What Cause Lawyers Do *For*, and *To*, Social Movements

An Introduction

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The last half of the twentieth century in the United States was, in part, a story of law's role in movements for social change—from the struggle for African-American civil rights to efforts to secure equal rights for women, from the struggle to expand the reach of human rights to efforts to secure gay rights (Sarat, Garth, and Kagan 2002). In this story cause lawyers played an important, though controversial, part (Lobel 2003). They pressed the claims of oppressed people and disadvantaged groups and reminded Americans of our shared aspirations and ideals. They used legal institutions to energize a political process that all-too-frequently failed to live up to those aspirations and ideals (see Kinoy 1983; Hilbink 2003).

In the most idealized version of this period of American history, litigation mobilized movements, informed the public about particular injustices, and re-framed political struggles (for a discussion of this point see Epp 1998). This version is replete with the vindication of lawyers who fought skillfully on behalf of what, at the time, seemed to be the most hopeless of causes (Lobel 2003). It is also a reminder to lawyers of the importance of resisting the temptation to choose strategies that have the highest likelihood of prevailing in court in favor of those that push the envelope of conventional understandings and, in so doing, speak both to a broader political context and to history itself.

In our previous work we have attended to the ways lawyers construct causes and causes supply lawyers with something to believe in (Scheingold and Sarat 2005) as well as to ways commitment to a cause challenges conventional ideas of lawyer professionalism (Sarat and Scheingold 1998). In *Cause Lawyers and Social Movements* we shift the focus in two ways. First, we move from an analysis of causes to a concern with social movements. Second, we turn our attention

from the way cause lawyering articulates with the project of the organized legal profession to the explicitly political work of cause lawyers.

From Causes to Social Movements

For our purposes, a cause becomes a movement when it provides the basis for "a sustained series of interactions between power holders and persons successfully claiming to speak on behalf of a constituency lacking formal representation, in the course of which those persons make publicly visible demands for changes in the distribution or exercise of power, and back those demands with public demonstrations of support" (Tilly 1992: 306).[1] If causes are abstract and disembodied, movements tend to be more concrete and embodied in the people who work in and for them, the organizations that represent them, and in the actions taken to advance the movement's goals (see McCarthy and Zald 1977; Jenkins 1983; Buechler and Cylke 1997). If lawyers have great freedom in constructing causes, movements constrain lawyers in various ways, for example by setting their agendas, dictating strategic considerations, and/or offering distinctive sets of incentive and rewards (Handler 1978; Burstein 1991).

As this book demonstrates, although all cause lawyering cuts against the grain of conventional understandings of legal practice and professionalism, social movement lawyering poses distinctively thorny problems—taking most lawyers out of their comfort zones (Scheingold 1998). As we will show, causes and movements both invigorate and constrain lawyers. In associating themselves with a movement, lawyers are likely to find that they are called upon to sign over elements of their independence—asked, in effect, to surrender some of the autonomy they earned by becoming members of the bar and the sense of agency they sought in cause lawyering. On the one hand, they may be asked not to deploy the tools of their trade and, on the other, they may find themselves relegated to "second-chair" status within the movement.

In addition, because lawyers are by training and temperament comfortable in a courtroom, litigation is for them the line of least resistance. Of course, lawyers are not strangers to bargaining in the shadow of law, to trying their cases in the court of public opinion, nor to the rough and tumble of "inside the beltway" style politicizing—at every level of government. All of these activities were long ago incorporated into full-service lawyering in the profession as a whole (see, e.g., Kritzer 1991; Heinz, Laumann, and Nelson 1993). On the other hand, grass roots organizing and conducting political campaigns to broaden support for a movement's agenda are not activities that lawyers qua lawyers are likely to welcome or to feel well equipped to carry out.

One obvious solution to this problem is a division of labor between movement activists and cause lawyers. And, indeed, as McCann and Silverstein (1998) have argued, if lawyers are to resist the allure of litigation, they are best able to do so from within a social movement where legality will, perforce, be viewed within the broader context of movement strategies and the prioritizing of long- and short-term goals. However, to divide labor in this fashion tends to reinforce the second class, indeed the dependent, status of lawyers within the movement hierarchy.

Movements, in any case, tend to be resistant and intractable, thus forcing the burden of adaptation mostly on their lawyers (e.g., Silverstein 1996). However cause lawyers may wish to construe the cause, their influence is filtered through the perceived needs of leaders of the movement who must in turn take account, to a greater or lesser degree (depending on the structure of the movement), of the needs and desires of rank and file members (see Olson 1984; Burstein 1991). The problem thus posed is whether lawyers, with their penchant for taking charge, can serve, rather than seek to control, political organizations.

