Section 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States or other person ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."
How Litigation Can Lead to Substantial Relief for Clients and Significant Social Change


By Florence Wagman Roisman

Ev

ery public interest lawyer should read Beth Harris’s new book. Defending the Right to a Home validates public interest work and teaches important lessons about how to do the work more effectively.1 Harris, a political science professor at Ithaca College, has researched and analyzed five lawsuits brought by legal aid lawyers on behalf of impoverished families seeking adequate housing in which to raise their children. Although the cases were filed during years of hostility to programs for poor people (1986–1991), each produced substantial new financial and other benefits that have survived the federal welfare “reform” of 1996, state budget deficits, and other negative forces. The antipoverty lawyers were able to “forc[e] state officials and powerful private actors to change policies and practices, despite the constraints of limited organizational resources, the sometimes arbitrary policy preferences of judges, and the limitation of the existing structure of the legal field, including the statutes, constitutional provisions and accepted legal doctrines.”2 Studying how this was accomplished can help mount ever more effective campaigns for social justice.

The five cases Harris discusses are from California (Hansen v. Department of Social Services), Illinois (Norman v. Johnson), New York (Jiggetts v. Grinker), Massachusetts (Massachusetts Coalition for the Homeless v. Secretary of Human Services), and Washington (Washington State Coalition for the Homeless v. Secretary of Department of Social and Health Services).3 Each used child welfare or public assistance laws to argue

1Beth Harris, Defending the Right to a Home: The Power of Anti-Poverty Lawyers (2004). To put into context my evaluation of Harris’s work, I must note that the book is based on her dissertation, which in turn was prompted by an article I wrote in 1991 when I was working for the National Housing Law Project: Establishing a Right to Housing: A General Guide, 25 Clearinghouse Review 203 (July 1991); see Harris at vii. I learned about this only after the dissertation had been completed and accepted, when I happened to meet Beth Harris at a Law and Society Association conference in 1999. I now count her a cherished friend. Since my admiration for her work was an important basis for our friendship, I believe that this review’s expression of that admiration is not influenced by the friendship. Each reader of the review will have to make her own judgment about that, of course.

2Harris, supra note 1, at 135.

that the state was obligated to provide housing assistance to enable families with children to raise those children in homes. The objective was to establish not simply a right to housing but a right to a home: a “relational” right to have the government “support dependent relationships that are fundamental to caregiving.” All the cases led to substantial financial redistribution and reform, as well as vastly enhanced family stability. Four led to the creation of new programs. Hansen induced the California legislature, in 1987, to create a new Homeless Assistance Program that, two years later, was “a $70 million program serving more than 100,000 families…. Since 1991, the Norman program has provided cash assistance to thousands of Illinois child welfare client families each year. Because of Jiggetts, New York has paid increased shelter allowances for tens of thousands of families who otherwise would have been evicted. The Washington State Coalition for the Homeless led to new legislation that established detailed obligations toward homeless families on the part of state welfare and housing agencies. And while the Massachusetts Coalition for the Homeless did not lead to a new program, the Massachusetts legislature did increase public assistance benefits and housing subsidies for homeless families receiving Aid to Families with Dependent Children.

While antipoverty lawyers will enjoy reading about these cases simply to relish the achievements of colleagues and gains for clients, Harris’s analysis offers substantial lessons for antipoverty law reform practice. Seeking to explain how antipoverty lawyers achieved such results, she considers and identifies sources of “the power of antipoverty lawyers.”

4Harris at 3, viii, adding that “[h]ome is something more than physical space or property; it encompasses socially valued and legally protected relationships.”

5Id. at 4.

6Id.; see also id. at 91 (“In 1995, nearly 2,500 families who were child welfare clients received some form of cash assistance through the Norman program…. Between July 1, 2001 and June 30, 2002, 4,218 families were served by the Norman program(s). In fiscal year 2002-2003, the legislature allocated $4.4 million for Norman programs.”); see also id. at 92 (“resources dedicated to the reunification of families increased from an average of $500 per family case in the early 1990s to approximately $8000 per family in 1999.”)

