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LEADERSHIP AND SOCIAL JUSTICE LAWYERING

Faith Rivers James*

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INTRODUCTION

Integrating leadership into the legal curriculum presents an opportunity for law schools to better prepare students for the practice of law and their roles as civic leaders.¹ Law and leadership studies are designed to build technical, behavioral, and professional proficiencies in law graduates as an important, practical supplement to substantive legal knowledge. Recently, the American Bar Association reiterated its call for law schools to “focus on making future

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1. See Donald J. Polden, *Educating Law Students for Leadership Roles and Responsibilities*, 39 U. TOL. L. REV. 353, 359 (2008).

lawyers practice ready” in order to meet the demands of complex contemporary practice; and encouraged legal educators to “provide the knowledge, skills, values, habits and traits that make up the successful modern lawyer.”² As practitioners and academics endeavor to make curriculum more relevant and practically useful for law graduates, law-oriented leadership studies present avenues to teach both substantive legal analysis and critical lawyering skills, such as problem solving, strategic planning, and negotiation.³

“Social justice” or “cause” lawyering refers to the use of law and legal strategies to achieve community advancement objectives. In her seminal work reflecting upon the evolution of law practice in recent decades, Professor Mary Ann Glendon observed that lawyers have considerable influence on how the United States grapples with “the great issues of our time—the deterioration of natural and social environments, crime, poverty, education, race relations, the plight of child-raising families, decaying infrastructure, intense international competition, and so on.”⁴ The majority of these “great issues” have a social justice component at the core.

Lawyers have a unique ability to lead social justice causes. Professor Glendon suggests that lawyers have the power to favorably influence society’s ability to address the “great issues of the day”⁵ because of the “order affirming”⁶ characteristics that traditional lawyers possess: an eye for the issue and the future, a feel for common ground, mastery of the legal apparatus, knowledge of legal architecture and procedure, problem solving skills, strong tolerance for others in adversarial situations, and an appreciation for incremental change.⁷ In essence, these lawyering characteristics are pivotal leadership skills which qualify and empower legal professionals to lead in the public square. In the social justice

2. AMERICAN BAR ASSOCIATION & NEW YORK STATE BAR ASSOCIATION, 10 B Report to the House of Delegates, 1, *available at* http://www.abanow.org/wordpress/wpcontent/files_flutter/131290083010B.pdf.

3. *See generally* ROBERT W. CULLEN, THE LEADING LAWYER: A GUIDE TO PRACTICING LAW AND LEADERSHIP 130–33 (2009).

4. MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 100 (1994).

5. *Id.*

6. *See id.* at 101.

7. *See id.* at 102–07.

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context, campaigns to change, create, or refine laws require sound legal analysis and innovative lawyering. In addition, the change-oriented nature of the work requires expert client relations skills, consensus building, and negotiation expertise in order for advocates to bring about social movements that improve the community condition.

Leading clients and communities toward socially-oriented objectives requires advocates to use important lawyering skills. Social justice lawyering case studies offer an opportunity for law students to view and understand legal problem solving, and provide students with an introductory overview of administrative law and legislative process.⁸ This Article considers three social justice case studies that exemplify lawyering and leadership skills. First, Charles Hamilton Houston's ground-breaking strategic litigation strategy to dismantle Jim Crow reveals both the potential and limitations of problem solving through the judicial system. Second, El Congreso's campaign to establish farm worker health and safety standards through the OSHA rulemaking process provides an introduction to the power, process, and politics of the administrative state. Given the limitations of achieving social change within the judicial, legislative, and administrative arms of government, the third case study explores the role of lawyers in achieving social change through extra-legal means by considering the sit-in movement led by the "Greensboro Four"—students from North Carolina State Agricultural & Technical (North Carolina A&T) State University. Through social justice case studies, law students are able to witness the power of lawyering as an important tool that can be employed on behalf of individual clients or communities.

The purpose of using social justice lawyering case studies is to teach leadership and lawyering skills, rather than specifically promoting a social justice agenda. While students planning to pursue careers in public interest can learn career-

8. See generally Faith Rivers James, *Engaging Law Students in Leadership*, 30 ST. LOUIS U. PUB. L. REV. 409, 410 (2011). The experiential component of the course pairs teams of students with nonprofit organizations that have a public law issue. Working in teams, under the guidance of faculty and executive coaches, students have the opportunity to develop, strategize, and coordinate work for a corporate client dedicated to public policy or charitable goals. *Id.*

impacting lessons from the study of social justice lawyering, students with ambitions in the private or public sector can glean legal analysis skills and practice techniques from these examples. The goal of this area of study is to produce lawyers who can think creatively, work collaboratively, and produce results for their clients.

I. STRATEGIC LITIGATION: CHARLES HAMILTON HOUSTON'S CAMPAIGN TO DISMANTLE JIM CROW

Charles Hamilton Houston's legal career provides a wealth of leadership lessons. Houston was known for his role as the architect and leading lawyer in the campaign to dismantle Jim Crow, which was enshrined in the "separate but equal" principle established by the U.S. Supreme Court in *Plessy v. Ferguson*.⁹ The keystone of his effort was breaking down the barriers to quality education for African Americans. The son of a lawyer, Houston's path to a career as a leading lawyer began in the halls of Harvard Law School, where he excelled and became the first African American to earn an editor position on the Harvard Law Review.¹⁰ After graduating fifth in his class, and pursuing a Doctorate in Juridical Science from Harvard Law, Houston joined his father's Washington D.C. law practice and taught at Howard University Law School.

A. *Strategic Assessment and Alliances*

At Harvard, Houston became a protégé of Felix Frankfurter, who served on the National Association for the Advancement of Colored People's (NAACP) Legal Advisory Committee.¹¹ Frankfurter encouraged Houston's professionalism project documenting the experiences of African American lawyers throughout the country. In this initial assessment phase, Houston documented that a drastic increase in the number of minority lawyers would be required

9. See *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

10. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1975); GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* (1983); CHARLES J. OGLETREE, *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF BROWN V. BOARD OF EDUCATION* (W.W. Norton & Co. 2004).

11. See KLUGER, *supra* note 10, at 115.

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to launch a campaign to overturn Jim Crow.¹² Houston dedicated his efforts to building that cadre of lawyers at Howard Law School. He articulated a vision of lawyers leading the charge for social justice:

A lawyer's either a social engineer or . . . a parasite on society A social engineer [is] a highly skilled, perceptive, sensitive lawyer who [understands] the Constitution of the United States and [knows] how to explore its uses in the solving of problems of local communities and in bettering conditions of the underprivileged citizens.¹³

Howard Law School became the nerve center and cradle of social justice lawyering, as Houston engaged colleagues, such as William Hastie, and trained students, like Thurgood Marshall, in the campaign to end segregation in American society.¹⁴

In the quest to achieve his vision of social justice, Houston aligned with the NAACP, the premier civil rights advocacy group working for the minority enfranchisement. The NAACP's campaign for African American education was multifaceted, combining advocacy, philanthropic support, and strategic litigation efforts among a mélange of education leaders, lawyers, and community activists.¹⁵ Charles Hamilton Houston's strategic lawyering was the key to unlocking the door to African American education.

