BOOK REVIEW

THE POLITICS OF LAWYERING

Rights on Trial: The Odyssey of a People's Lawyer. By Arthur Kinoy.* Cambridge, Massachusetts: Harvard University Press. 1983. Pp. 340. $20.00.

*Reviewed by David Hoffman***

The literature on progressive lawyers[1]—their lives, politics, and law practices—is unfortunately thin.[2] This dearth of litera-

---

* Professor of Law, Rutgers University, Camden.

** Clerk (1984–85), Judge Stephen G. Breyer, U.S. Court of Appeals for the First Circuit. I wish to thank the following people for helpful comments on this review: Akhil Amar, Betsy Bartholet, Gary Bellow, Tom Carothers, Joseph Halpern, Karl Klare, Stephen Presser, and the editors of this journal. Betsy and Gary deserve special thanks for the unstinting way in which they share both energy and insight with their students at Harvard Law School; I was fortunate to be one of the beneficiaries of their generosity.

[1] By "progressive lawyer," I mean an attorney who seeks left-oriented political and social change—whether through traditional cause-related litigation and lobbying or through representation of individuals who are poor or otherwise disadvantaged. There are some conceptual difficulties involved in defining the words "progressive" and "left-oriented," the most significant being the ability to establish boundaries, since the words could embrace a spectrum from mere social reformist to terrorist. Additionally, it must be recognized that within and among defined groups, there will be some conflict of goals, agendas and methods.

Given the formidable—and perhaps irreducible—difficulties inherent in arriving at a satisfactory definition, I simply refer the reader to a partial list of groups that come immediately to mind as organizations of progressive lawyers: the NAACP Legal Defense Fund, National Lawyers Guild, National Conference of Black Lawyers, American Civil Liberties Union, Center for Constitutional Rights, NOW Legal Defense Fund, Environmental Defense Fund, National Resources Defense Council, Southern Poverty Law Center, and the host of organizations affiliated with Ralph Nader.

I have chosen not to use Kinoy's term—"people's lawyer"—for reasons which I elaborate more fully below. *See infra* note 11.

[2] During the late 1960's and early 1970's, a handful of books on progressive lawyers appeared. *See, e.g.*, Radical Lawyers (D. Black ed. 1971); A.

ture is particularly unfortunate because progressive lawyers, unlike those in the legal and political mainstream, have fewer role models. Therefore, when someone of Arthur Kinoy's stature and experience writes a personal account, those who would follow in his footsteps have a rare opportunity to see how an accomplished progressive lawyer got where he did and what the journey was like.

In Kinoy's case, that journey encompasses much of the political history of the left in the United States since World War II. Kinoy has been involved in many of the memorable cases and causes of the postwar period: the last desperate attempt to save Julius and Ethel Rosenberg from execution; challenges to Sen. Joseph McCarthy and the House Un-American Activities Committee; the defense of Adam Clayton Powell's seat in Congress; a variety of civil rights victories, including the landmark injunction in *Dombrowski v. Pfister;*[3] and the successful appeal of the Chicago Seven's conviction for organizing demonstrations at the 1968 Democratic Convention. *Rights on Trial* is worth reading if only for its first-hand account of these struggles—particularly its account of the McCarthy Era, a period that has generated less discussion on the left than it deserves.

Rights on Trial is not a particularly personal account of Kinoy's career;[4] neither is it a mere collection of war stories. Instead, Kinoy tries to distill from the experiences of his extraordinary legal career a coherent view of the lawyer's proper role in the political struggles of union organizers, civil rights groups, antiwar activists, and other participants in what was once referred to as "the movement."

Ginger, The Relevant Lawyers (1972); Law *Against* the People (R. Lefcourt ed. 1971); M. James, The People's Lawyers (1973). A few personal accounts have also been written, *see, e.g.*, W. Kunstler, Deep in My Heart (1966); C. Lynn, There is a Fountain (1979), but as Michael Boudin pointed out recently, legal autobiography has never been a thriving genre. *See* Boudin, *The Best Defense*, 35 Stan. L. Rev. 621 (1983).

[3] 380 U.S. 479 (1965). In *Dombrowski*, the plaintiff, a civil rights organizer, won an injunction barring enforcement of an overbroad state law that was being used to discourage political expression.

[4] *See* Section III below.

Kinoy's effort to combine theory and practice has been a consistent theme throughout his professional life. Kinoy's decision to go to law school rather than become a college professor—which he recounts in one of the most charming vignettes of the book—was the beginning of a career-long effort to steer a course somewhere between the twin poles of the contemplative and the active life. Kinoy had been offered a teaching position at Harvard in American literature and history. He arranged to meet his former Harvard College classmate, Leo Marx, as he wrestled with the question of whether to accept the job at Harvard. As the two friends strolled around the Central Park reservoir, Kinoy told Marx that he had decided to accept the position because of the attractive prospect of playing "a useful, social, even a radical role within the academic world" (p. 42). Marx reported that he had decided to take a more active part in trying to change the world; he would be enrolling in law school in the fall. Each felt the other was making a mistake.

