection of programmatic postulates to be worshiped on the Fourth of July; and the easier it would be for the Court to retreat from conflicts in the real world into the ideal realm of pure principle, the less ready and able would it be to protect the community against transgression of its fundamental code.[317]

It may well be that the enunciation of a principle without a commitment to enforce it would have the effect that Professor Scharpf describes and cannot be considered law but mere rhetoric. But a judge's commitment to a principle he or she articulates cannot be measured in pure all-or-nothing terms, as Professor Scharpf suggests. Rather, judicial commitment comes in all shades and hues, just as the community's commitment to its narratives of law can take many forms.

As Robert Cover points out in Nomos *and Narrative*, there is a difference between the commitment demonstrated by a community that "writes law review articles," forcing the officialdom to maintain its interpretation

314. *Leon*, 468 U.S. at 924.
315. *Id.* at 924–25
316. Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 565 (1966).
317. *Id.* (citation omitted).

"merely by suffering the protest of the articles," and a community that disobeys the criminal law, forcing judges to affirm the official interpretation of law only by committing violence against the protestor.[318] To Cover, however, both communities demonstrate a commitment to create and maintain law. We certainly cheer more loudly for the civil resister; law review authors win no Nobel Prizes. One clearly has a stronger commitment than the other, but neither is merely dishonestly evoking an unworkable moral ideal. The soldier who retreats in the face of a massive and uncontainable enemy assault in order to take up a more defensible position from which to fight may have no less a commitment to his nation's cause than the soldier who stands fast and dies.

So too, judicial commitment to constitutional liberty and justice takes many forms, and cannot be measured simply by the heroic judge who affirms justice at the peril of his office, his legitimacy, or his life. Certainly, Chief Justice Marshall's dicta in *Marbury* that high executive officials are not above the law has been accorded as much legitimacy as if he had ordered Marbury appointed—particularly if the result of that decision would have been that President Jefferson refused, and the Supreme Court's authority was consequently decisively weakened. Judge Greene, while (in my opinion wrongly) declining to enforce the clear constitutional command that Congress authorize war, nonetheless kept jurisdiction over Dellums' claim and suggested that given the right circumstances in the future, he would, or more aptly might, enforce the law. Had a majority of Congress voted down the authorization for war when President Bush finally placed the issue before it in early January 1991, and had the president nevertheless proceeded to initiate war as he later indicated he would have done,[319] Judge Greene might have enforced Article I had a soldier or representative of Congress so requested. What Judge Greene would have done in that not purely hypothetical scenario[320] is conjecture; quite possibly, he would have found yet another way to avoid issuing an injunction. But certainly his opinion left open that possibility, and was not purely abstract moralizing. It is not hard to see why, when another congressional war powers challenge to executive war making was raised some years

318. Cover, *supra* note 306, at 47–48.

319. President Bush continued to maintain that congressional approval was unnecessary and was committed to war even if Congress voted against him. As he later explained, "I didn't have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait." *Remarks of President George Bush Before the Texas State Republican Convention*, FED. NEWS SERVICE, June 20, 1992, at 3.

320. On January 2, the Senate narrowly approved authorization by a 52–47 margin. S.J. Res. 2, 102d Cong. (1991). The House version passed by a much wider margin. H.R.J. Res. 27, 102d Cong. (1991).

later, the plaintiffs again sought to draw Judge Greene, despite his refusal to grant relief in the *Dellums* case.[321]

The question of whether those who act as Judge Greene did are affirming or avoiding their constitutional responsibilities, must, in the final analysis, be determined on a case-by-case basis where the context and circumstances of each case is evaluated, and the court's specific decision is analyzed. My point here is not to fashion a sweeping proposition either affirming or denying the validity of such judicial action. Rather, it is to suggest that particularly in cases where the litigation functions in whole or part as a forum for public debate, judges should consider it as an option. That is especially true if the judge is disposed to permit an injustice to continue because of his or her reading of formal law or of the practical necessities of the situation. In some cases, a judge's resort to this option may have the effect that Professor Scharpf describes, making judges less ready and able to protect the community against transgressions of its fundamental code. In others, it might help spur the political movement in ways that may be more important than obtaining judicial relief. How judges craft their opinion can help or harm the political or social movement of which the plaintiff is but a representative. Congressman Dellums certainly felt that Judge Greene helped his cause.

Judge Greene's decision upholding constitutional principle while granting the plaintiff no relief represents an extreme case of what in essence is a fairly common and endemic problem in law reform litigation. The tension between the role of courts in articulating rights and granting relief afflicts many law reform cases. The reluctance of federal judges in the contemporary conservative judicial climate to grant broad equitable relief has led many lawyers to frame their cases narrowly and request fairly narrow relief in order to increase their chances of winning in court. The result may be that the plaintiffs win the case yet do not obtain the relief they really desire and seek. Judge Greene's somewhat unusual judicial technique in *Dellums* thus reflects a deeper, more pervasive dilemma present in many law reform cases.

Robert Cover ended his book *Justice Accused* with an insight about judges: "If a man makes a good priest, we may be quite sure he will not be a great prophet."[322] That insight sounds correct, but it may also be true that a good priest may be able to aid, instead of obstruct, those that are prophets. Judges are seldom great prophets, but the best can prove very valuable and helpful to

321. *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000) originally was filed before Judge Greene but was transferred to District Judge Paul Friedman. *See* JULES LOBEL, SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA 245 (2003).

