You Know the Type. . .: Categories of Cause Lawyering

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AUSTIN SARAT AND STUART SCHEINGOLD, EDS. *Cause Lawyering: Political Commitments and Professional Responsibilities*. New York: Oxford University Press, 1998. Pp. ix + 545. $30.

AUSTIN SARAT AND STUART SCHEINGOLD, EDS. *Cause Lawyering and the State in a Global Era*. New York: Oxford University Press, 2001. Pp. xi + 405. $25.

Debates over the place, role, and actions of lawyers in society have a long history. With each new generation, with every major shift in political climate, comes a renegotiation of what it means to be a lawyer, what are acceptable "forms of practice," and the place of lawyers and the legal profession in a wide range of social institutions and processes.[1] Nowhere are

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1. Witness debates over the role of lawyers in recent corporate-corruption scandals in the United States, where there are now calls for changing rules over the secrets lawyers may keep (Glater 2003). Or, similarly, look at battles over the actions of Lynne Stewart, a lawyer for Muslim fundamentalist leader Sheik Omar Abdel Rahman. Parties as distinct as Attorney General John Ashcroft on the right and "people's lawyer" Ron Kuby on the left challenged

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debates over lawyering more intense than among the "deviant strain" of the profession whom academics have dubbed "cause lawyers" (Sarat and Scheingold 2001a). In two recent volumes under the general title *Cause Lawyering*, a group of law and society scholars have focused on the questions of what constitutes cause lawyering and the debates over such work in the legal profession, the state, social movements, and societies around the globe.

The volumes are the fruits of the organizing energies of Austin Sarat and Stuart Scheingold. Pursuing individual projects on death penalty lawyers and "left-activist" lawyers, the two reached out to other academics pursuing empirical research and writing on the intersection of lawyering and social action. In doing so, they hoped for a "more capacious, more encompassing concept" than their projects alone provided. A series of informal meetings morphed into a set of formal meetings that became a "collective editorial project" (Sarat 2003).[2]

To their credit, Sarat and Scheingold purposely kept the parameters of the collective project vague and did not determine a common set of questions for the individual authors to investigate and address (Sarat 2003). The result is a collection of essays that set forth an extraordinary body of empirical research and thought about cause lawyering around the world, simultaneously adding to the literature in this subfield while challenging many of its assumptions and guiding principles.

The books present case studies of a varied collection of lawyers and legal organizations, forcing readers to grapple with definition of the field and the forces that influence the trajectories of such legal actors. At the most basic level the books are a revelation to those interested not only in cause lawyering, but also professionalism, social movements, and the law in action, and as someone currently immersed in the history of cause lawyering in the United States, I found that the studies of cause lawyers in such diverse venues as Israel, Malaysia, Indonesia, Brazil, Argentina, Cuba, and England bring a much-needed comparative perspective to the field. Yet the project's import goes beyond its expansion of knowledge of the numerous cases. It redefines the parameters that distinguish the types of lawyering, bringing fresh and valuable insights to the field.

Stewart's association with and representation of her client. Ashcroft indicted Stewart for providing assistance to terrorists (a charge dismissed by the federal court in the case). Kuby, an ally of Stewart in other areas, questioned her decision to represent the sheik in the first place. "I sure as hell don't think people who would take my family, put them in purdah and put me up against a wall and shoot me are entitled to my support in that struggle" (Packer 2002).

2. Despite the collective approach to the development of the volumes, they contain disappointingly little dialogue between the individual contributors. Sarat and Scheingold bring together the insights of the many essays in their introductions and conclusions (discussed in greater detail below). Nonetheless, I was left wondering what were the sticking points, the bones of contention, the debates that ensued in the course of the meetings of contributors and collaborators, whose separate essays do not appear to be explicitly informed by those of their colleagues.

I. DEFINING AND TYPING CAUSE LAWYERING

In the 1975 film *Three Days of the Condor*, freelance assassin Joubert (played by Max von Sydow), sings the praises of his chosen profession to an idealistic young CIA agent (played by Robert Redford): "Well, the fact is, what I do is not a bad occupation. Someone is always willing to pay. . . . [I]t's really quite restful. It's almost peaceful. No need to believe in either side or any side. There is no cause. There's only yourself. The belief is in your own precision."

In reading the contributions to the *Cause Lawyering* volumes, one sees that cause lawyers are clearly *not* the metaphorical cousins of Joubert's hired guns. With cause lawyering, the issue is not someone's ability to pay, nor is the primary motivator found in doing one's job with the utmost professional skill. Instead, belief in a cause and a desire to advance that cause are the forces that drive cause lawyering actions. Going beyond Joubert's definition suggesting what cause lawyering *isn't*, however, presents a thorny problem of the most fundamental sort: How does one determine what fits within the rubric? Carrie Menkel-Meadow's contribution to the first volume demonstrates this difficulty when she lists the plethora of terms used to describe the people and activities that are the subject of the *Cause Lawyering* project. Such lawyering, she observes, is described as rebellious, progressive, transformative, radical, critical, socially conscious, alternative, political, visionary, and activist. Lawyers engage in action for social change, social justice, and equal justice. Lawyers represent the underrepresented, the subordinated, and the public interest. Each term has its value as well as its drawbacks—politically, descriptively, and professionally (Menkel-Meadow 1998). Though the editors settled on the seemingly generic term cause lawyering, the definitional problem remains (Halliday 1999, 1015).

In their introduction to the first volume, Sarat and Scheingold allow that cause lawyering exists where the "morally activist lawyer . . . 'shares and aims to share with her client responsibility for the ends she is promoting in her representation.'" Cause lawyers "thus reconnect law and morality" (Sarat and Scheingold 1998, 3b). By the introduction to volume two, the definition has jelled, and cause lawyering is defined as a practice distinct from, yet enmeshed in, conventional lawyering.

> The objective of the attorneys we characterize as cause lawyers is to deploy their legal skills to challenge prevailing distributions of political, social, economic, and/or legal values and resources. Cause lawyers choose clients and cases in order to pursue their own ideological and redistributive projects. And they do so, not as a matter of technical competence, but as a matter of personal engagement. (Sarat and Scheingold 2001b, 13)

Nonetheless, the editors recognize the difficulty in defining a set of practices that is highly contingent politically, socially, professionally, legally, and historically (Scheingold 2001). In their words, cause lawyering is a "contested concept," and their job is to "identify the terrain on which this contest takes place" (Sarat and Scheingold 1998b, 5). Thus, at times the reader is left to survey the terrain chapter by chapter as each author offers what he or she believes to constitute cause lawyering. Lisa Hajjar, to take one example, contends:

> What distinguishes cause lawyers from "conventional lawyers" is that the former apply their professional skills in the service of a cause other than—or greater than—the interests of the client in order to transform some aspect of the status quo, whereas the latter tailor their practices to accommodate or benefit the client within the prevailing arrangements of power. (Hajjar 2001, 68)

Hajjar's definition is to me quite compelling. However, like those of other contributors, it raises as many questions as it answers. What constitutes the status quo or prevailing distributions of power? Does U.S. affirmative action policy constitute the "status quo"? If so, are recent efforts by right-wing lawyers to eradicate affirmative action in higher education challenges to the prevailing power distribution? Or does such lawyering represent an attempt to maintain persistent racial inequality in the United States? It isn't clear, and, to be fair, it was never Hajjar's intent to answer such broad questions.

This example raises the larger question of why these volumes do not in any instance tackle the case of right-wing cause lawyers. According to Sarat, this was a bone of contention at the outset of the project, and Scheingold's conclusion to the second volume rightly asserts that the subject demands attention (Scheingold 2001, 401). A few studies have offered a lens onto this subfield (Houck 1984; Heinz, Paik, and Southworth 2003). But still, it would have been valuable to have studies of groups such as the Institute for Justice or the American Center for Law and Justice—both active conservative advocacy groups—in order to better delineate and complicate the field of cause lawyering. Forthcoming volumes in the *Cause Lawyering* series will include such critical studies as well (e.g., Hatcher forthcoming).[3]

Yet the issue of right-wing cause lawyers exposes part of the difficulty inherent in the enterprise.[4] Defining cause lawyering is a massive challenge.

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3. Another forthcoming edited volume in the series will be *The Worlds Cause Lawyers Make*. Sarat and Scheingold are also authoring a forthcoming volume positing a theory of cause lawyering entitled *Something to Believe In: Professionalism and Cause Lawyers*.

4. In his 1987 study of the NAACP, Mark Tushnet takes the position that lawyers for that organization did not engage in practices markedly different from noncause lawyers, corporations, governments, or class actions involving the victims of defective products (Tushnet 1987, 155). He is not alone in making this wholly defensible claim. My work has been challenged on just this point by peer reviewers and participants in panels.

Independent of the definitions offered by the editors, each chapter makes a case as to why its examples constitute cause lawyering, and while I certainly finished some contributions with a raised eyebrow as to whether *I* would call something cause lawyering—the best example being Anne Bloom's look at transnational personal injury attorneys (2001)—all contributors seemed to make a defensible case. The fact that the contributors to these volumes do not adopt a common definition does not constitute a failure. I felt as if I'd been transported back to the dinner table at law school while my classmates and I, as members of a public interest law program, debated what type of lawyering fell within the parameters of "public interest law." As back then, there are no clear-cut answers, but there is some consensus that seems to be floating about. The part of me that wished to leave the table with a firm sense of what cause lawyering *is* (in other words, with closure), remained unsatisfied.

From a different perspective, however, the lack of a strict, agreed-upon definition emerges as a virtue. By more or less refusing to exclude[5] many types of lawyering that scholars and others (including myself) might place outside the field, Sarat and Scheingold bring together distinct and diverse case studies that allow for new understandings of variation and commonality in the field, identifying "elements of coherence while at the same time honoring diversity and contingency" (Scheingold 2001, 383). The "big tent" approach aids in the reconceptualization of how we study activist lawyers.

The editors and contributors to these volumes are hardly the first to dedicate efforts to understanding the world of lawyering discussed herein. While prior studies have been very important and valuable, they have collectively suffered from a diffuse conceptual framework and an unorganized lexicon. As a result, studies of lawyering talked past one another at times. Thus, the primary contribution of the volumes currently under review does not lie in the discovery of untrod wilderness (though they contain much newly discovered or freshly analyzed material), but rather in their reconception of the field of study as a whole. By advancing a broad and generous conception of cause lawyering, Sarat and Scheingold—backed up by their fellow contributors—allow for analyses of legal practices and actors that might have once seemed too distinct to allow for comparison. In this essay, then, I build on this reconception of the field and use the evidence and ideas presented by the 29 contributors in 31 chapters to present a tripartite typology of cause lawyering that connects—across contexts and countries, across issues and eras—the various approaches to lawyering for a cause.

5. See comments above regarding right-wing cause lawyers. Note also that the volumes include no studies of government lawyers working in the United States. There are chapters on lawyers in government positions in Ghana, South Africa, and Cuba (Michalowski 1998; Klug 2001; White 2001). However, the absence of an analysis of, say, lawyers for the United States Department of Justice's Civil Rights Division, or even a district attorney's office leaves a gap in the understanding of what is or is not cause lawyering.