A foundational resource in the effort to provide educational opportunities for African Americans was the Rosenwald Initiative, funded by Sears & Roebuck tycoon Julius Rosenwald.¹⁶ At the behest of Booker T. Washington, Rosenwald provided matching grants to construct schoolhouses, teachers' homes, and shop buildings. Over the initiative's twenty year course from 1912–1932, African American communities provided \$4,478,653¹⁷ to match

12. OGLETREE, *supra* note 10, at 114.

13. See MCNEIL, *supra* note 10, at 84 (quoting Charles Hamilton Houston).

14. See sources cited *supra* note 10.

15. See generally KLUGER, *supra* note 10.

16. See MARY S. HOFFSCHWELLE, THE ROSENWALD SCHOOLS OF THE AMERICAN SOUTH 1 (2006); see also, *The Rosenwald Rural School Building Program*, PRESERVATIONNATION.ORG, <http://www.preservationnation.org/travel-and-sites/sites/southern-region/rosenwald-schools/history/> (last visited Nov. 17, 2011).

17. J. Scott McCormick, *The Julius Rosenwald Fund*, 3 J. NEGRO EDUC. 605,

Rosenwald's \$4,361,119, as well as supplies and labor to construct African American schools. Over 5000 schools¹⁸ were built in 883 counties¹⁹ in 15 southern states.²⁰ "Although the Rosenwald program did not challenge school segregation head-on, it did challenge the racial ideology behind segregation."²¹ With philanthropic help from Rosenwald, the provision of school structures facilitated states meeting the requirements to provide basic African American education. But these segregated, one-to-four room schoolhouses were a poor comparison to the state supported schools, complete with transportation services and new supplies, provided for white students.²²

Faced with scarce resources and multitudinous challenges, the NAACP strategically built on the Rosenwald facility resources, and began combining philanthropic support with advocacy and litigation in the campaign to create quality educational opportunities for African Americans.²³ Beginning in the 1920's, the NAACP launched an effort to require school districts to place African American teachers in segregated schools. This effort was successful;²⁴ however, once African American teachers were hired into these districts, they were relegated to race-based salary scales.

With a grant from the American Fund for Public Service, founded by Charles Garland, the NAACP hired Nathan Margold, another protégé of Felix Frankfurter and former United States attorney, as an NAACP consultant.²⁵ Margold

620 (1934).

18. HOFFSCHWELLE, *supra* note 16 at 1.

19. *The Rosenwald Rural School Building Program*, PRESERVATION NATION.ORG, <http://www.preservationnation.org/travel-and-sites/sites/southern-region/rosenwald-schools/history/> (last visited Nov. 17, 2011).

20. H.A. BULLOCK, *A HISTORY OF NEGRO EDUCATION IN THE SOUTH: FROM 1619 TO THE PRESENT* 139 (1967).

21. *Rosenwald Schools, Students, and Communities*, PRESERVATIONNATION.ORG, <http://www.preservationnation.org/travel-and-sites/sites/southern-region/rosenwald-schools/history/rosenwald-schools-students.html> (last visited Nov. 17, 2011).

22. See Erik Eckholm, *Black Schools Restored as Landmarks*, N.Y. TIMES, Jan. 15, 2010, at A16.

23. See generally KLUGER, *supra* note 10.

24. See Adam Fairclough, *The Costs of Brown: Black Teachers and School Integration*, 91 J. AM. HIST. 43, 49 (2004) ("By 1920 both New Orleans and Charleston had bowed to black demands to employ black teachers.")

25. See OGLETREE, *supra* note 10, at 111–23; MARK TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 1925–1950* (1987); Robert

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issued a 218-page text that raised technical legal questions and laid out a multipronged plan to end discrimination in education and housing.²⁶ In 1934, the NAACP invited Houston to join the organization's legal committee, and he became Special Counsel to the organization the following year. "Houston refined Margold's recommendations, developed a strategy, and implemented a battle plan."²⁷ He suggested that the NAACP focus on discrimination in education as the initial seed in the campaign to end Jim Crow and the principle of segregation established in *Plessy v. Ferguson*. Upon joining the NAACP, Houston launched the effort with another assessment phase. Traveling the South over the first quarter of his appointment as Special Counsel, Houston documented the poor condition of segregated schools and other public facilities designated for African Americans.²⁸

B. Leading Change Through the Judicial System

Rather than jump directly to desegregation of public elementary and secondary schools, Houston built the path to desegregation one case at a time.²⁹ One prong of the attack was to demand teacher pay equalization. In *School Board of City of Norfolk v. Alston*,³⁰ the Court held that the school board's action in fixing African American teacher salary schedules at a lower rate than the schedule for White teachers violated the Due Process and Equal Protection clauses of the Fourteenth Amendment. African American teachers were paid 30–43% less than White teachers.³¹ With

Carter, *Book Review: The NAACP's Legal Strategy Against Segregated Education*, 86 MICH. L. REV. 1083, 1084 (1988); MICHAEL MELTSNER, *THE MAKING OF A CIVIL RIGHTS LAWYER* 33 (2006).

26. See OGLETREE, *supra* note 10, at 113.

27. *NAACP Legal History*, NAACP.ORG, <http://www.naacp.org/pages/naacp-legal-history> (last visited Nov. 12, 2011).

28. See sources cited *supra* note 9.

29. See sources cited *supra* notes 9–10; DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* (6th ed. 2008). *The Road to Brown* video provides an engaging context for an examination of Charles Hamilton Houston's litigation strategy. *THE ROAD TO BROWN* (Univ. of Va. 1990), transcript available at <http://www.newsreel.org/transcripts/roadtob.htm>.

30. *Alston v. Sch. Bd. of Norfolk*, 112 F.2d 992, *cert. denied sub nom.* Sch. Bd. of Norfolk v. *Alston*, 311 U.S. 693 (1940).

31. *Id.* at 995. See also William A. Elwood, *An Interview with Modjeska Simkins*, 14 CALLALOO 190, 198 (1991) (Simkins recounts, "I was out up at the bank standing in line to get my check cashed, and there was a white teacher about three in front of me talking. . . . I saw that this woman teaching – when

this precedent in hand, the NAACP forced many school boards to toss out blatant race-based salary scales.³² Although the effort was seeded in the labor movement, teacher pay was a factor in the NAACP's primary concern—inequality in education.

According to Judge Robert Carter, a former NAACP attorney, this area of litigation was not itself an attack on segregation in education, nor an effort to integrate teaching staff.³³ In his view, the objective was simply “to upgrade the pay scale of black teachers to that of white teachers.”³⁴ But beyond the substantive results related to the employment law aspects of the case, this legal strategy did create a constituency of teachers who looked to the organization with the appreciation and enthusiasm most workers would reserve for a union that fights for their dignity in employment matters.³⁵ In so doing, the NAACP built a loyal, professional constituency that became a critical factor in grassroots and litigation advocacy efforts to come.³⁶

In another prong of the attack, Houston targeted graduate and professional education.³⁷ The strategy was to

the man counted out the money to her she was getting exactly twice as much as I was getting, and both of us were teaching sixth grade!”).

32. Cf. OGLETREE, *supra* note 10, at 120. Scott Baker notes, however, that school districts maneuvered around equalization by implementing test procedures which had the overall effect (if not intent) of increasing white teacher salaries. Scott Baker, *Testing Equality: The National Teacher Examination and the NAACP's Legal Campaign to Equalize Teachers' Salaries in the South, 1936-63*, 35 HIST. OF EDUC. Q. 1, 49-50 (1995).