322. COVER, *supra* note 82, at 259.

a prophetic or redemptive constitutional movement that has as its primary arena not the courtroom, but the streets.

V. THE ROLE OF LAWYERS IN THE COURTS AS FORUMS FOR PROTEST MODEL

That litigation can often have as a primary or significant purpose or effect political mobilization and education outside the courtroom yields important insights for lawyers as well as judges. This model of litigation radically redefines the role of a lawyer. The lawyer in presenting his or her case often does not act as the neutral detached advocate posited by the traditional model, nor even the less detached, elite, sympathetic and empathetic legal expert of the law reform model. Rather, the lawyer is often not simply for the movement, but in and of the political or social movement he or she represents; "a lawyer can join the client as a comrade *and* serve in the role of legal advisor."[323] Activist attorneys use the term "movement lawyer" to express what they do and how they view their role. For example, prominent socialist labor activist attorney Staughton Lynd derived his legal role from the notion of "accompaniment" used by liberation theologians in Latin America. "This meant a duty to accompany workers in their struggle for justice, to help them articulate their interests, express their anger, and present their vision of a more just and ultimately socialistic society."[324] Many lawyers who bring litigation for broader political purposes straddle the line between lawyer and political activist, as did Salmon Chase, Staughton Lynd, or well-known civil rights lawyer, and later Rutgers Law School professor Arthur Kinoy.

This conception of a lawyer's role leads to somewhat different legal decisionmaking and strategies from those posited by both the traditional dispute resolution model and the institutional litigation model. First, the decision to bring a case, make an argument, or raise a claim cannot be based solely, or at times even primarily, on an analysis of the legal merits. As Professor Kinoy, a leading civil rights litigator of the 1950s through the 1970s explained in his autobiographical book, *Rights on Trial*:

> [T]he test of success for a people's lawyer is not always the technical winning or losing of the formal proceeding. Again and again, the real test was the impact of the legal activities on the morale and understanding of the people involved in the struggle. To the degree that the

323. David J. Luban, *Conscientious Lawyers for Conscientious Lawbreakers*, 52 U. PITT. L. REV. 793, 800 (1991).

324. LOBEL, *supra* note 321, at 127.

> legal work helped to develop a sense of strength, an ability to fight back, it was successful. This could even be achieved without reaching the objective of formal victory. [325]

Thus, for Professor Kinoy, the decision whether to bring a lawsuit could not be based solely on "the likelihood of success within the court structure."[326] Rather, the question was what role the lawsuit would play in the people's struggle. "If it helped the fight, then it was done, even if the chances of immediate legal success were virtually nonexistent."[327]

This approach requires such movement lawyers to take risks in bringing cases that present difficult, uphill battles and could create bad precedent. For many traditional law reform litigators, such as former NAACP Legal Defense Fund general counsel Jack Greenberg, test cases generally "should not be brought if they are likely to be lost."[328] To be sure, the likely legal success of a case should be carefully considered before it is brought, and the risk of creating bad precedent should be weighed, but under the public protest model of reform litigation that cannot be the sole, or at times even the primary, consideration. For example, in Danville, South Carolina, Kinoy and William Kunstler pioneered the use of the long-dormant federal removal statute to prevent state prosecutions of civil rights activists.[329] Jack Greenberg, then the legal director of the NAACP Inc. Fund, completely rejected the idea of using this old Reconstruction-era statute to stop the state court trials of the demonstrators, calling it a crazy idea amounting to "playing with the courts."[330] But, despite the reservations of many of the lawyers, and the lack of legal precedent, Kinoy and Kunstler decided to try, for there were no other good alternatives and the civil rights movement was pressing for some legal action. Miraculously, Kinoy and the other Danville lawyers temporarily won an injunction in the Fourth Circuit Court of Appeals.[331]

Similarly, "when the first Holocaust restitution lawsuit was filed in October 1996 against the Swiss banks, most legal observers viewed the suit as a 'sure loser.'"[332] Yet the suit obviously had a political motive to create public embarrassment and put political pressure on the Swiss banks by exposing

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325. KINOY, *supra* note 22, at 57–58.
326. *Id.* at 71.
327. *Id.*
328. Jack Greenberg, *Litigation for Social Change: Methods, Limits and Roles in Democracy*, 29 REC. ASS'N B. CITY N.Y. 320, 349 (1974).
329. KINOY, *supra* note 22, at 193.
330. *Id.*
331. *Id.* at 193–208.
332. Michael J. Bazyler, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT'L L. 11, 36 (2002).

their role in the Holocaust. The suit, a "legal loser," succeeded in that aim. "Less than two years later, the Swiss banks were [willing] to pay $1.25 billion to end the litigation."[333]

Most cases brought in the face of unfavorable precedent undoubtedly lose in court. They therefore may create bad precedent, although in most instances they simply pile more bad precedent on an already poor situation. Some cases do contain a silver lining when the judges draft their opinions in a manner to create room for the law to grow and develop despite the defeat in court.[334] But generally, while the risk of creating bad precedent ought clearly to be weighed before litigation is commenced, lawyers ought not to allow a fear of losing to paralyze their work, stifle creativity, or make them overly cautious. Thus, lawyers who utilize the courts as forums for protest must balance the risk of creating bad precedent against the other, more political aims of the lawsuit, and recognize that often the aim of litigation extends beyond winning or losing in court. This balancing is therefore different from the questions faced by lawyers operating within either of the two more mainstream models of litigation.