II. A TYPOLOGY OF CAUSE LAWYERING

Studies of the legal profession demonstrate the extent to which not all lawyering is alike.[6] Beginning with Jerome Carlin's groundbreaking study of practitioners in the early 1960s and moving to the more recent analyses of Heinz and Laumann, Ronen Shamir, and Carol Seron, sociolegal scholars have revealed that lawyers have vastly varied approaches to their jobs, reflected in a variety of characteristics, including lawyer-client relations, affiliation with the organized bar, and understanding of ethics rules (Carlin 1962; Heinz and Laumann 1982; Shamir 1995; Seron 1996). In a similar vein, these lawyers have varied understandings of the legal system itself—how it functions, their role in it—that belie assertions of a uniform and unitary guild.

This is very much the case within the realm of cause lawyering as well. Far from accepting the idea that there are two types of lawyering—"regular" and "cause" without further distinction—the *Cause Lawyering* volumes, my own work, and the work of other scholars reveal the diversity in the way lawyers view the legal system, how they understand the "cause" for which they work, and their relations with those they represent. Despite the diversity, however, what emerges from analysis of these and other studies of lawyers are three ideal types of lawyering that fall under the broad order of cause lawyering, serving to further distinguish and organize how we study the phenomenon. In presenting these types, I stress that individual cases of lawyering will not necessarily possess each of the qualities set out within each type. Some examples will possess characteristics that fit in more than one category.

This typology of cause lawyering developed out of my own research on lawyers in the 1960s and 1970s. In looking at civil rights, legal services,

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6. A few things about my use of the term *lawyering*. First, I use the term not simply to denote what lawyers *do* (e.g., argue in court, write briefs, meet with clients), but also how lawyers *conceive* of what they do. I adopt a theory of legal practice that Christine Harrington has described as "organizational forms and practice that embody an ideology about law and legal work" (Harrington 1995, 55). After all, one could videotape two lawyers arguing in court, and those two lawyers might appear to be doing the same thing. However, as I lay out in more detail below, the way those lawyers think about what they are doing, and how their actions as lawyers fit into a larger set of beliefs and relationships necessitate distinctions that may not be immediately obvious.

Second, I discuss types of *lawyering* rather than types of *lawyers* in recognition of the fact that lawyers change their behaviors and ways of thinking over time. The lawyer remains the same person, but may traverse types depending on a range of variables. The term *lawyering* recognizes and allows for that fluidity. As Stuart Scheingold observes, "It is important to realize that cause lawyers regularly cross and recross the line dividing political from legal cause lawyering" (Scheingold 2001, 387).

Futhermore, given the tendency to talk about lawyers in connection to the issues on which they advocate–for instance, poverty lawyers—use of the term lawyering allows for the fact that, as I set out below, lawyers who work on similar subject matter often do and conceive of their jobs in very different ways. Thus, John Kilwein writes about "cause lawyering for the poor," yet he and I both recognize that the lawyers he surveyed are engaged in very different lawyering practices (Kilwein 1998).

public interest, and radical lawyers, I began to notice three types of cause lawyering that I now label *proceduralist, elite/vanguard,* and *grassroots*. Each of these types is demarcated by three categories of characteristics that link the types of lawyering across issues and eras (see table 1). These characteristics are as follows:

First, lawyers displayed distinguishable ways of thinking about and discussing the "system" within which they lived and worked, what I call the "vision of the system." This understanding has two levels. Lawyers express different ways of thinking about democracy and the role of government in society. Scheingold, in his conclusion to the second volume, notes a similar phenomenon that he labels a "vision of democracy" (Scheingold 2001, 383).[7] The vision of the system also incorporates what I call a "jurisprudential vision." In other words, how do lawyers think about the law, the law's role in society, and the ways in which legal actors make, interpret, and enforce the law? This question links legal theory and legal thought to legal practice.

Second, lawyers also reveal distinct visions of the cause for which they work. The cause may be conceived of in procedural or substantive terms; it may also incorporate different understandings of strategy[8] and audience as well as varied views on how strategies and goals are determined. This category links political and social thought to legal practice.

Third, lawyers adopt distinct visions of their job as lawyers: how they behave in and out of court, their relationships with clients, how they behave in terms of legal ethics, and how they organize their practices. This last category involves the nuts and bolts of what many would consider *lawyering*. For instance, Michael McCann and Helena Silverstein recognize the varied "ideal types" of organizational roles and relationships played by lawyers in working with social movements (1998, 279).[9]

Rather than being isolated variables, these characteristics are closely linked. How a lawyer thinks about the system might shape how he conceives of the cause and his role as a lawyer. Or, alternatively, how a lawyer conceives of her duties as a lawyer can influence how she thinks about the system and the cause. A change in one set of characteristics will,

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7. Scheingold denotes two types of democratic aspirations undergirding the enterprise: the "liberal democratic vision" and the "egalitarian democratic vision." The liberal democratic vision is "directed at securing political accountability, basic human rights, and the rule of law." On the other hand, social and economic democracy "enlists cause lawyering into a struggle on behalf of egalitarian values and redistributive policies" (2001, 383).

8. Scheingold labels this "strategic choice" (2001, 383),

9. McCann and Silverstein's four "ideal types" of organizational roles/relationships are staff technician, staff activist, hired gun, and nonpracticing lawyers (McCann and Silverstein 1998, 279). According to them, which role a lawyer adopts in a given situation depends, in turn, on four factors: (1) the formal roles and relationships of cause lawyers in movement organizations; (2) the general organizational structures of the movements within which lawyers act; (3) the systemic opportunities for tactical legal success; and (4) the lawyers' own historically developed experiential knowledge and insights about political lawyering.

View of cause	Emphasis on procedural justice Cause delineated by professional ideals Cause led by profession Audience as profession Representation as goal	Emphasis on substantive legal justice Cause delineated by legal ideals Cause led by lawyers Audience as elites (up and out) Legal outcome as goal	Emphasis on substantive social justice Cause delineated by political ideals Cause led by clients/movement Audience as grassroots (in and around) Political success as goal
View of lawyer and client	Client as individual Lawyer as servant Client comes first Clients come to lawyer Lawyer as neutral representative	Client as group, general public, or principle Lawyer as leader Cause comes first Lawyers find clients Lawyer as interested representative	Client as group or individual Lawyer as a participant Cause and client fight come first Lawyers and clients as active party Lawyer as interested representative

because of the interconnection of these factors, influence and cause change in the other characteristics (Scheingold 2001, 385).

While studying the cases presented by the many contributors to the *Cause Lawyering* volumes, it became clear that the proceduralist, elite/vanguard, and grassroots types were not simply limited to the 1960s United States. Rather, these types appear to span national borders, issues, and legal cultures.[10] This essay brings the essays in the Sarat/Scheingold volumes together, analyzing them within the framework of this three-part typology.

A. Proceduralist Lawyering

As noted, I label the first type of cause lawyering *proceduralist*, using a term that repeatedly crops up in the language of lawyers whose work I place in this group. Proceduralist lawyering is marked by a belief in the separation of law and politics, and a belief that the legal system is essentially fair and just. As the label suggests, the cause underlying proceduralist lawyering emphasizes procedural justice, a cause delineated by professional ideals. Proceduralist lawyering emphasizes individual client representation by lawyers who purport neutrality and nonpartisanship in the execution of their professional duties.

The *Cause Lawyering* volumes offer only a few examples of such lawyering (see chapters by Bisharat 1998; Boon 2001; Kilwein 1998; Lev 1998; and Sarat 2001). Perhaps this is because, as discussed below, there are questions as to whether lawyers engaging in this type of lawyering are cause lawyering at all.

1. *Vision of the System*

On a spectrum, the proceduralist type falls closest to mainstream or traditional professional lawyering in its main characteristics. Lawyering in the proceduralist category treats law and politics as separate phenomena, reflecting what Judith Shklar dubbed *legalism*, whereby law is believed to be neutral and objective, rational and predictable, superior to politics (Shklar 1964).

In Daniel Lev's chapter on what he calls *rule of law* cause lawyering in Indonesia and Malaysia, the attorneys believe the state is limited in its power by law (Lev 1998, 447). For Yoav Dotan's subjects in Israel, law is seen as autonomous and overarching (2001, 253), offering a set of procedures and values that set it apart from politics and partiality. Or, as George Bisharat

10. Note that this typology, as with any ideal type, does not hinge on examples perfectly matching every characteristic of a given type.

observes in his chapter on Palestinian cause lawyering, some lawyers enunciate "classically liberal notions" about the importance of the rule of law, and they retain a faith in the legal system outside the limited context within which they practice. Law is viewed in "highly abstract, reified terms, as an entity 'above' society, and at least in a 'natural' state of affairs (that is, in the absence of military occupation), one distinct from politics" (Bisharat 1998a, 471). Similarly, for lawyers from the American Bar Association (ABA), the debate over the death penalty in the United States—as described by Austin Sarat—becomes an issue of the rule of law, rather than a political or moral battle (Sarat 2001a, 200).

Lawyering of this type generally reflects a belief in the fundamental soundness of the legal system itself (if not at present, then in the system's future promise). With its emphasis on neutral principles and procedures, in many ways this view bears similarity to the liberal process school of jurisprudence in mid-twentieth-century America (Duxbury 1995; Kalman 1996). The legal system is envisioned as inherently rendering justice if the process itself functions "as it should." With proceduralist lawyering, this vision requires little more than representation by counsel when needed to discharge the duty to provide "equal justice."

This procedural focus is particularly prominent among advocates of legal services for the poor. As Jack Katz writes in his study of poor people's lawyers, after the flurry of substantive reform activity in the Progressive era the "procedural ideology finally took over in the form of a distinctively passive interpretation of 'equal justice' as access to a day in court" (Katz 1982, 37; Grossberg 1998). Reginald Heber Smith, considered by many to be the father of Legal Aid in the United States, pointed to delays in adjudication, court costs and fees, and the expense of hiring counsel as the cause of injustice for the poor. Fix these procedural inequities, and justice could be achieved (Smith 1919). E. Clinton Bamberger, the first head of the Office of Economic Opportunity's (OEO) Legal Services Program (LSP), expressed a similar view:

> Stand by the bench in a court of lesser jurisdiction and listen while evictions issue unchallenged, while judgments by default are rattled off in dreary monotone, while writs of repossession are signed in bundles. The judge is bored while he listens to the lawyers for the landlord or the merchant recite a tedious litany. The poor are not represented. A search for truth and justice built upon an adversary system walks half-blind when there is no advocate for one side of the proposition. (Bamberger 1966a)[11]

11. To be clear, this is one quote of Bamberger's from one of many speeches he gave in his tenure at OEO. The vision he put forth varied from audience to audience and over time. I use this quote—which appeared in many of his speeches to bar associations—as exemplary of the proceduralist vision, only. Categorizing Bamberger would be more tricky.

A few years later, the Lawyers' Committee for Civil Rights Under Law expressed its belief that "'the system' really can be made to work for everyone, regardless of race or economic station—or that the system can be changed by legal means until it does work" (LCCRUL 1969–70, 3). In his study of cause lawyers in Pittsburgh, John Kilwein describes some lawyers who, "tended to view their work as the fine-tuning needed to make the justice system and society operate more fairly" (Kilwein 1998, 187).