7Id. at 96 (“Legal Aid lawyers estimated that nearly 30,000 welfare recipients in New York City were receiving supplemental shelter grants in 1996, and another 10,000 may have cycled on and off the program by then); id. at 4 (“by 1997, approximately ten per cent of all recipients of Aid to Families with Dependent Children (AFDC) in New York City were receiving new forms of relief, amounting to at least $72 million annually.”)

8Id. at 121, 124 (the legislative relief extended also to unaccompanied homeless youth, whom the trial court had excluded from the plaintiff class).


10Harris’s book serves another important function: it undercuts the criticisms (from “left” and “right”) attacking public interest lawyering as ineffective and disempowering. See id. at 7 (“Socio-legal scholars have argued that even when public interest lawyers achieve favorable judicial decisions, which is rare, the relations of power in the political and administrative arenas neutralize the reform potential of those decisions.”); id. at 22–23 (discussing the view that litigation disempowers poor people); id. at 133–34, 149. For criticism of “cause lawyering,” see, e.g., Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (1991); Jack Katz, Poor People’s Lawyers in Transition (1982); Ross Sandler & David Schoenbrod, Democracy by Decree: What Happens When Courts Run Government (2003). For defenses, see, in addition to Harris, supra note 1, Michael McCann & Helena Silverstein, Rethinking Law’s “Allurements”: A Relational Analysis of Social Movement Lawyers in the United States, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 261 (Austin Sarat & Stuart Scheingold eds., 1998); Michael W. McCann, Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization (1994). Harris concludes that, as her subtitle says, antipoverty lawyers themselves have considerable power. See Harris, supra note 1, at 149 (“Anti-poverty lawyers continue to have symbolic capital to counter the dominant discourses that exile those who are poor and politically disfavored from legal protections; to expose the harms caused by neoliberal reforms as violations of fundamental rights, and to mobilize institutional resources, including reform litigation, for triage to protect those who are most vulnerable.”). See also id. at 5–6 (Harris writes that her study gave her “a much deeper understanding of the role of law in protecting human beings from both the brutal consequences of unmediated market competition and the punitive powers of state agencies governing the lives of poor people…. [M]y research has convinced me that professionals have significant and particular roles in shaping the norms and procedures that govern the lives of those who lack political power…. The professionals’ credentials, skills in constructing professional discourses, and organizational resources provide forms of symbolic power….”). Harris also indicates that “[t]he process of legalizing political conflicts and negotiating remedies may also create outcomes that are counter to the advocates’ initial goals,” including subdivision of categories of poor people and exclusion of some not protected by the litigation. See id.
The first essential source of power that Harris identifies is the ability to "frame" a tenable claim that the defendants—in this case, state governments—have failed to perform a legal duty owed to the plaintiffs, thus violating a legal right "named" by the lawyers. In the cases she examined, Harris says, the lawyers challenged the dominant political discourse, which blames poor parents for their "negligence" in taking care of their children's basic needs, by defining poor families as legal subjects whose "homes" require protection by the state. The law professionals are attempting to transform the legal classification of homeless families from outlaws, failing to meet their legal obligations as parents, into members of political communities that have a legal obligation to support those who are providing socially valuable contributions by caring for dependent children.

To "frame" the claims in these cases, lawyers used the literal language of state public assistance and child welfare laws. The lawyers were effective, Harris concludes, because they shaped these frames by telling a compelling story and making powerful factual records. She emphasizes that the litigators must frame relief claims that are judicially manageable. As she recognizes, the most successful of the cases are Norman and Jiggetts, where the relief is narrowest; the least successful, Hansen and Massachusetts Coalition for the Homeless, were the most ambitious. Courts are most likely to act in situations in which, as in Norman and Jiggetts, client suffering and agency "bad acts" are evident. Harris's research suggests a general rule: the broader, more general, and less specific the relief sought, the more difficult it will be to attain.