Another critical lesson mandated by the courts as forums of protests model is that public interest lawyers must draft their complaints and argue their cases before the courts based not simply on the technical, legal arguments, but on the broad moral and political themes that will resonate with their clients, the political movement they represent, the general public, and often judges. Salmon Chase and the other antislavery lawyers understood this when they framed their legal arguments as broad moral and constitutional broadsides against slavery. These arguments might not, and in fact often did not, convince a court, but the antislavery arguments were effective because they emphasized both the immorality of slavery and the absolute incongruity of democracy and slavery.[335]

The *Shelley v. Kraemer*[336] case presents another example of a lawyer making a broad moral and political argument that might make an impression on a judge, but will more likely resonate in the public debate. George Vaughn, a municipal court lawyer in St. Louis who had brought the *Shelley*

333. *Id.* Bazyler also observes that in December 1999, "Germany and its industry . . . agreed to pay [$4.8 billion to settle Holocaust slave labor claims], just months after two New Jersey federal courts ruled that German companies were immune from such litigation in the United States." *Id.* at 36–37.

334. Often the dialectical process by which the common law and constitutional law changes begins with failed efforts to change the law, followed by a series of cases that distinguish the first cases or create exceptions that eventually lead to a change in the rule. *See* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 5–6 (1949).

335. *See* HART, *supra* note 91, at 71–73.

336. 334 U.S. 1 (1948).

case to the Supreme Court, argued the restrictive covenant cases along with the NAACP's Thurgood Marshall.[337] Philip Elman, an attorney in the Solicitor General's office who helped draft the government's brief in *Shelley* and attended the oral arguments, recounts Vaughn's argument:

> He made an argument that as a professional piece of advocacy was not particularly distinguished. You might even say it was poor. He mainly argued the thirteenth amendment, which wasn't before the Court. He tried to distinguish cases when it was clear that the cases were indistinguishable and the only way to deal with them was to ignore or overrule them. . . . It was a dull argument until he came to the very end. He concluded his argument by saying . . . "Now I've finished my legal argument, but I want to say this before I sit down. In this Court, this house of law, the Negro today stands outside, and he knocks on the door, over and over again, he knocks on the door and cries out, 'Let me in, let me in, for I too have helped build this house.'"
>
> All of a sudden there was drama in the courtroom, a sense of what the case was really all about rather than the technical legal arguments . . . . [It was] the most moving plea in the Court I've ever heard.[338]

Vaughn was so inspiring that "he was invited to repeat [his speech] at the 1948 Democratic National Convention."[339]

The example of George Vaughn making compelling emotional, moral, and political arguments, and poorly arguing the technical legal distinctions that are the daily grist of an appellate lawyer's life, is extreme. Indeed, in many cases, it is precisely the broad moral, political, and legal arguments that place more technical legal points in their proper context, and, if made, properly can influence both the judges hearing the case and the broad public to whom the lawyer seeks to appeal. Many more polished and experienced oral advocates than Vaughn have recognized that to convince both judges and the public, one often has to cut through the narrow technical legal arguments with a broad plea to justice and morality. For example, Harold Koh, who argued the Haitian Refugee case before the U.S. Supreme Court, started his argument with a broad plea about the injustice of the U.S. government's policy, hoping that his opening might convince the Court to view his technical arguments more

337. *See* William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1627–33 (1997). As Rubenstein notes, several cases were consolidated for review in the Supreme Court. *See id.* at 1629–30.

338. *Id.* at 1630 (quoting Philip Elman & Norman Silber, *The Solicitor General's Office, Justice Frankfurter and Civil Rights Litigation, 1946–1960: An Oral History*, 100 HARV. L. REV. 817, 820 (1987)) (first ellipses added; other alterations in original).

339. Rubenstein, *supra* note 337, at 1630.

favorably, but recognizing that even if it did not, it would appeal to his broader audience.[340]

Another example of a case which was litigated and argued to the U.S. Supreme Court with politics and public opinion uppermost in the advocate's mind was *Planned Parenthood v. Casey*.[341] Kathryn Kolbert, the attorney who argued *Casey*, maintains that "the entire case was litigated on the theory that we were going to lose, and that the issue of reproductive choice would be going back to the political arena."[342] Accordingly, "her clients wanted her to focus on the big picture—the continuing viability of *Roe v. Wade*—rather than the particular provisions of the law, such as the requirement that married women seeking an abortion notify their husbands."[343] In her oral argument, Kolbert therefore heavily focused on "the importance of preserving [a woman's right to choose whether to have an] abortion as a fundamental right, prompting Justice Sandra Day O'Connor at one point to ask her if she was ever going to discuss the specific provisions of the law."[344] Kolbert's strategy was to force the Court to rule on whether to preserve *Roe*, reasoning that even if they lost, which she thought likely, the courtroom defeat would galvanize public opinion and bring a legion of pro-choice politicians into office in the upcoming national elections.[345] Fortunately, the Court reaffirmed that a woman's right to choose was a fundamental right.