33. See Carter, *supra* note 25, at 1086.

34. See *id.* Carter notes “[t]he only justification I can discern for lumping the school segregation and teacher-pay litigation together is that the teachers'-salary cases advance the [Tushnet] book's thesis that the NAACP's legal strategy was subject to mutation as demanded by organization requests.” See *id.*

35. See Fairclough, *supra* note 24, at 50 (noting “the campaign to equalize the salaries of black and white teachers drew the various black teachers' associations into formal alliances with the NAACP.”).

36. See Tushnet, *supra* note 25, at 37; cf. THE ROAD TO BROWN, *supra* note 29 (recounting that Houston took on teacher pay equalization cases because “Houston knew their support would be key in mobilizing black communities in the South for the larger fight against Jim Crow.”); cf. Robert L. Carter, *supra* note 25, at 1084-85 (1988) (*reviewing* MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 1925-1950* (1987) (Carter challenges Tushnet's observations about NAACP strategy, and notes that the pay equity litigation program was independent of the school desegregation program.)).

37. See Tushnet, *supra* note 25, at 34-36.

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explode segregation from within.³⁸ The common practice in Southern states was to either fail to provide any graduate education facilities, or provide stipends for African American students to attend professional schools outside of the state.³⁹ Having documented the inferiority of resources in segregated educational facilities, Houston would charge Southern states with failing to provide equal, separate facilities.⁴⁰ Forcing states to provide equal facilities within their borders would make separate-but-equal economically untenable. Houston expected that building separate schools would become so expensive that Southern states would have to choose integration as a more cost-effective option.⁴¹

Houston began the graduate school desegregation effort with *Pearson v. Murray*,⁴² where Houston's protégé, Thurgood Marshall argued against his native state's law school, which would not consider him for admission. In the Court of Appeals, Marshall defeated the University of Maryland and stopped the state from continuing their system of providing a \$200 subsidy for African Americans to attend law school out of state.⁴³ Two years later, the Supreme Court applied the *Murray* reasoning to strike down Missouri's stipend program for African Americans in *State of Missouri ex rel. Gaines v. Canada*.⁴⁴ After *Gaines*, states either had to integrate their existing graduate schools, or build separate schools within their borders.⁴⁵ Houston and the NAACP took on the separate school system in the case of *Sweatt v. Painter*.⁴⁶ Texas had taken the route of establishing a separate, "makeshift" black law school—but it was woefully understaffed and under-resourced.⁴⁷ The Supreme Court made it clear that the University of Texas was a much more attractive school, and struck down the bifurcated system. In *McLaurin v. Oklahoma State Regents*, the NAACP challenged the so-called desegregation system, where the University of

38. *Id.* at 105.

39. *Cf.* CONSTANCE BAKER MOTLEY, EQUAL JUSTICE UNDER LAW 62 (1998)

40. *See generally id.* at 61–65.

41. *See* OGLETREE, *supra* note 10, at 119.

42. *Pearson v. Murray*, 182 A. 590 (1936).

43. *See* MOTLEY, *supra* note 39, at 62.

44. *State of Missouri et rel. Gaines v. Canada*, 305 U.S. 337 (1938).

45. *See* Tushnet, *supra* note 25, at 105.

46. *See* *Sweatt v. Painter*, 339 U.S. 629 (1950).

47. *See* Tushnet, *supra* note 25, at 126.

Oklahoma roped off McLaurin from his peers in the classroom, library and cafeteria.⁴⁸ The Supreme Court held that this mandated isolation violated the Equal Protection Clause because getting an education required interaction with one's peers.⁴⁹ Setting the path to Brown, the Supreme Court began to consider not only books and teachers, but the intangibles that are necessary for an educational institution.⁵⁰

Once Houston's line of cases broke down the doctrine supporting segregation of graduate educational institutions, pursuant to the strategic plan, the NAACP then focused on elementary and secondary education.⁵¹ Twenty years after Houston joined the NAACP to plan and lead the effort, the Supreme Court finally broke down legal support for segregation in education in *Brown v. Board of Education*.⁵² Houston represented families in the Washington D.C. case, *Bolling v. Sharpe*,⁵³ which became one of the five cases rolled into *Brown*. This case marked two major developments. First, the Court acknowledged the stigmatization of racism, and second, for the first time, the Court defined segregation as a type of discrimination.⁵⁴ The Court declared that separate was not equal, and in *Brown II*,⁵⁵ required school desegregation to proceed, albeit "with all deliberate speed."⁵⁶ While Houston did not live to see the final culmination of the case, *Brown v. Board of Education* was borne of the litigation strategy that Houston led.⁵⁷

C. Leadership Lessons

The legacy of Houston's use of strategic litigation is exceptionally noted in legal and political history.⁵⁸ The ability to consider a challenge, assess the situation and

48. *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950).

49. *See id.* at 641.

50. *See* Tushnet, *supra* note 25, at 131; *McLaurin*, 229 U.S. 637, 641.

51. *See* Motley, *supra* note 39 at 65.

52. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

53. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

54. *See* Motley, *supra* note 39 at 105–06.

55. *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955).

56. *Id.* at 297.

57. *See* THE ROAD TO BROWN, *supra* note 22.

58. *See generally* TUSHNET, *supra* note 25; OGLETTREE, *supra* note 10; MOTLEY, *supra* note 39.

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context, build supporting human and capital resources, and develop a part-by-part strategy to address the issue is the heart of problem-solving, a critical lawyering skill. From studying Houston's quest for social justice, law students perceive the analytical, strategic assessment and planning, collaborative teamwork, and coalition building skills that are required for lawyers to persuade decision-makers to achieve a particular outcome for their clients. Professor Charles Ogletree notes of Houston's overarching strategy:

Upon taking over the helm of the NAACP's litigation effort, Houston began working on a three-prong strategy: first, to solidify a nationwide network of African-American lawyers to file "test case" litigation against segregation practices; second, to build precedential support for a direct constitutional attack against segregation through this carefully targeted litigation; and third, to organize local black communities in broad, unified support of legal, political, and social action against ongoing discriminatory practices.⁵⁹

Houston's ultimate goal extended beyond public education; rather, he sought "to mobilize the black community against segregation"⁶⁰ and to dismantle Jim Crow in toto. Each step in the strategy to solve the problem of segregation required Houston to combine his legal genius with strategic planning team—building, and political leadership skills.

Reviewing Houston's work in context also provides students with a perspective on self-leadership.⁶¹ Houston's passion of achieving a desegregated America was the driving force of his professional life.⁶² Historians and colleagues have commented that Houston's intense drive was sometimes seen as oblique perfectionism, and that in today's vernacular, Houston might be viewed as a "workaholic." Dr. Edward Mazique recalled, "[h]e was a workhorse. He dedicated his whole life to law, to justice, to legal matters, and to people. I can't recall a single social event, I can't recall one in which Charlie went to. I can't recall one, not one."⁶³ Houston suffered ailing health, and against doctors' advice, Houston

59. OGLETREE, *supra* note 10, at 116–17.

60. *Id.* at 119.

61. *See* James, *supra* note 8, at 417–20.

62. *See* THE ROAD TO BROWN, *supra* note 22.

63. *Id.*

returned to work and suffered a fatal heart attack. Given Houston's credo, "I would rather die on my feet than live on my knees," however, one could imagine that Houston might say that the ultimate legal victory for the country was worth the personal sacrifice.⁶⁴

Juxtaposed against one of the most remarkable strategic litigation achievements in American legal history, Houston's self-knowledge and self-management provides an example of the kinds of life patterns and decisions young lawyers may face in their professional careers. A strong internal compass and personal experiences drove Houston's passion for social justice; that same passion may have impacted the work habits that his health could not sustain. This case study of Houston's strategic lawyering shows law students how to problem-solve around seemingly insurmountable law and societal structures. Soberingly, Houston's story helps young lawyers to "count up the costs" of the path and passions they pursue in their legal careers.