> We debated and argued for more than two hours . . . . I used every argument I could think of to justify my decision to go back to Harvard and follow the path of academic studies. He used every argument he could think of to justify his decision not to return to Harvard but to go to law school and train himself for the active life. Then an incredible thing happened . . . . By the time we left Central Park that afternoon, he had persuaded me, and I had persuaded him . . . . Today Leo Marx is one of the most creative teachers and students of American history and literature in the country. And I am a people's lawyer. (p. 46).

Much later in his career Kinoy chose to combine teaching and practice. In 1964, he became a professor at Rutgers Law School in Camden, where he founded Rutgers' Constitutional Litigation Clinic. Thus, Kinoy's attempt in *Rights on Trial* to define a role for progressive lawyers is all of one piece with his extraordinary career, for he has devoted himself not only to the calling of progressive legal work but also to the attempt to understand it.

I. Theory and Practice

Progressive lawyers, as Bob Gordon has pointed out, are "hungry for theory."[5] They seek ideas or perspectives "that would help make sense of their practices."[6] Without such perspectives, many progressive lawyers eventually become discouraged and subject to what Karl Klare has described as the "long-term occupational hazards of 'radical lawyering': the slide into reformism or cynicism."[7]

Happily, Arthur Kinoy has succumbed to neither of these hazards. Indeed, Kinoy appears to have retained considerable optimism, as evidenced by the very act of writing a book like *Rights on Trial*. Although Kinoy recognizes that his work and that of other movement lawyers might sometimes have the perverse effect of legitimating the system that he is trying to change,[8] his own experience seems to have convinced him that a strategy of forcing the legal system to live up to its promises can play an important part in transformative politics.[9] At the same time, he warns us to avoid falling into "an attitude of overreliance upon the stated premises of justice and fairness built into the constitutional system, [an attitude] which from

---

[5] Gordon, *New Developments in Legal Theory*, in The Politics of Law 281 (D. Kairys ed. 1982). This article by Gordon, a Stanford law professor, is an excellent introduction to some of the themes of the Critical Legal Studies movement. *See infra* note 15.

[6] *Id.*

[7] Klare, *Law-Making as Praxis*, 40 Telos 123, 135 (1979). This article by Klare, a law professor at Northeastern University and one of the leading labor law scholars in the United States, is a concise and cogent description of the interplay between neo-Marxist thinking and Critical Legal theory.

[8] Kinoy wonders, for example, whether his decision to challenge Senator McCarthy's Internal Security Committee on the senator's home turf—though it resulted in a confrontation that was useful from an organizing standpoint—might not have somehow legitimated McCarthy's witchhunt (p. 131).

[9] For example, when Southern law enforcement officials tried to stymie the efforts of civil rights organizers by making them defend against a plethora of minor charges for demonstrating, Kinoy would often file a *Dombrowski*-type suit against the officials, both to stay their hand and to provide encouragement for those whose interests were at stake. Winning, he found, was often a virtue in and of itself, for even the most limited tactical victory could build morale (p. 114).

time to time overwhelms the recognition of political reality" (p. 88).

The key to Kinoy's approach to progressive lawyering is his awareness that little can be accomplished without the political momentum of the people that he represents. He reminds us throughout the book that the guiding question for the progressive lawyer must always be whether a given strategy will foster that momentum. Kinoy's answers to this question have taken a variety of forms. One of the ways in which he has put this strategy to work is by using the law creatively and aggressively—launching legal counter-offensives rather than merely defending his clients from the companies and officials against whom they are struggling.[10]

Maintaining the momentum is difficult, of course, when "the people" are not moving.[11] For much of Kinoy's career this was

---

[10] *Rights on Trial* is filled with examples of this type of lawyering. See, for example, Kinoy's courtroom arguments in the Willie Seals case (ch. 6) and in *Dombrowski v. Pfister* (ch. 8), the challenge of the Mississippi Freedom Democratic Party (ch. 9), and his defense of Adam Clayton Powell's right to be seated in the House as Harlem's Representative in Congress (ch. 10). This same theme has been urged by the English historian and Marxist, E.P. Thompson:

> The rhetoric and the rules of a society are something a great deal more than sham. In the same moment they may modify, in profound ways, the behavior of the powerful, and mystify the powerless. They may disguise the true realities of power, but, at the same time, they may curb that power and check its intrusions. And it is often from within the very rhetoric that a radical critique of the practice of the society is developed: the reformers of the 1790's appeared, first of all, clothed in the rhetoric of Locke and Blackstone.

Whigs and Hunters 266 (1975).