Proceduralist advocates also point to the legal system as a source of social and political stability. Along the lines of Talcott Parsons's structural functionalist conception of the legal profession—where the legal profession serves as a moderating force between society and the state (Parsons 1954)—this characteristic of the proceduralist type reflects the idea that fair procedures and access to lawyers and the legal process channel conflict in nonviolent directions while also convincing the poor to invest in the system. In advocating for the Legal Services Program in 1965, then-ABA president (and future U.S. Supreme Court justice) Lewis Powell said, "There is a natural tendency for [poor people] to think of the courts as symbols of trouble and of lawyers as representatives of creditors and other sources of harassment" (Johnson 1974, 56). Providing lawyers to the poor, he implied, would cause people to have greater respect for the law.

2. *Vision of the Cause*

The vision of the system is consistent with a lawyer's conception of the cause that he or she undertakes.[12] Because their vision of the system is procedurally centered, the cause is constructed and defined at the level of procedure. Lawyers in chapters by Sarat, Kilwein, Lev, and others work to make a system they believe to be essentially fair work more smoothly. As Lev observes of lawyers in Malaysia and Indonesia, "While they do not ignore substantive justice, it is largely procedural justice, fairness of institutional treatment that dominates their imaginations" (Lev 1998, 447). Similarly, the ABA's advocacy on the issue of capital punishment centers on procedural legal principles such as due process and equal protection rather than substantive opposition to state-sponsored murder as inherently morally or constitutionally wrong (Sarat 2001). Some who advocate for legal services for the poor speak in similarly procedural terms, emphasizing the provision of lawyers as assuring the legal system's health rather than believing in the claims of poor clients. John Kilwein describes

12. I specifically use the word *consistent* here to make plain that I do not take a position on whether lawyers' visions of their cause influences their vision of the state, the other way around, or whether both positions are simply parts of a larger whole. Daniel Lev suggests that lawyers' political vision is created by their professional ideology, but I'm not sure this applies to all attorneys (Lev 1998, 447).

this cause as satisfying unmet legal needs (Kilwein 1998, 183–84). The right to counsel, from this perspective, is nothing more than a neutral principle. Lucie White describes the goal of one Ghanaian legal group as promoting the "new liberal idea of a rule of law that gave each person in Ghana her own bundle of formal equal rights, including the right to hire a lawyer to enforce them" (White 2001, 56).[13] Representation becomes an end in itself, for once professional duties are fulfilled, the proceduralist lawyer's goals are seemingly accomplished.

The proceduralist lawyer's sense of mission is shaped by a set of professional ethics and values.[14] Lawyers interviewed by John Kilwein who focused exclusively on representing individuals cited professional responsibility as the factor motivating their work (Kilwein 1998, 193). Because they are professionally oriented in their mission, proceduralist lawyers look to their fellow attorneys for guidance rather than up to the state or down to the grassroots. Thus, early on in its history, the Lawyers' Committee for Civil Rights Under Law (LCCRUL) described its mission as getting the American legal profession to live up to its responsibilities (LCCRUL 1969–70). Yoav Dotan's subjects—Israeli lawyers—base their vision of the good society on a professional ideal of legal predictability and stability. Thus, they are critical of the *form* of Israeli rule in the occupied territories rather than the occupation itself (Dotan 2001, 250–55).

The stated duty of lawyers is to defend the legal system and provide representation to all who need it. The cause is the rule of law and support for the legal system—defending it, supporting it, helping improve it through client representation and other forms of advocacy.[15] While professional obligation may be satisfied through individual client representation, the true commitment is to the proper functioning of the system, rather than any one client. The point of proceduralist advocacy is to shore up the system and maintain law's legitimacy.

Further complicating the matter is the question of how such lawyering challenges the status quo or prevailing distributions of power—one element of the definition of cause lawyering set out in these volumes (Sarat and

13. Foreign funders, White writes, "have encouraged the women's rights lawyers to put aside substantive priorities altogether, and take up the formal proceduralist agenda of providing 'access to legal services' for all Ghanaian women" (White 2001, 62–63).

14. I recognize, of course, that professional values and duties reflect a set of political beliefs and presumptions. Cause lawyers who are professionally oriented, however, don't generally make such a connection, believing professionalism to be a politically nonpartisan ideology.

15. These other forms of advocacy may involve law reform work aimed at improving procedural aspects of the system, such as rules governing access to the courts (e.g., reducing court fees and costs) or developing systems to provide for other forms of dispute resolution (e.g., community mediation programs). Regardless, the underlying motivation for such advocacy still presumes that if achieved, a fair and equitable legal process will render substantively just results, thanks to the fact that "both sides" were given the chance to make their case.

Scheingold 1998a). John Kilwein's chapter offers such a challenge. The work done by some poverty lawyers in his survey appears to benefit the client within what Hajjar calls "the prevailing arrangements of power" (Hajjar 2001, 68). The cause, as delineated by such lawyering, aims not to challenge the system but to help individuals get the best outcome they can within that system. However, the work of lawyers such as those described by Kilwein can be reframed as a cause dedicated to "improving the condition of some identifiable portion of the low income community and other disadvantaged citizens" (Kilwein 1998, 182). Even if this involves no more than fulfilling unmet legal need, of balancing the scales of justice—a procedural rather than a substantive goal—it can still be characterized as a cause that challenges the status quo of the lives of the individuals represented.[16]

Similarly, it isn't immediately clear what aspect of the status quo is challenged by lawyers in Andrew Boon's chapter on legal aid in England. Boon documents attacks on the provision of legal services to the poor, characterizing the attacks as assaults on the fundamental principles guiding the legal profession: attorney independence, the importance of individual and civil rights, liberty, equality. "The lawyer in a liberal state ostensibly pursues the same ends as the state itself. . . . But lawyers hold the state to its promises" (Boon 2001, 153). Boon places this cause in the *mainstream* of legal thought and practice, where it advances supposedly dominant values in a manner consistent with the profession's (and the state's) demands.

Yet even in cases such as Andrew Boon's, where the values of the cause hew to the expressed ideals of the state, lawyers' actions in support of so-called mainstream values can constitute cause lawyering. This is because in a reality where "lawyers hold the state to its promises," lawyering serves not simply to uphold the status quo—where such promises are regularly and systematically ignored or neglected—but rather to force the state to a new place where rights are honored or, at the very least, recognized (Boon 2001). The *actual* status quo, after all, does not look like the promise it pretends to have fulfilled. In this light, proceduralist lawyering constitutes a deviant strain by pursuing the ends of the rule of law because the state does not in practice support such ends.[17] As Scheingold writes, "Legally engaged cause lawyers deny that an apolitical, rule-of-law mode of cause lawyering is, as some might have it, a contradiction in terms" (Scheingold 2001, 386).

The fact that professional responsibility supplies the motivation for proceduralist types raises a different set of questions about how proceduralist

16. This is certainly the case with the African-American lawyers studied by Aaron Porter, who worked for the cause of racial equality and justice by representing members of their community in Philadelphia in a wide range of seemingly non-"cause" matters (Porter 1998).

17. This is nowhere more starkly shown than in Daniel Lev's study of lawyers in Indonesia and Malaysia, where advancing the rule of law constitutes a serious attack on the status quo (Lev 1998; Scheingold 2001, 386).

lawyers are deviant. In their chapters, Boon and Sarat both place such lawyers at the edge of (if not over) the line dividing cause lawyering from mainstream lawyering. In discussing the ABA's work on the issue of capital punishment, Sarat labels the approach "abolitionism as legal conservatism" (Sarat 2001, 191).

Consistent with proceduralists' liminal place between mainstream and cause lawyering, questions are inevitable as to whether the cause of proceduralism is motivated by anything more than professional self-interest—in other words, whether the proceduralist "cause" is a cause at all. Dotan acknowledges this dilemma in discussing two of his subjects: "one may suggest that the only real 'cause' they share is the common will to preserve the status of their profession and the prestige of the law school from which they both graduated" (Dotan 2001, 253). The ABA's support for federally funded legal services in the 1960s can similarly be characterized as self-serving. At a time when the American Medical Association was stonewalling in its opposition to Medicare, losing power and prestige as a result, the ABA cooperated with the Johnson administration in part out of fear that if they did not, the profession's monopoly (and the influence that goes with it) would erode (Johnson 1974). Daniel Lev's chapter recognizes the possibility that lawyers' advocacy is tied to professional interests as well. Strong courts and binding procedural codes—the "things" for which proceduralist lawyers militate—undoubtedly create and protect a realm for the legal profession (Lev 1998, 447).

All the authors just discussed reject choosing one explanation over the other. Lawyers *are* motivated by self-serving motives. However, almost always they are also and primarily (if not overwhelmingly)—as the chapters show—motivated by altruism. These motivations interact in interesting ways. Indeed, in drawing the line between mainstream and cause lawyering, one could possibly use this question of motivation and the extent to which lawyering is professionally or economically motivated as a means of distinguishing between the two (see, for example, Anne Bloom's chapter on transnational personal injury lawyers [Bloom 2001]). But the idea that the presence of (professional or pecuniary) self-interest as *a* motivating factor might remove one's work from the category of cause lawyering altogether is firmly laid to rest in these chapters. To conclude otherwise would require cause lawyers to be ascetics in every way, not even deriving pleasure from helping others. Thus, the line between cause lawyering and noncause lawyering lies somewhere near the fulcrum between pure altruism and pure self-interest.

Another way of distinguishing mainstream from cause lawyering, suggested by Daniel Lev, is to ask this: If lawyers are self-interested, how do you explain the risks they take in advocating for the rule of law? The risk present in Lev's case makes this an apt question. In Indonesia and Malaysia, lawyers risk becoming the target of violence and repression by regimes

explicitly hostile to the rule of law and the values that often accompany it (Lev 1998). Stuart Scheingold observes that in autocratic states, "to introduce rule-of-law practices is to take a major step, perhaps a transformative step, forward" (Scheingold 2001, 386).

So, if you stick your neck out in a serious way, you're cause lawyering? The risk is relative, of course, and it is difficult (though less and less so) to imagine that proceduralist lawyering *à la* the ABA or the Israeli (as opposed to Palestinian) legal elite would incur violent or massive retribution from their governments for what seems to be rather tame advocacy for the advancement of procedural fairness. Does such lawyering actually involve risk taking?

The answer, perhaps surprisingly, is yes. As Austin Sarat's chapter on the ABA's advocacy on the death penalty demonstrates, professional organizations such as the ABA risk a great deal of "symbolic capital" whenever they engage in a debate or advocate on an issue that could change popular perceptions of their apolitical character, causing a "further diminution of its claims to authority based solely on technical expertise" (Sarat 2001, 205). While Sarat does not cite this as an example, one need only point to the Bush administration's decision to discontinue the ABA's "quasi-official" role in the evaluation of nominees for federal judgeships—in part because of perceived "liberal or political" stands taken by the organization—to see evidence of the costs of such actions (Lewis 2001).

But where the ABA may lose influence, individuals can lose their jobs.[18] This is made chillingly clear in the recent case of Jesselyn Radack, an employee of the U.S. Department of Justice's Professional Responsibility Advisory Office. In the days after "American Taliban" John Walker Lindh was taken into custody by U.S. authorities, Radack, in keeping with the duties of her post within the department, doggedly pressed her colleagues to observe and respect basic professional, legal, constitutional, and humanitarian standards in the process of questioning Lindh. Her entreaties were ignored. "It was like ethics were out the window," Radack told the *New Yorker*. "[I]t was, like, 'anything goes' in the name of terrorism." The cost: Her superiors forced her out of the department (and its honors program) soon after (Mayer 2003).[19]

18. Or, in the most extreme cases, their lives. The second volume of the *Cause Lawyering* series is dedicated to Nellam Tiruchelvam, a Sri Lankan lawyer killed by a suicide bomber in retaliation for his human rights advocacy (Dugger 1999; Scheingold 2001, 400).

