Washington University Journal of Law & Policy

Volume 12 *Access to Justice: The Social Responsibility of Lawyers*

2003

Social Change, Judicial Activism, and the Public Interest Lawyer

Thelton Henderson
United States District Court for the Northern District of California

Follow this and additional works at: https://openscholarship.wustl.edu/law_journal_law_policy

Part of the Judges Commons, and the Law and Society Commons

Recommended Citation

Thelton Henderson, *Social Change, Judicial Activism, and the Public Interest Lawyer*, 12 WASH. U. J. L. & POL'Y 33 (2003),
https://openscholarship.wustl.edu/law_journal_law_policy/vol12/iss1/4

This Essay is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Journal of Law & Policy by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

Social Change, Judicial Activism, and the Public Interest Lawyer

Hon. Thelton Henderson*

It is a great pleasure for me to be here as a part of the very distinguished Public Interest Law Speakers Series, and especially for me to be the Webster Society Annual Speaker. It is often said that we are known by the company we keep. I hope this saying is true, for the company in which I find myself in this speaker series including Barry Scheck, Dennis Archer, Scott Turow, and my fellow Californians and good friends professors Deborah Rhode and Angela Harris is indeed impressive.

Another reason I am so delighted to be a part of this series, which celebrates thirty years of excellence in clinical education, is my long-held belief that clinical education is a vital step in preparing public interest lawyers to launch their careers. Indeed, ever since 1968, when I taught clinical courses at Stanford Law School—after having been the director of a legal aid office for three years—I have believed that law schools have a duty to the community to provide clinical education for students who wish to practice public interest law.

Clinical education provides an invaluable service for any law student, no matter his or her career goals. For those who wish to work in the public interest arena, however, it plays an especially crucial role. I know that most of the students graduating from this fine university will go on to work in a traditional law firm setting. Traditional law firms will take your newly-minted diploma and your ability to think like a lawyer, a skill your professors have spent three years honing to perfection, and they will train and mentor you. The training that they will give you will most likely be deliberate and careful, often spanning several years. The client will usually pay for

---

* Judge, United States District Court, Northern District of California. This speech was presented as part of Washington University School of Law's 2002-2003 Public Interest Law Speaker Series.

Washington University Open Scholarship

at least a part, if not most, of that training through something with which we're all familiar: the billable hour.

If, however, you want to work for a legal aid office, or some other non-profit public interest group that has scant resources, you might well receive a stack of files and find out that you are on your own to learn lawyering as you go, perhaps even by trial-and-error. There is virtually no budget in most of these operations for training new attorneys, and, of course, the billable hour is not applicable in this setting. Law school clinical education courses provide these students with most of the tools needed to hit the ground running, allowing them to better serve their clients.

I concluded long ago that the frequent academic assumptions that the law school mission is simply to hone the mind and that the nuts and bolts of law practice are best left to the employer are a bit misguided. While such assumptions poorly serve students generally, they do a particular disservice to the public interest community. Where else will young lawyers get the type of training, and at what expense, in order to go on to be the best they can be? Because of the particularly strong clinical education program here at Washington University School of Law, I realize that I am probably preaching to the converted. But elsewhere, this message very much needs to be heard.

This brings me to our topic today which is "Social Change, Judicial Activism, and the Public Interest Lawyer." Of course each of these three concepts could easily be the subject of an entire lecture. Because this is a work in progress, I apologize in advance for any lack of fullness or cohesion. I thought, though, that I would begin by sharing a few thoughts about what I think it means to be a public interest lawyer. I then turn to whether views on judicial activism and other factors have created new challenges for today's public interest lawyers working through the courts to achieve their goals.