Public interest lawyers also have to look at the interaction between the litigation and the broader interests of their clients and the movements they represent, not only in arguing their cases, but in drafting their complaints. Many lawyers feel constrained in drafting pleadings by their perception of the Federal Rules of Civil Procedure requirement of notice pleadings,[346] and the constraints of professional standards. Lawyers therefore draft complaints that lose the details, passion and identity of their clients and thereby do not convey the full story of the oppression and injustice their clients suffered.[347] A model of litigation that focuses not on the technical arguments before the court but on the broader purposes of the lawsuit supports drafting complaints

340. Sale v. Haitian Ctrs. Council Inc., 509 U.S. 155 (1993); Interview with Michael Ratner, Co-counsel in *Sale* and President of Center for Constitutional Rights (Mar. 2004).

341. 505 U.S. 833 (1992).

342. Michael McGough, *Novice to Confront Supreme Court*, PITT. POST-GAZETTE, Mar. 22, 2004, at A1; *see also* EDWARD P. LAZARUS, CLOSED CHAMBERS 459–65 (1998).

343. McGough, *supra* note 342.

344. *Id.*

345. *See* LAZARUS, *supra* note 342, at 459–65.

346. FED. R. CIV. P. 8.

347. *See* Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763, 766–68 (1995).

in a manner that tells the client's full narrative and the richness of his or her story. Consequently, the judge assigned to the case is able to comprehend the plaintiff's full outrage, and, additionally, the media and the public can understand the plaintiff's dramatic and compelling story.[348]

By persuading a lawyer to think not only of the technical arguments that will win in court, but also which arguments will serve the movement with which he or she is working, the forum for protest model is more receptive to transformative arguments that look beyond the outcome of the particular legal battle and serve to transform political consciousness and reshape the way legal conflicts are represented in the law.[349] Lawyers who pay attention to the broader political aims of their clients and political movements when they draft complaints and argue before courts may temper some of the limitations of law reform litigation articulated by the Critical Legal Studies Movement and other progressive scholars. But that strategy raises new contradictions. Those new tensions are generated by what often is a conflict between broad political, moral or legal arguments and the often narrow terrain that lawyers are forced to work in. That conflict envelops many law reform cases, particularly those in which the lawyers' and litigants' goals are broader than just winning in court.

The litigation forum often channels legal argument into forms that are likely to persuade a judge, but are not necessarily what the lawyers, litigants or political movements believe represent justice. For example, Professor Charles Lawrence has discussed this dilemma in the context of whether and how to support the diversity defense of affirmative action. In the short run, that legal strategy is most likely to succeed in the contemporary judicial climate, yet it leaves unchallenged and indeed affirms a university's role in perpetuating and entrenching a privileged elite. For the lawyer using the courts as a forum both to protest and hopefully to ultimately transform the social, political and economic injustices of our society, the dilemma is particularly acute, for he or she, unlike the theorist, must work daily in the judicial arena. For that lawyer, one question is how to introduce what Professor Lawrence terms "transformative arguments" into litigation, and to use that litigation to inform the political dialogue.[350] Generally, the institutional law reform model does not address this dilemma, because this problem focuses

348. *See id.* at 771–72.

349. *See* Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1983); Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 965 (2001).

350. Lawrence, *supra* note 349, at 963–68.

more on the relationship between lawyers and the political movements they work with and less on the role of the judge in a particular case.

For some constitutional theorists, the solution is to abandon the effort to articulate progressive, transformative or aspirational norms in the courts.[351] Some civil rights litigators, however, reject that approach and continue to view litigation not merely as a means to reform institutions, but as one forum among many to raise questions that may eventually transform contemporary, mainstream political dialogue.

This question was starkly presented in litigation challenging U.S. Steel's plant closings in Youngstown, Ohio in the late 1970s.[352] An attorney in that case, Staughton Lynd, had articulated a promissory estoppel theory that he believed was supported by contract law.[353] U.S. Steel had made a promise to keep the Youngstown mills open if they could be made profitable. The workers had agreed to a variety of concessions, worked hard, and relied on that promise to their detriment, yet U.S. Steel had breached its promise. The promissory estoppel theory, in Lynd's view, both articulated the workers' feelings of injustice and posed a radical challenge to traditional management rights.[354]

But the district court judge raised a much more radical theory, positing that the Youngstown community had perhaps acquired some vested property rights in U.S. Steel from the lengthy, long-established relationship between U.S. Steel and the Youngstown community.[355] Ultimately, the judge concluded that there was no legal precedent for such a property right, dismissed the "property right" claim, and found that U.S. Steel had not breached any promise to keep the mills running.[356]

The workers appealed and Lynd wrote a brief arguing for the workers' contract claim. But Lynd could not write a brief arguing for a community property right for which there was no precedent. Lynd's socialist politics led him to believe that while he could use the law to win concrete victories and raise issues, the limitations of capitalist laws had to be recognized, understood, and explained. While Lynd was perfectly willing to bring a "prophetic" case

351. *See* Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 529 (1997); Robin West, *Is Progressive Constitutionalism Possible?*, 4 WIDENER L. SYMP. J. 1, 14–16 (1999); Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 714–15 (1990).