11 As to the significance of naming, see Harris, supra note 1, at 22 ("Hierarchies of power influence whether people perceive their own experiences as harms that can be remedied or as troubles that must be endured."); id. at 24–25.

12 Id. at 9; see also id. at 55 ("When the anti-poverty lawyers create right-to-home frames for communicating the problem of family homelessness and proposing possible remedies, they are drawing on existing legal categories in order to construct an interpretation of what should be the 'universal interpretation' of policy, not merely advocating the interests of their politically powerless clients."); id. at 77 (in Hansen, Norman, and Jiggetts, ")[the legal advocates were able to use their organizational resources, professional authority, and symbolic resources within the juridical field to frame their clients' economic problems as legal problems that required judicial intervention in the policymaking process").

13 Harris considers that the laws on which the suits relied were "the traces of a social welfare discourse" inherited from the New Deal and the War on Poverty, a discourse "that was being replaced by neoliberal principles.

14 Regarding story telling, see Harris, supra note 1, at 55 (discussing the need to appeal to judges' sense of morality). One element of public interest lawyers' power that Harris does not explore derives from their holding the moral high ground. To the extent that adversaries and the public acknowledge the morality of the plaintiffs' position, plaintiffs' approval or disapproval constitutes real reward or punishment. I do not know an authority to cite for this proposition, but my own experience has shown that even opponents want to earn "gold stars" from public interest advocates. Regarding powerful factual records, see id. at 60–61 (describing Hansen); id. at 67 (Norman); id. at 71 (Jiggetts); see also id. at 54.

15 See id. at 116 (discussing the relative scopes of the remedies sought and manageability in the context of the agencies' capacity to administer relief).

16 See id. at 129 (stating that Norman's remedy was "the most limited in its scope").

17 See id. at 101 (in Jiggetts "poor families had to be on the brink of eviction" to secure relief; id. at 67 (in Norman "[a] social worker testified that she was ashamed to discover how Mr. Norman had been treated by the child welfare agency. She told the court, 'No good social work standard would have pulled those children from this working class poor man who had suffered the loss of his wife; who had just launched off an older son graduating from high school in a neighborhood where 50% graduate; where his kids are doing well in school'"). See also e-mail from Laurene Heybach to Florence Wagman Roisman (Dec. 26, 2004) (on file with Roisman)."They took Mr. Norman's children because he was unemployed!".)
As Harris shows, part of what the advocates must establish is that the relief they seek makes sense financially. In some situations this means showing that what advocates seek will cost less than what they oppose.18 In other situations the crucial issue is not the magnitude of the cost but the source of the funding—whether federal or state and from which agencies at either level. Thus, for example, state and local agencies are likely to support the use of federal funds. This helps explain the program in which New York City paid legal aid lawyers to defend families against eviction.19 This made sense for the city both because it reduced the number of families eligible for the shelter required by earlier right-to-shelter litigation in New York and because the source of the money for this program was the federal Emergency Assistance program.

The source of funding was also a crucial factor in Hansen, where both parties shared an interest in not having the child welfare agency be responsible for housing intact families.20 In Hansen and in Washington State Coalition for the Homeless an important consideration was the conflict between child welfare and housing agencies as to which would bear housing assistance costs.21 Conflicts between city and state governments also had to be taken into account. The City of Seattle, for example, paid for an organizer to promote statewide legislative relief and supported the plaintiffs’ claims in other ways, while New York City supported the Jiggetts plaintiffs’ efforts to protect the state legislation upon which their claims were based.22

Second, having “framed” a tenable claim, Harris says, the lawyers need to win some judicial endorsement, which they then can use as leverage with legislatures and agencies. Harris focuses on preliminary injunctions, which were secured in these cases, but surviving a motion to dismiss may do as well.23 Indeed, simply filing a lawsuit, thus compelling a response and subjecting the defendants to discovery, may itself furnish adequate leverage to wring significant relief from defendants.24

