OXYMORON

In the spirit of our dual mission to "present both the failures of law and the possibility of using that same law" for liberatory ends and commitment to "challeng[e] the nature of legal discourse" and "revalu[e] voices which have been suppressed or silenced," LAW AND LIBERATION asked Yale Law School faculty, civil rights practitioners, and system-impacted legal advocates to respond to the question: *Is Law and Liberation an oxymoron?*[1]

The following are some of the answers we received:

BAHER AZMY

Law and liberation is an oxymoron. Lawyering and liberation is not.

Law is not a neutral or natural expression of justice; it is an expression of power. In a nation built upon and scaffolded by the power of capitalist exploitation of law and labor, white supremacy, and heteronormative patriarchy, law has thus historically functioned to protect insiders who benefit from this default power dynamic through a set of rules; those rules, subject to rare exception, are designed to organize, regulate and control persons, particularly those outsiders who stray from constructed normative behaviors, appearance or class, enforced by the latent violence of the state. Indeed, as scholars have increasingly observed, and as recent Supreme Court jurisprudence demonstrates, politically privileged insiders see law as contributing to their own sense of exultation or liberation, specifically through the legal exclusion or repression of disenfranchised outsiders.

As radical lawyer and Center for Constitutional Rights' co-founder William Kuntsler observed:

> I suspect that more people have gone to their deaths through a legal system than through all the illegalities in the history of man: six million people in Europe during the Third Reich. Legal. Sacco and Vanzetti. Legal. The thousands of great trials throughout the South where Black men were condemned to death. All legal. Jesus. Legal. Socrates. Legal. All tyrants learn it is better to do this thing through some semblance of legality than to do it without that pretense.[2]

As a practical matter, law has no neutral liberatory promise.

Asserting this premise in a law school context is not meant as a provocation, nor does it recommend nihilism. It merely suggests a strategic – and liberatory – approach to lawyering inside politically distorted social systems. It means that lawyers committed to liberation cannot prioritize shaping legal doctrine or the pursuit of rights-recognition for its own seemingly salutary sake. Generations of critical legal theorists have demonstrated rights are contingent on politics and not the other way around and are thus not durable sources of protection for marginalized communities. Liberatory lawyering must center strategies around shifting *power*, not changing legal doctrine. A victory in a court of law will not bring meaningful liberation; only the political success of social or political movements can.

The power-shifting strategy of lawyering has two interrelated strands. One is to use litigation to destabilize power narratives that lazily justify state repression, exclusion, or violence by rendering them false, pretextual, or motivated by irrational animus. The other is to use lawyering to build the power of mobilized movement or community actors through a variety of methodologies, including clearing legal

[1] This piece pays homage to the historic Journal of Law & Liberation that asked this same question to the Journal's advisory board in 1989.

[2] Public Broadcast Service, *The Terrible Myth - William Kunstler: Disturbing the Universe*, YOUTUBE (June 24, 2010), https://www.youtube.com/watch?v=Ft8UNDhV2Uc.

obstacles to organizing, honoring a community's agency and expertise, and elevating the lived experiences of those most harmed by injustice (a practice lawyers looking for the "perfect plaintiff" for law reform-focused impact litigation rarely undertake).

In this vision of liberatory lawyering, the means of lawyering can mean as much as – or often more – than any legally-obtained ends. It offers prominence for strategies of lawyering that include: lawyering for **political critique** by opening up the courtroom to contest, through narrative, evidence building, and community organizing, the morality and legitimacy of state practice; lawyering for **recognition** by claiming an entitlement to have rights, vulnerable communities assert their human dignity in forums that are obligated to see and honor such constituencies' claims to protection from important normative values like equality or procedural fairness; and lawyering for **resistance** by refusing to accede to totalizing and dehumanizing narratives of the state and instead asserting our humanity's rejection of leviathan state power in a way that, as Muneer Ahmad explains, ultimately "makes us human." And when we are seen as equal humans, we have a path toward liberation.