[11] Kinoy's invocation of the talismanic phrase "the people" (as in "people's lawyer", *see supra* note 2) sounds dated, but in the era Kinoy describes, there appeared to be some rough consensus about who the "people" were—principally blacks and other minorities, the poor, and those who opposed the Vietnam War. Today, the concept of "people's lawyer" seems far less coherent. For one thing, the "movement" of the 1960's and early 1970's has widened to include other constituencies—e.g., women, environmentalists, consumer activists, gays and lesbians, the aged, and the handicapped. As political

not a problem; during the years of the civil rights movement, the antiwar movement, and even during much of his period of involvement with the United Electrical Workers ("UE"), "the people" were in fact in motion. But during the McCarthy era, Kinoy found himself puzzled by the inertia of the left, and asked himself

> How does one function as a lawyer for the people when there appears to be no immediate prospect of struggle other than in the arena of formal legal defense? If the driving motivation of a people's lawyer ought to be the use of skills and legal techniques to help create an atmosphere in which the people themselves can better organize, function, and move forward, how does one meet this responsibility when the people's movements seem to have lost their own sense of struggle . . . ? (p. 90).

These questions have an obvious pertinence for the left lawyers of the 1980's and, unfortunately, Kinoy has no answers to them. Moreover, Kinoy's model of empowerment—helping people stay in motion to seek their own liberation—does not include any normative vision of the purpose or direction of this motion. Kinoy would refer all such matters to the people themselves. However, the political lawyer often becomes a part of the political movement that she represents by virtue of long and close association with her "clients", and to that extent these questions cannot be avoided or deferred.

II. "Rights" on Trial

For all its talk of the lessons Kinoy learned as a "people's lawyer," *Rights on Trial* does not provide us with a broad theory of progressive lawyering. Perhaps Kinoy's ambition for the book was more modest; he may have intended *Rights on Trial* to be

activism has broadened its base, the interests of the "people" have sometimes diverged; often these interests seem to be hopelessly at odds with each other (e.g., seniority vs. affirmative action). Because Kinoy never explains what he means by the term "the people," the concept of "people's lawyer" seems not only anachronistic but unhelpful.

no more than a personal account informed by the political experience and wisdom that he gleaned along the way. But as one of Kinoy's readers who hungers for theory, I found it difficult not to compare his ideas of what it means to be a progessive lawyer with other theories that are the subject of increasing discussion in political and legal literature.

Until recently, few theories of progressive lawyering existed. The traditional model of progressive lawyering—and Kinoy's career, I believe, fits this model—involved manipulation of the existing legal system to minimize discrimination, expand access to social welfare programs, and maximize people's "entitlements" to political and social freedom. Although some radical lawyers questioned how far one could go with such a strategy—i.e., whether fundamental change could be accomplished without abandoning reform for revolution—their practice as lawyers generally conformed to the traditional model of seeking incremental change through lobbying and litigation.[12]

The Chicago Seven trial in 1969 startled many liberals and radicals in the legal community because the tactics of the trial lawyers in that case broke sharply and quite visibly from the traditional model.[13] In that trial, and in the numerous trials of Black Panther Party members in the 1960's and 1970's, both radicals and their attorneys made open defiance of the political system the central focus of their legal and political strategy. Building on the lessons of these trials and on new developments in legal theory, several lawyers and law teachers associated with the National Lawyers Guild ("Guild")[14] and the Conference on Critical Legal Studies ("CCLS")[15] have begun to sketch another

---

[12] For a description and critique of this traditional model, see Simon, *Visions of Practice in Legal Thought*, 36 Stan. L. Rev. 469, 474–84 (1984); Comment, *The New Public Interest Lawyers*, 79 Yale L.J. 1069 (1970).

[13] *See* T. Hayden, *Trial* 29–86 (1970).

[14] Information about the Guild can be obtained from its national office, 853 Broadway, Room 1705, New York, NY 10003.

[15] Information about the CCLS can be obtained from Prof. Mark V. Tushnet, Georgetown Univ. Law Center, 600 New Jersey Ave., N.W., Washington, DC 20001. *See also* Kennedy & Klare, *A Bibliography of Critical Legal Studies*, 94 Yale L.J. 463 (1985). Members of the CCLS and the Guild have collaborated on a book of essays, The Politics of Law (D. Kairys ed. 1982), which provides a useful introduction to ideas that are current within the two organizations.

model of progressive lawyering that challenges the assumptions of liberal legalism and takes up questions that Kinoy leaves unanswered.[16] An article by Peter Gabel, a law professor who has made important contributions to the CLS movement, and attorney Paul Harris, a past president of the Guild,[17] is perhaps the most systematic exploration of such a new approach, which provides an instructive counterpoint to Kinoy's.

Gabel and Harris begin with an analysis of the role of law in society, an analysis that rejects both an orthodox Marxist view of law as mere "superstructure" (hence, not worth reforming) and a liberal-legalist understanding of law as relatively autonomous (hence, susceptible to "real" change). Instead, Gabel and Harris see the role of law as perpetuating certain myths about the naturalness, inevitability, and legitimacy of our hierarchical social arrangements and about our collective powerlessness to change those arrangements.[18] According to the authors, these myths are maintained by public acceptance of various symbols of legal authority (such as courts and judges) and by faith in law itself (i.e., legal reasoning), which the public mistakenly assumes to be a neutral arbiter of disputes. Gabel and Harris's program for countering the law's "hegemony"[19] has three planks: the progressive lawyer should seek

(1) to establish a relationship of equality with her client,

(2) to demystify the symbolic power of the state, and

(3) to reshape legal conflicts in such a way that the limiting nature of legal ideology and the true socioeconomic and political foundations of legal disputes will be revealed.[20]

The Gabel and Harris article is remarkable, in one sense, for offering its program as if its elements were quite new. In

---

[16] *See* Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. Rev. L. & Soc. Change 369 (1982–83); Gordon, *supra* note 5; Klare, *supra* note 7; Simon, *supra* note 12.