II. LEADERSHIP IN THE ADMINISTRATIVE STATE

A. *Public Law and Leadership*

President Andrew Jackson is rumored to have said of the Supreme Court's controversial and unpopular decision in *Worcester v. Georgia*,⁶⁵ "John Marshall has made his decision; now, let him enforce it!"⁶⁶ The phrase explores the division of power between courts making decisions and other branches of government which implementing court rulings.⁶⁷ Once legal precepts are adopted, it is the administrative arm of government that implements policy. Leading lawyers must be cognizant of the public law and policy arenas. Understanding the structure of the administrative state helps leading lawyers problem-solve on broad, societal issues and particular client interests.

James Landis, one of the forefathers of this body of law, observed that "[t]he administrative process is, in essence, our

64. *Id.*

65. *Worcester v. State of Ga.*, 31 U.S. 515 (1832).

66. CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY*, Vol. 2: 1821-1855, at 219 (1922).

67. See Stephen Breyer, *Making Our Democracy Work: The Yale Lectures*, 20 YALE L.J. 1999, 2005 (2011).

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generation's answer to the inadequacy of the judicial and the legislative processes."⁶⁸ Social justice or cause lawyering often requires advocates to resort to public law mediums to achieve political and administrative goals. In fact, administrative law can be a tool to achieve social change, particularly where problems are widespread or seemingly intractable. Empowered with these tools, a lawyer can utilize knowledge of the system to unravel, build, or restructure the regulatory implementation process.

A case study of El Congreso's campaign to establish health and safety standards for farmworkers provides an example of the power of administrative law and processes to redress societal problems; while the twenty-year history of the effort gives a sobering view of the limitations of this area of law where policy and politics are inevitably mixed.⁶⁹ El Congreso's twenty-year battle through the administrative and political process provides an example of how lawyers can utilize public law to achieve results that may not be achievable through traditional case-by-case litigation.

An outgrowth of the civil rights movement of the 1960's, the campaign to improve the plight of migrant workers took on national importance. A vestige of the plantation and share-cropping labor systems, the migrant worker system enabled farmers to move crops from field to table; but migrant workers were subjected to degrading work and substandard health and living conditions. An important CBS documentary, *Harvest of Shame*, called the nation's attention to the deplorable conditions in migrant camps and fields. One worker described the degradation, and urged fellow migrants to use the power of collective bargaining to rectify the conditions:

We live anywhere, in a tent, under a shade tree, under a river bridge. We drink water out of a creek or anywhere we can get it. Five or six families drink out of one cup, tin can, or anything else. We're to blame, we tolerate that stuff. If we stick together and say we won't do it, won't

68. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 46 (1938).

69. See generally PETER STRAUSS ET AL., *GELLHORN & BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS* 2-10 (Foundation Press 10th ed. 2003) (Strauss, Rakoff, and Farina lay out an excellent introduction to administrative law and process in Section One's introductory problem titled "Field Sanitation," which is the foundation for the El Congreso campaign case study.).

pick your cherries until you give us some restrooms in the fields for the ladies and some for the men and some water fit to drink we won't pick 'em, we'd get 'em!⁷⁰

The film exposed a national crisis and became an international embarrassment, as Radio Moscow used the film in anti-American propaganda.⁷¹ Viewing the apartheid-like conditions and stark poverty of migrant farmworkers, the film cites, “[o]ne farmer looked at this and said ‘We used own our slaves; now, we just rent them.’”⁷²

Journalists gave voice to farmworkers, who were not able to challenge the agricultural system. With this support, the movement began to formulate a legal solution to the farmworker plight. A considerable challenge was figuring out what tools to use in the fight, and where to wage this battle. The *Harvest of Shame* documentary articulated the administrative law challenges for migrant workers looking for regulatory help in the multi-state battle between farmers and migrant workers. When asked why the American Farm Bureau Federation opposed Federal legislation on matters related to migrant workers, Federation President Charles Shoeman’s response described the intra-governmental and lobbying interest conflict that has plagued farmworker policy for decades:

I think there'd be more rapid progress with State regulation than there will be with Federal legislation. We think that Federal legislation will follow the route that almost all Federal legislation does of additional and more stringent, and more regulations with more and more red tape and more cut into a certain pattern all over the country. And in fact it would probably rule out the use of migrant labor very quickly.⁷³

Traditionally, the task of balancing employer interests and worker safety might be done by a judge. Litigants might choose employment law or torts to stake their claims, but individual or class action cases could require complex, multiple suits. And the risks and shortcomings of litigation

70. *Harvest of Shame* (CBS television broadcast Nov. 25 1960) (quotation at 41:50), available at http://www.youtube.com/watch?v=yJTVF_dya7E.

71. JOSEPH E. PERSICO, EDWARD R. MURROW: AN AMERICAN ORIGINAL 473 (1988).

72. *Harvest of Shame*, *supra* note 70 (quotation at 01:10).

73. *Id.* at 45 (quotation at 01:23).

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had to be considered. Already living in abject poverty, economic reprisals could be drastically severe.⁷⁴ Without a constitutional principle to challenge, as Charles Hamilton Houston encountered in the desegregation cases, balancing employer interests and employee safety needs might be waged more efficiently in the political arena—where legislators could negotiate compromises between constituencies and executive agencies would have the power to enforce the deals.

When Congress enacted the Occupation Safety and Health Act (OSH Act) in 1970, the legislation set out to “assure so far as possible every working man and woman in the Nation safe and healthful working conditions.”⁷⁵ This was the first federal attempt to provide comprehensive health and safety standards across different sectors of the national economy.⁷⁶ Rather than require a multitude of judges to consider every employment context or employer’s practices, the Act gave the Secretary of Labor the authority to promulgate industry-wide standards, “defined to be regulations requiring conditions or practices reasonably necessary or appropriate to provide safe for healthful employment and places of employments.”⁷⁷ Under the OSH Act, policymakers could establish standards about sector employment through the federal administrative process. While the federal government’s power to establish standards was clearly established by Congress, the responsibility to implement the OSH Act left a measure of discretion to the Secretary of Labor. When the Secretary of Labor failed to promulgate standards for farmworker safety, El Congreso challenged the breadth of this discretion, first within the administrative agency and then in the courts.⁷⁸

Although the issue involved provision of basic human sanitation needs, the implications of federal regulatory action were quite complex. Would farmers be required to build permanent bathroom facilities in the middle of fields, to be

74. Robert S. Catz & Miriam D. Guido, *A Demonstrated Need for Agricultural Standards Under the Occupational Safety and Health Act of 1970*, 9 GONZ. L. REV. 439, 439 (1974).

75. 29 U.S.C. § 651(b) (2011).

76. STRAUSS ET AL., *supra* note 69, at 2.

77. *Id.* (citing 29 U.S.C. § 623(8) (2011)).