Independence is, of course, most likely to be compromised when cause lawyers work, not only for, but also, within the movement as, in effect, salaried employees. Alternatively, being a movement lawyer may entail remaining in private practice—perhaps on retainer for the movement or perhaps serving episodically as the movement's counsel. Well-organized and well-established movements are likely to expect cause lawyers to enlist for the long term, while ad hoc movements will feel constrained to accept cause lawyers on their own terms. In *Cause Lawyers and Social Movements* we ask what the uncertainty of autonomy and dependence tells us about the dependability of cause lawyering as a social movement resource, about what cause lawyers can do *for*, and *to*, a social movement.

From the Professional to the Political

Although our previous volumes were attentive to social movement issues—reporting the findings of numerous studies of cause lawyers working with social movements (see, e g., Kilwein 1998; Morag-Levine 2001; Israel 2005), in making social movements the centerpiece of this book we enter a political terrain that, although readily recognizable, introduces a notably new perspective. Instead of thinking of cause lawyers as professionals making independent choices among political and legal strategies in their very personal quests for something to believe in, the essays collected in this book start with social movements and examine what cause lawyers do *for*, and *to*, them. In so doing,

the essays foreground issues about the political nature and efficacy of cause lawyering.

Put another way, the paradoxical consequence of treating cause lawyers as role players in social movement dramas is to enhance the relevance of cause lawyering as political and social practice. Viewing cause lawyering through the prism of social movements, rather than vice versa, this book underscores the primacy of the political. It describes the distinctive resources and skills that cause lawyers can and do bring to social movements as well as the limits of those resources and skills and the dangers that law, legal action, and lawyers pose to movements.

Although scholars sometimes warn of lawyer domination of movements (Handler 1978), patterns of interaction generally are more complex and multidimensional than such scholars recognize (Silverstein 1996). During the earliest phases of organizational and agenda formation, lawyers help define the realm of the possible, offering advice about the relative efficacy of legal versus political strategies (Milner 1986). With their help, marginalized groups can "capitalize on the perceptions of entitlement associated with (legal) rights to initiate and to nurture political mobilization" (Scheingold 1974: 131). They contribute to what McCann (2004: 511) calls "'rights consciousness raising'" by providing a vocabulary drawing on, "legal discourses to 'name' and to challenge existing social wrongs or injustices."

Yet there is no guarantee that lawyers working for a cause or with a movement will offer distinct advantages (Milner 1986). Rights are, in some cases, tremendously significant, but lawyers are themselves often the most skeptical about the capacity of rights-based legal action to effect change. As McCann (2004: 519) observes, "Legal mobilization does not inherently disempower or empower citizens. How law (and therefore lawyers) matters depends on the complex, often changing dynamics of context in which struggles occur. Legal relations, institutions, and norms tend to be double-edged, at once upholding the larger infrastructure of the status quo while providing many opportunities for episodic challenges and transformations in that ruling order."

The Civil Rights Example

Close to the heart of any version of the history of the United States in the last half of the twentieth century, and of contemporary images of cause lawyers and social movements, is the story of civil rights and of the elimination of de jure discrimination from the lexicon of American law (Kluger 1975). And, at the heart of the story of civil rights is the Supreme Court's landmark 1954 decision in *Brown v. Board of Education* (1954). Yet it did not end the indignities that

the law itself had heaped on African-Americans. Its legacy, like the legacy of all great historical events, is, even today, contested and uncertain. *Brown* was at once a turning point and a source of resistance, a point of pride and an object of vilification.

As is now widely recognized, until 1954 the project of establishing the American Constitution was radically incomplete. It was incomplete because, in both chattel slavery and then Jim Crow, the law systematically excluded people from participating fully, freely, and with dignity in America's major social and political institutions on the basis of their race. But *Brown* changed everything. "*Brown*," J. Harvie Wilkinson (1979: 6) contends, "may be the most important political, social, and legal event in America's twentieth-century history. Its greatness lay in the enormity of the injustice it condemned, in the entrenched sentiment it challenged, in the immensity of law it both created and overthrew." It stood for the proposition that "race is an impermissible basis for governmental decisions" (Tushnet 1994b: 176). As the then-editors of the*Yale Law Journal* (1984: 981) put it in their celebration of the thirtieth anniversary of *Brown*, "No modern case has had a greater impact either on our day-to-day lives or on the structure of our government."

Ours is, however, a time of revision and mixed views about *Brown* and its legacy. Although some commentators have noted that it has not resulted in the elimination of racism in American society (Lawrence 1980), or even of segregation in public education (Orfield 1969), others suggest that *Brown* has been given too much credit for sparking racial progress (Rosenberg 1991). "[F]rom a long-range perspective," Michael Klarman (1994: 10) argues, "racial change in America was inevitable owing to a variety of deep-seated social, political and economic forces. These impulses for racial change . . . would have undermined Jim Crow regardless of Supreme Court intervention."