[17] *Supra* note 16.

[18] *Id.* at 372.

[19] *Id.* at 374 n.12 (discussing Gramsci's treatment of the concept). *See also* E. Genovese, *The Hegemonic Function of Law*, in Roll, Jordan, Roll! (1974).

[20] Gabel and Harris, *supra* note 16, at 376.

Rights on Trial, we can see that Kinoy deployed much of this program in struggles dating back to the 1950's. Kinoy tried to counter hierarchical tendencies that crept into relationships with his clients and co-workers (pp. 56, 90–91).[21] Kinoy also appears to have been adept at getting his clients involved in the drama of each case in order to demystify the power wielded by their foes (pp. 57–58). We can see in many of his legal battles the effort to pierce the veil of legalistic argument and to focus instead on the underlying social and economic forces at work.[22]

What *is* new, however, about the Gabel and Harris program is its sharp break from a traditional result-oriented view of political lawyering. For Gabel and Harris, unlike Kinoy, "demystification" is not simply part of a progressive lawyer's agenda; demystification (or delegitimization) *is* the program. In other words, whatever apparent similarities there might be between Kinoy's practice as a political lawyer and the approach that Gabel and Harris advocate, the differences between them on the level of political theory are both substantial and significant.

A useful way to examine these differences is to look at two brief narratives—one from *Rights on Trial* and the other from the Gabel and Harris article—which typify their respective authors' visions of the progressive lawyer's role. These two stories, both of which involve defiance of a judge, also suggest a great deal about their authors' views of politics and law.

The first story, from *Rights on Trial*, recounts what must have been one of Kinoy's great moments as a lawyer. Kinoy

---

[21] It is quite surprising, however, given Kinoy's work as a labor lawyer, to see how little attention he pays in *Rights on Trial* to labor relations within his own office. In a brief reference to his (apparently overworked) secretarial staff (pp. 90–91), Kinoy indicates that he was concerned about the hierarchical structure of relations in his office. But, as compared with Kinoy's "larger" political agenda, this concern does not seem to have occupied a prominent position.

[22] For example, in Danville, Virginia, where Kinoy challenged efforts by the mayor and other city officials to enjoin all forms of civil rights protest in the city, Kinoy's legal strategy relied heavily on exposing the abuse of power by Danville's white power structure rather than simply making legal arguments concerning the marchers' constitutional right to assemble (ch. 7).

was arguing for the release of two civil rights demonstrators who were being held by the state of Virginia. He tried to explain to the presiding federal district court judge, Thomas Michie, that federal removal and habeas corpus statutes *required* the judge to order the release of the two activists. As he reasoned in vain with the recalcitrant judge in chambers, Kinoy reports:

> I noticed that the judge had the statute book open on his desk. Without weighing any of the consequences of what might have been considered unlawyerlike conduct, I jumped up, walked around the desk, and, as [Kinoy's co-counsel William] Kunstler has delightedly told people on occasion over the years, took Judge Michie's finger in my hand and placed it directly on the word "shall" in the statute, saying, "There it is, Judge. You *shall* sign the writ. That's the law." It was clear when I resumed my seat that something had rocked Judge Michie from his well-anchored base in the southern power structure. We all sat quietly for a moment, and then the judge lifted his pen and signed the writ of habeas lying before him . . . . (p. 200).

It must have been clear at the time that if Judge Michie had refused to sign the writs, Kinoy could have successfully appealed. But, as Kinoy noted later, forcing the judge to sign the writs "said to every member of the Black community in Danville that the power structure was not invincible" (p. 201).

Although this surely is a great piece of drama, it has a disturbing feature. For even though Kinoy, with undeniable courage, might have succeeded in humbling a reactionary judge, his victory accomplished a demystification of "state power" only in the narrowest sense—i.e., at the expense of glorifying law in general, and "federal" law in particular. The hero of this drama is, of course, Kinoy himself. His story requires a lawyer to be at center stage because only a lawyer could (1) manipulate the relevant doctrinal levers (habeas corpus, removal), and (2) get away with grabbing a judge's finger without being arrested. Thus, we see governmental authority harnessed to the needs of the people at a critical moment, but only because the people's lawyer was there at the right time and place.