19. Some death penalty lawyers, despite the ultimate punishment their clients face, believe that "playing by the rules" is morally (and strategically) important (Sarat 1998, 335). Yet as these examples show, even when they *do* stay within the bounds of accepted practice, cause lawyers are branded as unprofessional (Shamir and Chinski 1998, 230–35). Death penalty lawyers are "vilified as rogues who violate the canons of their profession" rather than as "guardians of important legal values" (Sarat 1998, 321). Or take another example: the rare attorneys who fulfilled their professional duties during the McCarthy era by representing those accused of having Communist ties. Jerome Auerbach documents well the legal and professional retribution that those lawyers faced (1976).

3. *Vision of the Lawyer's Role*

This leads us to the final aspect of proceduralist lawyering: the conception of the lawyer's role, especially with regard to the client.[20] Again, the proceduralist type incorporates a traditional/mainstream conception of the lawyer-client relationship. Clients, from the perspective of this type, are seen as atomized individuals, their cases discrete from any larger cause or group (aside from the proceduralist cause itself). Legal Services director Clinton Bamberger outlined just such a vision for LSP lawyering: "Once a client is accepted by an OEO-assisted program, the lawyer's obligation is clear—regardless of any group interests which the client may represent or oppose—the lawyer must represent the interest of the client with absolute dedication" (Bamberger 1966b).

Thus, proceduralist lawyering doesn't deviate from established professional norms. Kilwein describes lawyers who adopt such an approach as "comfortable with individual client lawyering. For them, their job was to represent an individual client with a legal problem, guiding her or him through the legal system" (Kilwein 1998, 187). This is not meant to conflate such lawyering with that of so-called hired guns who take any case. Rather, as Dotan points out in his chapter, a cause (the rule of law) is served by simply representing individuals in discrete cases. The hired gun, as conceived in the popular imagination, has no such tie to a larger principle (Dotan 2001, 250–51).

Another aspect of the lawyer's role central to proceduralist lawyering is the idea that lawyers are nonpartisan and don't adopt their clients' causes as their own. Proceduralist lawyering embraces the notion of neutrality.[21] Dotan's example of cooperation between state and civil rights lawyers in Israel who refuse to choose sides complicates the connection between cause lawyering and partisanship. Such lawyers don't identify with the (substantive) national and political aspirations of the Palestinians (Dotan 2001, 250–55).

In describing its early involvement in the civil rights–era South, the LCCRUL made clear that its representatives went to Mississippi not as "activists" or "civil rights lawyers." Their goal was not to "target" southern white racism, but rather to simply serve as lawyers for a client (in this case, the National Council of Churches) who approached them and requested assistance. (LCCRUL 1973, 27). It was only later that they became enmeshed with the substantive goals of the civil rights movement.

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20. I note a distinction between the many who advocate for the generic principle of representation—such as the ABA's support for federally funded Legal Services for the poor—and those who actually do the representing.

21. Neutrality is, of course, relative. In adopting the cause of the "rule of law" in Indonesia and Malaysia, lawyers are perceived as taking sides against the government. Such advocacy, however contextually radical, remains deeply rooted in procedural and professional values.

The LCCRUL's professionally based stance reveals another aspect of the lawyer-client relationship valued in proceduralist lawyering: It is the client who comes to the lawyer seeking assistance, thus avoiding contravention of ethical rules that bar lawyers from "stirring up" litigation. Rather than actively seeking out clients whose cases might further a litigation or political strategy, lawyers passively wait for cases to come in, handling them as discrete legal work in the courts once that relationship is formed.

B. Elite-Vanguard Lawyering

For many, the elite/vanguard type will seem most familiar. Elite/vanguard lawyering treats law as a superior form of politics. Such lawyering trades on the faith that law has the capacity to render substantive justice and that legal institutions do so. Thus elite/vanguard lawyering aims to change substantive law and thereby change society. The cause's substantive goals are delineated by the political ideals of the lawyers themselves, rather than a set of professional ideals. Elite/vanguard lawyers represent groups or principles or the "public interest," emphasizing test-case litigation and substantive law reform by lawyers who are personally invested in the substantive outcomes of their cases.

Whether claiming Louis Brandeis or Thurgood Marshall as their ideal, it is the lawyer as leader and hero, as social engineer and independent spirit that many associate with the idea of cause lawyering. It was, after all, individuals such as Brandeis and Marshall, or groups such as the ACLU and the NAACP that made cause lawyering a well-known phenomenon, inspiring imitators and proselytizers not only in the United States but around the globe.

1. *Vision of the System*

Elite/vanguard lawyering shares with the proceduralist type a lofty vision of the law and law's power to influence society. Unlike proceduralist lawyering, which believes law and politics are separate, elite/vanguard lawyering treats law as a form of politics, but one that is superior to other forms of politics (such as direct action). Law inspires a certain faith in its righteousness, in its transcendence above parochial politics. Thus, Yves Dezalay and Bryant Garth discuss the growth of the human rights community as, in part, exchanging political power into law by "investing in a neutral discourse of human rights" (Dezalay and Garth 2001, 362).

The elite/vanguard vision of law centers on substantive rather than procedural justice. Thus, Ford Foundation president McGeorge Bundy's support for "public interest" law was not driven by a vision of insuring fair process so much as it sought a "'redress of inequity' or a more just

'distribution of the material and nonmaterial things that society prizes most'" (Dezalay and Garth 2001, 361). In other words, it is the end result that matters. Furthermore, elite/vanguard lawyering often reflects what Stuart Scheingold has called "the myth of rights," a view that identifies constitutional values with social justice (Scheingold 1974; McCann and Silverstein 1998, 261).

To use the terminology of Ronen Shamir and Neta Ziv in their chapter on cause lawyering and land policy in Israel, law is perceived as "majestic" and "constitutive" (Shamir and Ziv 2001, 297). Dezalay and Garth also emphasize that such lawyering reflects a belief in the "relative autonomy of the law and the institutions that promote legal autonomy" (Dezalay and Garth 2001, 356). Such autonomy allows legal reform to occur away from the corrupting influence of political processes that favor expediency over principle.

Such autonomy gives courts and other institutions the perceived capacity to "effect larger processes of social change" (Morag-Levine 2001, 335). The belief in law's capacity is tied to its ability to transcend the specific case and vindicate general principles (Shamir and Ziv 2001, 297). Law becomes an instrument of social change, and changing law—primarily through litigation—becomes an end in itself. When practiced by lawyers on the Left, this vision of the system constitutes what Laura Kalman has described as "legal liberalism": a belief that society's ills can be cured through legal action (1996, 42–43).

Because elite/vanguard lawyering reflects the belief that law has such transformative capacity, the institutions that "make" law enjoy a place of privilege. Elite/vanguard lawyering relies on judges and the courts (and the state more generally) to confer fundamental rights or recognize claims for justice (Shamir and Ziv 2001, 298; Ziv 2001, 214, 218). Judges are often seen in heroic terms. Thus the Warren Court of the 1960s United States was a "cultural phenomenon" depended on by those who believed that most of America's flaws could be corrected by legal means (Kalman 1996, 42–43). In this view, "a petition to the Supreme Court is considered as the epitome of a legitimate and enlightened legal practice" (Shamir and Chinski 1998, 242).

Perhaps nowhere is this reverent attitude towards the Supreme Court more evident than in the case of Lewis Steel. Steel, a lawyer for the NAACP from 1964 to 1968, was fired by the organization's board of directors for publishing an article entitled "Nine Men in Black Who Think White" in the *New York Times Magazine*. The article challenged the perception—one presumably shared by members of the NAACP board[22]—that the Supreme Court played a valuable and essential role in the struggle for racial equality. After the legal staff of the organization

22. Of course, in dismissing Steel, the board may simply have been taking a politically strategic position, wishing not to anger neither members of the Supreme Court, who had

resigned in solidarity with Steel, Robert L. Carter, then general counsel of the NAACP, expressed his distaste for the NAACP board's expectation that its lawyers conform to a "kind of orthodoxy" that did not allow for criticism of the Court (Dallos 1968).

This is not to say that those engaged in elite/vanguard lawyering believe in the present perfection of the legal system. Rather, they have a faith that the substance of law can be rewritten in such a way as to make things right. For instance, when a Ghanaian lawyer interviewed by Lucy White discusses his hopes for his country, he doesn't believe that justice exists presently in a government marred by corruption. He does believe, however, that if he learns the "black-letter doctrine of U.S. administrative law, banking law, and commercial transactions," he can return to Ghana and use that law "to do his part to clean up corruption in the civil service" (White 2001, 51). Law can cure society's ills.

2. *Vision of the Cause*

These visions of the law and the legal system lead to different visions of "the cause." The causes are substantive and varied and (in cases studied in *Cause Lawyering*) include the environment, racial equality, the rights of disabled persons, land policy, and human rights.[23] While embracing substantively diverse causes, elite/vanguard lawyering reflects common characteristics in the ways in which its practitioners conceive of and advocate for their causes. Their goal is not to support professional values or the legal system, but to "change policy, law, and social systems in such a way that the status of marginalized groups" is improved (Kilwein 1998, 189).

Elite/vanguard lawyering, in keeping with a specific vision of law, tends to treat legal work as something separate from political activism. Law is

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arguably made and would continue to make decisions of benefit to the NAACP, nor contributors to the group, who might be put off by what at the time were seen as radical critiques of a revered institution.

23. Important to note are cases where lawyers engaged in what I would generally classify as elite/vanguard lawyering address procedural issues in their advocacy. Take, for instance, American "public interest" lawyers of the late 1960s and early 1970s. While their advocacy aimed to alter the administrative processes of the federal government on the grounds that they wished to "balance the scales of justice," ultimately, their goals were substantive (Center for Law in the Public Interest 1976). They believed that if the scales were balanced, policies that reflected the interests of consumers or "the public" (as opposed to corporations) would necessarily result. Thus, while claiming to be "representing unrepresented interests," as the Ford Foundation touted in one publication from the era, Robert Rabin rightly noted that public interest practitioners were "quite selective" in which of the unrepresented they chose to represent (1976, 230).

This is in contrast to proceduralist lawyering, such as some who supported Legal Aid and Legal Services in the 1960s, who were uninterested in the substantive outcomes of representing poor people. Their interest ended when the procedural elements were met. Public Interest lawyers admitted a clear stance in favor of certain substantive outcomes. Procedure was a means to an end, not an end in itself (Johnson 1974; Davis 1993).

privileged as a strategy. But rather than law and politics occupying two distinct realms, from this perspective legal and political actions are two sides of the same coin. Legal action is believed to represent the superior side. When the direct action phase of the civil rights movement began with the Montgomery bus boycott, NAACP Legal Defense Fund director-counsel Thurgood Marshall was disgruntled. According to Taylor Branch, Marshall suggested to the press that challenging segregation was "men's work and should not be entrusted to children" (Branch 1988, 189–90; Tushnet 1994, 305). In other words, lawyers could take care of the problem, and activists would only complicate matters.[24]

The contributors to *Cause Lawyering* describe similar beliefs about the messiness of politics (and the implicit value of law). In lauding a Chilean human rights group, the Ford Foundation noted that it was "not just people yelling and screaming" but was "curiously legalistic" (Dezalay and Garth 2001, 363). The Foundation believed it could get involved in funding human rights activism "the closer it was to 'law'" (Dezalay and Garth 2001, 363). Elite/vanguard lawyers use law to promote change, but in a "principled" way, using the mechanisms of the state to change the state itself, working very much within the system (Scheingold 2001; Shamir and Ziv 2001, 298).