In each of these cases, relief was granted after preliminary judicial proceedings. Harris underscores a point that far too many commentators miss—that litigation makes change through action in the trial courts and negotiation, settlement, and consent decrees. While academics usually focus on the Supreme Court—or the courts of appeals—most cases never get beyond a trial court, and most cases do not go to trial. These cases validate the theory that “[t]he threat of increased judicial intervention may influence official actors to negotiate policy alternatives in order to prevent further costly legal chal-

18See Harris, supra note 1, at 66 (noting that the Norman advocates thought their remedy “would actually save the Department money by preventing unnecessary foster care placements, which are far more expensive than helping parents establish stable housing …”); id. at 75, 96 (because New York City had an obligation (created by litigation) to provide shelter for homeless families, everyone agreed that keeping these families in their homes would be cheaper than serving them in the shelter system). Because of rent control and rent stabilization, it would be cheaper than finding new housing for them. Id. at 71. As rent control and rent stabilization ended, however, some landlords lost interest in supporting the Jiggetts relief. See id. at 95–96.


20See also Harris, supra note 1, at 61, 63 (“[Department of Social Services] officials wanted to shift the problem … to the legislature so that another agency could be identified for implementation of a new program.”).

21Id. at 123.

22Id. at 122, 125, 127.

23Id. at 57.

24See id at 8; McCann, supra note 10, at 139; Goldberg v. Kelly, 397 U.S. 254 (1970) (showing that the mere filing of the suit led the agency to establish a procedure for pretermination review and restore benefits for several of the named plaintiffs). While Goldberg is from an earlier and much more generous era, this is not an uncommon consequence of filing a lawsuit. See also Federal Practice Manual for Legal Aid Attorneys 17 (Jeffrey S. Gutman ed., 2004) (regarding pretrial negotiation and offers of settlement); Harris, supra note 1, at 56 (describing why defendants cannot remain passive when litigation has been filed); Brown v. Lynn, 392 F. Supp. 559 (N.D. Ill. 1975); Ferrell v. Department of Housing and Urban Development, 186 F.3d 805 (7th Cir. 1999) (the U.S. Department of Housing and Urban Development (HUD) Mortgage Assignment Program was created because HUD did not want to respond to discovery requests after a motion to dismiss had been denied).
challenges to their policymaking authority.  

Third, Harris says that resources and commitment are necessary not simply for the filing of the lawsuit, but to see it through implementation of relief, which may well take decades.  

(Harris and Jiggetts, for example, are well into their second decades.) Harris’s research shows the necessity of “a strategy for developing long-term political and administrative commitments to reform goals.”  

As to the source of the resources, Harris says, “The fact that the anti-poverty lawyers were working within organizations that financially supported and valued their reform litigation efforts was critical in all of the right-to-home cases.”  

I think, however, that Harris’s research shows that the criteria for success are resources, commitment, and ability, whether the lawyers are in organizations or acting individually.  

Fourth, Harris concludes that there are no essential differences between the cases in which lawyers initiated and controlled the litigation and the Massachusetts Coalition for the Homeless and Washington State Coalition.  

for the Homeless cases, in which coalitions representing homeless people were named plaintiffs and, in Massachusetts, supplied the initial theory for the lawsuit.  

Harris agrees with commentators—and, indeed, public interest lawyers themselves—about the importance of grassroots organizations and social movements.  

However, she reports that her research suggests that, under certain conditions, by transforming politically and economically marginalized social groups into legal subjects, advocates can mobilize protection from repressive governmental interventions and leverage redistributive benefits. The leverage provided by the establishment of judicial oversight over official practices can be sustained even if prior to litigation there has been little support from third parties with political clout, and the litigation fails to enhance the collective power of the legal subjects to develop their own oppositional movement.  

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25 Harris, supra note 1, at 8 (emphasis added).

26 See id. at 87 (assessing the resources of the Western Center on Law and Poverty, which served as lead counsel, as inadequate for implementation of Hansen).