The story that Gabel and Harris tell of defying a judge's authority involves the sentencing hearing of a convicted marijuana smuggler whose attorney, a member of the Guild, brought his client's wife and two children to the courtroom for the hearing.[23] Before the judge arrived, the bailiff warned the attorney that the children, aged seven and ten, would not be allowed to stay in the courtroom. The attorney explained to the bailiff that this was the children's last opportunity to see their father before he went to prison. The bailiff replied that the judge had a standing rule that barred children. The attorney insisted that the children had a constitutional right to be there, "told the wife and children to stay and asked the bailiff to inform the judge of his position, which he did." When the judge entered the courtroom, he said nothing about the children, who remained throughout the proceeding.[24]

Like the Kinoy vignette, Gabel and Harris's recounts a nice bit of lawyering, but its message is quite different from that of Kinoy's tale. First of all, the stakes here seem small by comparison with those in Kinoy's story. Gabel and Harris are interested in the way the exercise of illegitimate authority can be challenged in everyday life, rather than at headline-making junctures in time. Second, although the lawyer in this story is, like Kinoy, at center stage, he has done nothing extraordinary as a lawyer; nothing that his client's wife could not have done had she known or dared to. Finally, the power of the judge was not undone simply by marshalling another (more powerful) authority or body of law, as in Kinoy's story, but rather by confronting the injustice of the judge's flat rule with a straightforward refusal to succumb.

These two stories also illustrate the differences between their authors on the subject of "rights", an important theme in Kinoy's book. Kinoy's story involves the vindication of abstract rights (the rights to a habeas writ, a federal forum, free speech); Gabel and Harris's involves the vindication of the concrete

---

[23] The story appears in Gabel and Harris, *supra* note 16, at 400.

[24] *Id.* Gabel and Harris point out that the children of the client's co-defendant, who was represented by a "prestigious New York dope lawyer," remained outside the courtroom because the lawyer chose not to challenge the standing rule.

human needs of the defendant and his family. As Kinoy's title suggests, the espousal of his clients' "rights" plays an important role in the way he champions their aims and interests. Gabel and Harris do not entirely dismiss rights rhetoric as dangerous false consciousness; they view it as a necessary evil in the courtroom but urge progressive lawyers to move away from using it "in everyday political activity."[25]

This suggested move away from the language—and logic—of rights is a move which many people on the left find difficult and controversial. To abandon the rhetoric of "rights" is for Kinoy and his colleagues to give up the terrain on which the major battles of progressive lawyers have been won.[26] As Kinoy put it in a 1970 article:

> The struggle to preserve the elementary forms of procedural guarantees, designed originally to protect individual liberty and the right to a fair trial, is *not* a struggle to "delegitimize" or "demystify" these forms. The struggle is to *defend* these forms, to *protect* them; if you will, to *legitimize* them against the efforts of the rulers to *delegitimize* them . . . . It provides a focus for the organizing of massive support among the broadest sections of the people, to whom the . . . "right" of American citizens to liberty and justice remains an important question.[27]

These views—to which Kinoy evidently still adheres—are nearly the mirror image of the views of Gabel and Harris. This

---

[25] Gabel and Harris, *supra* note 16, at 375, 377 n.13. Duncan Kennedy takes a more charitable view of rights rhetoric; he suggests, for example, that political lawyers "work at the slow transformation of rights rhetoric, at dereifying it, rather than simply junking it." Kennedy, *Critical Labor Law Theory: A Comment*, 4 Indus. Rel. L.J. 503, 506 (1981).

[26] One of those colleagues, Victor Rabinowitz, a veteran Guild lawyer, recently described the heart of the movement lawyer's mission as the effort "to compel the state to keep the promises it makes—the promises contained in the Constitution." Rabinowitz, *The Radical Tradition in the Law*, in The Politics of Law. *supra* note 14, at 317.

[27] Kinoy, *The Role of the Radical Lawyer and Teacher of Law*, in Law *Against* the People, *supra* note 2, at 288–89 (emphasis supplied).

difference between them over the question of "rights" and "rights rhetoric" is important because it lies near the heart of what makes the Gabel and Harris approach distinct from traditional progressive practice and reflects, at least to some extent, a debate within the CCLS over the question of "rights."[28] Gabel and Harris suggest that we need to look beyond the political actions that we encourage or defend and to consider how progressive lawyers help people to reimagine their world and its possibilities. Kinoy would certainly agree that people's consciousness is a vital factor, but I think it is fair to say that Gabel and Harris's heavy emphasis on the power of consciousness is fundamentally at odds with Kinoy's way of looking at the world. Gabel and Harris describe the legal system as "*principally* concerned with . . . the control of popular consciousness through authoritarian and ideological methods."[29] The legal system accomplishes this manipulation, they argue, by providing people with "fantasy images of community that can compensate for the lack of real community that people experience in their everyday lives."[30]

To someone like Kinoy, who has spent a great deal of time working in the civil rights movement, Gabel and Harris's views

---

[28] *See, e.g.*, Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 Stan. L. Rev. 509 (1984); Lynd, *Communal Rights*, 62 Texas L. Rev. 1417 (1984).