Some "impact" litigators believe that victory in a single case will solve "not only present-day problems but also those of similarly situated persons in the future." Others believe "individuals won specific cases and the system was changed" (Kilwein 1998, 184, 189).[25] In keeping with the belief in the perceived capacity of the legal system to have broad impact, elite/vanguard cause lawyers define their work in terms of general principles of constitutional or human rights. ACLU attorneys serve as the "guardian of liberty," first and foremost (ACLU 2003). Civil rights lawyers "speak the language of the state, i.e., the language of constitutional law" (Shamir and Ziv 2001, 298). Legal principles exist at the national, international, or "universal"

24. Marshall biographer Juan Williams recounts Marshall's reluctance to represent those arrested at lunch counter sit-ins in the 1960s. Quoting Derrick Bell, "Thurgood stormed around the room proclaiming in a voice that could be heard across Columbus Circle that he did not care what anyone said, he was not going to represent a bunch of crazy colored students who violated the sacred property rights of white folks by going in their stores or lunch counters and refusing to leave when ordered to do so" (Williams 1998, 287). To Marshall, the law was clear—making it futile to go before a judge. Marshall, under pressure from younger staff members, relented, agreeing to push a legal strategy that claimed a restaurant must serve anyone who sought service under the Fourteenth Amendment guarantee of equal protection (Williams 1998, 287).

25. A number of authors raise at least a question as to whether such professed faith in the law and legal system is deeply held or simply strategic (Dezalay and Garth 2001). Lisa Hajjar, for one, believes human rights activists in the Middle East made strategic uses of legalism "to orient and legitimize counter-hegemonic struggles"; "indeed, the insight that law is inseparable from politics is nowhere more fitting than in the sphere of human rights" (2001, 74). By adopting the language of legalism, in other words, lawyers speak a language that is accepted by the state while simultaneously challenging the state's legitimacy.

level, but rarely at the local (Morag-Levine 2001, 347, 350). Success is defined not primarily in terms of the impact on the individual client, but on the system or the larger population. Poverty lawyers in Pittsburgh look to remedy systemic societal ills that affect the poor as a group (Kilwein 1998, 184). The work of cause lawyers is oriented outward, extrapolating from the local situation to the national or international audience.

With an orientation toward the state generally and courts specifically, litigation becomes the tool lawyers turn to first and foremost, using their expertise to make "principled constitutional arguments" (Shamir and Ziv 2001, 297–98). Legalism is reflected in legally fixed strategies. "We have never sought out issues that didn't offer a legal angle," said one Israeli environmental lawyer in the organization's newsletter (Morag-Levine 2001, 348, 335). As a result, elite/vanguard lawyering shifts issues away from the "political," "historical," and "cultural" dimensions of a case toward the legal principles of "equality" or "discrimination" (Shamir and Chinski 1998, 244, 252).

As Neta Ziv's chapter makes clear, however, courts are the primary but not the exclusive forum for elite/vanguard practice (Scheingold 2001, 387). Such lawyering may also (or alternatively) occur in legislative or administrative forums. Lawyers may work closely with the media or with social movements. But even though the venues are varied, lawyers continue to represent their cause in a legalistic manner (Dezalay and Garth 2001, 366), engaging in what Shamir and Ziv label "state-centered political activism" (Shamir and Ziv 2001, 291). The ultimate audience is the state and the elites who operate at that level—such as philanthropic foundations and other sources of funding (Lazarus 1974, 121–45; Dezalay and Garth 2001, 365; Hajjar 2001, 73, 85; Morag-Levine 2001, 336). Thus, cause lawyering is also oriented "up," speaking to elites. As Lisa Hajjar described the human rights movement in the occupied territories, human rights provided the opportunity and need to "look 'upward' to international law and 'outward' to the international human rights movement" (2001, 92).

With elites as the audience for such action, then, comes a commensurate emphasis on expertise and elitism within the organizations themselves. Susan Carle's recent work on the NAACP demonstrates the extent to which elite involvement was central to the early growth of the NAACP's legal work (Carle 2002; Wilkins 2002). Dezalay and Garth emphasize the role of elites in the formation of the international human rights movement, what they label "an establishment out of power" (Halpern 1974; Dezalay and Garth 2001, 371).[26] Such elites mobilize their social and political capital, as well as the power of the institutions they control, to push their agendas (Dezalay and Garth 2001). Similar emphasis on elite status was

26. Simon Lazarus called public interest lawyers of the 1960s and 70s "elites without power" (1974, 145).

visible early on in the public interest law movement in the United States (Lazarus 1974).

Because these lawyers adopt a legalistic approach, expertise is at a premium (McCann 1986, 26). Attorneys distinguish themselves from political activists by their professionalism, emphasizing their "professional tools" or identifying themselves as "professional advocacy group[s]" (Dezalay and Garth 2001, 356; Morag-Levine 2001, 348). Expertise is sometimes valued as much as, if not more highly than, commitment to the cause in recruiting attorneys (Morag-Levine 2001, 341). In one case, a "heavy lawyer" was put on a brief in a case before the Israeli Supreme Court, not because he was expected to work on the case, but because of his position as a recognized supporter of the client group and his reputation as a lawyer "with good professional standing, impressive social connections, and high public visibility" (Shamir and Chinski 1998, 246).

It is thus not surprising that with elite/vanguard lawyering, as my label suggests, lawyers are often situated in the leadership of the causes. At the very least, attorneys' involvement with popular or grassroots social movements (to the extent such movements exist in any given context) is tentative or distant. Shamir and Ziv label this a distinct type of subpolitics "based on various forms of 'private' initiatives and on the activities of issue-specific professional organizations" (Shamir and Ziv 2001, 291). Such an approach emphasizes a small number of "employed activists and expert advisors," their activism "marked by the overrepresentation of lawyers and the development of strong legal departments" (Shamir and Ziv 2001, 291). Shamir and Ziv document the example of the Association for Civil Rights in Israel (ACRI) as an example, but the model is very familiar in U.S. legal circles. Groups such as Environmental Defense (formerly the Environmental Defense Fund) or the Center for Law and Social Policy emphasized legal and scientific expertise early on in their existence, and they demonstrated little connection to the movements with which they shared substantive affinity (Halpern and Cunningham 1971, 1105; Halpern 1974, 120–21). In its formative years Human Rights Watch emphasized its technical skills and links to "cutting-edge law," defining itself in contrast to Amnesty International's mass mobilization approach (Dezalay and Garth 2001, 366–67).

Elite/vanguard organizations are often funded by national and international philanthropic foundations (McCann 1986, 54–55; Morag-Levine 2001, 336; Shamir and Ziv 2001, 291). As a result, they need not depend on a broad membership base for their continued existence. It is not surprising, then, that lawyers are in charge. Neta Ziv's chapter on the role of cause lawyers in the drafting and passage of the Americans with Disabilities Act emphasizes the extent to which attorneys held broad discretion "to decide about the means to accomplish the legislative objectives and to a certain extent about its goals" (2001, 224). Noga Morag-Levine describes the

history of a top-down environmental organization created by lawyers, funded by American foundations, going out in search of cases and clients. In effect, the lawyers created and led the cause with little input from the populace it sought to benefit (Morag-Levine 2001).[27]

3. *Vision of the Lawyer's Role*

With such a conception of the cause comes a distinct formulation of the lawyer's role, the client's place, and the relationship between the two. Shamir and Ziv contend that lawyers who adopt a legalistic orientation "tend to uncritically accept the acclaimed 'proper' professional rules governing this type of activism." They file briefs in courts, they are open about their intentions, and they make "principled constitutional arguments" (Shamir and Ziv 2001, 297). Indeed, the profession shows great respect for and professional acceptance of such approaches. Yet to the extent that the traditional or mainstream conception of the lawyer-client relationship exists, such lawyering deviates quite seriously from that norm (Hilbink 2002). Lawyers choose the clients, lawyers determine the strategy and goals, and sometimes they stage the events necessary to create a valuable set of facts (Carle 2002; Hilbink 2002).

Another way in which elite/vanguard lawyering deviates from the expressed norm of the profession is the lawyer's overt commitment to the substantive cause. Elite/vanguard lawyering transgresses the traditional professional ideology that presumes neutral partisanship. Whereas Proceduralist lawyering entails a professional (and procedural) basis for the commitment, elite/vanguard lawyering entails an investment in the substantive goals of the cause for which lawyers advocate. Clarence Darrow and the ACLU were deeply invested in defeating Tennessee's antievolution law in the Scopes trial (Walker 1990; Larson 1997). Thurgood Marshall and Charles Houston were similarly devoted to the cause of racial equality in their litigation (Tushnet 1987, 1994). Lawyers representing the disability rights movement demonstrated a commitment to "the social and political ends of their representation and considered themselves personal stakeholders in its outcome" (Ziv 2001, 217).

In such situations, it isn't simply a question of who is in charge? The first question is who is the client? Thus, it wasn't wholly without irony that one environmental lawyer in the 1970s asked, "Should trees have

27. Another example is that of Thurgood Marshall and the NAACP. In the years after *Brown*, Marshall was frustrated by increased pressure from the NAACP membership to be "aggressive, even militant in his tone and action with white segregationists." Local NAACP activists and members wanted the Legal Defense Fund to file more lawsuits in order to challenge a broader array of racist laws. Many believed the lawyers needed to be more activist in their approach. Marshall rejected such entreaties, arguing with NAACP head Roy Wilkins that the membership could not set the agenda for the lawyers (Williams 1998, 258).

standing?" (Stone 1974). Neta Ziv points out that the model rules assume the existence of an identifiable client with whom an attorney can form a one-on-one relationship (2001, 219). Ziv offers an extreme case in the legislative situation where lawyers employed by public interest organizations represented the interests of 29 million people with disabilities. "It is questionable if they had a client at all" (2001, 217). But the definitional dilemma is nearly as difficult in more direct relationships. Whose interests did the NAACP represent in the *Brown* litigation? Oliver Brown's? All African Americans'? In one argument before the Supreme Court, NAACP counsel Robert Carter told the court that he represented not any one client, but instead the "entire Negro community" (Hilbink 2002, 90).[28] In cause lawyering aimed at vindicating or advancing a broad principle, the individual client fades into the background.

With the individual case a vehicle for the advancement of general principles, the client is seen as of secondary importance. In their description of litigation over Israeli land policies in the Supreme Court, Shamir and Ziv demonstrated how high-level litigation transformed the plaintiffs from a "'private' family striving to improve its quality of life to a public asset that symbolized the struggle against ethnic discrimination" (2001, 295). Environmental lawyers in Israel did not include citizens directly impacted by a construction project because the organization believed "the issue was not primarily local but rather a question with national rule-of-law and environmental policy implications" (Morag-Levine 2001, 347).