What does it mean to be a public interest lawyer? I have had a keen interest in this question since I was in law school. I wondered how I was going to fashion a legal career for myself that would give me personal satisfaction, allow me to support myself and my family, and at the same time provide some benefit for the public good. Over the years I have come to believe that this question must necessarily be viewed both narrowly and broadly.

https://openscholarship.wustl.edu/law_journal_law_policy/vol12/iss1/4

The prevailing view of the public interest lawyer is relatively narrow in scope. Given the persistent nexus between wealth and access to legal representation, our multi-layered society is always in need of lawyers committed to serving poor and under-represented people who would not otherwise have access to crucial legal advice. Our society is equally in need of lawyers who are committed to upholding rights and addressing issues that do not generally attract adequate financial backing, such as civil rights, immigrant rights, child poverty, and today more than ever, those who get caught, perhaps innocently, in the cross-fire of our war on terrorism. I believe that these lawyers deserve special recognition because they devote their careers to the public interest and they do so usually at a substantial personal financial sacrifice.

At the same time, the circle of lawyers who serve the public interest can be viewed as much broader than we sometimes think. In the profession of law, the public interest is always implicated, and we mistake ourselves by assuming otherwise. This premise is as true for a corporate transactional lawyer with Fortune 500 clients as it is for a public defender or an impact litigation attorney. The weighty legal and moral obligations that attorneys face leave ample room to vindicate the public interest if they so choose. Thus, even in the justifiable pride of electing a legal career explicitly dedicated to the public interest, one must never be so jealous of the term 'public interest' as to forget or deny that all lawyers are almost preternaturally so dedicated—else how can we invite our fellow lawyers to that higher purpose?

Indeed, I firmly believe that a prosecutor who wisely and fairly uses his or her power to forego prosecuting someone when the interest of justice so requires furthers the public interest just as much as a public defender who, from the trenches, defends the criminally-accused indigent. A partner in a major law firm who works to ensure that his or her corporate clients treat their employees in a non-discriminatory manner, or that his or her clients take the high road even as they pursue the bottom line (for example, consider Enron or Worldcom) furthers the public interest just as much as the plaintiffs' lawyer who sues the corporation for discrimination or the government lawyer who charges the corporate executive with fraud and malfeasance.

Washington University Open Scholarship

One of the biggest and most significant civil rights cases I have tried in my 23 years on the bench, a case which challenged widespread unconstitutional conditions at the foremost maximum security prison in California,[1] was litigated by a small prison law group in partnership with one of the country's leading law firms in high-tech litigation and transactional work. The partners and associates at that firm worked in a pro bono capacity and expended tremendous resources, including advancing costs well in excess of a million dollars, on behalf of this very important case. The public interest prison law group could not possibly have handled the case by themselves. The large law firm, in my view, personified the spirit and essence of public interest law.

Whether you can devote your life to being a public interest lawyer as I first defined that term, or whether your career path takes you in other or more varied directions, I hope that you will always consider how your position affects and implicates the public interest, and how you can strive to serve and further the public interest in whatever way your position permits.

As I stand here espousing these rather high-sounding views about the public interest, and about professional obligations balanced against professional privileges, it occurs to me that it is no accident that lawyers have shaped our constitutional history as well as the day-to-day events of our society at large. Lawyers are peculiarly equipped, by training and experience, to be partisans for a cause and to take the lead in the vigorous and frank discussions of our society's needs and problems. They have long functioned as architects as well as artisans of social reform, redesigning, reshaping, and creating not only legal institutions, but social, economic, and political institutions as well. To give one obvious example, it was largely lawyers who shaped and managed Franklin Delano Roosevelt's New Deal Administration in l932, a program which brought us out of the most devastating depression in our country's history and positioned us to become the most powerful and prosperous country in the world. And in the early 1960s, lawyers of all colors and backgrounds, young and old, joined the civil rights movement en masse, and made it possible

1. Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995).

https://openscholarship.wustl.edu/law_journal_law_policy/vol12/iss1/4

for Dr. Martin Luther King, Jr. to fashion the most successful civil rights movement in our nation's history, one based upon a willingness to go to jail for passive resistance to immoral laws.

A very long time ago, I was a public interest lawyer myself, and I aspired to achieve social change through the courts, however modest that change might be. I know it isn't always easy. I recall, for example, how difficult it was, especially before the Rodney King incident, to convince a jury or judge that police sometimes misbehave with respect to the rights of minority citizens. Now juries and judges are much more open to considering such cases on their merits.