27 Id. at 104; see also id. at 81 (“If lawyers expand their approach to the implementation of judicial reform beyond the negotiation of a particular remedy to the creation of new rules to transform agency decisionmaking and professional norms, they can contribute to agencies’ becoming more conducive to redistributive reforms.”).

28 Id. at 129.

29 See id. at 8–9, 38, 40, 129. Harris notes that both the Western Center and the Washington State Coalition for the Homeless had experienced lobbyists (63, 125), but she does not discuss the lobbying capacity of the Illinois, New York, or Massachusetts advocates. In my view the essential factors are an individual’s commitment to the issue and to finding the resources. I think it noteworthy that, in several of these cases, the individual lawyers continued their involvement even though the institutional entity changed. This was the case, e.g., in Chicago, where both Rene Heybach and Diane Redleaf left the Legal Assistance Foundation of Chicago, the former for the Chicago Coalition for the Homeless and the latter for private practice. It also was the case in Washington State, where Evergreen Legal Services declined federal funding because of the restrictions attached to the funding; Evergreen became Columbia Legal Services. See Harris, supra note 1, at 126. Four of the five organizations representing plaintiffs in the cases studied declined federal funding. See id. at 144.

30 Harris devotes Chapter 6 to considering the two cases, in Massachusetts and Washington State, in which coalitions for the homeless were plaintiffs; she is interested in whether and to what extent a coalition as a plaintiff changed the ability to influence policy making. She concludes that naming a coalition as a plaintiff may not have mattered very much since in each case “the anti-poverty lawyers had significant ongoing contact with homeless advocacy organizations and shared common understandings of the causes of and solutions to family homelessness.” Id. at 115. The experienced, sophisticated advocates in each of these cases understood that the audience was not only a court but also the executive, legislature, agencies, media, and the public. As Harris suggests, the differences in outcomes are more likely due to local legal and political contexts than to whether or not a coalition for the homeless was a plaintiff. See id. at 115–17, 129. Interestingly the two Coalition for the Homeless cases did not grant the most effective relief, although each did have significant redistributive effects. See id. at 119 (discussing redistribution in Massachusetts); see also id. at 128 (comparing the scope of the remedy achieved in Norman to that in Washington State Coalition for the Homeless).

31 See McCann & Silverstein, supra note 10, at 267.

32 Harris, supra note 1, at 5. Harris’s research leaves open the question of whether even more might have been accomplished if there had been a broad and powerful grassroots movement. She reports criticism by an organizer that the Massachusetts Coalition was a “grass-tips,” not a “grass-roots,” organization, and the criticism of one cocounsel that the movement should have included low-wage workers as well as public assistance recipients. See id. at 127, 131.
Fifth, Harris’s case studies show the utility of shaping relief in a way that advantages people or entities in addition to the poor families who are plaintiffs. Thus, for example, the relief in Jiggetts—having the state pay supplemental shelter allowances—helped the New York City officials, who thereby avoided having to serve those families in the right-to-shelter litigation, and helped the landlords, who had been forbidden to squeeze additional rents from the tenants.

Sixth, and most innovative and important, is Harris’s discussion of how to use the leverage secured by litigation to achieve substantial legislative or administrative relief. While commentators often contrast the adversarial nature of litigation with “collaborative” legislative and agency advocacy, Harris shows that, in each of the cases that she studied, a combination of adversarial and collaborative techniques led to substantive results. Harris finds that “the adversarial legal process can open up opportunities for collaborative relationships between advocates and administrators that previously would have been impossible.” She considers both litigation and collaboration essential. Without the former, she says, antipoverty lawyers “lack the authority to demand compliance with agreements and are unlikely to be permitted to participate in the resolution of problems that emerge during the implementation process”; without the latter, “they may be unable to mobilize enduring official commitments to their reform goals.” The claims of ‘have-nots’ can acquire a significance in the juridical field that may not have been possible through legislative or administrative advocacy,” she concludes. And, by skillfully combining adversarial legal tactics with collaboration, anti-poverty lawyers sometimes can transform judicial decisions into redistributive remedies that reform the administrative processes of implementing agencies and mobilize official support for new programs. Their participation in administrative rule-making increases opportunities to reshape the norms and organizational infrastructures within state bureaucracies and enables them to become agents for social change.