352. United Steelworkers of Am. Local 1330 v. United States Steel Corp., 492 F. Supp. 1 (N.D. Ohio 1980), *aff'd in part, vacated & rev'd in part*, 631 F.2d 1264 (6th Cir. 1980).

353. *Id.* at 4; 631 F.2d at 1270–73.

354. Interview with Staughton Lynd (June 2000).

355. *See* STAUGHTON LYND, THE FIGHT AGAINST SHUTDOWNS 166 (1982).

356. *United Steelworkers of Am.*, 492 F. Supp. at 4–10.

for which there was some legal precedent, even if for political reasons the case would likely lose, he was unwilling to argue a case with no supporting precedent. The role of a radical labor lawyer, Lynd thought, is to articulate the workers' feelings of injustice in a manner that the law could recognize. If the law did not recognize the workers' complaint as actionable, then the lawyer's role was to relay that to the workers, and develop another strategy for fighting the injustice.[357]

However, although Lynd was unwilling to argue the community property right issue to the court of appeals, there was a respected national legal group and a prominent national lawyer willing to fill the void. The Center for Constitutional Rights (CCR) submitted an amicus brief, signed by Arthur Kinoy, by then a professor at Rutgers Law School, that argued for a community property right to prevent a company in U.S. Steel's position from unilaterally deciding to close mills vital to that community.[358]

Professors Kinoy and Lynd had differing approaches to the dilemma presented by "transformative arguments."[359] Local unions were actively engaged in struggle, raising fundamental questions of whether the Constitution protected not merely civil and political rights, but also economic rights. Irrespective of whether legal precedent supported a community property right, Professor Kinoy believed that people's lawyers had to find and use whatever they could to argue that the Constitution supported such rights—a position that would help motivate workers across America to struggle against plant closing. He hoped that the mass labor movement around plant closings would have the same impact as the civil rights movement had on the courts in the 1960s.[360]

While Lynd's approach recognizes the limits of law and using litigation both to advance particular struggle and to help explain, educate and expose the nature of capitalist law, for Professor Kinoy, the law and the Constitution are fundamentally indeterminate vessels, with their meaning determined not by legal precedent, but by the political struggle of the masses.[361] Articulating radical rights, such as economic and social rights, both in the context of litigation as well as in political forums, can, for Professor Kinoy, motivate thousands of people to struggle for those rights which in turn will impact the courts.[362] For Professor Kinoy, the paradigm for this courts as forums for

357. Interview with Staughton Lynd, *supra* note 354.
358. *United Steelworkers of Am.*, 631 F.2d at 1265.
359. *See* LOBEL, *supra* note 324, at 142–47.
360. Interview with Arthur Kinoy (Aug. 2002).
361. *Id.*
362. LOBEL, *supra* note 321, at 195–96.

protest model was the mass, democratic civil rights struggle during the 1960s. It was during this period that Professor Kinoy articulated radical, transformative notions of the Thirteenth and Fourteenth Amendments, which, at times, were accepted by the courts.[363]

The different approaches to law and constitutional rights taken by Professors Kinoy and Lynd reflect longstanding tensions in the radical movement's view of the Constitution and of litigation that commenced with the split within the abolitionist movement over whether the Constitution, properly interpreted, outlawed slavery. Lynd sympathized with the abolitionists who had accurately viewed the Constitution as having accepted slavery and thus had called on antislavery judges to resign, as opposed to those abolitionists, such as Alvan Stewart, who had proposed radical reinterpretations of the Constitution based on theories of natural law and natural rights.[364] Professor Kinoy's view hewed closer to that of Alvan Stewart and Senator Charles Summer, who argued in court and elsewhere that the Constitution should always be interpreted in favor of liberty, equality, and human rights.[365]

My intellectual predilection lies more with Lynd's approach, which captures critical theory's emphasis on exposing the contradictions and limitations of law, and the litigators' focus on presenting arguments to the judge based on precedent However, Professor Kinoy was able to use his approach effectively in the 1960s to help use litigation to mobilize thousands of civil rights activists and law students to engage in potentially transformative litigation.[366] What this suggests is that solutions to the dilemma must come in a case-by-case context, and that in some eras and cases Professor Kinoy's approach may have the invaluable effect he sought. It did not in the *Youngstown* case.[367] Perhaps the main contribution of the courts as forums for protest model is simply to articulate the dilemma of attempting to make transformative arguments in the context of litigation, thereby forcing litigators to attempt to grapple with the problem and not ignore it.

The courts as forums for protest model forces lawyers to address other contradictions that face progressive lawyers. Lawyers who undertake this type of litigation must be both willing to support their clients' political actions and mount public educational campaigns that dovetail and interface with the

363. KINOY, *supra* note 22, at 177–208; Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387, 426–27 (1967).

364. *See generally* COVER, *supra* note 82 (explaining the different positions taken by the Garrisonian abolitionist versus the Stewart wing of the abolitionist movement).

