Journal of Law and Interdisciplinary Studies

A JURISPRUDENCE OF INSURGENCY: LAWYERS AS COMPANIONS OF UNIMAGINED CHANGE

Michael E. Tigar*

On August 28, 1963, I watched the March on Washington speeches on television, as I sat in Los Angeles. What was happening?

- I was about to drive up to Berkeley to begin law school.
- Nelson Mandela and other African National Congress leaders were awaiting trial in South Africa.
- *Brown v. Board of Education* was not yet ten years old. Federal troops and federal marshals had been sent to enforce desegregation orders.
- The lunch counter sit-in movement had begun in 1960 and swept the country. Protesters were still being beaten and jailed.
- American military involvement in Vietnam was escalating.
- The Supreme Court had decided *Fay v. Noia*, opening up post-conviction relief for death row inmates.
- Earl Warren was Chief Justice of the United States, and the Court had begun to hold that the Fourteenth Amendment incorporated provisions of the first ten amendments.

What had not yet happened?

- John F. Kennedy's assassination.
- Freedom Summer—the summer of 1964 in Mississippi—cost the lives of civil rights workers, and saw a Klan reaction that included bombing and burning of dozens of African-American churches.
- Sixty-four leaders of the Mississippi Freedom Democratic Party came to the Democratic National Convention in Jersey City and demanded to be seated in place of the "official" all-white Mississippi Democratic Party.
- Nelson Mandela was not sentenced to death.
- American involvement in Vietnam escalated, as did draft calls and draft resistance.
- The Civil Rights Act of 1964 led to some desegregation and to a Supreme Court decision that freed many sit-in protesters.

* Professor of Law, Emeritus, Washington College of Law. Professor of the Practice of Law, Emeritus, Duke University School of Law.

- The Supreme Court had not decided *Dombrowski v. Pfister*, which gave some hope that the federal courts could stop state law incursions on fundamental rights through expansive use of the injunction power.

Each of these events has inspired articles, essays and books. I have not put in any footnotes about them. If you want to know more, go to the library or on-line. At the end of this essay, you will find a list of sources. Steep yourself in some of this history. The aspiration of many who lived these events was for social justice, a prerequisite to social peace.

Lawyers and law students in my generation shared this aspiration. But we were called upon to do more than aspire. Our first task was to describe the ways in which the legal system of our time held back progress towards the goal of social justice. We had then to propose ways to alter that system to bend it towards the goal, or to remove barriers to achieving it. And if we were candid, and had studied deeply enough, we could describe a legal system that would come to be in the wake of the great social change to which we aspired. To various extents and in various ways, lawyers and law students responded to these challenges.

There was one overriding consideration, which through hubris or bewilderment some lawyers and law students failed to grasp. As a character in one of my plays said, arguing with Clarence Darrow:

> Your lawyer's ego wants you to think you stand at the center of every event by which the world is changed. Your right to stand there is only because some brave soul has risked death or prison in the people's cause and you are called to defend him — or her. When you put law and lawyers at the center of things, you are only getting in the people's way, and doing proxy for the image of the law the state wants us to have.

The civil rights lawyers who litigated desegregation cases had first to find clients willing to stand up to the inevitable threats of retaliation. The lawyers who defended sit-in protesters and freedom riders would have had no work if there had been no movement for social change that called out their services.

Those of us in law school or law practice had to ask ourselves two questions: First, what can I achieve? Second, am I ready to try? The first question deals with the outward forms called history. The second with an inward look at our own reasons for acting.

In our study of outward forms, we must understand the trajectory of past events in order to do anything useful about the present. This statement is more than simply an extension of Santayana's warning, "those who cannot remember the past are condemned to repeat it. " As lawyers, we are inevitably in the business of predicting the results of our and our clients' actions. To do that we must understand the sweep of history and the possible directions of change. After all, law is a process more than it is a

structure, for it is always being interpreted and applied, as well as amended. When we seek to understand history, we must also focus on the way that law is expressed in the lives of people.