Harris’s research and analysis teach us that litigators should plan for the implementation process, trying to retain judicial supervision, to assure deep involvement for plaintiffs’ representatives and to change not only rules but also agency norms. Her analysis identifies continuing judicial oversight as important and penetration of the agency as crucial.

The Important Element: Continuing Judicial Supervision

Harris emphasizes that continuing judicial supervision enables plaintiffs to secure effective legislative or agency redress. That being able to threaten a return to court substantially strengthens plaintiffs’ positions is doubtless true, but sometimes defendants refuse to agree to

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33 Harris also discusses this point in Beth Harris, “Repeat Player” Implementation Strategies: Representation of Homeless Families, 33 LAW AND SOCIETY REVIEW 911 (2000).
34 HARRIS, supra note 1, at 6.
35 Id. at 57.
36 Id. at 11 ("When legal reformers are able to … enhance … their positions both as skilful legal adversaries and as expert professional collaborators, they are more likely to mobilize support for their policy goals."); id. at 13–14 (discussing the importance of judicial oversight, which did not continue in Hansen or Washington State Coalition for the Homeless); id. at 91 (reporting that the court-appointed monitors in Norman expressed doubt “that the financial commitment to Norman programs would have been sustained if the judicial oversight had been prematurely ended because the Department of Children and Family Services] faced so many competing demands for resources").
any compromise unless the case is dismissed. 40 Both Hansen and Washington State Coalition for the Homeless were dismissed as the price of legislative reforms; the Hansen relief was short-circuited, but the Washington State Coalition for the Homeless relief continued. 41 The explanation for the different results may well be in the nature of the state officials: in California, Gov. Pete Wilson declared war on the Homeless Assistance Project; in Washington State, Gov. Gary Locke supported the relief, and several administrators were deeply committed to the remedy.42 Thus, while we can agree that continuing judicial supervision is highly desirable, failure to secure it need not necessarily be the death knell of a remedy.

The Crucial Element: Penetration

Harris’s analysis suggests that the single most important component of the antipoverty lawyers’ power may have been their penetration, or infiltration, of the agencies that they sued. 43 For effective relief, some representatives of the plaintiffs must seem to be intimately involved in rule making, implementation, and norm changing within the agency. 44 The cases that achieved longest-term relief—Norman, Jiggetts, and Washington State Coalition for the Homeless—are those in which plaintiffs’ representatives most actively participated in internal agency activities. 45

The infiltration need not be by the plaintiffs’ lawyers. 46 But the infiltration is essential, and part of the litigation planning should be anticipation of the need for long-term, intimate involvement in implementation, and the identification and commitment of the necessary temporal and financial resources to maintain that effort.

The antipoverty lawyers in these cases negotiated important rule changes. 47 This is necessary, but not sufficient, to accomplish genuine, long-lived change. As Mark Galanter pointed out in a classic article, “[t]he system has the capacity to change a great deal at the level of rules, without corresponding changes in everyday practice or distribution of tangible advantages. Indeed rule change may

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40See id. at 63–64 (possibly suggesting that was the case). Harris implicitly criticizes the Hansen (but not the Washington State Coalition for the Homeless) litigators for giving up continuing judicial supervision (id. at 64), but one cannot know whether this was not a condition of getting anything from their adversaries. Hansen was the first of these lawsuits; that later cases insisted on continuing judicial oversight may be due to the lessons learned from the California case. (One of the few aspects of the litigation that Harris does not discuss extensively is the interaction among the people involved in them, and the ways in which results in each case were taken into account in strategizing in others.)