78. *See id.* at 24; *See also* Farmworker Justice Fund, Inc. v. Brock, 811 F.2d 613, *vacated as moot*, 817 F.2d 890 (D.C. Cir. 1987).

used during the six-week picking season? Could small farmers compete with agribusiness operations that could more readily afford to build permanent structures? Should large, mostly mechanized grain and dairy farms in the Midwestern region attain an advantage over smaller fruit and vegetable farms in the Southeastern region?⁷⁹ How would the government monitor the adequacy of bathroom facilities? What would be the impact of the government's actions on the nation's food supply, which could be threatened by an outbreak of diseases that stem from unsanitary conditions on farms?⁸⁰

El Congreso petitioned the Department of Labor to promulgate standards for farmworkers, but encountered a series of lengthy delays.⁸¹ For a time, the Department simply did not respond to the request for action. The Secretary then referred action to an internal Committee, but sat on the Committee recommendations—until El Congreso asked the courts to force the agency to comply with statutory timeframes for acting upon the Committee's recommendation. In the midst of these regulatory contests, the executive agency changed hands, transitioning administrations between Presidents Ford and Carter, and then transitioning philosophies with President Reagan. The farmworker health and safety standards issue seeped over into the political arena, becoming an issue in the Senate confirmation process for Secretary Brock. A compromise surfaced on an appropriations rider that prohibited the Secretary from expending funds to prescribe any regulation that applied to small farms that employed ten or fewer employees.⁸² After a protracted political and administrative contest, the courts ordered the Secretary of Labor to issue field sanitation standards in 1987—nearly two decades after the battle began.⁸³ At that time, the agency documented the nature of the problem in the statement of its basis and purpose for the rule in language reminiscent of the *Harvest of Shame* dialogue three decades earlier:

79. *Harvest of Shame*, *supra* note 70 (quotation at 34:34).

80. Cf. Caroline Smith DeWaal, *Food Protection and Defense: Preparing for a Crisis*, 8 MINN. J. L. SCI. & TECH. 187, 195 (2007).

81. See STRAUSS ET AL., *supra* note 69, at 4–7.

82. *Id.* at 5.

83. See *id.* at 7.

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Where facilities are unavailable or inadequate, farm workers are faced with alternatives that threaten their health because they cannot take care of their most basic physiological needs. Working in hot environments, if they minimize their fluid intake to try to limit their need to urinate, they risk dehydration and heat stress. If they drink water from irrigation pipes or ditches to quench their thirst, as some do, they risk being poisoned by agrichemicals or infected by pathogens from solid waste eliminated into the soil or ground water. They can try to retain their urine, but thereby, for women especially, risk getting urinary tract infections. Or they can simply urinate and defecate in the fields, subjecting their co-workers to exposure to communicable diseases.⁸⁴

The Department of Labor promulgated field sanitation standards, and now requires “covered employers to provide: toilets, potable drinking water, and hand-washing facilities to hand-laborers in the field; to provide each employee reasonable use of the above; and to inform each employee of the importance of good hygiene practices.”⁸⁵ The legislative compromise endures, as the standards only covers agricultural employers with eleven or more farmworkers.⁸⁶ Thus, for farmworkers toiling on small tracts, the challenge remains.

B. Leadership Lessons

Launching an administrative campaign requires policy analysis and political skills to create the momentum necessary to move government positions and enlist affirmative government action. In every instance, advocates must make the case for legislators and administrators to consider an issue, make it a priority for action, and build a coalition of stakeholders who can influence decision-makers toward the policy goal.⁸⁷ This is the essence of leadership—

84. *Id.* at 6 (citing 52 C.F.R. § 16050 (1987)).

85. U.S. DEPT OF LABOR, WAGE AND HOUR DIV., FACT SHEET #51: FIELD SANITATION STANDARDS UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT (revised July 2008), available at <http://www.dol.gov/whd/regs/compliance/whdfs51.htm>.

86. *See id.*

87. *Cf.* Peter Edelman, *Opening Address: Lawyering for Poor Communities in the Twenty-First Century: Opening Address*, 25 *FORDHAM URB. L.J.* 685, 690 (1998).

the process of persuading others to achieve a change or outcome.

The El Congreso case study exemplifies leading lawyers in action. Administrative lawyering requires substantive knowledge of the underlying area of law, legislative skills to understand and draft statutes, advocacy and negotiation skills to influence the adoption of statutes and the promulgation of regulations, as well as regulatory prowess to understand when and how client interests are impacted by regulations or guidelines. Studying administrative law in the context of leadership exemplifies that lawyers must exercise leadership to influence lawmakers in order to achieve their clients' policy objectives.

Advancing the cause of improving farmworker health and safety conditions required stakeholders and advocates to persuade executive and legislative officials to tackle an entrenched societal program. Media influenced the debate and built the case among the general population, with targeted journalist columns and television exposes that explained the issue and exposed the government's inability or unwillingness to address the problem.⁸⁸

Lawyers for El Congreso and its successor entity, the Farmworker Justice Fund, had to weigh the benefits and risks of challenging the Department of Labor—the entity ultimately responsible for promulgating farmworker safety standards. Despite political and ideological challenges, these lawyers' ability to navigate the administrative process⁸⁹ and willingness to seek court enforcement was the key to establishing at least a minimal level of farmworker health and safety standards.

The El Congreso case was marked by crises of leadership. The twenty-year delay in establishing health and safety standards for farmworkers goal reflects some of the challenges of effective leadership in the public law arena. Lawyers' inability to persuade policymakers, or failure to move the administrative process to a successful conclusive action failed to achieve change for a generation of farmworkers.⁹⁰ Entrenched interests collide in the halls of

88. *Harvest of Shame*, *supra* note 70 (quotation at 45:10).

89. STRAUSS ET AL., *supra* note 69, at 3.

90. *Id.* at 5 (noting that standards were adopted in 1987—seventeen years after Congress enacted OSHA).

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Congress, where leadership challenges thrive. In the end, “we are not yet saved,”⁹¹ as advocates continue to make the case for improving farmworker safety standards in the present day. Farmworker Justice Fund’s mission describes the kinds of leading lawyering activities the organization continues to provide:

Farmworker Justice monitors and analyzes decisions by Congress, the White House, the courts and administrative agencies that affect farmworkers. In collaboration with farmworker groups and others, Farmworker Justice develops agendas for improving the effectiveness of federal and state regulation of the agricultural workplace. To promote the interests of farmworkers, Farmworker Justice meets with high-level agency officials, submits written comments on proposed regulations, and files formal complaints. When these methods are inadequate, Farmworker Justice seeks remedies through litigation, media attention and requests for Congressional investigations or legislation.⁹²

The example of El Congreso’s work trains students to consider a full complement of leadership skills to influence policy makers through advocacy, legislative, and administrative lawyering to achieve their client objectives.

III. EXTRA-LEGAL ADVOCACY

A. *The Sit-In that Sparked a Student Movement*

An important component of the civil rights movement was the evolution beyond court-focused strategies to non-violent, but direct action. Dr. Martin Luther King, Jr. promoted a strategy that aligned rights and riches—encouraging African Americans to withhold their economic resources from public companies that denied them fair access and service.⁹³ The Montgomery Bus Boycott began a new era in the campaign for social justice. The corollary campaign for voter rights, led by legal defense and direct action

91. DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 3 (1987) (quoting *Jeremiah* 8:20).

92. *Our Mission*, FARMWORKER JUSTICE MISSION, <http://www.fwjjustice.org/about-farmworker-justice/our-mission> (last visited Nov. 12, 2011).

93. *See generally* DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* 298 (1986).

organizations, changed the face and trajectory of American politics. Yet, in the midst of the “establishment” organizations’ economic boycotts, freedom rides, and marches, the seeds of a new genre of direct action were sown in Greensboro, North Carolina.