Our inward study can take many forms. For example, the Buddha cautioned against greed, anger and delusion, while also asking that we seek identification with all living beings and their struggle. If we are deluded about the possibility of change and the way to achieve it, we do not serve our own ends nor those of our clients. If we allow ourselves to think the struggle is about "us," the lawyers—that form of greed for recognition can distort our perspective on what the clients need. And anger is quite different from a concern, or sense of injustice; anger clouds judgment, concern focuses it.

The lawyers who showed up for work had a fairly limited box of tools. They could obtain court orders to do this or that, or to free people from imprisonment. The injunctive power of courts might mandate fairly comprehensive relief on particular subjects in a particular region. The class action device enhanced the power of legal and equitable remedies. But the lawyers, as lawyers, could not construct a new and more just society. That work could be done only by the clients, organized into a movement for social change. As I have observed ere now, the lawyers could fashion a jurisprudence of insurgency, but could not *be* the insurgency. This is not to denigrate lawyers and lawyering. Lawyers' elegant and forceful presentation of demands for justice have shaped the narrative of social change in each generation.

This observation combines my sense of institutional limitations, and my vision of what lawyers do. The legal system, considered as an institution, is geared to enforce the dominant values of the social system in which it sits. Changing that system requires pushing to gain the maximum justice that the existing rules permit. *Brown v. Board of Education* was in essence a reformulation of a text about equality. The Court asked and answered the question, "what does equal protection most plausibly mean?" The Court could not command the creation of a racially just society. It could only work with the tools that it had.

But how did the Court do its work? Why was it moved to change from "separate but equal"? The lawyers who argued *Brown* brought a new narrative of oppression. It was not "their" narrative. They used all the tools they could find—including the work of social scientists—to tell their clients' story. They understood what the character in my play was talking about: they were no better than their ability to hear, understand and express the human condition of their clients.

Now, as then, the lawyer asks himself or herself "Whose vision of social justice will I serve?" If you decline to make a choice, you are choosing to serve and go along with the dominant group, the rich and powerful. When you have made your choice, you will decide how to use your special skills and insights.

I return to the beginning of this short essay. In 1963, racist public officials used their power to frustrate the right to equality and to fair treatment in the courts. An apartheid South African government exerted its power to stifle resistance. The right to counsel, and to all the procedural rights that lawyers could assert, were necessary but hardly sufficient conditions of social progress.

The same paradigm is useful today. Imagine yourself listening to Dr. King's speech on that August day. What would you have done? Would you have boarded a Freedom Ride bus, sat in at a lunch counter, or gone to South Africa to work with the clandestine African National Congress? You would in each of those places have been a participant. But if you were a lawyer then, or becoming one, you would have asked how your unique skills and talents could serve the aspirations of those whose goals you shared. You would have understood that in the struggles of that moment, the first question was the effect of your work on social justice. With your lawyer-ness, you would have an automatic opportunity to participate in a meaningful way, to make the sort of difference that you do not make if you are simply among ten thousand marchers.

I am not saying that one path is better than another. In 1963, I did not know whether I should follow an academic career into teaching history, or continue my work as a journalist reporting on public affairs, or go to law school. I chose law school because it seemed to me that I would be able more quickly to have a meaningful—at least to me—role in the change that was happening.

Another such moment may be upon us. "Arab Spring" upsets old regimes in the Middle East, and may herald a new wave of anti-colonial sentiment. The Occupy Wall Street movement forcefully reminds us that the disparity between rich and poor, white and those of color, has become greater in the past twenty years. Labor rights are threatened, and workers are pushing back. The right to a fair trial, and in some cases to any trial at all, is threatened and courageous lawyers are taking up this challenge.