[29] Gabel & Harris, *supra* note 16, at 376 (emphasis added). Peter Gabel has gone so far as to say that:

> In my opinion, the law has virtually no instrumental function, at least to the extent that the word "instrumental" is meant to refer to the economic significance of the legal outcome. The vast majority of legal outcomes have no serious impact on the economic structure as a whole, and certainly do not directly serve the interests of a dominant class. On the contrary, the legal outcome must in fact be uncertain until the judge reasons to a decision—otherwise there would be no appearance of justice and so no legitimation. Sometimes the owner wins, sometimes the worker wins, and meanwhile the real world, of which legal practice is but a tiny part, goes on.

Gabel, Book Review, 91 Harv. L. Rev. 302, 313 n.18 (1977).

[30] Gabel & Harris, *supra* note 16, at 372.

would likely appear to overemphasize the extent to which the law relies on *indirect* means of social control. It is undeniable that the legal system is ideological and built on idealized imagery of fairness and neutrality. But to define the law's function almost exclusively in terms of its legitimating function is to miss some important differences in the way that the law operates in different communities. In black and poor neighborhoods, for example, where people are perhaps less inclined to see the legal order as fair, and thus legitimate, the police may use the very arbitrariness of their behavior as a method of social control, abandoning altogether the indirect method of "legitimation." Moreover, Gabel and Harris's view that a sense of "real community" is lacking in modern life might surprise those who live in ethnic, rural, and some inner-city communities where overlapping connections of family, church, and employment still provide a strong sense of social cohesion; in such communities the law's "fantasy images" might serve a reinforcing, rather than a compensatory, function. My point here is simply that Gabel and Harris's condemnation of the traditional model of progressive lawyering cuts too broad a swath. The rhetoric of rights and the law's "fantasy images" perform different functions in various communities. For the people that Kinoy represented in the South and with the UE, the rhetoric of rights operated differently because those rights were flagrantly violated—if not openly renounced—by those in authority.

In addition to considering political and social community as factors which affect the meaning of "rights" and "rights rhetoric," it may be useful to consider whether different *kinds* of rights are equally suspect, as the Gabel-Harris critique suggests. If we assume that some rights (e.g. the right of free speech and assembly or the right to organize collectively with co-workers) are to be preferred to others (e.g. property rights),[31] does the

---

[31] Recent articles by the late Edward Sparer, *supra* note 28, and activist-attorney Staughton Lynd, *supra* note 28, have argued for just such a reconceptualization of "rights." For Sparer, those rights which protect freedom of speech and expression deserve a preferred status inasmuch as they are "universal" and "inalienable." Sparer, *supra*, at 539. Lynd takes a similar approach, emphasizing the "collective" aspect of the rights he considers worth fighting for. For Lynd, freedom of speech and assembly *plus* various rights

criticism of rights rhetoric across the board make sense? The ideology undergirding our legal system may indeed encourage people to generalize from certain relatively uncontroversial rights, e.g. the right to exclude others from one's residence, to more debatable ones, e.g. an employer's right to exclude others from the workplace.[32] But the progressive lawyer's educative function may include contextualizing and particularizing the rhetoric of rights to combat the false consciousness which elides the differences between the employee and her boss.

Of course, the "preferred" rights are vulnerable to the same deconstruction—based on their indeterminacy and incoherence[33]—as the less preferred. On the other hand, this deconstruction may be more appropriate generally as a critique of legal theory than as ordinary political rhetoric. The popular rhetoric of rights does not aspire to precision, nor is it continually refined and redefined by scholars; although it originates in legal theory, it is layered over with other meanings and associations. In part, Kinoy's success as a self-styled "people's lawyer" is attributable to his ability to evoke those meanings and associations. Kinoy recognizes that the rhetoric of rights strikes a deep and powerful chord in American political discourse.[34]

---

associated with workplace organization and economic survival are "communal rights" because they belong not to individuals (however much individuals may benefit from their exercise), but to society as a whole. Lynd, *supra* at 1422–35.

From a Critical perspective, Sparer's and Lynd's attempts to rehabilitate rights rhetoric may appear naive, for neither of them confronts the problems of incoherence and indeterminacy inherent in any rights-based theory. *See infra* note 33 and accompanying text. Sparer might have answered this criticism by distinguishing liberal *rights* (such as free speech) which he endorses from liberal theory, which he does not. *See* Sparer, *supra*, at 515. This distinction, however, begs the question; Sparer's preferred rights are devoid of meaning outside the context of political theory and social practice shaping exercise and enforcement of those rights.

[32] This example is drawn from Gordon, *supra* note 5, at 287.

[33] For an elaborate and masterful development of this critique, *see* Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L.J. 1 (1984).

[34] Gabel acknowledges that during the rise of progressive movements, the rhetoric of rights solidifies commitment and reinforces a sense of community. *See* Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 Tex. L. Rev. 1563, 1586–97 (1984). But, after this initial period is over, he argues, the same focus on "rights" leads to demobilization of the movement, alienation, and cooptation by the State. *Id.*

Thus, he would probably reject Gabel and Harris's assessment of the rhetoric of rights as a "necessary evil;" to accept that approach would cast the progressive lawyer in a somewhat schizoid role: advocating "rights" in the legal arena while debunking them elsewhere.