For scholars like Klarman, *Brown* stands not as a monument to law's ability to bring about social change, but instead as a monument to its failure to do so. In their view, whatever racial progress America has achieved cannot be traced back to *Brown*. "[C]ourts," Gerald Rosenberg (1991: 70–71) contends,

> had virtually no effect on ending discrimination in the key fields of education, voting, transportation, accommodation and public places, and housing. Courageous and praiseworthy decisions were rendered, and nothing changed . . . In terms of judicial effects, then, *Brown* and its progeny stand for the proposition that courts are impotent to produce significant social reform.

Still others remain unsatisfied with the doctrinal basis of the *Brown* opinion (see Washburn 1994). And some now say that the integrationist vision that is

most closely associated with *Brown* is inadequate to deal with the continuing subordination of African-Americans in contemporary American society (Flagg 1994).

A clear understanding of the record of civil rights lawyers is essential to working through the claims and counterclaims in which *Brown* continues to be embroiled (for an example see Mack 2005). This record also serves as an instructive point of departure for much of the research reported in *Cause Lawyers and Social Movements*. Specifically, the civil rights era in the United States supplies the most notable and the best documented example of cause lawyers working in ways that complicated, and perhaps frustrated, the work of building a social movement (see Greenberg 1994).

In that instance, attorneys for the National Association for the Advancement of Colored People (NAACP) who took the initiative in attacking racial segregation and achieved its milestone victory in *Brown*, fought tooth and nail against direct action politics of more radical organizations like the Student Nonviolent Coordinating Committee (SNCC) and the Reverend Martin Luther King, Jr.'s Southern Christian Leadership Council. Thus, although a civil rights *social movement* did eventually take shape and is generally credited with success in ending de jure segregation and in advancing integration, it did so in spite of, and in conflict with, the cause lawyers of the NAACP (see Morris 1984; also Mack 2005).

It would be easy, particularly in retrospect, to portray NAACP attorneys as shortsighted and misguided individuals who were simply blind to what others could readily see and understand. NAACP lawyers were, however, inspired by a faith in the efficacy of courts and law—by "the myth of rights." According to the myth of rights, "politics *is and should be* conducted in accordance with patterns of rights and obligations established under law" (Scheingold 2004: 13). In other words, once the courts speak, respect for the law is supposed to take over and compliance to follow—perhaps sooner, perhaps later. The underlying point is that the lawyers for the NAACP subscribed to a widely shared belief system, one embedded in the popular conscience as well as in the education and professional socialization of lawyers (Greenberg 1994).

Accordingly, the NAACP's campaign on behalf of civil rights should be seen less as an aberration than as a cautionary tale concerning the inertial tendencies of legal process, the validation of these processes by the prevailing political and legal cultures, and of the shortcomings of cause lawyers as movement leaders (see Tushnet 1987). It was their faith in the courts and in the law that initially led NAACP lawyers to pursue a litigation strategy and that sustained them even as a campaign of "massive resistance" was mounted against the *Brown*

decision (Tushnet 1994a; for a contrary view see Mack 2005). After all, the surest way to poison the ultimate fruits of litigation, according to this way of thinking, is to undermine respect for the law by giving up on the courts and resorting to direct action politics like sit-ins, freedom marches, and the like.

With all that said, cause lawyers were instrumental, in spite of themselves, in constituting the civil rights movement. The myth of rights not only fueled the original NAACP campaign but also generated hopes and fears once the *Brown* decision had decisively invalidated legally segregated schools. Belief in the myth of rights and thus in the *Brown* decision generated fears in the south that led to the counter-campaign of "massive resistance." Conversely, the televised spectacle of angry crowds at schoolhouse doors, the use of cattle prods, and the unleashing of dogs during desegregation demonstrations, as well as the murder of civil rights workers, were indirectly instrumental in sparking the civil rights movement and its achievements (Scheingold 1988).

Cause Lawyering for Right Wing Social Movements

If the history of the last half of the twentieth century was a history of civil rights activism, its successes, and its failures, the history of the early part of the new century may be a story a counter-mobilization and its apparent triumph (Crawford 1980; Diamond 1995; Hodgson 1996). Today it has become clear that the right has taken its cues from the left—constructing its own cultures of victimization and resistance as well as its own social movements—on behalf of property rights, against abortion rights, and so on—and deploying them legally and politically (Himmelstein 1990). They have recruited their own cadres of cause lawyers, who have crafted conservative versions of the politics of rights (Teles 2003).

Conservatives have both challenged egalitarian inflections of rights and proposed culturally resonant alternatives (Southworth 2005). In claiming that the fetus has rights, abortion foes are, of course, attempting to expand the meaning of rights beyond its traditional boundaries—altogether analogous to the efforts of their egalitarian counterparts on the left. Similarly, opponents of affirmative action argue for a color-blind interpretation of rights—a return in effect to a formal, decontextualized conception of equal rights and equal opportunity (Glazer 1975). Gay rights and American Indian treaty rights are then reinterpreted as special rights and thus at odds with equal rights (Goldberg-Hiller 2002; Dudas 2004).