Four freshmen at North Carolina A&T State College dared to move beyond their impassioned late night “bull sessions” bemoaning the state of civil rights.⁹⁴ Instead, they decided to *do* something about the unfair treatment of African Americans. On February 1, 1960, with regal solemnity, the “Greensboro Four” walked from their segregated campus to the downtown Woolworth’s store. The steel in their spines had been forged in the vicissitudes of indignity. As Dr. Franklin E. McCain explains,

I found Greensboro unbearable. Greensboro reinforced the lack of dignity, the lack of manhood, and the lack of respect on me. It reinforced all of that on me, and my colleagues as well. . . . McNeil, Blair and Richmond had the same preoccupations with trying to find a modicum of manhood, respect, and decency.⁹⁵

It was ironic, but no coincidence, that Greensboro, North Carolina was the site of the sit-in that sparked a student movement.⁹⁶ Traditionally known as “the Gateway” to the new South, Greensboro boasted a proud tradition of religious tolerance, blended with business acumen more familiar in Northern metropolises. In this Piedmont city, however, interactions were “dedicated to the idea of a social system which did not use brutal force to maintain order, but rather had much more subtle means of control.”⁹⁷ The modus

94. Dr. Franklin E. McCain, Remarks at Elon University School of Law Annual Martin Luther King Program: Forum on Civil Rights Law and the Greensboro Sit-Ins (Jan. 20, 2010) (transcript available with author).

95. *Id.*

96. *Cf.* Randall L. Kennedy, *Introduction to MATTHEW J. PERRY: THE MAN, HIS TIMES, AND HIS LEGACY* 9 (W. Lewis Burke & Belinda F. Gergel eds., 2004) (discussing the January 1, 1960 sit-in at the Greenville, South Carolina airport where community leaders protested the maltreatment of Jackie Robinson the prior year).

97. Dr. William H. Chafe, Co-Director of the Duke University Center of the Study of Civil Rights, Remarks at Elon University School of Law Annual Martin Luther King Program: Forum on Civil Rights Law and the Greensboro Sit-Ins (Jan. 20, 2010) [hereinafter Chafe, Forum] (transcript available with author); *see also* WILLIAM H. CHAFE, *CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA, AND THE BLACK STRUGGLE FOR FREEDOM* vii (Oxford Univ. Press

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operandi of this “more gentele form of social control” was to “be nice to people, but not basically change the status quo.”⁹⁸ Despite the progressive reputation and surface civility, life in Greensboro was plagued by a great deal of incivility, as manners became a substitute for progress⁹⁹ that the “Greensboro Four,” in particular, found insufferably stifling, yet ultimately motivating.¹⁰⁰

Although no lawyers were involved in the conceptualization of the sit-in, the students’ legal strategy was remarkably insightful. The “Greensboro Four” selected Woolworth’s for action because the national chain employed inconsistent policies: six years after *Brown v. Board of Education*, the “Greensboro Four” could shop and be served lunch in any Northern Woolworths.¹⁰¹ But African Americans could spend their money all but one counter in the Greensboro Woolworths—the lunch counter. The “Greensboro Four” set out to change that.

Upon entering the store, the students purchased school supplies at other counters and kept their receipts—testaments to the fact that they had been invited to enter and transact business in the store, and were not trespassing.¹⁰² But when they took seats at the lunch counter, the Four were told that they could not be served at the counter. The only meal option for African American shoppers was to pay full fare, but eat standing up, in the back corner of the lower level of the store.¹⁰³ Displaying the analytical skills of a jurist, Dr. Franklin McCain describes the students’ colloquy with store personnel, setting up the conflict between public facilities, trespass laws, and segregationist customs:

[W]e sort of tapped the counter, “may we be served, may we be served, may we be served?” And finally someone stopped and said “I’m sorry we can’t serve you.”

We said, “Sorry, we beg to disagree with you. We’ve been served here, and we’ve got receipts to prove it. We’ve already been served.”

1980).

98. See sources cited *supra* note 68.

99. See Chafe, Forum, *supra* note 97.

100. See McCain, *supra* note 94.

101. *Id.*

102. *Id.*

103. *Id.*

[They responded] “But we can’t serve you at this counter.”

[The students asked] “Why not? . . . Is it illegal? Is there a law against it?”

[They responded] “It’s *custom*.”

[The students asked] “But you will agree that the custom is wrong, won’t you? The custom is unfair.”

“Well I don’t make those decisions. . . .”

The manager . . . Curly [Harris] came out, and he said, “Well I can’t serve you here . . . We can’t serve you here, coloreds.”

And we went and said to him, “Mr. Harris we’ve got receipts. We’ve been served, and if this is a private club you need to put a sign out there, saying ‘members only’.”

He said “Oh, it’s not a private club, it’s a public place.”

I said, “Well, if it’s public, *we’re* a part of the public. You ought to serve us!”

He said “Oh boys, I can’t do that. No I can’t do that. It’s our custom and we can’t get away with that. And besides, New York wouldn’t let me.”¹⁰⁴

After that dichotomous dialogue, a policeman came, branding a bully club; but he did not interact with the students. Baffled, the store manager decided to close the store early. Carefully avoiding the constructs of trespass, the “Greensboro Four” left upon closing. The following day, they were joined by a faithful few who quietly sat and regularly requested service. Once the spark ignited, hundreds of students followed in Greensboro and in cities across the South.

B. Leadership Lessons

1. *The Price of Being a Pioneer*

The “Greensboro Four” exercised leadership skills with astounding forethought and precision. The coalesced behind a vision, deliberately devised a strategic plan for action, and affirmed their individual commitment to the collective goals. In sit-in protests, as well as test cases attempting to overturn discriminatory laws and customs, student activists and

104. *Id.*

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plaintiffs took on monumental responsibilities at great risk to themselves. These defiers were prepared to break the law, suffer the legal consequences, and even pay the ultimate sacrifice. Dr. Franklin McCain recounts:

There were two possibilities on February 1st for me. I knew that when we walked downtown, one of two things would happen to Franklin McCain. First of all, I knew my days as a student were going to be over. I knew that. If I were lucky, I would go to jail for a long, long time. If I were not quite so lucky, I would come back to my campus in a pine box. But it did not matter because the way we were living was probably worse than either of those options. Oh how sweet death could have been! Relief! Dignity in the grave! But not the way we had been forced to live.¹⁰⁵

Social justice lawyers had to be mindful that challenging local authorities with direct action, or filing law suits against the state posed gave threats to their clients' economic security and personal safety.

People don't remember and think about in each of those instances there was a young man or young woman suing their State, subjecting themselves to a lot of problems. Their family and their friends stood with them. I call them some of the unheralded heroes that we hardly talk about. We know their names, because their names are listed in the cases, but we hardly talk about their stories.¹⁰⁶

Advocates had to prepare their clients for the negative exposure and potentially dangerous ramifications of their legal challenges, all in pursuit of the greater good.

[W]hen you are the Plaintiff suing the State of Texas or the State of Maryland, your name and picture would be in the paper; they would know who your mother and father [is] [*sic*]; they would know where you live, where [they] [*sic*] work, and in some instances you may be subjected to economical reprisal, so it was no easy task being the plaintiff.¹⁰⁷

105. *Id.*

106. Romallus O. Murphy, Former General Counsel for the North Carolina NAACP, Remarks at Elon University School of Law Annual Martin Luther King Program: Forum on Civil Rights Law and the Greensboro Sit-Ins (Jan. 20, 2010) (transcript available with author).