365. *See id.*

366. LOBEL, *supra* note 321, at 142–47.

367. *Id.* at 147–48.

litigation.[368] Yet, often clients' political actions cause problems with a law reformer's carefully calibrated legal or political strategy. For example, in the Haitian refugee litigation, the Haitians' hunger strike pushed the popular mobilization beyond the "legal team's grand plan."[369] While the strike led to a very successful organizing educational effort around the case, it caused division amongst the legal team as to whether the strike and resulting publicity was helpful or harmful.[370]

Similarly, a model of litigation that focuses on the political goals of a movement has the potential to come into conflict with the needs and interests of the individual clients who are the plaintiffs in the lawsuit. This problem is also endemic to public interest litigation generally, particularly class action litigation, where often the interests of the lawyer, the clients, and the political movement are in tension.[371] Successfully navigating this inherent tension requires that the lawyers pay close attention to fostering democratic decisionmaking in the lawsuit, and to the particular interests of the individuals and groups concerned, and not simply act based on their own legal or political instincts and principles. Indeed, while some scholars like Derrick Bell argue that a class action should serve as a vehicle for organizing class members to promote the class's interest,[372] empirical studies of class actions reveal "very little if any active attempt by lawyers to organize class members to participate in the suit or to engage in other activities complementary to the suit."[373] The courts as forums for protest model requires lawyers to change that perspective.[374]

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368. *See* GERALD LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 3 (1992) (decrying activist lawyers who never thought of mounting public educational campaigns).

369. Ratner, *supra* note 15, at 208–11.

370. *See id.*

371. *See* Rubenstein, *supra* note 337, at 1625–26 & n.8.

372. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 513 (1976).

373. Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives From an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 380–81 (1988).

374. In 2001, I was one of a team of lawyers who brought a class action lawsuit challenging cruel and unusual conditions at an Ohio Supermaximum Prison and due process violations in the placement and retention of prisoners at that prison. Austin v. Wilkinson, 189 F. Supp. 2d 719 (N.D. Ohio 2002), *aff'd in part, rev'd in part*, 372 F.3d 346 (6th Cir. 2001). The prisoners at the Ohio Supermax were housed there indefinitely, some for many years in over twenty-three hours a day solitary confinement with no outdoor recreation and virtually no contact with other humans. We operated on a key principle that the approximately fifteen named class representatives were to democratically discuss and vote on any reasonable settlement offer and discuss basic strategies for trial and that our litigation tactics would be developed in dialogue with two prison leaders. The state of Ohio's attorneys strenuously objected to our holding group meetings with the named plaintiffs, claiming that these prisoners were the "worst of the worst" in the Ohio prison system, could not rationally and

I conclude with a discussion of the litigation brought on behalf of the prisoners being held by the United States at Guantanamo Bay, Cuba. This important litigation fits comfortably within the courts as forums for protest model, and illustrates many of the insights and contradictions of the model.

In early 2002, the CCR challenged the Bush Administration's detention of suspected Taliban and Al Qaeda prisoners at Guantanamo Bay without affording them the protections or rights mandated by the Geneva Convention and human rights norms.[375] At the time, many individuals and organizations were timid about openly challenging the administration's antiterrorism policies.[376] Moreover, a case on behalf of the Guantanamo detainees presented a particularly difficult context to challenge the administration. These prisoners had been captured in and around Afghanistan as part of a popular war effort. The memory of September 11 was fresh in people's minds. The government claimed that what it was doing at Guantanamo was necessary to defend American national security and prevent future terrorist attacks, a claim that resonates particularly strongly with the courts. Most important, *Johnson v. Eisentrager*,[377] decided by the Supreme Court in 1950, held that nonresident enemy aliens, after being convicted of war crimes by a military tribunal (detained by the U.S. government outside of U.S. territory) had no right or privilege to avail themselves of the jurisdiction of a U.S. court to challenge their detentions.

While the legal and political climate was bleak, the CCR attorneys believed that *Johnson* was distinguishable and that it was possible to win in court. The CCR decided to take the risk.[378] The government's position was in clear violation of the Geneva Convention as well as due process and was in effect saying that no law applied to these detainees. But the CCR's objective

objectively discuss settlement offers, and would present grave security concerns if allowed to meet as a group. Eventually, pursuant to the threat of court order, the state did allow us to have several group meetings with the prisoners under draconian conditions in which each prisoner was locked in an individual cell, with only a small opening through which they could see us and we could see their face and hear their voice. The cells were adjacent to each other so that all the named plaintiffs could fit in one wing with their lawyers seated at a table facing the cells. Despite the state officials' prediction, the prisoners engaged in serious, rational, and informative discussion with each other and their lawyers, reaching consensus on accepting one settlement offer, rejecting another, and agreeing on the basic strategies for trial.

375. Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002), *aff'd sub nom.* Al Odah v. United States, 321 F.3d 1134 (D.C. Cir 2003), *rev'd sub nom.* Rasul v. Bush, 124 S. Ct. 2686 (2004).

376. *See* Adam Liptak & Michael Janofsky, *Scrappy Group of Lawyers Shows Way for Big Firms*, N.Y. TIMES, June 30, 2004, at A14. ("'Early on, we felt very, very isolated because we were going against the grain of the superpatriotism around us,' Ron Daniels, executive director of the center, said.").

377. 339 U.S. 763 (1950).