I have now been embosomed in the world of the judiciary for the last 23 years. I thought this lecture today, however, would provide me an opportunity to reflect upon some of what has occurred over the last 20 years, and specifically to think about whether debates over judicial activism and other such factors have created new or additional challenges for public interest lawyers who seek to use the courts as a vehicle to achieve social change or social justice. It will not come as a surprise that I have been called a judicial activist on more than one occasion.

I believe there are new challenges for those practicing in the public interest, and that these challenges come from different directions. First, as some of our social problems grow more intractable and complex, it becomes much more challenging for lawyers to tackle them through judicial avenues. It is much easier to bring a lawsuit in response to an incident of blatant discrimination than it is to prove forms of discrimination which are no less devastating in their results, but which occur in more subtle or indirect forms. When I began my legal career in 1962, the civil rights battle was over the right to vote, to sit in the front of the bus, eat at the drugstore lunch counter, or to have an official policy of not hiring minorities. Today, institutional red-lining, undisclosed higher interest rates on car and other loans, racial profiling, and subjective job interviews provide much more elusive and amorphous targets.

At the same time, we have seen federal funding for legal services drastically slashed, and legal aid offices around the country have had to consolidate or close to meet bare-bones funding limits set by the

Washington University Open Scholarship

Legal Services Corporation. Studies show that at least eighty percent of the legal needs of the poor still go unmet.[2]

Strict restrictions on the types of cases that legal aid offices can bring have also been imposed. For example, legal aid offices are no longer allowed to bring class action cases,[3] which further impedes their ability to efficiently and effectively enforce important rights. Before this restriction was in place, a legal aid office in northern California brought a class action in federal court, *Sneede v. Kizer*,[4] contending that the State of California was improperly interpreting the Medicaid statute, and in the process depriving thousands of class members of medical benefits to which they were legally entitled. Legal Aid won that case, and thousands of Californians began to receive critically important medical benefits. Under today's restrictions, this class action could not be brought, and the important rights at stake could never be vindicated, at least not by a legal aid office, except on a one-client-at-a-time basis.

The current restrictions on impact litigation are, for me, particularly ironic. Back in the early days of Lyndon Johnson's war on poverty, when I directed the East Bayshore Neighborhood Legal Center, we would dutifully represent our clients on an individual basis in their grievances against landlords, collection agencies, and the like. I remember clearly when the lightbulb went off for legal aid offices around the country that the best way to fight the systemic problems faced by our clients was to conduct so-called impact litigation, which strikes at the heart of the problem that needs to be addressed. It is a pity this has been stopped.

Not only are resources more scarce, and social issues often more difficult to identify and address, but a more conservative Supreme Court has also significantly impacted the practice of public interest law. In recent years, Supreme Court decisions have dramatically changed the landscape for citizens and lawyers seeking to enforce civil rights or environmental laws.

---

2. LEGAL SERVICES CORP., SERVING THE CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS, A SPECIAL REPORT TO CONGRESS 12 (2000), *available at* http://www.lsc.gov/pressr/EXSUM.pdf (last visited Mar. 13, 2003).

3. 45 C.F.R. § 1617.3 (2002) (prohibiting recipients of Legal Services Corporation funds from "initiating or participating in any class action").

4. 728 F. Supp. 607 (N.D. Cal. 1990).

https://openscholarship.wustl.edu/law_journal_law_policy/vol12/iss1/4

For example, in three decisions in the 1998-99 Term the Court resoundingly pronounced the inviolability of state sovereignty in the federal system.[5] In the three decisions, all decided by a majority of the same five justices, the Court dramatically curtailed the power of Congress to provide a judicial forum for redress of state infringement of federal rights.

We need not debate the soundness or the wisdom of this jurisprudential trend to expand states' rights in order to understand the concerns of the civil rights community where, historically speaking, the term "states' rights" has been considered synonymous with racial segregation and Jim Crow laws that perpetuated second class citizenship for blacks in our southern states.