Right wing cause lawyers have been particularly successful at establishing and funding foundations dedicated in part or in whole to legal advocacy (Hatcher

2002). At least three distinct camps of cause lawyering have emerged on the right. Two of them—*neo-liberal* advocates of property rights and *libertarians* who embrace a much wider range of the private rights—are well within the legal mainstream. Accordingly, they are inclined to privilege litigation because they can expect, at the very least, a sympathetic hearing from the courts. In contrast, *evangelical cause lawyering* repudiates rights as a cornerstone of politics and society. For evangelicals, the problem with rights is that they are secular, individualistic, and privilege personal entitlement. Evangelicals are, therefore, more inclined toward political mobilization and regularly engage in a politics of rights (den Dulk 2001).

Either way political mobilization proceeds from contested meanings with the objective of enlisting support not only from a core of true believers but also from the political mainstream. Not the least of the objectives of evangelical movements is, of course, to alter the composition of the courts to make them more receptive to evangelical aspirations. In sum, conservative counter-mobilization, although politically at odds with egalitarian evocations of the politics of rights, seems analytically indistinguishable from them (Heinz, Paik, and Southworth 2003).

Social Movement Politics

In order to fully appreciate the complex relations of cause lawyers and social movements of the kind exemplified in twentieth century civil rights movements or twenty-first century right wing movements, it is necessary to understand what is distinctive about movement politics whether of the left or the right—and in particular how they differ from conventional interest group politics. At first glance, there does not seem to be much to distinguish a social movement from an interest group (McCarthy and Zald 1973, 1977). And, indeed from an organizational perspective there often is considerable overlap. Labor unions and a host of advocacy organizations working on behalf of environmental protection, property rights, racial justice, right-to-life issues, and so on are primarily interest groups, but they may also serve as sites of social movement politics.

An organizational perspective is, however, inadequate for understanding social movements that are not so much organizations as collective voices of political protest or moral visions (see Tilly 1992). Social movements may or may not be represented by an umbrella organization, though they may well be sustained by component organizations—each representing a divergent strand within the movement. But thinking in these organizational terms obscures what is most distinctive about movements and what cause lawyers contribute to building, maintaining, and realizing the aspirations of social movements.

It is the breadth of their aspirations and a distinctive mode of politics that are the defining traits of movements (Tilly 1992). As McCann (2004: 509) puts it, "social movements aim for a broader scope of social and political transformation than do most more conventional political activities . . . they are animated by more radical aspirational visions of a different, better society." Given these objectives, it follows that social movements draw sustenance from, and give voice to, aggrieved—indeed deeply aggrieved—elements of the population. Because the normal channels of politics tend to be impervious to their needs, and/or are so perceived, movements may turn to unconventional political action. As McCann (2004: 509) observes, "they are far more prone to rely on communicative strategies of information disclosure and media campaigns as well as disruptive 'symbolic' tactics such as protests, marches, strikes, and the like to upset ongoing social practices."

As a result, cause lawyers may find themselves in court, defending movement activists who have participated in direct action campaigns that disrupt public order. As defense counsel, they can offer preventive assistance by clarifying the boundary between lawful and unlawful disruptions. And when movement activists cross that boundary, or are deemed to have done so by the authorities, cause lawyers can either mount a conventional defense in hopes of securing an acquittal or they can, ordinarily at the behest of and under instructions from the activists, politicize the trial so as to generate public support for the movement (Kinoy 1983). These strategies need not be mutually exclusive. Thus, a defense directed at jury nullification creates an intermediate stage that is part conventional, and part political, trial. Whatever the tactics, defense of movement activism puts cause lawyers, by definition, in the position of responding reactively to initiatives undertaken by movement leaders. Still, when cause lawyers take an active role in the politicization of criminal trials, they are in effect seeking resonant social meaning beyond the realm of positive law.

Insofar as cause lawyers think of law as more than a set of authoritative institutions, written rules and established doctrines, and instead view it as part of a cultural process in which rules resonate within the broader culture, law can serve as a useful site for articulating and advancing alternative visions of the good. As Judith Butler (1990: 1716) reminds us, "... [T]he law posits an ideality . . . that it can never realize, and. . . this failure is constitutive of existing law." Law exists both in the "as yet" failure to realize the Good and in the commitment to its realization. Confronting this tension in law is the distinctive work of "cause lawyers" wherever they practice, and whatever movements they serve. Cause lawyers use their professional skills to move law away from the daily reality of injustice and toward a particular vision of the Good. For them, the

Good is known in the causes for which they work even as its realization may be deferred.