This is not to say that the "critique of rights" has no relevance for progressive lawyers. On the contrary, this critique has played an invaluable role in revitalizing progressive theory and practice.[35] It has illuminated, for example, some of the doctrinal traps that progressive lawyers have inadvertently created and to which they have later fallen prey.[36] On the other hand, experienced movement lawyers such as Kinoy are not easily fooled by their own rhetoric. Kinoy describes the readiness with which progressive lawyers—like any lawyer—must be prepared to turn against hard-won legal principles when those principles no longer serve the purpose for which they were originally sought.[37] Throughout his career, Kinoy seems to have followed the advice that his mentor, UE general counsel David Scribner, gave him: "Don't be paralyzed by the notion of the eternal life of an idea or of a body of legal concepts. After all,

---

[35] *See, e.g.*, Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561 (1983); Gordon, *supra* note 5; Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buffalo L. Rev. 205 (1979); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 Minn. L. Rev. 265 (1978).

[36] *See, e.g.*, Freeman, *Legitimating Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049 (1978) (describing courts' adoption of perpetrator rather than victim perspective); MacKinnon, *Abortion and the Male Ideology of Privacy*, Radical America, July–Aug. 1983, at 23 (describing courts' adoption of "right to privacy," rather than principle of non-subordination of women, as justification for legalizing abortion).

[37] During the McCarthy era, for example, Kinoy found the NLRB to be working hand-in-glove with Congressional witchhunters. He was stymied, however, in his attempt to enjoin the NLRB by the exhaustion-of-remedies doctrine that his predecessors in the UE had worked hard to establish, in order to protect the operations of the New Deal NLRB. Kinoy notes the irony of now seeking to overturn all of his predecessors' efforts, and notes further the possibility that, on another day, progressive lawyers may need to rebuild the doctrines that he was trying to dismantle (pp. 107, 111).

the only thing which is 'eternal' to a lawyer for working people is the struggle of those people for a better life" (p. 111).[38]

This advice, on which Gabel and Harris and Kinoy could certainly agree, is more than a truism. Scribner's remark reminds us that adherence to theory of any sort, even critical theory, will not stand the progressive lawyer in good stead unless she also develops a sensitivity to the political context in which we act on and test those theories. This is a sensitivity which Kinoy obviously has learned. Even if *Rights on Trial* fails to reflect the nuances of the many new developments in legal theory, Kinoy's practice demonstrates a talent that is no doubt equally valuable: an ability to articulate the felt needs of the people he represents and to develop, out of the raw material of a deeply flawed legal system, creative, ad hoc, albeit purely instrumental legal methodologies for furthering their interests.

III. The Personal Dimension

One of the most moving aspects of Kinoy's account is its evocation of the personal risks and rewards of devoting his life to the cause of social change. In recounting the moments of connection with the people that he represented and with fellow movement lawyers, and his elation when there were victories to celebrate, Kinoy gives the reader some sense of the emotional sustenance that kept him and his colleagues going.[39]

---

[38] Kinoy does not discuss or fully take account of the uneasy tension between his view of rights as, on the one hand, ephemeral, manipulable, and essentially instrumental, and on the other hand, enduring and valuable in themselves.

[39] Kinoy describes one such moment in 1963 when he, his colleagues, and the civil rights movement of Danville succeeded in overturning an injunction against the movement's activities:

> Word . . . spread like wildfire through the Black community. Not only was the federal injunction against the movement dissolved, but Martin Luther King was coming to town! A spirit of elation swept through the community . . . . That evening I witnessed a gathering like none I had ever experienced. Thousands of cheering Black people jammed into the High Street Church. Bill Kunstler

Kinoy's work in the South during the early years of the civil rights movement (p. 233) is particularly inspiring because there were then so few lawyers who were willing to take personal risks for the sake of black people. The National Lawyers Guild had organized a Committee to Assist Southern Lawyers, and eventually a substantial number of lawyers went south to help with voter registration battles and other legal work. In the early 1960's, however, Kinoy and his small band of colleagues had little help, as they rushed from one end of the South to the other, handling the enormous amount of legal work that was necessary to keep the movement from being crushed by the white power structure there. Kinoy's account of those years provides us with a reminder of how savagely the local police and segregationist politicians of the South responded to the civil rights movement: the lynchings, the bombings, the beatings of demonstrators, the murder of organizers Goodman, Schwerner, and Chaney. In Danville, for example:

> Rev. McGhee called for volunteers to go with him to take part in a prayer vigil for those in jail. Fifty people, mostly women, left the church with the minister and marched downtown, singing hymns. When they reached the alley beside the jail, they all knelt down in prayer.
>
> Suddenly one end of the alley was sealed off by a large group of white men armed with clubs and truncheons . . . . The Mayor stepped forward from the armed men, turned to the police chief, and said, "Give them all you've got." . . . . [Tlhe police rushed in with clubs and started to beat the demonstrators, women and men alike. Some [demonstrators] tried to escape by hiding under parked cars but were yanked out and beaten harder for trying to escape. Of the fifty people who marched and prayed that evening, forty-seven were treated in the segregated public hospital that

---

and I sat there with . . . the other Danville lawyers listening to Dr. King's impassioned speech, and . . . we all stood and held hands to sing the emotional words of "We Shall Overcome." (p. 204).