Further compounding this effect is the growing trend to label decisions upholding or expanding civil rights as the product of judicial activism, with the pejorative implication that such decisions represent an attempt by judges to improperly disregard legal precedent or to thwart "the will of the legislature" or "the will of the people." Conversely, decisions that are consistent with a more politically conservative outlook are typically portrayed as products of judicial restraint.

It seems to me, however, that the term 'judicial activism' ultimately depends upon whose ox is being gored, and not upon judicial, political, or social persuasion. The truth is that the term 'judicial activism' is not a particularly coherent concept to begin with. All judges are required to act in every case, and every form of judicial action bears some social consequences, if only for the parties involved. Thus, the claim that a judge who maintains the status quo is quiescent whereas a judge whose decisions modify the status quo is active seems to me to be a distinction without a difference. In reality, there are plenty of issues on a conservative agenda that would require active judging to implement, just as there are a host of liberal issues that will only hold firm if judges are restrained in approaching them.

Indeed, the misleading nature of the judicial activism debate is made even more evident when one considers that it seems to be only invoked to describe decisions perceived as having a liberal bent.

---

5. Alden v. Maine, 527 U.S. 706 (1999); College Sav. Bank v. Florida Prepaid Postsecondary Educ., 527 U.S. 666 (1999); United States v. Morrison, 529 U.S. 598 (2000).

Washington University Open Scholarship

The true nature of the judicial activism debate can, in my view, be fairly easily and obviously exposed, as was recently done by Professor William P. Marshall of the University of North Carolina.[6] After comprehensively analyzing the decisions of the Supreme Court since 1995, Professor Marshall concluded that the current court is actually the most "activist" in our history.[7] Among other things, he found that it has invalidated over twenty-six federal laws in the last six years.[8] In striking contrast, he tells us that during the entire first 200 years following ratification of the constitution, the Supreme Court only struck down a grand total of 127 federal laws, an average of a little more than one law every two years.[9]

It has also been frequently observed that the recent line of Eleventh Amendment cases that I mentioned earlier[10] represents one of the most dramatic departures from precedent in Supreme Court history. Indeed, Judge John T. Noonan, a former Boalt Hall Law School professor, and now a highly regarded member of the Ninth Circuit Court of Appeals, who also happens to be a Reagan appointee and who is usually considered a judicial conservative, made this point quite passionately in his recent book.[11] In his extraordinary critique of the Supreme Court, Judge Noonan contends that the Supreme Court's recent expansion of the states' immunity from the reach of federal law is untethered from the Constitutional design, and "without justification of any kind,"[12] thus threatening "intolerable injury to the enforcement of federal standards"[13] and presenting a "danger to the exercise of democratic government."[14] This is strong language indeed, especially from a federal judge who is supposed to take his marching orders from the Supreme Court. What reform or

6. William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217 (2002).

7. *Id.* at 1223.

8. *Id.* (citing Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1074 (2001)).

9. *Id.*

10. *See supra* note 5 and accompanying text.

11. JOHN T. NOONAN, NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002).

12. *Id.* at 154.

13. *Id.* at 155.

14. *Id.* at 140.

https://openscholarship.wustl.edu/law_journal_law_policy/vol12/iss1/4

improvement is more evidently needed than light on decisions that fail to carry out purposes set out by the Constitution itself.

Unfortunately, however, the persistent drumbeat of judicial activism may take a toll. While I would not expect that it would affect the outcome of any particular case, the persistent campaign against judicial activism inevitably contributes to the politicalization of the judiciary, especially at the federal level, which can only serve to undermine the overall independence of the judiciary and, in turn, the legitimacy and effectiveness of our courts as an institution. This, in turn, necessarily increases the challenge for the public interest lawyer who must rely upon a strong and independent judiciary to vindicate civil rights and implement its judgments.

Of course, no discussion of the challenges facing public interest lawyers would be complete without addressing the very real obstacles to effectuating social change through civil rights litigation, obstacles that have been revealed all too clearly by the last 25 years of civil rights history in this country.