Neta Ziv describes the interaction of ADA advocates with their "clients" wherein lawyers made the day-to-day decisions, often briefing the advocacy coalition only after substantive decisions were made. Local groups were involved when organizers directed them to send letters or make phone calls to members of Congress (2001, 221, 230). Similarly, Shamir and Ziv describe plaintiffs as entering into an "expert-client relationship" when a civil rights organization took their case to the Supreme Court.[29] For the client, his "fate is not in his hands. This relative passivity is especially critical in activities aimed at social change" (2001, 296). Thus, it is elite/vanguard

28. Derrick Bell famously addressed the issue in his article *Serving Two Masters* (Bell 1976). The matter continues to occupy practitioners and scholars (Bell 1976; Polikoff 1996; Rubenstein 1997). Like many of the dilemmas central to the cause lawyering enterprise, the question of who a lawyer represents is not unique to activist attorneys. A recent article by Ann Southworth both reviews and advances the literature on this question (1999).

29. In his re-evaluation of Louis Brandeis's work as an attorney, Clyde Spillinger writes of the tension between autonomy from and engagement with clients as key to understanding Brandeis' advocacy (Spillenger 1996, 1354). Brandeis, in acting as a "lawyer for the situation," assumed a place in regards to his clients that deviated from the perceived traditional role of lawyers. In Spillenger's words, "Brandeis saw a 'situation' that he could solve, in the manner of a good Progressive problem-solver—or, in the words of one of my colleagues, a 'one-man New Deal'—and he sought to impose a solution that made reference less to the expressed desires of the parties involved than to a vision nurtured by and known only to himself" (1996, 1509).

lawyers who are in charge, determining strategy, fighting on the front lines of the cause, often creating the cause themselves.

The formation of the lawyer-client relationship further reflects the primacy of the cause and the lawyer's leadership role in fighting for that cause. Lawyers are often the active parties in initiating a legal relationship with clients. The NAACP tended to actively recruit clients for its test cases against segregated education, rather than responding to the advances of individuals or groups (Powe 2000; Carle 2002; Hilbink 2002). In another example, Israeli environmental lawyers invited fishermen to join their water pollution case (Morag-Levine 2001, 345). Even when lawyers are approached to represent individuals or groups—by the people themselves or through a referral—they consider whether the potential client's case is "worthy of litigation" (Sterett 1998, 300; Morag-Levine 2001, 341; Shamir and Ziv 2001, 293). Thus, lawyers decide which cases will best advance their cause. Any lawyer-client relationship has a screening process at the outset, of course. However, rather than screening for ability to pay, or fit with the firm's areas of practice, this screening process closely analyzes the value a client could have in vindicating the principles at the hub of the cause.

C. Grassroots Lawyering

Grassroots lawyering perceives law as just another form of politics and is skeptical of law's utility as a tool of social change. The legal system is often seen as corrupt, unjust, or unfair—an oppressive force. Grassroots lawyering aims to achieve substantive social justice, but such gains need not be made in the courts. Rather, legal action is seen as only one weapon in a widespread assault on injustice. In keeping with this view, lawyers *qua* lawyers do not play a leadership role in movement work; litigation is not given primacy in strategic planning. Lawyers work with grassroots social movements, often as supporting players. The movement is typically the lawyer's client, though when a lawyer represents an individual, he or she attempts to link the single case to a larger set of principles. Finally, while grassroots lawyers may not be invested in the specific outcomes of cases, they do take a partisan interest in their movement's goals.

The third type of cause lawyering is the most prevalent in the cases offered in these two volumes. Why the grassroots type predominates in the collection is not so clear. It could be that "grassroots" groups are the most interesting to study, allowing the scholar to look at a wider set of interactions. It may reflect the personal choices of scholars, or may involve fewer restrictions stemming from lawyer-client privilege. But it also seems—as will become more evident as I describe the type—that at least in the realm of left-wing cause lawyering, the grassroots model, in increasingly

conservative political climates around the world, represents the most viable and, thus, most prevalent approach.

1. *Vision of the System*

Grassroots lawyering rejects the majestic vision of law. Law and politics are generally indistinguishable. The purported values of the law—neutrality, rationality, predictability, consistency, fairness, and justice—do not, from this perspective, describe the reality of the legal system. Rather, the legal system is "ideologically biased," "skewed," and "conservative" (McCann and Silverstein 1998, 266; Sarat 1998, 334; Coutin 2001, 131). Law does not provide a "rational means of arriving at an empirical truth" (Coutin 2001, 131). Said one wage-equity lawyer, "Logic and legal analysis do not seem to be particularly important" (McCann and Silverstein 1998, 266). An immigration lawyer repeatedly portrayed the American legal system to clients as "arbitary" (Coutin 2001, 130–31). A feminist wage-discrimination attorney rejected law's capacity to change society. "You have to be pretty naïve, politically, to think that winning a lawsuit, even a big test case, even a whole string of cases, by itself really makes a difference in the scheme of things" (McCann and Silverstein 1998). Most blunt is the criticism made by an American radical lawyer in 1971: "Law is Illegal" (Cloke 1971; Lefcourt 1971).

By offering such critiques of the law, grassroots lawyering reveals a similar perception of legal actors. At best, the judiciary is "inattentive" (Sarat 1998, 335), and lawyers may tell their clients that the impartial judiciary is simply an "illusion" (Coutin 2001, 129). Judges act as an extension (or facilitator) of executive and military power (Meili 1998, 496), regulating exploitation, repression, and oppression for those powers rather than rendering justice for society. Prosecutors "break the rules all the time" (Sarat 1998, 335).

Why would people—and particularly lawyers—choose to participate in the legal system if it serves such oppressive ends; if it is, in the view of Bedouins, "an all-encompassing web of rules that one must learn to avoid or subvert"? (Shamir and Chinski 1998, 228). Of course, some people have no choice when they are caught up in law's web. But grassroots lawyering treats law as both a "constraint and a resource for differently situated parties in complex, ever-changing ways" (McCann and Silverstein 1998, 264; Coutin 2001, 119). As one attorney told Stuart Scheingold, "Some days I feel like there's no use dealing with the system and other times there's some give and you get something for somebody" (Scheingold 1998, 126). The courts may be racist, but by being creative and well informed one might succeed in "the game" (Coutin 2001, 129–30). Law is but one locale through which society expresses itself. And it presents a place on which battles for social change can be fought. Grassroots lawyering reflects attitudes that are "highly

circumspect, critical, and strategically sophisticated about the pitfalls of legal action"(McCann and Silverstein 1998, 266).

2. *Vision of the Cause*

It is not surprising that grassroots lawyering melds the "legal" and the "political" (McCann and Silverstein 1998, 276; Scheingold 1998, 126), but this is not to say that grassroots lawyering makes no distinction between the two. As Shamir and Chinski's chapter on cause lawyers for the Bedouins argues, some attorneys "maintain a radical distinction between the 'law' of the case and the 'politics' of the cause" (Scheingold 1998, 125–30; Shamir and Chinski 1998, 239). Yet these lawyers, in their "struggle to politicize legal practice" (Scheingold 1998), coordinate and carry out their strategies in close connection with clients and/or social movements, cultivating political alliances, stripping the law of its "regal qualities," and using it "as a resource for community-oriented political activism" (Shamir and Ziv 2001, 297; Hajjar 2001, 81).

Elite/vanguard cause lawyering is motivated by the goal of vindicating "large" substantive principles in the upper echelons of state structure on behalf of "unrepresented interests," "the public interest," or other similar constituencies. Grassroots lawyering, too, is rooted in a desire to promote social, legal, economic, and political change. Such desires are undergirded by substantive political and moral principles, be they opposition to racism or the death penalty; support for gender equality or better treatment of animals; or, most broadly, the attainment of social justice. Less specifically, lawyers may see it as their duty to demystify the law or to increase the voice of marginalized groups in political and legal avenues (Kilwein 1998, 190; Meili 1998, 489). Grassroots lawyering aims to transform society—or society's attitudes—on these issues. However, transformation need not proceed from the top as with elite/vanguard lawyering. As the word *grassroots* implies, transformation occurs from the bottom up, beginning with individuals and communities (and often the parties themselves). Lawyers subscribe to the principles that guide their work, but these principles are often shared by or "emanate from the people" with whom the lawyers make common cause (Meili 1998, 489).

Pursuing change at the grassroots creates yet another set of dilemmas. Shamir and Chinski highlight the tension between vindication of the principle and the interests of the individual client (1998, 238–39). Since the legal system as well as professional ethics tend toward the individuation of issues—particularly when it is the state initiating the legal action rather than a legal group bringing test cases—grassroots cause lawyering often forces practitioners to deal with the particularities of each case. In such cases, grassroots lawyering occupies a space between proceduralist and elite/vanguard advocacy, concerned with the individual client while at the same

time pursuing larger substantive goals. Representation is both means and end, simultaneously helping the individual and seeking broader change.

At times grassroots lawyering uses this quality to its advantage by turning such individuation into a political strategy.[30] Individual immigration cases may be used to highlight broader injustices that transcend any given case (Sterett 1998, 312). Lawyers for death row prisoners in the United States link the particular injustices of individual cases to broader patterns of injustice (Sarat 1998, 324), using such cases outside the courtroom and going to the legislature, the media, or the public with the narratives.

Or, grassroots lawyering may use the intimacy of the lawyer-client relationship as a site for client empowerment (Trubek and Kransberger 1998, 204). As such, it is in working with the client that a lawyer empowers individual litigants and helps defendants gain "a measure of self-respect" (Ellmann 1998, 378; Scheingold 1998, 134). With such lawyering the concern is not the health of the system, but rather that of the client. Gerald López has famously dubbed an approach that emphasizes such transformative collaboration with the client *rebellious lawyering* (López 1992).

The contrast between proceduralist and grassroots approaches is perhaps best evidenced in the formation of the Legal Services Program in the mid-1960s. Present at the creation were Edgar and Jean Camper Cahn, whose *Yale Law Journal* article "The War on Poverty: A Civilian Perspective" advocated the involvement of poor people in conceiving, designing, and directing the projects intended to combat poverty in their communities. Lawyers would serve as collaborators and legal assistants in pursuing such goals (Cahn and Cahn 1964). As the ABA became more involved in developing the program, the foundational philosophy of Legal Services looked more and more like the proceduralist type—emphasizing the health of the system and disclaiming solidarity with poor clients. The Cahns' grassroots-type model, however, empowered the people in the hopes that they would speak out and eventually *win*, that their interests would prevail.

The recent focus on client empowerment by grassroots lawyers on the left reveals the scaled-back goals of cause lawyering. Grassroots lawyers do not necessarily set their sights on eradicating inequality with a victory in the Supreme Court. Rather, such lawyering involves setting smaller goals, or short-term goals (Scheingold 1998, 133–34).[31] These can involve getting media attention, rallying support for an issue (Meili 1998, 492), or more

30. Stuart Scheingold notes that some lawyers—looking through a poststructuralist lens—see individual cases as the best site to challenge "domination at microsites of power" (Scheingold 1998, 143; Shamir and Chinski 1998, 229). When oppression is diffused, occurring everywhere rather than only at the highest points where state meets citizenry, then the significance of the individual case shifts away from challenging the state writ large toward challenging individual perpetrators of oppression (Sterett 1998, 307). The discrete case becomes the means and end in an endlessly recurring battle for empowerment of individuals.