107. *Id.*

Some plaintiffs, like Heman Sweatt, never enjoyed the benefit of their landmark cases. Instead of going to law school, Sweatt spent his entire career working at a post office, enduring taunts and threats of fellow Texans who resented his role in the case.¹⁰⁸ Indeed, in at least one landmark desegregation case, the plaintiff mysteriously disappeared.¹⁰⁹ While leadership is often described as the process of influencing people to achieve desired results, it also includes counseling clients for the worst possible outcome in pursuit of a social change. That requires honesty, forthrightness, and sobering realism in law practice.

2. *Defending the Defiers: Footsoldiers for Justice*

In the best situations, lawyers counsel clients on how to obey the law. Defending clients who intentionally violate what they perceived to be unjust or inapplicable laws, however, requires a different set of skills. Moreover, rather than leading clients into a conflict, civil rights lawyers came in after-the-fact, finding themselves limited to dealing with the consequences of protest action. In this earliest form of community lawyering, clients set the agenda, rather than the lawyer counseling a path of action. In the southern battleground states of North Carolina, South Carolina, and Georgia, civil rights lawyers led clients, the courts, and their communities to a higher plane.

The public nature of dime store lunch counters did not deter law enforcement officials in Greensboro and other cities from arresting students for trespassing or violating vagrancy ordinances. North Carolina Attorney General Seawell announced that “he knew of no law that would force a private business to serve anybody it chose not to serve.”¹¹⁰ In “looking glass” courts, civil rights lawyers were tasked with answering bizarre charges where the elements of the charge defied elemental definition. Trespass, commonly defined as “wrongful entry on another’s real property,”¹¹¹ seemed to be a

108. *See id.*

109. *See TUSHNET, supra note 25, at 74; MOTLEY, supra note 39, at 62 (1998)* (noting that Lloyd Gaines, the plaintiff in *State of Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1938), “mysteriously disappeared” after the Supreme Court’s decision striking down Missouri’s out-of-state program).

110. *See CHAFE, supra note 97, at 118.*

111. BLACK’S LAW DICTIONARY 1541 (8th ed. 2004).

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far cry from entering a public place to which one has been invited to transact business. Yet, six members of the United States Supreme Court believed that there was no legal restriction to prevent owners of private property from discriminating on the grounds of race.¹¹²

Coordinating the defense of an entire of class of activists required lawyers to exercise leadership skills. When mounting a defense to the simplest trespass charge, lawyers had to be cognizant of the multiple, moving components of defending masses of clients who intentionally sought to overload and break the system. North Carolina NAACP attorney Romallus O. Murphy recalled the practical challenges of coordinating the defense for the sit-in movement campaign:

Now when this thing swept the state, you had students really coming down from other places to participate. That's when they were using the vagrancy laws. The disadvantage was that they asked these students to post a bond. It wasn't much – sometimes it was ten, twenty-five, or thirty dollars. Many of [the students] never came back! So in a sense it was draining the community¹¹³

In addition to “traditional” legal work of appearing, preparing pleadings, and thinking strategically about the impact of each client’s actions on the emerging body of civil rights laws, these lawyers had to mobilize community resources to support dozens or hundreds of jailed students, who had needs running the gamut, from bail to personal hygiene products and school supplies.¹¹⁴ Sit-in student leaders did not seek counsel or ask permission to begin the campaign.¹¹⁵ Lawyers came in to support the movement, rather than direct it. Functioning in this support role required a different set of leadership skills, requiring that attorneys utilize counseling,

112. Constance B. Motley, *Memory, History, and Community*, in MATTHEW J. PERRY: THE MAN, HIS TIMES, AND HIS LEGACY 229 (W. Lewis Burke & Belinda F. Gergel eds., 2004) (citing MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 39–40 (Hill & Wang 1998)).

113. Murphy, *supra* note 106.

114. See Attorney Romallus O. Murphy and Yoland Leacraft, *Remarks at Elon University School of Law Public Law & Leadership: Extra-Legal Activism Panel Discussion* (Jan. 13, 2009) (transcript available with author).

115. See GARROW, *supra* note 93, at 129 (“Although some competition for leadership was visible between supporters of the NAACP, CORE, and SCLC, [one observer noted,] ‘many student leaders expressed the desire to keep the movement as much ‘student-led’ as possible’”).

advocacy, and community organizing skills.

The nature of civil rights work required lawyers to prepare clients for the worst possible outcome. In addition, many civil rights lawyers became targets of incivility and violence themselves. In the early days of his practice as a trial attorney representing African American clients in South Carolina during the 1950s, Perry was treated with disdain by some judges who would not afford him or his clients' arguments respect in court.¹¹⁶ Attempting to defend Gloria Rackley, an African American school teacher arrested for trespassing in a South Carolina hospital's "whites only" waiting area (while her daughter was being treated in a hospital emergency room), Perry rejected the judge's admonition to abandon a line of questioning designed to elicit testimony that his client's race was the only reason for the trespassing charge.¹¹⁷ Perry remarked to the judge, "Your honor, I know how to represent my client and I intend to do so to the best of my ability."¹¹⁸ The judge responded by ordering Perry to jail.¹¹⁹

In addition to preparing clients for the worst and dealing with personal incivilities and threats, civil rights lawyers dealt with the consequences of the justice system's failures.

116. See MELTSNER, *supra* note 25, at 62 ("Judges in the southern states, most of them elected, were unremittingly hostile to civil rights claimants."). According to folklore, in the early days of his career, Perry was forced to sit in the segregated balcony until his cases were called. See Douglas Martin, *M.J. Perry Jr., Legal Pioneer, Dies at 89*, N.Y. TIMES, Aug. 5, 2011, at A21. This disrespectful treatment was common for African American lawyers litigating cases in the state. See 106 Cong. Rec. H2101 (daily ed. Apr. 11, 2000) (statement of Rep. Clyburn) (noting legislation naming the a Federal Courthouse in Judge Matthew J. Perry's honor, and recounting the story of Harold Boulware, an attorney who "had to be smuggled out of town in the trunk of his automobile").

117. Robert J. Moore, *The Civil Rights Advocate*, in MATTHEW J. PERRY: THE MAN, HIS TIMES, AND HIS LEGACY 163 (W. Lewis Burke & Belinda F. Gergel eds., 2004) (discussing that after a brief period of incarceration, Perry returned to the courtroom, whereupon he and the judge exchanged apologies).

118. *Id.*

119. *Id.* Perry served as chair of the South Carolina NAACP Legal Committee, and excelled in his civil rights practice, which including representing sit-in clients across South Carolina. Making arguments based on the Due Process and Equal Protection clauses of the Fourteenth Amendment, Perry led the charge to unravel South Carolina's segregationist customs and laws. Perry took on the challenge of fighting segregation, despite warnings from blacks and whites "to eschew affiliations with civil rights activists" which risked attracting "the enmity of powerful whites." *Id.*

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Just one month after graduating from law school, Vernon E. Jordan, Jr. found himself immersed in Attorney Donald Hollowell's defense of Nathaniel Johnson.¹²⁰ The NAACP called Hollowell's law firm to help Johnson, whose previous counsel advised him to plead guilty to charges of raping a white woman with whom Johnson claimed to have had a consensual affair, in hopes of avoiding the death penalty.¹²¹ With a forty-eight hour deadline, the young law graduate accompanied Hollowell in a flurry of hearings, motions, and appeals for a stay of execution.¹²² While the pair made their rounds to judges and political leaders, Johnson was executed. In his memoir, Jordan recounts the burden that civil rights lawyers bore:

That was a moment of complete despair—deadening, almost paralyzing in its intensity. We had tried so hard, thinking of everything we could, chasing down every legal avenue that was open to us, believing there was some way within the system to give this man a chance, and it was all to no avail. . . .