I am not, however, talking about the value of a legal education in the abstract. One message of this essay is that you are required to choose which side you will be on. I do not discount the difficulty of that choice. I went to a state law school and paid about $400 a semester in fees, and that included health care. Every law student and most lawyers who read this essay know that legal education today costs exponentially more than that. Most young lawyers come out of law school with burdens of debt that limit career choices. The knowledge that they will face this burden tends to direct the kinds of choices and aspirations they start to have from the first days of law school.

It would take a longer essay, much longer, to address this problem in any detail. Law school curricula have lagged behind, in the sense that they do not address the challenges that these newer generations of students will face. Legal education is mired in a vision of itself that owes too much to a century-old image of the legal profession. And we all know what color and gender that profession reflected, and what values it espoused. Funding for legal services—civil and criminal—is under attack. There are

ways to address these issues, and I have suggested some of them in two essays cited below.

Those who shared Dr. King's vision did not win, nor did they lose. Today's struggles remind us that there is a perpetual battle for social justice, and therefore always an opportunity to participate. We must keep in mind the dialectical idea of progress. Social change happens when contradictions are sharpened—and issues clarified—through struggle. Because contradiction is the motive force of history, "reaction" is inevitable and in a quite precise sense necessary. Each generation therefore faces a new set of decisions and challenges that arise from past events and present reality. If you make today's list, in the fashion of the list one might have made in 1963, you would see that Shelley's hopes about the writers of his own time can be applied in every generation, including this one. And you would also see that he might as well have been talking about lawyers.

> The great writers of our own age are, we have reason to suppose, the companions and forerunners of some unimagined change in our social condition or the opinions which cement it. The cloud of mind is discharging its collected lightning, and the equilibrium between institutions and opinions is now restoring, or is about to be restored.

Sources and suggestions for further reading:

- ROLAND BARTHES, *Dominici, or the Triumph of Literature*, in MYTHOLOGIES 43 (1957). This is a classic essay. You can read it in French as well, in the collection of the same name. If Barthes, a most exciting writer on narrative, impresses you, use his name as a Westlaw search. You will find that I have often cited him, as have others.
- Michael E. Tigar, *The City Upon the Hill*, in RAISE THE BAR: REAL WORLD SOLUTIONS FOR A TROUBLED PROFESSION (Lawrence J. Fox ed. 2007).
- Michael E. Tigar, *Narratives of Oppression*, 17 HUM. RTS. BRIEF 34 (2009).
- Michael E. Tigar, *Crisis in the Legal Profession: Don't Mourn, Organize* Ohio N.U. L. Rev. (2011).
- My memoir, FIGHTING INJUSTICE (2002), expands on the themes of this essay. My book, NINE PRINCIPLES OF LITIGATION AND LIFE (2009), discusses lawyers' roles and obligations.
- KENNETH S. BROUN, SAVING NELSON MANDELA: THE RIVONIA TRIAL AND THE FATE OF SOUTH AFRICA (2012), is a magnificent study not only of the African National Congress treason trial but of lawyers and clients working for social change.
- Michael E. Tigar, *Haymarket: Whose Name the Few Still Say with Tears: A*

Dramatization in Eleven Scenes, 2 U. PA. J. L. & SOC. CHANGE 11 (1994).

- Cases relevant to the essay include Brown v. Board of Education, 347 U.S. 483 (1954); Fay v. Noia, 372 U.S. 391 (1963) (expanding federal habeas review for state prisoners, particularly those sentenced to death; the fountainhead of all later federal habeas caselaw) (abrogated in part with respect to excusing defendant procedural default); Coleman v. Thompson, 501 U.S. 722 (1991); Hamm v. City of Rock Hill, 379 U.S. 306 (1964) (setting aside convictions of sit-in demonstrators based on passage of Civil Rights Act of 1964); Dombrowski v. Pfister, 380 U.S. 479 (1965) (invalidating Louisiana anti-subversive legislation and upholding a broad view of federal court power to halt prosecutions that threaten first amendment rights).