

## A COMMENT ON ROSENBERG'S NEW EDITION OF *THE HOLLOW HOPE*

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Gerald Rosenberg's new edition of *The Hollow Hope*<sup>1</sup> repeats his earlier book-length argument against the prospects of social reform through law.<sup>2</sup> Complete with tables, charts, and updated statistics, the new edition replies to his critics and extends his analysis to a number of new areas, including same-sex marriage.<sup>3</sup> The new material reinforces his original conclusion that legal rulings fail to spark social progress not already underway.<sup>4</sup>

Therefore, reformers with limited resources and energy should direct their efforts to avenues such as electoral politics, grassroots organizing, and street activism. Nothing is wrong, according to Rosenberg, with pressing for favorable legal rulings,<sup>5</sup> but one should not hold out unrealistic hopes for their efficacy. *Roe v. Wade*,<sup>6</sup> for example, did little to increase a woman's access to abortion services.<sup>7</sup> *Brown v. Board of Education*<sup>8</sup> produced a negligible increase in the proportion of black schoolchildren attending integrated schools, and rulings upholding gay marriage, according to the new edition, have yielded similarly unimpressive results.<sup>9</sup>

If Rosenberg is right, as I believe he is, regarding the difficulty of achieving social reform through the judicial branch, why is his thesis so

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<sup>1</sup> GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008) [hereinafter ROSENBERG, SECOND EDITION].

<sup>2</sup> GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1st ed. 1991).

<sup>3</sup> ROSENBERG, SECOND EDITION, *supra* note 1, at 339–429.

<sup>4</sup> See, e.g., *id.* at 35 (“While the conditions suggest that courts can be effective producers of significant social reform, capturing part of the Dynamic Court view, they also suggest that this occurs only when a great deal of change has already been made.”); see also *id.* at 10–36 (describing the constrained view).

<sup>5</sup> Such a ruling may have symbolic value or may place ideas on the public agenda. *Id.* at 8.

<sup>6</sup> 410 U.S. 113 (1973) (link).

<sup>7</sup> See ROSENBERG, SECOND EDITION, *supra* note 1, at 201 (“[T]he Court is far less responsible for the changes that occurred than people think.”).

<sup>8</sup> 347 U.S. 483 (1954) (link).

<sup>9</sup> See ROSENBERG, SECOND EDITION, *supra* note 1, at 39–169 (discussing civil rights), 173–246 (discussing women's rights), 339–429 (discussing same-sex marriage).

counterintuitive? In this Essay, I aim to accomplish two goals: explain *why* Rosenberg's analysis seems to fly in the face of common knowledge, and, second, why his argument is nevertheless *sound*. Doing so will entail explaining a number of mechanisms that inhibit social change.

### I. DOES THE COURT SYSTEM REALLY WORK TO EFFECT CHANGE?

Why do most readers, at least ones of a liberal persuasion, react to Rosenberg's thesis with shock and disbelief? Most of us take it as an article of faith that law, including the judge-made variety, really does work. We seem to see examples of this every day. If a prosecutor wins a jury verdict, the defendant goes to jail. If a legal services attorney wins a judgment that a poor family's landlord was at fault for maintaining the stairway in a dangerous condition, the landlord must pay to fix it. If the government shows that Smith failed to file a tax return for a certain year, Smith has to pay, including, probably, a fine.

In everyday experience, then, judicial rulings make a difference. Legislation does so, too. State X passes a new law providing that no one may allow trees to shade an adjacent house's solar panels. Shortly thereafter, we notice that our neighbors obediently begin topping their trees. A state requires that drivers pass an eye examination starting at age 70 to renew their licenses. Across the state a host of senior citizens buy newer, stronger eyeglasses.

Certain unpopular laws—such as ones forbidding marijuana use—may be widely violated.<sup>10</sup> But these laws are the exception and usually concern victimless crime and actions that are merely *mala prohibita*.<sup>11</sup> With acts that society widely condemns and regards as *mala in se*,<sup>12</sup> compliance is much higher. Even laws that compel (rather than forbid) behavior, such as those regarding the filing of a tax return or sending one's children to school, are widely honored even though much more difficult to enforce.<sup>13</sup>

Civil disobedience might appear to be a narrow exception to the rule that law generally shapes behavior.<sup>14</sup> But the civil disobedient breaks the

<sup>10</sup> The classic work pointing this out is JOHN KAPLAN, *MARIJUANA—THE NEW PROHIBITION* (1970).

<sup>11</sup> *Mala prohibita* acts are wrong only because they are criminalized, not because of anything inherent in their nature. BLACK'S LAW DICTIONARY 978–79 (8th ed. 2004). Most “victimless crimes,” including drug crimes, fall in this category.

<sup>12</sup> These acts are wrong because of their dangerous or antisocial nature. Society condemns them even apart from the criminal prohibition. Examples of *mala in se* crimes include murder, rape, and battery. BLACK'S LAW DICTIONARY 978 (8th ed. 2004).

<sup>13</sup> These behaviors are difficult to enforce because they are acts of omission rather than commission. Hence, breaches of the duties to send a child to school or file a tax return are unlikely to come instantly to the attention of the authorities in the way that reckless speeding, for example, is.