In reflecting upon these modes of lawyering, I think of cases I have been involved in that reflect the highest liberatory aspirations. I think of my CCR colleague, Rachel Meeropol, and her Supreme Court argument in *Ziglar v. Abbasi*, which challenged post-9/11 discriminatory round-ups and brutalization of Muslims in New York and New Jersey. Staging a form of an intergenerational liberatory narrative, Rachel – the grandchild of Julius and Ethel Rosenberg, who the Attorney General executed in a prior moral panic implicating Communism and American Jews – fought (ultimately unsuccessfully) in the nation's highest Court to hold a new Attorney General accountable for abuses implicating a new disfavored minority for a new moral panic. I think of the brave Black and Latino New Yorkers like David Floyd and David Ourlicht, who took on what the mayor called the "eighth largest army in the world" – the NYPD – through organizing, litigation, and struggle to condemn the NYPD's widespread practice of "stop and frisk" as racist, illegitimate and unconstitutional. I think of the Muslim American plaintiffs, like Farhaj Hassan and Imam Deen Shereef, who filed suit to defend their communities against a blatantly discriminatory NYPD surveillance program in the form of collective action, solidarity, and love. I think of CCR client Tarek Ba Odah, a Guantanamo detainee, shivering and frail at 76 pounds from a principled eight-year hunger strike in refusal to relent to his captor's illegitimate claim to his detention and by insisting his lawyers fight for him on his terms in the courts and the media, ultimately shamed and prevailed over the largest military in the world to grant him his freedom. I think of Jo and Joy Banner, who lead the Descendant's Project and expression of joy and love for their Wallace, Louisiana community to resist, through community organizing and litigation, to disrupt the endless cycle of petrochemical exploitation of their land, including land of their enslaved ancestors; the Descendants' expression of love for the struggle of their ancestors, through legal and political action is liberatory.

And, ultimately, there is the possibility where lawyering, love, and liberation intersect. Josh Aiken, YLS '24, a former student in my civil rights course, offered this moving reflection on the power of lawyering for love:

> Love is making room for people to define what freedom entails and honoring the expertise of those practiced in moving through the world as if their loved ones' lives depended on it (because, ultimately, they do). Liberation, it seems, might be how we love and love and love and find that loving is success without [courtroom] victory, and the will to struggle reminds us that we are worth loving again.

SAMUEL MOYN

Law has mostly served domination and oppression and much more rarely emancipation and liberation. This doesn't mean law is anything in particular; it does mean that law is a social practice that reflects and a tool that presupposes the distribution of authority and power (both non-violent and violent, and both structural and superficial) of its time and place. It has always been this way for as long as law has existed. All societies to date have been organized around the domination and oppression of some over others, and law has

normally served the goal of institutionalizing and protecting that subordination. That modern times have begun to lift the yoke of subjugation (sometimes literally) thanks to new ideas and movements doesn't mean that law's age-old function ever changed radically. But it did change somewhat. The same is true of how law is studied and taught. Mostly, that takes place, even today, in order to legitimate and rationalize domination and oppression, producing those who will join in. But like law itself, in law study and teaching, there is now a much more consequential and visible struggle than before to demystify how law does its work or even to reclaim it as an emancipatory instrument. We are, clearly, only in the early days of that transformation. That it is possible at all does not exonerate law for the oppressive functions it has performed. It does mean that it is another terrain of struggle – though far from the only one or even the most important – for those who hope that freedom and equality of all will involve much more than those words have implied so far.

DELESO ALFORD AND BENJAMIN CRUMP

The historic Henrietta Lacks' litigation journey provides a real-world example of the tension between law and liberation. On one hand, Henrietta Lacks' experience contextualizes the dehumanization of a Black woman in 1951 and the "legalized genocide"[3] of people of color that has since persisted. On the other hand, the law is a critical tool through which the Lacks family has pursued justice to right the wrongs of many generations.

The case of Mrs. Lacks embodies law and liberation in its duality. This historical settlement on August 1, 2023, in which the Lacks family settled their lawsuit with a biotech company that used Lacks' cells without her consent, also marks the birthdate of Mrs. Henrietta Lacks and a positive step toward addressing the family's 70-year pursuit of justice. Ten days later, on August 10, 2023, the Lacks Estate filed a second complaint for the single cause of action of unjust enrichment against Ultragenyx Pharmaceutical, Inc.

In response to the complaint, Ultragenyx moved to dismiss for failure to state a claim under Rule 12(b)(6). The Lacks family attorneys filed an opposition to the motion to dismiss, to which defendant Ultragenyx replied. On May 20, 2024, based upon the record and without a hearing on the motion to dismiss, federal Judge Deborah L. Boardman denied, in a 76-page memorandum opinion, the defendant's motion to dismiss.[4] This denial is significant. The Lacks litigation is shaping the legal discourse as to the impact of collaborative storytelling in law to address historic and present-day medical racism. As the Lacks family litigation has thus far illustrated, the arc of justice is bending toward the right side of history: Mrs. Henrietta Lacks' "cells were plac[ed] back into her body"[5] when a court of law found that the Lacks estate "has stated a claim for unjust enrichment against Ultragenyx [that] survives the motion to dismiss."[6]