With nothing really left to say, Mr. Hollowell and I left the state capitol building. The combination of fatigue and utter demoralization had wiped out any chance that I could be productive at work, so I asked for the day off. I decided to walk home. Although it was before noon, the temperature was already scorching. This was a brutally hot Georgia summer. I walked along replaying the previous forty-eight hours in my head over and over, thinking of how our client had been killed by a poisonous combination of incompetence, hatred, and indifference—and then the tears began to flow. The more I cried, the weaker I got, and before I knew it I looked down and realized that I had totally lost control. I had urinated on myself as I was walking along, and my beige summer suit was wet. There was nothing to do but keep walking. The sun was beating down so intensely that by the time I got home, my suit was completely dry.

120. See VERNON E. JORDAN, JR. WITH ANNETTE GORDON-REED, VERNON CAN READ!: A MEMOIR 130–33 (2001).

121. See *id.* at 130–31.

122. *Id.* at 131.

I got up the next day and went back to work. We had to carry on¹²³

Across the South, civil rights lawyers carried the weight of a people yearning to be free, and a nation that depended upon them to help the country live up to the ideals of constitutional justice. Lawyers led and supported the campaign for civil rights and a better society. Outside of the national spotlight, local counsel defended victims of unjust prosecution of the law. Most often, they had no illusions of grandiose victories at trial before a recalcitrant bench, but they built and preserved trial records that laid the path for appeals that could carve a path to victory in federal courts.¹²⁴

For every Murphy, Perry, and Jordan, there are hundreds of lawyers with stories of tragedies, trials, and triumphs from their work representing the defiers. Despite the indignities of segregation in society and their chosen profession, and notwithstanding perilous assignments and representations, these counselors strove for freedom—for themselves and their clients. These lawyers were the implementers of Houston's strategic plan to engineer social transformation in American society.¹²⁵ Without these foot soldiers for justice, the promise of America would have been unfulfilled. Edward M. Kennedy said, in reference to a George Bernard Shaw quote, "Some men see things as they are and say *why*. I dream things that never were, and say, *why not*."¹²⁶ In the social justice arena, leading lawyers accept the charge to "dream things that never were, and say *why not*."¹²⁷

IV. SOCIAL JUSTICE LAWYERS AND LEADERSHIP SKILLS

Social justice case studies provide examples of the importance of leadership skills, and the relevance of these skills to lawyering. While it may be uncommon for most law

123. *Id.* at 132–33. Jordan's work with Hollowell led to his appointment as the Georgia Field Director for the NAACP, the first of many leadership positions with national civil rights organizations. *Id.* at 331.

124. Randall L. Kennedy, *supra* note 96, at 11; Motley, *supra* note 112, at 230.

125. See Motley, *supra* note 112, at 224.

126. CBS News: *Edward M. Kennedy's Eulogy of Sen. Robert F. Kennedy*, (CBS television broadcast Aug. 26, 2009) (emphasis added), available at <http://www.cbsnews.com/video/watch?id=5268061n>.

127. *Id.*

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students to find themselves handling these types of groundbreaking cases, and these stark, extreme injustices may be foreign for modern students of a new generation, these case studies help students and lawyers understand the complexity of strategic litigation and administrative advocacy, and the challenges of defending clients who pursue extra-legal activity in pursuit of a client or community objective.

Lawyers have been leaders in the fight for social justice.¹²⁸ Trained and licensed by the system, citizens look to lawyers to make, implement, or change laws and regulations in order to redress systemic wrongs. From lawyers waging national campaigns, like Charles Hamilton Houston, to local counsel, like Romallus O. Murphy, these counselors employed key leadership skills. In addition to technical lawyering skills, social justice attorneys have to see the big picture, brainstorm ideas, build coalitions, and work in disparate teams that may have different views of the best way to handle a case.¹²⁹ The impetus for action might be a daring, unknown citizen willing to risk her life for the cause, or a media-driven campaign where journalists ventured to speak for the voiceless. In the crucible of social justice cases, these lawyers' leadership skills "came forth as gold."¹³⁰

Having endured monumental personal and professional challenges, Matthew Perry gained the respect of colleagues and was the first African American appointed to the U.S. District Court for the District of South Carolina. Robert E. McNair, who served as Governor at the height of South Carolina's civil rights struggle, observed of the state's former adversary in many cases:

One of the most fortuitous and positive . . . relationships was struck with a young civil rights lawyer, Matthew J. Perry, who had already proven himself on the legal battlefield and who was unfailingly courteous, disarmingly modest, and one of the most persuasive people I have ever known. In even the most difficult periods of social upheaval and unrest, he demonstrated a remarkable

128. See CULLEN, *supra* note 3, at 138–40; *cf.* GLENDON, *supra* note 4, at 100–01 (“Traditionally, the country has depended on the legal profession to supply most of our needs for consensus builders, problem solvers, troubleshooters, dispute avoiders, and dispute settlers.”).

129. See *generally* CULLEN, *supra* note 3, at 72–73 (discussion of Thurgood Marshall's counsel team strategy meetings).

130. See *Job* 23:10.

ability to defuse tense situations and build trusting relationships, which ultimately produced workable solutions.¹³¹

Once relegated to the court balcony at the beginning of his legal career, in 2004, the federal courthouse in Columbia, S.C. was named in Judge Perry's honor.

After his gut-wrenching introduction to the cause and the legal profession, Vernon E. Jordan, Jr. rose to become the President of the National Urban League. Presidents, corporations, foundations, investors, and clients seek Jordan's counsel in business and government affairs.¹³² It is a role that his leadership experiences prepared him to assume. In 2001, the NAACP selected Jordan to receive the Spingarn Medal, the organization's highest honor.

Upon hearing the experiences of Attorney Romallus O. Murphy and Dr. Franklin McCain of the "Greensboro Four," Elon Law student Amanda Tauber observed that she took the leadership lessons to heart:

It was a great charge to all of us to be active. We can't sit on our hands and wait for change to happen. As lawyers, we will have the influence, the intelligence, and the creativity to really make an active change in our communities and in the world.¹³³

Studying social justice lawyering helps students realize that they need to develop leadership skills that may be employed to help communities deal with the "great issues of our time."¹³⁴

While leadership skills are the key element that transitions traditional lawyering into social change movements, these skills are also the keys to effective law practice. Regardless of the area of practice interest or professional pursuits, social justice lawyering provides an important lesson of leadership that is transferrable to any area of practice. These cases provide a view of legal problem-solving on a grand scale, and provide context to understand

131. Robert E. McNair, Personal Views of Matthew J. Perry, *in* MATTHEW J. PERRY: THE MAN, HIS TIMES, AND HIS LEGACY 146 (W. Lewis Burke & Belinda F. Gergel eds., 2004).

132. See JORDAN, *supra* note 120, at 329.

133. Phillip Craft, *Impact of Sit-Ins on American Civil Rights Movement Explored at Elon MLK forum*, ELON.EDU (Feb. 2, 2010), <http://www.elon.edu/e-net/Note.aspx?id=942521>.

134. GLENDON, *supra* note 4, at 100.

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the suite of leadership skills that clients and society expect of lawyers. Studying social justice case studies helps law students to consider their own leadership skills and calling.