31. As a federal judge made the distinction to a friend of mine, "Some lawyers want to change the world. You want to help people."

subversively, throwing "sand in the machine" (Sarat 1998, 334). In such situations, the goal becomes delaying state action—destruction of a home, deportation, or execution—that will have grave impact on an individual (Sarat 1998, 331; Shamir and Chinski 1998, 240; Sterett 1998, 303; Coutin 2001, 121). Often in such cases, delay is the best one can hope for (Scheingold 1998, 121).

Alternatively, throwing sand in the machine can involve overwhelming the jails and the courts to force a city or state to come to the bargaining table, or compromise—a tactic favored by activists and lawyers in the southern civil rights movement. There, movement lawyers filed hundreds of removal petitions in federal courts in order to force action by federal judges and executive branch officials (Hilbink 1993). In such a conception, lawyering becomes a tool in the larger struggle, more as a form of direct action than legal action. Susan Sterett points to the "process costs" imposed on courts by immigration lawyers who refused to stand down in individual cases and thereby clogged the system. Such costs, she contends, forced judges to make substantive changes in order to keep the system running (1998, 303, 307). Shamir and Chinski's characterization of such tactics in the case of the Bedouins in Israel applies more generally here: "a subtle and not always intentional way of subverting, or at least challenging, the very integrity of the legal system within which these lawyers and their clients are situated" (1998, 240).[32]

Grassroots cause lawyering is driven by a variety of principles and goals in its implementation. As will be discussed below, at times these principles are vindicated through work in the legal system. At others, however, lawyers reject legal action. For grassroots lawyering like that studied by Stephen Ellmann, the choice between the two "is determined not by grand theory but by opportunity" (1998, 358). "Many movement lawyers are very aware of the considerable drawbacks associated with using the legal system and, as a result, approach their strategic efforts in a relatively sophisticated, often creative manner" (McCann and Silverstein 1998, 288). Like the pay-equity and animal-rights lawyers profiled by McCann and Silverstein, grassroots cause lawyers are skeptical of the value of litigation (McCann and Silverstein 1998, 266; Shamir and Ziv 2001, 288). Given that such lawyering does not give law a privileged place in pursuit of its goals, changing the law is no more than a means to an end, and one of many means at that. Which approach is used when is part of a "strategic choice of forum" (Ellmann 1998, 359). McCann and Silverstein succinctly emphasize the "ancillary leveraging function of litigation" (1998, 269).

32. Transformation in individual cases may not even benefit the client, however. This is particularly true when immediate success is elusive, yet the aggregate of cases can—one hopes—make a difference over the long term. Austin Sarat describes such death penalty lawyers as carrying "a vision of a future in which justice prevails over that violence" (Sarat 1998, 322).

Litigation is "all part of a menu," said one animal-rights activist (McCann and Silverstein 1998, 267).

As outlined above, grassroots lawyers often provide "traditional" legal services, of course, but work to balance individual client work with other approaches (Coutin 2001, 122). At times, lawyers engage in affirmative litigation that, on the surface, looks much like elite/vanguard test-case litigation. However, as one lawyer put it, "Preparing and arguing cases in the narrow sense takes up only about 10% of my time. . . . The largest portion of time is spent out there talking to people, educating, mobilizing, organizing, proselytizing, ranting and raving if necessary" (McCann and Silverstein 1998, 270).

"Non-traditional" (Meili 1998, 500) strategies include engagement in and organizing of community and collective action, public education, media work, human rights reporting, and political organizing and campaigning (Ellmann 1998, 359; Meili 1998, 491; Trubek and Kransberger 1998, 210; Coutin 2001, 122). Further transgressing professional lines, grassroots lawyering often involves supporting and defending deliberately "lawless" actions—such as illegal strikes, public protests, property sabotage, and civil disobedience—aimed at calling attention to injustices or forcing change (McCann and Silverstein 1998, 271).[33]

Others display a willingness to engage in non-"lawyerly" work (Shamir and Ziv 2001, 294). Stephen Ellman points to one organization in India: "To call AWARE a 'cause-lawyering' group may indeed be a misnomer, since most of its work appears to go beyond lawyering and is done by people who are not lawyers." In another example, Stuart Scheingold quotes a lawyer who steps in to lead a protest, but does so by showing his fellow protesters how to engage in disruptive (though not illegal) actions (1998, 136). Stephen Meili points out that many cause lawyers in South America promote rights enforcement, but outside of traditional legal structures by using the church and the media to promote their causes (2001).

So when do grassroots lawyers see opportunity in the courts? First, when they believe litigation can provide a necessary catalyst. Grassroots lawyers do not believe a legal victory equals actual change. Rather, the legal action begets reactions. Litigation may help coalesce or invigorate a protest movement, as pay equity litigation got workers to rally to the cause (McCann and Silverstein 1998, 267–68, 272). It may put pressure on other institutions to take action, just as Susan Sterett contends, litigation on behalf of immigrants forced British Parliament to take on the issue of immigration policy (McCann and Silverstein 1998, 268; Sterett 1998,

33. By way of contrast, note that early leaders of the LCCRUL denounced violations of "valid laws" by civil rights protesters who broke such laws (in their view) "simply to create sympathy for the civil-rights position or, even less defensibly, simply to dramatize the contentions of the demonstrators" (Tweed, Segal, and Packer 1971, 96).

310–11). It may educate the public about "open defiance of the law" by public and private actors (McCann and Silverstein 1998, 268). To this extent, activists use the court not as a legal forum, but as a political forum (Sarat 1998, 324; Scheingold 1998, 125–28). As described by William Kunstler's biographer, David Langum, the "Chicago Eight" aimed the "guerrilla-theatre tactics of taunts and pranks" they carried out in the courtroom at the public outside the courtroom (Langum 1999, 114–15). Grassroots lawyering involves collaborating in such actions.

These goals force a reconceptualization of what constitutes success in the legal system. In some cases, of course, "meaningful results" come in the form of legal victories (Ellmann 1998, 367). But courtroom "victory" isn't necessary to success. Just as "small" gains are often more important in grassroots lawyering, sometimes losing a case is not seen as a real loss. An unsuccessful lawsuit can "dramatize worker claims and [put] pressure on employers fearful of being branded as 'discriminators'" (McCann and Silverstein 1998, 270). A habeas petition, though denied, serves as a record and history of injustice (Sarat 1998, 323).

Often times, activists will provoke others to take legal action. Civil disobedience, for instance, is often intended to expose the state's raw power, oppression, or injustice (King 1969). Shamir and Ziv describe a case in which activists used standard property laws to facilitate an Arab man's purchase of a home in a segregated Jewish town in Israel. Through clandestine and discrete action, the man and his family moved into the town, immediately creating visible change while the state was forced to take action to evict the family. All the while, an elite/vanguard civil rights organization waited for the courts to process their affirmative legal challenge to the discriminatory law that barred the family from living there (Shamir and Ziv 2001, 295–99).

Defensive cases present a somewhat different set of issues. It is when clients are defendants (rather than the initiators of legal action) that the stakes are highest and the limits of grassroots cause lawyering are most evident. Cause lawyers often limit their representation to those most likely to fit within the state's categories (Coutin 2001, 123–27). Once they take on a case, lawyers may abandon any sense of cause simply to save their client—accepting rather than challenging a detrimental precedent or rule if the client can be made to "fit" within its parameters (Bisharat 1998, 469–74; Sterett 1998, 306; Hajjar 2001, 70, 83). Shamir and Chinski, George Bisharat, and Lisa Hajjar all raise serious questions as to whether such legal work constitutes cause lawyering at all.[34]

34. In this situation, grassroots lawyering shows similarities to proceduralist lawyering. The difference lies in the fact that in cases such as those described by Coutin, lawyering does not begin and end with individual client representation. It is seen as only one part of a larger set of actions.

3. *Vision of the Lawyer's Role*

What is the lawyer's role in a professional sense in a situation where, as one lawyer said, the "legal stuff is secondary. . . . It's probably not even secondary. It's relatively unimportant"? (Scheingold 1998, 125). The question that arises again is "who's in charge"? (Rosenthal 1974). In Shamir and Chinski's view, lawyers "are not simply carriers of a cause but are at the same time those who shape it, name it and voice it" (1998, 231). Sometimes they are leaders, while other times they are not.[35] But, unlike elite/vanguard lawyers, grassroots lawyers work closely and in solidarity with social movements (McCann and Silverstein 1998, 262–64). In determining strategy, grassroots lawyering typically involves working with (or as part of) social movements—planning litigation or legal action not in isolation from the movement but as part of an integrated approach in solidarity with movement actors (Scheingold 1998, 124, 135).

The grassroots lawyer-client relationship generally avoids the rigidity of traditional lawyer-client interactions. Often this grassroots approach involves a collaboration between partners rather than an "expert-client" relationship. Trubek and Kransberger found that every firm they interviewed "stressed the importance of creating a more collaborative and less traditionally hierarchical relationship with the client, and insisted on the importance of client empowerment, personal agency, and autonomy" (1998, 211).[36] Lawyers strive, in the course of representation, to connect with the person they represent (Lopez 1996; Sarat 1998, 325).[37] In working to bring an Arab family into an exclusively Jewish Israeli town, lawyers and their client worked together, with the client as an active participant who took initiative, assumed control, and secured his interests (Shamir and Ziv 2001, 296). National Lawyers Guild lawyers working with members of the civil rights movement were known for "deferring to the desires of the activists they represented" (Langum 1999, 64–65) rather than privileging their view of what was the best strategy. Lawyers serve not as decision makers, but as

35. In working with disempowered clients, or even well-organized social movements, lawyers are regularly accused of running the show—taking over and substituting their views for those of their clients—particularly when clients come from disempowered groups (Alfieri 1987–88, 1992; Cunningham 1992; Lopez 1996).

This does not mean, of course, that all lawyers or organizations manage to avoid the pitfalls of paternalism, resentment, or frustration in dealing with the very people lawyers claim to be empowering (Bisharat 1998, 471; Ellmann 1998, 380–82; Shamir and Chinski 1998, 255). The grassroots type, after all, is an ideal.

36. This is the subject of much lawyering literature. See, e.g., Alfieri 1987–88, 1992; White 1990; Cunningham 1992; Lopez 1992, 1996.

37. Again, such "connection" isn't always the case. Shamir and Chinski found little difference between the style of lawyering of "cause" lawyers (those who were affiliated with a cause organization) and local attorneys who took cases as they came and without the political commitment (1998, 230). More destabilizing, the authors noted, is the fact that in field observations, cause lawyers seemed to have little personal connection to clients, while "independent" lawyers for hire offered a "less alienating and less distant form of lawyer-client relations" (1998, 255).

facilitators—giving clients (be they individuals or social movements) the information they need to make informed decisions about what course of action to pursue (Hilbink 1993; Trubek and Kransberger 1998, 212). As such, lawyers and clients ideally develop solidaristic bonds that facilitate and enhance communication and cooperation (McCann and Silverstein 1998, 275).