378. *See* Marcia Coyle, *Taking the Risks; Rights Center Tackles Guantanamo Detentions*, NAT'L L.J., Feb. 16, 2004, at 1.

went beyond winning or losing in court. Its objective was to demonstrate that there was resistance to U.S. policy, to help publicize the injustice to, and plight of, the detainees, to keep the issue of the detainees in the public mind, and to use the case as part of a broader political movement against the administration's antiterrorism policies. The decision to litigate was not based on whether the CCR attorneys thought the litigation had a good chance of winning in court.

The CCR first filed a complaint with the Inter-American Commission of Human Rights of the Organization of American States, which ruled that the Guantanamo prisoners may not be held "entirely at the unfettered discretion of the United States government," and that the government must accord those prisoners a hearing to determine their legal status.[379] The Bush Administration predictably refused to comply with the Commission's ruling. Indeed, given the certainty that the administration would not comply with any unfavorable Commission ruling, the purpose of the complaint was to obtain an authoritative ruling, and to use that ruling to mobilize international and domestic public opinion against the administration's Guantanamo policies.

The CCR also brought a federal lawsuit on behalf of several of the detained prisoners. The federal district court, and then the U.S. Court of Appeals for the District of Columbia Circuit, ruled unanimously in the government's favor.[380] Nonetheless, the CCR persisted, and the Supreme Court decided in November 2003 to hear its appeal.[381]

The Guantanamo case had an impact even before the Supreme Court handed down its June 2004 decision reversing the court of appeals. For over two years, the case helped keep the outrageous Guantanamo situation in the public eye and galvanized international protest. News reports sparked outrage at keeping the detainees in what British judges termed a "legal black hole."[382] Amicus briefs submitted to the Supreme Court from former federal judges, former senior American diplomats, former American POWs, former Judge Advocates General of the Navy and top Marine Corps lawyers, the Bar Association representing the fifty-four nations of the former British Commonwealth, and the International Bar Association reflected and fanned

379. Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba), Inter-Am. C.H.R. (Mar. 12, 2002), *reprinted in part in* 41 ILM 532–34 (2002).

380. Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002), *aff'd sub nom.* Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd sub nom.* Rasul v. Bush, 124 S. Ct. 2686 (2004).

381. Rasul v. Bush, 124 S. Ct. 534 (2003).

382. R. v. Sec'y of State for Foreign & Commonwealth Affairs, [2002] EWCA Civ. 1598, at ¶ 22, *available at* 2002 WL 31452052.

the widespread protest against the U.S. Guantanamo policy.[383] That protest, combined with Supreme Court review, compelled the administration to release a number of the prisoners, even before the Supreme Court announced its decision.[384]

The question the case presented to the Supreme Court was narrow and involved only whether federal courts have jurisdiction to consider the detention of foreign nationals captured abroad and held at Guantanamo Bay.[385] Thus, at that stage of the litigation, the specific relief being requested of the Court was minimal (although the implications of the Court grant of that relief are significant), namely, a holding that federal courts have jurisdiction to hear plaintiffs' habeas petitions. On remand, the district court will determine what rights the plaintiffs have, and to what process they are entitled. Because the issue before the Court was solely jurisdictional, the plaintiffs were able to obtain a ruling articulating the basic norm that executive detentions, even in wartime, cannot be lawless. Yet because the issue was framed jurisdictionally, neither the plaintiffs nor the Court had to grapple immediately with the exact contours of the plaintiffs' rights and the potential remedies to which they may be entitled.

The Supreme Court's assertion of jurisdiction to hear the case is a tremendous victory. It articulates and gives meaning to a fundamental constitutional principle: that executive detentions of prisoners outside the United States cannot operate entirely outside the law or without some legal process. While the Court's decision addresses only the applicability of the writ of habeas corpus to the detention of prisoners at Guantanamo Bay, Cuba, the implications of the Court's holding are broad; as Justice Scalia correctly notes in his dissent, the Court's decision potentially applies to prisoners held by the military in other places. Moreover, while the Court merely asserted federal court jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing, footnote fifteen of Justice Stevens' majority opinion states that the plaintiffs' claims "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'"[386] That footnote, in which Justice Stevens cities Justice Kennedy's concurrence in *United States v. Verdugo-Urquidez*,[387]

383. *See* Douglas W. Cassel, Jr., *The Founding Fathers Knew Better*, CHI. DAILY L. BULL., Oct. 17, 2003, at 6.

384. *See* Amy Waldman, *Guantánamo and Jailers: Mixed Review by Detainees*, N.Y. TIMES, Mar. 17, 2004, at A6.

385. *Rasul*, 124 S. Ct. at 534.

386. Rasul v. Bush, 124 S. Ct. 2686, 2698 (2004).

387. 494 U.S. 259, 275–78 (1990) (Kennedy, J., concurring).

clearly indicates that on the merits, the plaintiffs have constitutional due process rights which a court must recognize.