These more expansive aspirations are more likely to emerge when cause lawyers switch from defense to offense and deploy law and litigation as a sword rather than a shield. The courtroom becomes an arena of movement activism, and cause lawyers, almost by definition, are elevated from support staff to positions of leadership. In this sense cause lawyers' service to social movements begins with legal expertise and access to the courtroom, but that access can be leveraged so as to contribute to the construction of causes and the mobilization of movements. This leveraging relies less on legal expertise than on a willingness to participate with activists in the politicization of the law.

Politicization, in turn, is dependent on the recognition and exploitation by both cause lawyers and movement leaders of the cultural resonance of rights and legality. Simply put, cause lawyers contribute most compellingly to movements not as a result of the direct consequences of litigation but indirectly through deploying courtroom encounters strategically—irrespective of whether judicial decisions go in their favor (McCann 1994). There are, thus, ample opportunities for cause lawyers to make meaningful, indeed seminal, contributions to the building, maintenance, and success of social movements.

To the extent that they are prepared to deploy legality as a political and cultural resource, cause lawyers are uniquely positioned to politicize grievances, mobilize activists, and leverage law and rights within public and private institutional arenas. To do so, however, means lawyering outside the lines of mainstream practice and of established patterns of cause lawyering as well. Today's cause lawyers are less likely to be constrained, as were the NAACP lawyers of the mid-twentieth century, by an internalized belief in law as a necessary and sufficient condition of social change.[2] Nonetheless, the politicization of legal practice is neither free of costs nor, as the chapters in this volume make abundantly clear, is it unproblematic.

Constituting Social Movements: Rights as a Political Resource

Cause lawyers who are willing to confront the costs and problems of politicization can, however, make seminal contributions to the building of social movements. McCann (2004: 511) describes a four-stage process of movement building that draws its sustenance from legality and more specifically from the cultural resonance of legality, four ways in which cause lawyers do things *for* social movements. The process begins with building a collective sense of grievance and entitlement that generates, "processes of cognitive transformation in the movement constituents." Rights claiming, thus, becomes intrinsic to

the construction of a cause rooted in grievance and validated by discursive association with constitutional and legal rights. The base is activated not so much by grievances, as such, which in all likelihood have been long experienced—or even by giving voice to those grievances. Instead, activation is a product of identifying grievances with the sense of legitimacy, entitlement, and the collective identity attaching to legality.

The second stage entails the use of litigation, or the threat of litigation, to negotiate concessions directly and/or to generate exogenous pressure to soften up the opposition. In the former instance, movement leaders use the costs and the uncertainties of litigation to avoid litigation. "For one thing, organizations targeted by reformers often are well aware that litigation can impose substantial costs in terms of both direct expenditures and long-term financial burdens . . . More important, powerful public and private interests typically fear losing control of decision-making autonomy . . . to outside parties such as judges" (McCann 2004: 514). In the latter instance, legal and extra legal tactics are combined to generate political support for movement goals. As McCann notes (2004: 515), "Political scientist Helena Silverstein (1996) has demonstrated how. . . [i]n a variety of instances . . . litigation has been used to dramatize abuses of animals to embarrass particular institutional actors, and to win favorable media attention." Thus the second stage combines the institutional and the cultural resources of legality to shift the focus of movement activity from raising the consciousness of its members to generating pressure against its opponents.

In the third stage the institutional levers of legality are deployed to gain compliance with court decisions and to pursue their policy implications. This ordinarily takes shape as institutional reform litigation in which courts, in effect, become executive agencies—by, for example, providing injunctive relief and deploying special masters (Chayes 1976). "Social movement groups often use litigation specifically to create such formal institutional access to state power as well as to apply pressure to make that access consequential. In this way, legal resources often provide a series of more refined tools—basic procedures, standards, and practices—along with blunt leveraging tactics for shaping the 'structure' of ongoing administration at the 'remedial' stage of struggles over policy" (McCann 2004: 517). As McCann acknowledges this may be the most problematic stage of movement building either because courts are short on coercive resources or because "judges and other legal officials shrink from cases requiring great technical knowledge and experience" (McCann 2004: 517).

Finally, McCann calls attention to what he terms the "legacy" that legal struggle can leave to social movements. He draws upon his own research on the pay equity movement to discuss the potentially transformative secondary

consequences of litigation. "[W]orkers," he says (2004: 518), "repeatedly talked to me about matters of . . . workplace empowerment. They told me how their sense of efficacy as citizens was greatly enhanced, and even how their identification with other women workers had been increased markedly. This was related to a growth in the organizational power of women within their unions, and of their unions relative to their employers." Here, the focus turns from tangible results back to consciousness raising and from outside agencies to the internal energy generated within the movement itself. But perhaps even more noteworthy is McCann's finding of the broad sense of empowerment that flowed from the struggle itself.