41See Harris, supra note 1, at 125 (reporting that the Washington State case was dismissed (thus ending judicial oversight), but “[d]uring the next four years both ‘statutory responsibilities and funding for homeless families and homeless youth remained stable, despite the growing state deficit…. Pressures from courts, legislators, and [Washington State Coalition for the Homeless] have contributed to [Department of Social and Health Services] officials now publicly recognizing that part of their official mission includes the prevention and reduction of family homelessness.”). See also id. at 140; but see id. at 128 (“no housing resources for the state child welfare agency were in the final budget of the 1999 [Washington State] legislature”).

42Id. at 128.

43Id. at 5, 139, 57.

44Id. at 83.

45Id. at 99 (on Jiggetts the legal aid lawyers were deeply implicated in the implementation process, largely because the judge’s consistent rulings for the plaintiffs created a situation in which “both the state agency and Legal Aid lawyers preferred to develop administrative procedures … rather than bring every case to court.”); id. at 128 (Washington State Coalition for the Homeless members were involved in planning and monitoring, as was not the case in California).

46In Norman plaintiffs’ lawyers’ “infiltration” was supplemented by the participation of court-appointed monitors. See Harris, supra note 1, at 89; see also id. at 140 (in Washington State Coalition for the Homeless “the state agencies were held accountable through the inclusion of members of the Washington State Coalition for the Homeless in the planning and evaluation processes. Concerned legislators also continued to review implementation.”). Harris also caution against excessive infiltration and notes that when the antipoverty lawyers themselves assumed administrative responsibilities, as in Jiggetts, negative consequences ensued. id. at 104.

47Id. at 103 (“The anti-poor lawyers negotiated rule-changes to create an effective system for establishing, monitoring, and evaluating the redistributive programs. The lawyers’ ongoing involvement allowed them to identify where decisions were being made that impeded the development and administration of new programs.”)

become a symbolic substitute for redistribution of advantages.”

Moreover, as circumstances change, rules need to change as well, so that participation limited to initial rule making will be insufficient, even apart from the opportunities for administrators to combine formal compliance with substantive subversion. Also, if administrators are hostile to the new rules, they will seek legislative changes. As Harris points out, the programmatic process always is dynamic; what is won in one forum must be defended in another. One of the most striking tales in the book concerns Jiggetts. Advocates were able to secure increased shelter allowances because the New York statute imposed upon an agency the duty to set shelter allowance levels. If the statute had been changed, the basis for the court’s order would have disappeared. For more than seventeen years, governors of New York tried to persuade the legislature to change the statute so that Jiggetts payments could end. A coalition of plaintiff families, New York City officials, and landlords was able to persuade the legislature not to undo the remedy. Even after some landlords lost interest, the legislature continued to reject proposals to invalidate the relief.

Crucial to effective implementation is changing the norms within the agency and bringing the agency itself to accept the principles underlying the plaintiffs’ claim of state obligation. This is achieved by a combination of education, example, and taking into account the needs of the agency actors.

As Harris points out, the general cultural norms regarding public assistance in the 1990s emphasized the importance of reducing caseloads and making poor parents more reliant on the labor market to sustain their families. In this context, the protection of the right to a home was devalued, except in the context that stable housing might increase the ability of recipients to search for and maintain jobs. The well-being of children was considered a by-product of their parents’ employment, not the provision of stable housing.

Part of the mission of the antipoverty lawyers was “to change this … by convincing administrators that the provision of meaningful housing assistance was a legal mandate, an efficient approach to social policy, and normatively consistent with professional social welfare principles.”

To achieve these norm changes, plaintiffs’ counsel must understand and accommodate the needs of agency staff, including their desire to enhance the agency’s reputation for being law-abiding, using its financial resources wisely, and affording the staff opportunities to experience personal satisfaction in their work. Harris says that “when those monitoring implementation understood how the state bureaucracies worked and were committed to the goals of the lawsuits, they were able to collaborate with administrators to both mobilize enough funding for successful implementation and develop policies and rules that enhanced the ability of front-line workers to perform their jobs.”