The singular civil rights case of the last century, in my view, was *Brown v. Board of Education*.[15] When *Brown* was decided in 1954, the black community rejoiced in a way it had not since Joe Louis defeated Max Schmeling in an historic heavyweight boxing match. There was great optimism throughout the land that, with the overturning of *Plessy v. Ferguson*,[16] the days of segregated education in this county were on their way to becoming an unpleasant memory. However, painful experience has shown that this historic judicial ruling cannot, without legislative and executive action, and without grass-roots mobilization, achieve the degree of social change that many, infused with the optimism of the 1950s and 60s, may have hoped for.

Nearly half a century later, we must concede that our public schools are more segregated than ever.[17] The New York Times recently reported on a new study by the Civil Rights Project at Harvard University that shows that white, black and Latino school children are more isolated within their own racial groups than they

15. 347 U.S. 483 (1954).
16. 163 U.S. 537 (1896).
17. *See, e.g.*, Jodi Wilgoren, *Schools Are Re-Segregate, Study Finds*, N.Y. TIMES, Jan. 21, 2003, at A14.

Washington University Open Scholarship

were 30 years ago.[18] This is certainly not what Thurgood Marshall and others expected would be the legacy of *Brown* as they savored their legal victory in 1954. Indeed, the limits on the ability of courts alone to achieve social change cannot be more clearly illustrated than with the case of *Brown v. Board of Education*.

Interestingly, as the Harvard study found, demographics alone do not account for the rapid re-segregation of schools that has been occurring over the last ten years.[19] Another significant factor has been the recent termination of court-ordered desegregation remedial plans.[20] Since the early 1990s when the Supreme Court began making it easier to terminate such plans, many school districts have lifted desegregation orders.[21] Thus, while *Brown* can be used to starkly illustrate the limits of the courts, it also serves to underscore their power. When courts utilized the full extent of their remedial power to enforce *Brown* vigorously through desegregation orders, it had a substantial impact. However, as soon as the courts were required to step back, the force of *Brown* quickly dissipated, and schools re-segregated. As an aside, I might mention that I've seen this same pattern in prison reform cases, once the court ceases to supervise the constitutional remedies it has ordered.

The civil rights community will likely continue sorting out the complex lessons of *Brown* for some time, and I can not begin to do justice to that discussion here. Whatever conclusions one may draw, social change through the courts rarely involves a straight line from A to B, but rather is a far more complicated, tangled, and multi-layered process in which litigation can play an important, but far from exclusive role.

Frankly, the public interest lawyers of today certainly have their work cut out for them, and, I think, much more so than in the days when I practiced law. The path is not laden with easy choices, quick

---

18. ERICA FRANKENBURG ET AL., THE CIVIL RIGHTS PROJECT, HARVARD UNIV., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 4 (2003), *available at* http://www.civilrightsproject.Harvard.edu/research/reseg03/AreWeLosingtheDream.pdf (last visited Mar. 17, 2003).

19. *Id.* at 16.

20. *Id.* at 5.

21. *Id.* at 19.

results, or even friendly precedent. Nor is the path bordered with baskets of resources and bundles of support.

The problems to be tackled today are more sophisticated and they are more entrenched. The focus on judicial activism has, in my view, been used to politicize judicial decisions in what I believe to be an unhealthy way. The current Supreme Court has not shown itself to be a friendly forum for the public interest lawyer. And resources available for representing poor people are ever more scarce.

That these formidable challenges exist, however, is no reason to stand back or give up on the courts as a component for social change. On the contrary, the courts remain at center stage, and rightly so, as our nation continues to grapple with the social issues of the day. After all is said and done, we are a nation of laws. As a result, our laws are not only symbols, but necessary avenues for our own development and evolution as a free society. It is simply the nature of a society based on the rule of law that change will evolve, at least in part, through our courts. As such, the lawyers and the public, will always press for social changes through the courts. Neither side of the political spectrum will be immune from this pressure.