Yet it is clear that as much as law and lawyers may do *for* social movements they may do things *to* them as well (see generally Morris and Staggenborg 2004). Deploying law within the context of movement mobilization and political action has undeniable advantages over simply allowing legality, as such, to follow its own doctrinal and institutional logics. However, the mobilizing capacity of litigation may not survive a string of judicial defeats that make the law less and less resonant to movement activists. In addition, the record tells us that, as was the case with abortion rights, mobilization can lead to counter-mobilization—resulting in a standoff or something worse (Meyer and Staggenborg 1996). The point is not so much that politicization is a high-risk strategy, although it is, but rather that just as the status of cause lawyers within the movement may be unstable and unpredictable, so too may be the strategy itself.

In addition, cause lawyers may continue to think more like lawyers than like activists, and indeed if they are to have any distinctive value to movements it is precisely by being and thinking like lawyers. However, because they are comfortable with, and professionally attuned to, litigation they may push movements to legalize their agenda with a resultant narrowing of focus and loss of momentum (see Zald and Ash 1966; McCarhy and Zald 1987). Similarly, cause lawyers may, whether wittingly or unwittingly, parlay their expertise and their social capital to redirect the trajectory of the movement. In so doing, they may undermine the leadership and stifle the grassroots energies necessary for success of the movement (Handler 1978; Burstein 1991). If so, law becomes not the ally of politics but its enemy, and legal expertise works at cross-purposes to democratic participation.

Overview of the Book

The first section of the book—*The Life Cycle of Movements and Movement Lawyering*—highlights the importance of history in shaping what cause lawyers do *for* and *to* movements. Here history has two referents. In the first, the chapters

in this section attend to the broader historical contexts and time periods that offer particular opportunities and challenges for cause lawyers and the movements with which they work. What happens to the work of cause lawyers and the activities of social movements in periods of "rights activism" or when rights activism recedes? In addition to addressing this question, these chapters also examine the significance of the history of a movement itself. They show how lawyers fashion and respond to periods of mobilization, maintenance, and decline in movements.

In the opening chapter, "Retrenchment and Resurgence?: Mapping the Changing Context of Movement Lawyering in the United States," Michael McCann and Jeffrey Dudas examine cause lawyering in social context, arguing that the analysis of the latter is essential for that of the former. They contend that explorations of context are important for studying the relationship between cause lawyering and movements for two related reasons. First, they maintain that "scholarship about social movements . . . is overwhelmingly focused on analyzing context, on the specific institutional and organizational factors that shape political struggle." Second, they argue that "the potential contributions of cause lawyers to movement activity everywhere are variously enhanced or constrained by key features of the historical context."

McCann and Dudas explain "how the relatively favorable context for rights-based, legally oriented social movement activity in the United States in the middle part of the twentieth century gave way to an increasingly unsupportive, hostile context by the century's end." And in so doing, they both provide a specific historical backdrop for many of the other chapters in this book and highlight the need for "greater scholarly attention to the social context of cause lawyering activity in general."

Specifically, they suggest that these changes have made the modern presidency "an obstacle to progressives." Matters are more muddled in the federal courts where, the authors contend, there is a "curious mix of judicial restraint, on the one hand, and judicial activism, on the other hand," that "represents an occasionally incoherent compromise" between entrenched constitutional norms and the "hybrid New Right political vision." In Congress, however, there is little compromise, and the "ideological character" of the institution, McCann and Dudas contend, makes it "unsurprising that the progressive legislation and appropriations bills . . . have largely disappeared from the legislative agenda."

With social organizations and foundations, the authors see a similar trend. They suggest that nowhere "is the conservative appropriation of progressive tactics over recent decades more apparent than in tapping . . . social foundations for support." The same is true, they argue, of the legal profession as a

whole: "Organizing themselves into such groups as the Manhattan Institute, the Pacific Legal Foundation, and the Federalist Society, right-wing advocates have emulated the tactics used by left cause lawyers." Finally, McCann and Dudas's analysis of popular culture is similarly bleak, because for them the "outstanding fact of contemporary America," the "right turn" toward conservative ideals, is as much a product of popular cultural resentment as of shrewd political elites.

McCann and Dudas, thus, "map" the changing macro context of cause lawyering in the United States. They find, in sum, that many of the "changes in the larger American political map can be traced through the rise and fall of the Democratic Party's New Deal coalition," but temper this claim by noting that even these broad transformations were themselves situated within a larger, domestic and international context. The result is that "American lawyers (who) would take rights claims to court in the hopes of sparking a movement, generating public sympathy, and winning elite support typically face a far more hostile cultural environment in 2004 than they did in 1954."

Thomas Hilbink, in "The Profession, The Grassroots and the Elite: Cause Lawyering for Civil Rights and Freedom in the Direct Action Era," examines the life cycle of movement lawyering through the experiences of cause lawyers involved in the "direct action phase of the civil rights movement" and considers how their understanding of cause lawyering "reflected and reacted to social and professional experiences, circumstances, and beliefs." Hilbink contends that over time this resulted in "a new concept of lawyering that challenged contemporary conceptions of practice and professionalism both within and outside the movement."