<sup>14</sup> On civil disobedience, *See, e.g.*, MARTIN LUTHER KING, JR., Letter from Birmingham City Jail, *in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 289 (James Melvin Washington ed., 1986).

law openly, nonviolently, and prepared to suffer the consequences.<sup>15</sup> Although one could think of it as illustrating law's inefficacy, civil disobedience occurs rarely enough that it does not shake our faith in the system. And because the violator is prepared to accept punishment, it is scarcely a frontal challenge to that system as a whole.

The same is true for cases in which a minority group believes the law is both unjust and unlikely to change anytime soon. Then the group may seek actively to frustrate enforcement. Anti-snitching campaigns in the black community or efforts by Latino organizations to provide sanctuary or supplies to undocumented immigrants crossing the desert on foot are recent examples.<sup>16</sup> But even here, the law exhibits a kind of efficacy—the group seeking to nullify it has to go through great efforts and incur considerable risk to do so.

Everyday experience with cases like these, then, conveys the impression that law “really works.” How could Rosenberg seemingly maintain the opposite? The reason is that he is really not talking about individual, relatively routine cases where the only question is enforcement. Instead, he explores whether legal rules effectively change broad social attitudes, mores, and practices. When *Brown v. Board of Education* came down, did Americans begin thinking about and acting toward blacks differently? By and large they did not; Rosenberg provides impressive evidence on this point.<sup>17</sup> When the Supreme Court decided *Roe v. Wade*, did a woman's access to abortion services improve? Again, no; social disapproval did the work that an explicit legal prohibition formerly did, so that women desiring abortions were little better off than before.<sup>18</sup> And we find the same in other areas where law-reform advocates secure a breakthrough victory.<sup>19</sup> Rulings like those upholding same-sex marriage were soon rolled back by narrow construction, administrative foot-dragging, or delay resulting in little progress for the “victorious” group.<sup>20</sup>

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<sup>15</sup> *Id.* at 294. A further requirement is that the law must be unjust—imposing an obligation that the majority is unwilling to impose on itself—and that the civil disobedient purge herself of any hatred or similar negative emotions. *Id.*

<sup>16</sup> See, e.g., Richard Delgado, *Law Enforcement in Subordinated Communities: Innovation and Response*, 106 MICH. L. REV. 1193, 1204–08 (2008) (reviewing STEVE HERBERT, *CITIZENS, COPS, AND POWER: RECOGNIZING THE LIMITS OF COMMUNITY* (2006), RONALD WEITZER & STEVEN A. TUCH, *RACE AND POLICING IN AMERICA: CONFLICT AND REFORM* (2006), and DAVID WEISBURD & ANTHONY A. BRAGA, *POLICE INNOVATION: CONTRASTING PERSPECTIVES* (2006)) (link).

<sup>17</sup> See ROSENBERG, SECOND EDITION, *supra* note 1, at 39–156.

<sup>18</sup> *Id.* at 173–265.

<sup>19</sup> See *id.* at 269–92 (showing how law reform rulings have proven unable to transform environmental policy); *id.* at 292–303 (same, regarding reapportionment); *id.* at 304–35 (same, regarding criminal-law and prison reform).

<sup>20</sup> See *id.* at 355–419.

## II. TWO REASONS FOR THE JUDICIAL SYSTEM'S INEFFECTICACY

If judicial rulings are relatively ineffective in changing social values and practices in highly contested areas such as school desegregation, abortion, environmentalism, and same-sex marriage, what accounts for this failure?

I believe that the answer has to do with two related mechanisms. I call the first the *reconstructive paradox*.<sup>21</sup> This theory holds, essentially, that the greater a social evil—say, women's subordination or black slavery—the more massive the social effort required to eradicate it.<sup>22</sup> Moreover, because the belief or practice is so deeply embedded, it is invisible to many.<sup>23</sup> Furthermore, the massive social effort necessary to alter a historical social practice will inevitably collide with other social values—property rights, settled expectations, the southern way of life, etc.—that are widely held.<sup>24</sup> This effort will require shifts in spending and changes in the way we relate to one another.

These efforts for social change, by contrast, will be out in the open, where they will spark sharp resistance and the accusation that the reformers are totalitarians, moving too fast, imposing costs on innocent people, reviving old grudges, and the like.<sup>25</sup> These considerations will enable the opposition to feel righteous and believe that the reformers sacrifice real liberty and security for a nebulous goal. For these reasons, social reform and reconstruction will strike most, at first, as dubious, premature, dangerous, and wrong.<sup>26</sup>

A second, closely related, mechanism deals with words and meaning. Suppose, as a hypothetical example, that the Supreme Court one day announces a new approach to pupil assignment rules. Separate but equal educational facilities no longer satisfy the requirements of equal protection.<sup>27</sup> Instead, public school authorities may not use race as a criterion for assigning students to schools, especially if they intend to produce separate schools for white and black children.