On August 5, 2024, Henrietta Lacks' family filed a third lawsuit against two pharmaceutical companies, Novartis and Viatris, in federal court in Baltimore alleging that the defendants "will continue to be unjustly enriched because [they] received and continue[] to receive a benefit from Henrietta Lacks every time [they] acquire[], cultivate[], test[], researche[], sell[], and receive[] payment from HeLa cells, understood [they] receives a benefit from Mrs. Lacks every time it acquires, cultivates, sells, and receives payment for newly-replicated HeLa cells, and does so in circumstances in which acceptance or retention of the benefit was, is, and will continue to be inequitable without payment or permission."[7]

[3] BENJAMIN A. CRUMP. OPEN SEASON: LEGALIZED GENOCIDE OF COLORED PEOPLE (2019).

[4] Lacks v. Ultragenyx Pharm., Inc., 734 F. Supp. 3d 397 (D. Md. 2024).

[5] Deleso A. Alford, *HeLa Cells and Unjust Enrichment in the Human Body*, 21 ANNALS HEALTH L. 223, 224 (2012).

[6] Ultragenyx, *supra* note 4, at 408.

[7] Compl., Ron Lacks v. Novartis Pharmaceuticals Corporation et al., No. 1:2024-cv-02267 (D. Md. Aug. 5, 2024).

The fact that the "HERstory"[8] of Mrs. Henrietta Lacks is being allowed to proceed in a court of law signifies a legal recognition of what the Lacks family has known all along – HeLa cells are not chattel property, and defendants have been unjustly enriched by the acquisition, use, and sale of HeLa cells.

The blueprint for addressing both past and present medical racism in a court of law has been set in motion. The Henrietta Lacks litigation put our American "justice" system on trial and shined a light on the importance of genetic justice. However, that is not the end of the road. It will take present-day courage to acknowledge the historical wrongs of the past and the vestiges thereof, as Attorney Crump puts it in his call to action, for "Americans to begin living up to the promise to protect the rights of its citizens equally and without question."[9] The historic Henrietta Lacks litigation epitomizes the power of interweaving storytelling, law, and organizing as a tool with which to pursue the promise of justice for all. And it does so in the context of a family that was denied justice for far too long.

Herein lies the tension between law and liberation. Legal battles to both retain and achieve greater justice remain indispensable even as they are, themselves, imperfect tools.

GERALD TORRES

I am not sure what I would say, but let me just quote one of my teachers, Grant Gilmore:

> When we think of our own or of any other legal system, the beginning of wisdom lies in the recognition that the body of law, at any time or place, is an unstable mass in precarious equilibrium. . . . Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.[10]

LYLE MAY

A "civil" execution (i.e., State-sanctioned murder) is as likely as a defendant receiving due process from a federal court that values the finality of the jury's verdict over correctness. The premeditated and deliberate killing of incapacitated prisoners after they have spent years under the prolonged threat of death can never be "civil." Nor is due process really possible if the guilt or innocence determined at the trial level is treated as a "decisive and portentous event."[11]

In our society, the law has so circumscribed life that some rights are no longer guaranteed. This is especially true when bodily autonomy for women is a matter of debate for elected officials, when the right to vote is treated as a privilege easily revoked, when education isn't a right at all, and when the prohibition against slavery comes with an exception embedded in 21st-century America. Under this system, can there ever be such a thing as "ordered liberty," or beneath that burden of control, *do we fail to see how the law creates a Carceral State where freedom is a fevered dream?*

Ask the oppressed, who fear that their rights will be eroded by the next onslaught of populist rhetoric, what it means to awaken beneath the smothering weight of the law. Ask the innocent whether pursuing liberation within the construct of a constitutional claim should simultaneously be chained by the "limits of human fallibility" after the full weight of Society's resources "have been used to imprison them.[12]

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[8] Alford, *supra* note 5, at 227.
[9] Crump, *supra* note 4 (front cover).
[10] GRANT GILMORE, THE AGES OF AMERICAN LAW,110-111 (1st ed. 1974).
[11] Wainwright v. Sykes, 433 U.S. 72 (1977).
[12] Herrera v. Collins, 506 U.S. 390 (1993).

If a "civil" execution is a mask covering a condemned person's face as nitrogen gas is forced into their lungs until death arrives, then the throes of agony and jerking against the gurney straps is the law killing liberty. That is a system from which we all must be delivered.