Specifically, Hilbink documents the emergence of "Grassroots" cause lawyering and the displacement of "Proceduralist," "Elite/Vanguard," styles of cause lawyering. At the start of the direct action phase, Hilbink argues, the approach of lawyers working for the NAACP Legal Defense Fund was most prominent—an approach that was dominated by "a belief that society's ills can be cured through legal action." In its "focus on law as the primary means for bringing about change," Hilbink argues that those lawyers embraced an "elite/vanguard" method of lawyering.

The next group Hilbink examines, the Lawyers' Committee for Civil Rights Under Law, was, on the other hand, less concerned with helping activists than it was in evincing a "strong dedication to the legal system itself." In this sense, Hilbink contends, the Lawyers' Committee represented a prime example of "proceduralist" cause lawyering: the group was "dedicated to defending the legal system and upholding the duties of the profession."

Finally, he looks to a different set of legal organizations—the Congress for Racial Equality (CORE), the Student Nonviolent Coordinating Committee (SNCC), and the Lawyers' Constitutional Defense Committee (LCDC)—that fall under the "grassroots" umbrella. These lawyers viewed the civil rights struggle "in much the same terms as the activists themselves." Indeed, for these particular organizations, lawyers "acted as collaborators rather than directors, even in the realm of litigation"; they were "not the leaders of the movement, and not the heart of the movement," but they were, nonetheless, "a part of the movement."

Despite these distinctively different frames of reference, organizational affiliations, and initial agendas, Hilbink finds that "the experience of lawyering in the South had a significant impact on many (if not most) of the attorneys, forcing them to reenvision the legal system, the cause, and the role of lawyers within the cause." For example, many volunteers for the Lawyers' Committee experienced violence first hand and, more generally, concluded "that progress could not be made through the existing power structure." Others "went to the South with the belief that they were representing individuals," but returned knowing "that they were defenders of a movement."

Hilbink concludes that "experience in the field . . . forced attorneys to reconsider understandings of the profession and the profession's role in American society, and, perhaps more importantly, their role as lawyers working in the context of (if not directly with) the movement." The assumption that "lawyers must be neutral, disinterested, and dispassionate representatives of individuals" was challenged, and, for many civil rights lawyers, it would remain so forever.

The next chapter in this section explores the shifting role of cause lawyering in more than thirty years of same sex marriage litigation. Barclay and Fisher take as their starting point two cases decided by the Washington Court of Appeals: the first of which, *Singer v Hara*, held that "the state's denial of a marriage license" to same sex appellants is "required by our state statutes and permitted by both state and federal constitutions"; the second, *Anderson v King County*, found that Washington's prohibition of same sex marriage violated the state's constitution. For the authors, the switch in outcomes "demonstrates the dynamic nature of legal interpretation in relation to an unchanged set of laws." Despite the fact that "the legal claims presented on each occasion are remarkably similar," and that "each claim was initiated and litigated by a cause lawyer" the outcomes were markedly different. Barclay and Fisher suggest that these snapshots of legal history "offer insight into the role of litigation at divergent moments in the development and promotion of new social definitions with obvious legal overtones."

The two cases appear so different from each other that it would seem easy to assume there is no relationship between the two, or that the earlier serves only as a "substantial and negative precedent" for the subsequent same sex marriage litigation. And yet, Barclay and Fisher argue, not only did *Singer* present no obstacle to later same sex marriage litigation, but also "the 1974 case represents a different aspect of cause lawyering," and, as such, "was a necessary predecessor" of the latter case. Indeed, given the social and legal context of the time, it is, the authors note, "hard to imagine the 1974 case in Washington leading to a legal success." What it did do, they argue, is create publicity: the 1974 case (and others like it) "can be identified as the first shot across the bow of the socially accepted."

Because, law "plays a role in the production of naturalized patterns of behavior," the filing of the claim and associated publicity begins the process of "denaturalizing the current notions of sexuality, marriage, love, and commitment." Early litigation was also important because it let the gay and lesbian rights movement "publicly proclaim [its] presence and signal that [it] was active." Litigation "reappropriates the idea of same sex marriage and returns its 'ownership' to lesbian and gay individuals." In short, Barclay and Fisher maintain, in "the act of litigating, same sex marriage is transformed from the ridiculous to the possible."

The 2004 case occurred at a very different historical moment. Barclay and Fisher maintain that "the robust and serious national discussion" about gay marriage, and the "myriad of lesbian and gay rights organizations" that were active in it changed the atmosphere in which litigation occurred. It was in this context, they argue, that "litigation played a substantially different role than it did for the 1974 case." Indeed, in the case of Washington, they contend, "the litigation appeared designed to place the state legislature on notice to accept the idea that same sex marriage was about to become reality." Barclay and Fisher argue that in "the 1974 and the 2004 Washington cases we can observe cause lawyers adjusting effectively to the social context of the era and the related social recognition of the relevant cause at each stage."