Questions immediately arise as to what the Supreme Court meant. Does the ruling apply only in the South?<sup>28</sup> Must school districts bus children to achieve racial balance, or may they rely on remedies that operate on the

<sup>21</sup> See Richard Delgado & Jean Stefancic, *The Social Construction of Brown v. Board of Education: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547 (1995).

<sup>22</sup> *Id.* at 554–62 (describing and outlining the paradox).

<sup>23</sup> *Id.* (explaining that the deeply embedded practice becomes, like the air, invisible because we are accustomed to experiencing it every day).

<sup>24</sup> *Id.* at 559.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 559–62 (explaining the advantage this gives to the faction opposing reform).

<sup>27</sup> This is, of course, what *Brown v. Board of Education*, 347 U.S. 483 (1954) (link) held. The reader is invited to substitute any other favorite constitutional ruling, actual or future. I use this one merely for the purpose of illustration.

<sup>28</sup> See *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973) (implying that the answer is no) (link).

basis of school choice?<sup>29</sup> What about segregation resulting from housing patterns and neighborhood preferences?<sup>30</sup> Suppose, in the wake of the ruling, most of the white parents move out of a city and take up residence in all-white suburbs?<sup>31</sup> Does the ruling apply to public accommodations, swimming pools, and movie theaters, or just to schools? What about single ads in newspapers and separate high school proms?

Immediately after a law-reform ruling like *Brown*, public authorities will confront a host of questions like those just listed. And because the new ruling appears to go against the grain, authorities, even those with good will, likely will conclude that the Supreme Court could not have meant *that*.<sup>32</sup> In the end, the surprising new ruling will end up meaning very little.<sup>33</sup>

One way to understand this mechanism is by means of a device that narrative theorist Jean Stefancic and I have called the “empathic fallacy.”<sup>34</sup> A counterpart of the “pathetic fallacy,” familiar from literary theory, the empathic fallacy is the mistaken belief that one can change another’s beliefs and attitudes through words alone. In literature, the pathetic fallacy holds that nature is like us with moods, feelings, and intentions that we can read and understand. The poet, seeing rain, writes “The world weeps with me.”<sup>35</sup>

The empathic fallacy, which we coin, holds that narratives are of relatively slight use in dispelling pre-existing ones. A reader confronted with a new narrative—a black heroine, for example, when she has come to believe that blacks are lascivious and lazy, the opposite of heroic—will disbelieve it, or else pronounce the present case an exception. We are, in a sense, our stock of narratives.<sup>36</sup> These long held narratives form the basis against which we judge and interpret new ones, such as ones about intelligent African Americans; brave, resourceful women; energetic, hardworking undocumented aliens; or loving parents who are gay or lesbian. Unless the new

<sup>29</sup> See, e.g., *Green v. County Sch. Bd.*, 391 U.S. 430 (1968) (implying that districts may not rely solely on school choice remedies) (link).

<sup>30</sup> See, e.g., Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 MINN. L. REV. 825 (1996).

<sup>31</sup> See *id.*; see also *Milliken v. Bradley*, 433 U.S. 267, 281–83 (1977) (recognizing that “matters other than pupil assignment must on occasion be addressed by federal courts to eliminate the effects of prior segregation”) (link).

<sup>32</sup> See Delgado & Stefancic, *Social Construction*, *supra* note 21 (explaining how social meaning operates to limit law-reform rulings).

<sup>33</sup> Will this be the fate of recent cases limiting the scope of school desegregation, such as *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (link)? This seems distinctly likely; a host of conservative critics have warned that liberal educators in California, Michigan, and other states that have enacted referenda outlawing affirmative action have sabotaged those measures by fudging in various ways.

<sup>34</sup> See Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1261–62, 1281 (1992).

<sup>35</sup> *Id.* at 1262.

<sup>36</sup> *Id.* at 1279–82.

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narrative is unusually clever, calculated to resonate with another that we already hold, we tend to reject it as outrageous, extreme, or wrong.<sup>37</sup>

Supreme Court opinions are, of course, narratives—stories—and thus subject to both mechanisms. Over the course of history, a few Supreme Court opinions have contained such memorable language (“Poor Joshua,”<sup>38</sup> “There is no caste here”<sup>39</sup>) that they have moved significant numbers of readers and hastened reform. Rosenberg correctly notes their rarity, although he would be wrong if he maintains that the number is zero.

### CONCLUSION

Rosenberg’s new edition, then, soberly reminds reformers not to place undue reliance on courts and litigation. If dispossessed groups wish to combat unfair practices and laws, the legal profession may offer them symbolic victories, but little more. To secure real gains, they will need to explore other avenues, including storytelling and literature, electoral politics, and the oldest remedy of all—self-help and resistance to illegitimate authority.<sup>40</sup>

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<sup>37</sup> See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2415, 2434–45 (1989) (explaining that stories must be insinuating and well told).

<sup>38</sup> See *DeShaney v. Winnebago County Dep’t of Soc. Serv.*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting) (link).

<sup>39</sup> See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (link).

<sup>40</sup> See Delgado, *Storytelling for Oppositionists and Others*, *supra* note 37 (explaining the use of stories and narratives); Delgado, *Law Enforcement in Subordinated Communities*, *supra* note 16 (giving recent examples of resistance).