The Court's mere assertion of jurisdiction in the Guantanamo case has dramatically affected governmental conduct. Indeed, the Supreme Court's decision to hear the Guantanamo case had a strong impact on the government's behavior even before the Court announced its ruling, leading to the release of many prisoners and Secretary of Defense Rumsfeld's decision that some process would be established to determine whether a prisoner should continue to be detained.[388] Only eight days after the Supreme Court's decision, the Department of Defense announced that procedures to inform the Guantanamo prisoners of their rights and to review their detention would be implemented.[389] The government has thus moved quickly to establish some due process for the prisoners, although the prisoners' lawyers have severely criticized that process and seek hearings before federal district courts. Therefore, the process owed plaintiffs will be back before the courts fairly quickly.

Finally, the Guantanamo case also illustrates the limitations of litigation to transform the public dialogue. For some of the lawyers at the CCR, the most fundamental issue involved in the case is the Executive's use of the wartime paradigm to detain and prosecute people who should be prosecuted under civilian law. These attorneys would want to challenge whether the "war against terrorism" truly fits within the definition of a war, or whether Al Qaeda should be treated as a criminal conspiracy and its members prosecuted under ordinary civilian law.[390] But a challenge in the Guantanamo case to whether the war against Al Qaeda is really a war for constitutional or international purposes would have little chance of success in the courts.[391] Therefore, these attorneys

388. Secretary Donald Rumsfeld, Remarks to Greater Miami Chamber of Commerce (Feb. 13, 2004) ("For those detainees who pose a continued threat and who do not need to be detained the U.S. government is instituting a process for an annual review."), *available at* http://www.defenselink.mil/transcripts/2004/tr20040213-0445.html.

389. *See* Kathleen T. Rhem, *Detainee Status Review Tribunals to Begin Within Weeks*, AM. FORCES PRESS SERVICE, July 9, 2004, *at* http://www.defenselink.mil/news/Jul2004/n07092004_2004070902.html; *see also* Kathleen T. Rhem, *DoD to Review Status of All Guantanamo Detainees*, AM. FORCES PRESS SERVICE, July 8, 2004, *at* http://www.defenselink.mil/news/Jul2004/n07082004_200407080l.html.

390. The Executive's position on the Guantanamo and other detainees suspected of being linked to Al Qaeda seems Kafkaesque. It invokes the laws of war as the framework to analyze their detentions and then argues that the protections of those laws contained in the Geneva Convention are inapplicable because these prisoners are "unlawful combatants."

391. The courts will undoubtedly be asked to review the different question of whether an alleged Al Qaeda member or supporter not captured on the battlefield in Afghanistan but rather in some other country can be treated as an enemy combatant subject to the laws of war, and not civilian law.

are relegated to making that more fundamental point in their public speaking about the case, and not in court.

However, the filing and the arguing of the case at its various stages has resulted in a large amount of publicity in the United States and abroad, resulting in pressure on the government to discontinue this lawless policy. Such publicity can have various effects throughout society. It can encourage people to engage in discussion about their views on that particular situation. It can generate support for the movements advocating the various sides of the issue. It could even result in bringing new financial resources, and organizational or legal talent, to the movement. Thus, movement attorneys should realize that litigation and publicity should go together hand in hand as part of an overall strategy that will result in eventual success, even if that success is temporarily delayed by defeats in the courts.

The Guantanamo litigation is but a recent example of the long tradition in this country of using courts as one arena of protest. That case started as a lonely protest against an illegal government policy. The case was originally viewed as hopeless by most legal observers and rejected by the lower courts. Many observers might even initially have said that no reasonable lawyer could have any hope for success. The publicity and international outrage surrounding the Guantanamo policy helped force the Supreme Court to take the case seriously and eventually rule for the plaintiffs. Yet the fundamental lesson of the Guantanamo case is not to be found in the important Supreme Court victory, but in the decision of a dedicated group of lawyers to litigate the case in order to protest the administration's policy despite the seemingly difficult odds of success.

CONCLUSION

The courts as forums for protest model differs from the traditional, private dispute standard on institutional reform, the two models traditionally described by legal scholars. The reduced emphasis on winning or losing and the lesser role of the judge are two features that distinguish this model from the others. Our nation has seen a long tradition of litigators and movements using the courts as platforms for arguing controversial positions and garnering public support for them. From the Revolutionary period, through this country's struggle with the issues of slavery and women's suffrage, up until modern instances where private citizens and public officials have attempted to challenge governmental actions, our system's courts have been used as forums to stir debate by the citizenry.

Because of the importance of encouraging people to engage in discussion about current social issues, and because of the implications for freedom of speech, courts should not allow sanctions under Federal Rule of Civil Procedure 11 or other similar rules to stifle popular debate stirred by lawsuits that may be considered "frivolous" because they argue against precedent or are viewed as losing cases. Bringing a lawsuit to generate publicity for one's cause should not be viewed as an improper purpose under Rule 11.

Under the courts as forums for protest model, judges will often find themselves in a difficult position: They will be faced with a situation where legal precedent and social and political reality collide. Though articulating a legal principle while deciding a case without enforcing that principle may seem problematic, judges should feel comfortable doing so when it is necessary in order to encourage society and governmental actors to remedy an injustice that will otherwise continue unchecked.

Finally, progressive attorneys should adapt to this model as well. Realizing that litigation is part of an overall strategy that should include publicity and other forms of political action, they should become involved with the groups and movements they represent, and shape their litigation strategy so that it will dovetail with the overall goals of those movements.

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