Moreover, the significance of public interest litigation cannot always be measured by just one scale. For instance, the fact that *Brown* did not successfully prod our nation to a fully integrated public school system does not undermine the historical enormity of that decision. For the black school child, living with the knowledge and conviction that some measure of his or her plight is the result of unjust and legally disapproved conduct is a fundamentally different reality than having to live with the pain that such conduct is perfectly condoned and legal. Even if very little in day-to-day life changes and there is just the expectation of some material betterment, the knowledge that one's experience finds vindication in the eyes of the law is a good bit of what empowerment means. I think that this is especially true in democratic societies. I have been told by civil rights leaders from Martin Luther King to the remarkable Robert Moses of the Student Non-Violent Coordinating Committee that the new-found expectation that, unlike past administrations, John F. Kennedy would respond to Bull Connors's police dogs and fire hoses in Birmingham, was critically important fuel for the civil rights movement. While our experience with *Brown* and other civil rights cases may provide a

Washington University Open Scholarship

sobering dose of realism for the public interest litigator, it should not be cause for discouragement.

One need not look far to see that courts remain vitally involved in the critical social issues of the day. In our post-September 11th world, the courts will ultimately sort out the parameters of our civil rights and liberties, and how they intersect with issues of national security. Cases addressing racial profiling, the constitutional limits on big-brother surveillance and secret detentions, as well as closed deportation hearings are already winding their way through the courts. As one example, the Immigrant Rights Project of the American Civil Liberties Union has been challenging the nearly 600 closed deportation hearings that began shortly after September 11th. So far, the Third and Sixth Circuit Courts are split on their constitutionality.[22] The Supreme Court has also taken up the issue of affirmative action in higher education and the continuing validity of *Regents of Univ. of California v. Bakke*.[23] These cases will have profound consequences for our society for years to come.

In discussing the new and many challenges facing public interest lawyers, I do not intend to dissuade young, idealistic students from pursuing a career in the public interest. Rather, my observations are meant only to illuminate what lies ahead as our society continues to strive to fulfill its promise of equal opportunity and justice for all. These challenges should excite you. They should invigorate you. They should involve you intensely.

Indeed, while the challenges are undeniable, I think the law students of today are in some ways better equipped than ever to take up the public interest mantle. Students today have the benefits of lessons learned, technology which has made the practice of law easier, and increased public interest fellowships and opportunities than when I graduated from law school. And you, here at Washington University, have an extraordinarily fine and comprehensive clinical

---

22. *Compare* North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002) (holding that exclusion of the media from September 11th-related deportation hearings is not a violation of the First Amendment); Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) (holding that the First Amendment guarantee of freedom of the press applies to deportation hearings notwithstanding Attorney General Ashcroft's directive to the contrary).

23. 438 U.S. 912 (1978); Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 1617 (Dec. 2, 2002).

https://openscholarship.wustl.edu/law_journal_law_policy/vol12/iss1/4

education faculty to teach and inspire you. Clinical education was but a twinkle in Dean William Prosser's eye when I attended Boalt Hall.

It is up to each generation to move our country closer to the just and equal society we aspire to be. And it is beyond doubt that each generation of lawyers will find itself in the courts as facets of this struggle are played out upon the judicial stage. It is how it has always been, and how it will no doubt always be. I hope many of you will rise to the challenge and choose to assume your role upon that stage—whether it be in a supporting or leading role.

That is why I am so pleased to be here, so happy to look out and see so many of you here. I hope that whether you choose to practice public interest law in the traditional sense or have a job in which you can make a contribution to the public interest through pro bono work or in some other way, you always consider that the privilege of the practice of law must go hand in hand with the highest kind of duty and responsibility to the public to make certain that our system of justice represents the interests of not just a few, but of all Americans.

As I mentioned in the beginning, I cannot begin to do justice in these brief remarks to the weighty topics that I have chosen to discuss. I do hope, however, that I have at least raised some issues that can generate more substantive discussions in your classrooms or among yourselves.

Washington University Open Scholarship