As can be expected, attorneys sometimes serve as the leaders of the movement with which they are allied (Ellmann 1998, 377; Scheingold 1998, 135–36; Shamir and Chinski 1998, 231). Lawyers form nonprofits or initiate the organization of movements. For instance, lawyers created organizations such as the Workplace Project and Make the Road by Walking—both currently operating in New York—but studiously brought community members and nonlawyers into forming and developing the groups early on, making efforts to step back and let the people lead. More important, such groups avoided privileging law and litigation in their work (Gordon 1995; Open Society Institute 2003).[38]

Often, however, it seems that lawyers do not take the lead in the movements and organizations with which they work. On this point, George Bisharat describes cause lawyers as "products, rather than producers, of the cause they serve, or conscripts, rather than appropriators of a legal struggle for political ends" (1998, 454). Lawyers see themselves as, and are integrated into, social movements, expressing a sense of belonging to something bigger than just a legal movement (McCann and Silverstein 1998, 269, 275; Scheingold 1998, 125–31). Most compellingly, McCann and Silverstein describe the relationship between lawyers, social movement leaders, and movement constituents as "characterized in large part by interdependence, interaction, and cooperation" (1998).

Some grassroots lawyers see it as part of their political and cause lawyering identity to *violate* the rules of the profession. For one, they reject neutrality in favor of solidarity with clients. Their work entwines them in their clients' agendas "in order to make a political statement . . . privileging cause over legal and ethical constraints" (Scheingold 2001, 386). A willingness to transgress norms of the profession was a key aspect of radical lawyering in the 1960s and 1970s (Harris 1971; Kunstler 1971). National Lawyers Guild attorneys involved in the civil rights movement were "more supportive of demonstrations and sit-ins, less legalistic, and less interested in whether they antagonized the local power structure" (Langum 1999, 64–65).

Those engaged in grassroots lawyering further demonstrate their commitments through client selection. Unlike proceduralist lawyering,

38. Groups such as the Workplace Project and Make the Road by Walking appear to represent an increasingly popular and successful model for legal and political action and, in my estimation, are deserving of further attention and study by sociolegal scholars. For information on the latter organization, see www.maketheroad.org.

where attorneys take any case that fits within broad eligibility criteria (as income level or case type), or elite/vanguard lawyering, where attorneys select cases based on the case's potential to advance their strategy based on a principle, practitioners of grassroots lawyering tend to represent only their political allies. Thus, while an elite/vanguard lawyer would represent the Ku Klux Klan—even though he or she abhors the Klan's racism—in order to vindicate the First Amendment, a grassroots lawyer would defend the rights of only those with whom he or she agrees politically, defending the principle of free speech when it benefits an ally (Scheingold 1998, 128). Said one lawyer to John Kilwein, "I don't buy that a lawyer has to be objective and take any client who walks through the door. That's bullshit. I only represent people I agree with" (Kilwein 1998). Said another to Trubek and Kransberger, "We don't represent landlords . . . for me, the power dynamics in landlord/tenant cases are just so obvious that even if I have a tenant who's an asshole, it's still really easy for me to feel like I'm doing a good thing if I'm helping to preserve this person's basic housing necessities" (Trubek and Kransberger 1998, 208, 212).[39]

Finally, another way in which grassroots cause lawyering often—but certainly not always—challenges professional standards is through the organization and functioning of law offices. Thus lawyers seek to transform interoffice relations—making them "collegial and equitable," "humanistic and nonhierarchical" (Trubek and Kransberger 1998, 204, 213). The experiments of "law communes" in the late 1960s and early 1970s represented the apex of such attempts to transform law office culture. Lawyers and "support staff" were paid more equitably, some lawyers took on clerical duties, and offices made decisions collectively (Lefcourt 1971; James 1973).[40]

III. CONCLUSION

The value of a typology does not lie in the system of classification itself. While it may be important just to know that there are distinct types of lawyering, the inquiry does not end with such an observation. Rather, once the distinctions are made, the question becomes Why? Why do some types

39. Apparently, grassroots lawyers also have less trouble with profanity. While I'm joking, and recognizing that two examples does not constitute a sufficient survey, the use of profanity by grassroots lawyers does reveal their political colors, for profanity is part of political, not legal, language.

40. Grassroots lawyering is not unique in challenging traditional law office structures and practices. In a recent conversation, Center for Law and Social Policy founder Charles Halpern told me that restructuring the law office was one of the most important facets of the public interest law movement, involving such things as yoga classes (Halpern 2003).

of lawyering thrive when others wilt? What is it about the environment that has shaped the development and evolution of these types?

To borrow language from Shamir and Chinski in their chapter from volume one, a cause is not "an objective fact 'out there.'" What they say about causes applies equally to cause lawyering. It is "a socially constructed concept that evolves, if at all, through a process in the course of which experiences, circumstances, memories, and aspirations are framed in a particular way" (Shamir and Chinski 1998, 231). In order to link the development of this typology with the larger mission of understanding why cause lawyering takes the shape it does, I conclude with some observations on the factors that influence the type of cause lawyering in a given situation at a given time.[41]

The typology of cause lawyering presented here developed out of a need to better understand the combination of experiences, circumstances, memories, and aspirations that shaped cause lawyering in the 1960s and 1970s. A variety of forces and multiple webs of relations influenced the flourishing or failure of the three types. The pressing question is what these forces were and how they functioned to shape the field. Space and time considerations prevent me from making full observations in these pages. Some comments are justified, nonetheless.

In each of the practice areas I study in my history of cause lawyering—civil rights, legal services for the poor, public interest law, and radical—each of the three types is present at some point in the historical trajectory. Yet in each case, one type of lawyering comes to dominate while at least one of the other two withers. One example from my current research offers a clearer explication of this phenomenon: federally funded Legal Services. What the example of Legal Services shows is that the type of lawyering adopted in the LSP was influenced by a vast number of factors beyond the fact that Legal Services was aimed at using law to combat causes of poverty. Without question, the substantive area played a role, but just as important were influences large and small, general and particular, national and local.[42]

Following the framework of the typology forces analysis at a number of levels. Understanding the vision of the system requires that one look at the political and jurisprudential contexts in which lawyers' views developed. In

41. I am hardly the first to offer such a set of factors. Sarat and Scheingold, in both their introductions, build on the empirical contributions from the volumes to offer theoretical observations on the factors that shape cause lawyering (Sarat and Scheingold 1998b, 2001b). Stuart Scheingold's conclusion to volume two offers similarly valuable observations (2001). Carrie Menkel-Meadow's chapter in *Cause Lawyering* offers an excellent reflection on this theme (1998). Similarly, Terence Halliday offered an important contribution in reviewing the first volume of the series (1999).

42. What I present here is intended to illustrate some of the many influences shaping lawyering for the poor. It is not intended to be an exhaustive explanation. Such an analysis will be forthcoming.

the case of Legal Services, short-and long-term political trends played a part. This included not only who was in the White House and Congress, but how liberalism changed at the level of policymaking—from an emphasis on grassroots social action in the early 1960s to elite-controlled social change in the mid to late 1960s. The role of law in a liberal democracy was changing rapidly over this decade as well. Jurisprudential trends were reflected in the federal courts, where law was made, as well as in the law schools, where lawyers were trained. A jurisprudence that embraced an expansive reading of the Constitution and envisioned a central role for courts in supporting liberty and equality was replaced by a conservative understanding of the Constitution and the role of the courts in protecting the socially and economically downtrodden. Perhaps most significant was the increasing hostility in political arenas to the very idea of courts as forums for social reform. With Nixon only the most prominent critic of the federal courts, it became increasingly difficult to advocate for and protect Legal Services lawyering that provided anything more than the most proceduralist form of nonpartisan, one-on-one lawyer-client counseling.

The vision of the cause went through similar twists as the context of the battle against poverty changed. At the same time, the existence and vitality of social movements played a role as well. Legal Services was conceived at a time when the southern civil rights movement was at its zenith, offering a seemingly perfect model for mobilizing communities for social change. Indeed, it was the civil rights movement that inspired the welfare rights movement of the mid-60s, just as civil rights lawyers inspired the Legal Services Program. Yet the civil rights movement began to ebb and the poor people's movement found itself increasingly ineffective in the face of hostile federal, state, and local officials and voters. As the poor people's movement became less cohesive, lawyers went from playing a supporting role in relation to the movement to a leadership role that emphasized test cases and law reform.

Also influencing the type of poverty lawyering provided by LSP was funding. When federal funds seemed to have no limits, the possibilities of providing a lawyer to every poor person who required one—or of providing lawyers to work with poor communities in ways that did not render clearly identifiable results and benefits—seemed plausible. Yet as the money tap was slowly shut off over the course of the late 1960s, test-case law reform work came to be more attractive, as it promised the most bang for the funding buck. After all, grassroots mobilization was expensive. Further, direct-client work and law-reform work gave bureaucrats within the Office of Economic Opportunity the type of data they could use to lobby Congress to re-up their funding: x number of clients served, y number of cases handled, z number of cases won in the Supreme Court. Organizing and representing community groups did not offer such useful and recognizable numbers. The cause changed as circumstances changed.

Finally, the interactions of the lawyers and their impoverished clients further shaped the types of lawyering emphasized within the LSP. As Jack Katz and Martha Davis have shown in their studies of LSP lawyers, lawyering for the poor presents challenges to even the best theories (Katz 1982; Davis 1993). Law reform was made difficult by the fact that it was often difficult for lawyers to convince clients to hold out through the long process of precedent-setting litigation and appeal, when in contrast, settlement offered immediate and much-needed results.

Further, the idea of organizing poor people as a community was hampered by the many demands on clients' lives: multiple jobs, insufficient child care, and so on. Community action required free time many could not spare. Enormous dockets made it difficult, if not impossible, for lawyers to devote much time to any given case. Pressure to provide services to the greatest number possible forced attorneys further to emphasize settlement over going to court. Even the seemingly unremarkable notion of having legal services lawyers act like "normal" lawyers—providing the full range of legal services to poor people that the rich enjoyed from their attorneys—went out the window as administrators set priorities for what types of cases would and could be handled. Further shaping such restrictions on service were ideas held by members of Congress, members of the bar, and others, of what type of relationship lawyers and poor clients should have. As LSP funding was subject to public scrutiny and influence in a manner that other types of legal practice were not, conceptions of the "proper" lawyer-client relationship, and the role of lawyers in helping the poor, were shaped in the crucible of politics.

Far from being determined by the subject matter of the practice, then, what this cursory look at LSPs shows is the extent to which a wide variety of factors, at both the micro-and macrolevels shaped the type of lawyering adopted. While the types spanned areas of practice, the factors influencing adoption of one type or another often transcended practice types. By understanding that there *are* different types of cause lawyering, while also understanding what those types look like, it is possible to better connect the forces that determine the ways in which lawyers conceive of and do their jobs. By presenting this typology, I hope that this process of mapping and understanding the field of cause lawyering can progress under a set of understandings and ideas shared by scholars studying lawyers in the past and present, in the United States and around the globe.

The *Cause Lawyering* volumes—those reviewed here and those to come—offer scholars an unparalleled opportunity to explore these and other questions. The collective efforts of the editors and contributors constitute a great leap forward for sociolegal scholars of the profession, not only advancing our knowledge and understanding of the field, but providing the material that will allow other scholars to make similarly significant contributions.

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