> night. The records showed broken heads, fractured noses, fractured wrists, contusions . . . and in some cases, lasting injury to sight and hearing. (p. 186).

Even in Kinoy's courtroom encounters we get some hint of the dangerous climate in which civil rights lawyers in the South worked. During the trial of a Danville organizer, for example, the state judge before whom Kinoy and his colleagues were appearing refused to acknowledge the fact that the case had already been removed to federal court:

> When [Kinoy's colleague Len] Holt declared at the beginning of the trial that the judge had no power to continue the trial and that all the cases listed in Holt's petition were now removed to federal court, the judge simply stared at him and, to the astonishment of all the out-of-state lawyers present, fingered the gun he always kept on his desk. Then he said, "Let's proceed with the cases" (p. 194).[40]

It is difficult to read about the work that Kinoy and other movement lawyers undertook without an enormous sense of pride in their accomplishment and courage.[41] Yet it is also hard not to wonder what sort of personal lives, if any, these lawyers had. Unfortunately, Kinoy's reader looks in vain for an answer to that question. Kinoy provides only three tidbits of information about his family life, in the last of which Kinoy announces that he and his wife had decided to divorce. Though he had not prepared us for that outcome, I doubt that any of Kinoy's

---

[40] It is worth noting that even removal of cases to federal court was not always a panacea for civil rights lawyers during this period. One of the federal district court judges before whom Kinoy appeared—the chief judge for the Southern District of Mississippi—described a group of blacks who had sought to register to vote as merely "a bunch of niggers" (p. 238).

[41] *Cf.* M.L. King, *The Civil Rights Struggle in the United States*, 20 Rec. A.B. City N.Y. 5, 6 (1965)("[T]he road to freedom is now a highway because lawyers throughout the land, yesterday and today, have helped clear the obstructions, have helped eliminate roadblocks, by their selfless, courageous espousal of difficult and unpopular causes.").

readers were entirely surprised. It may be unfair to ask Kinoy, or any author who writes a personal account, to reveal more than he chooses to. But in Kinoy's case, it's difficult to leave the matter at that. For one thing, Kinoy doesn't omit all mention of his family, as he might have; he gives us just enough information to indicate that something is amiss, and many of his readers will surely want to know what. In addition, if the left has learned anything in the past fifteen years, I should hope that it has learned that the personal and the political do not occupy totally separate spheres. To know how Kinoy related to those around him and, indeed, how he felt about the life that he chose would surely play a part in our view of the success of his career as a whole.

I am not suggesting that the personal details of Kinoy's life are necessarily worth dwelling on for their own sake. Nevertheless, the genre in which Kinoy is writing—a personal narrative of his career as a progressive lawyer—is one in which we might expect a more three-dimensional treatment than *Rights on Trial* gives us.

There are several reasons for insisting on this point when the narrator is someone like Kinoy. First, if one of Kinoy's goals is to suggest that the committed life is an appealing one, personal detail would make his account more persuasive. Persuasion is, of course, the lawyer's stock in trade; but the type of persuasion called for in writing of one's life is of a different sort from that used in the courtroom. Here we listen for the voice of the lawyer's authentic self, hoping to be convinced that theory and practice have found some coherence. In *Rights on Trial* we hear only the voice of Kinoy's public self at the expense of his other voices.

A second reason for wanting a more three-dimensional treatment of his life is related to the problem of political hero worship. Kinoy's nearly exclusive focus on legal work—principally, his legal triumphs—lends a rather self-aggrandizing air to his book.[42] This aspect of *Rights on Trial* detracts from the

[42] For example, when he describes his oral argument before the Supreme Court in United States v. United States District Court, 407 U.S. 297 (1972), he conveys the impression that his ability to sway the Court was all that stood between us and the Nixon administration's plan for "abandoning constitutional government" (pp. 22, 31).

important message he would convey both to those who might wish to follow his path and to that larger body of readers who will never become activists, organizers, or political lawyers. This latter group will likely find his account a bit tedious as it moves from one legal victory to another. Kinoy does occasionally make a brief, off-the-cuff admission of self-doubt; he occasionally indulges in a bit of light self-criticism. But these insights and doubts never intrude for more than an instant. They are not integrated into the book as a whole. The left needs its heroes, as does any social movement, but the left also needs human-scale heroes, capable of error and doubt. The more grandiose model of heroism may be entertaining, but one of the lessons that the left should certainly have learned by now is that we would all be better off if our heroes were more like us—indeed were us.

Despite these shortcomings, however, *Rights on Trial* succeeds in giving us a sense of what the work, if not the life, of a progressive lawyer is all about. It broadens our knowledge both of this calling and of our recent political history. In doing so, it provides us with a little more of what we need to be our own heroes and to carry on with the work that Kinoy has staunchly and unselfishly pursued.