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49 HARRIS, supra note 1, at 8–9 n. 5 (“no single decision ends the process of political reform; rather, each decision is always subject to future political conflicts”); see also id. at 101, 141 (discussing the legislative changes that reduced the force of the Hansen relief and the unsuccessful, seventeen-year effort by governors of New York to change the statute upon which the Jiggetts relief rested).
50 Id. at 97, 141.
51 Id. at 95–96.
52 Id. at 102.
53 Id. at 83.
54 Id. at 76, 82, 58.
55 Id. at 142.
Harris offers Norman as a model of effective “infiltration.” The antipoverty lawyers negotiated a consent order that required the lawyers’ deep involvement in agency operations: “The anti-poverty lawyers would review all new policies, procedures, programs, rules, regulations, training programs, and notices for implementation, as well as provide input during the monitoring process.” The consent order required—in addition to the antipoverty lawyers’ participation—the involvement of court-appointed monitors who, Harris writes, “[a]s social workers, … shared values and a common vision, and … mobilized support within the department.” Administrators consider the Norman program a political asset because the costs have remained low, and Norman services prevent more expensive out-of-home placements.

This led to DCFS’ accepting that “providing economic and housing assistance to destitute clients was good child welfare practice …” despite powerful negative forces. In part, too, this lack of attention has been due to much of the antipoverty litigation—such as the cases that Harris studied—not going to the U.S. Supreme Court, and commentators tend to focus on Supreme Court decisions. Harris’s work is unusual and immensely valuable because she describes and analyzes each of these cases in detail, works to identify principles relevant to each, and concludes that thorough, strategic law reform advocacy that includes planning for legislative and agency implementation can and does lead to substantial, sustained, redistributive, and cultural reforms. Harris shows us that, even in an inhospitable political environment, major improvements in the lives of poor people can be achieved by thoughtful, creative, persistent lawyers who file well-designed complaints, conduct well-planned discovery and preliminary motions practice, and design and constantly revise sophisticated strategies for working with legislative and administrative agents. We all are indebted to Harris for this helpful, hopeful, careful, inspiring portrayal of the power of antipoverty lawyers.

Conclusion

There has been relatively little recent academic consideration of the work of antipoverty lawyers. In part, as Harris suggests, this is because, with the federally funded legal services program under attack, an “internal censorship” has discouraged programs from trumpeting their accomplishments. In part, too, this lack of attention has been due to much of the antipoverty litigation—such as the cases that Harris studied—not going to the U.S. Supreme Court, and commentators tend to focus on Supreme Court decisions.

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56Id. at 89.

57Id. at 89, 90, 129 (“The Norman remedy, which was the most limited in its scope, seemed to provide the most stable reforms, which continued to receive legislative and administrative support regardless of changes in the political environment and administrative leadership, in part because the judicially supervised monitors were able to mobilize a significant amount of support within the state agency itself during the first five years of implementation.”). See also id. at 102 (“The antipoverty lawyers and monitors in the Norman case seemed most effective in using the implementation process to increase the legitimacy of the child welfare agency in its political environment. They were able to use judicial supervision as pressure to facilitate rule-changes within the bureaucracy and mobilize support within the agency for redistributive reforms.”). The consent order “provided material assistance to homeless families involved in the child welfare system and also expanded” relief beyond the litigation “to include victims of domestic violence.” Legislative remedies also can enlarge the class that receives relief. This was the case, e.g., in [Washington State Coalition for the Homeless], where the legislation included homeless unaccompanied youths, who had been excluded from the plaintiff class. Id. at 124.

58Id. at 91.

59Id. at 90-91, 102 (“[T]he norms of the Illinois child welfare agency encompassed a right to a home for the children under their supervision. Creating permanent homes for children became a mission for the agency, and secure housing was critical to this process.”).

60Id. at 6.