From the social movement perspective, "litigation acted as a means," according to Barclay and Fisher, "to allow membership involvement in defining the direction of a movement in light of its geographically dispersed and organizationally divided structure." Put simply, litigation operated as "an informal referendum of the future direction of the movement," with strong support for the direction indicated by "repeated emulation on the same litigation in new locations by different local organizations." Relative lack of emulation in the early 1970s indicated a lack of organization and enthusiasm; repeated emulation thirty years later, by contrast, indicated a robust interest and organizational

effort, including "relative unity among organizations and cause lawyers." Early litigation efforts may have started out as a means to "effectively reclaim ownership and legitimacy over the idea of same sex marriage," but they became a way of developing "input into the direction and goals of the larger movement." Arguably, then, Barclay and Fisher provide another example of the shift in direction, called to our attention by Hilbink, from "elite/vanguard" cause lawyering toward "grass roots" cause lawyering.

Susan Coutin examines the life cycle of movement lawyering by focusing on efforts of lawyers working on behalf of Central American refugees and suggests that the recent history of this movement has been fueled and reshaped by cause lawyering. Legal developments in this area, she contends, have "redefined causes, constituencies, and agendas, even as changed circumstances gave legal developments new meanings." Drawing on three decades of research, Coutlin first analyzes the efforts of "cause lawyers and solidarity workers to obtain political asylum for Central American refugees during the 1980s." Next she describes "how Central American peace accords and US immigration reforms forced both advocates and cause lawyers to change strategies." Third, she delineates recent realignments that have produced unprecedented legal regulations. Throughout, Coutin attends "to the shifting relationships between causes, lawyers, and law."

She begins her chapter by noting that, during the 1980s, efforts to secure asylum were undertaken by religious groups, political activists, and legal advocates who "sought to establish that the US government was discriminating against Salvadoran and Guatemalan asylum seekers due to foreign policy considerations." To prevent Salvadorans and Guatemalans from being deported, Coutin continues, "solidarity workers sought to mobilize the law": "Volunteers connected Salvadorans and Guatemalans who were in deportation proceedings with attorneys who were willing to represent asylum seekers on a pro bono basis." Other legal advocates "filed class action suits designed to force the INS to change its treatment" of these asylum seekers—actions that, Coutin says, were part of a broad attempt to challenge immigration officials' treatment of Central Americans.

Some advocates, in addition to filing class action lawsuits, (unsuccessfully) sought legislative change that would have granted "Extended Voluntary Departure" status to Salvadorans. Although the bill "languished in Congress," other lawyers brought suits to bar future prosecutions of sanctuary workers. Ultimately, they had some success: a settlement was reached establishing that "every Salvadoran and Guatemalan who was in the United States prior to certain dates "had the right to apply or reapply for political asylum." But the settlement was not without its drawbacks, because the agreement put the asylum seekers "in an

ambiguous position," leaving them legally vulnerable and granting them only precarious residency.

In the early 1990s, Coutin notes, "the Central American solidarity movement declined significantly," as a result of several factors, including the fact that "sanctuary, which had been a key component of the solidarity movement, was no longer perceived as the most appropriate form of advocacy." But still, she notes, "cause lawyers and Central American activists continued to seek a permanent immigration remedy for" the precarious immigration settlements of the 1980s. But matters were complicated by "the fact that peace accords were signed with El Salvador in 1992"—putting the question of asylum and deportation in a new light. And when "efforts to obtain a blanket grant of permanent residency foundered," and "antiimmigration sentiment in the United States grew"—resulting in legislation like the Illegal Immigration Reform and Immigrant Responsibility Act—that dramatically altered the terrain.

This new legislation led, in Coutin's words, to "unlikely alliances and unprecedented regulations." Indeed, through a multiparty process "that one participant described as 'torturous' . . . regulations that created unprecedented solutions to a series of debates were crafted." This process resolved debates over who should adjudicate asylum claims; debates over "the enumeration of hardship factors" that would be of importance in determining the appropriateness of deportation; and debates over "whether or not the INS could grant a blanket finding of hardship" to the asylum-seeking groups in question. The new regulations were "a victory for Salvadoran and Guatemalan refugees."

In the end, Coutin maintains that the work of cause lawyers in this instance "not only reshaped refugee law and procedures but also empowered immigrants and inspired renewed activism." It demanded that lawyers serve the movement with both their legal skill and their political commitments.

Stephen Meili's "Consumer Cause Lawyers in the US: Lawyers for the Movement or a Movement unto Themselves?" examines cause lawyering and US consumer protection over the past fifty years and assesses the efficacy and legacy of legal mobilization strategies in the consumer protection movement. Drawing on a "political process model," he claims that "social movements are rational attempts by excluded groups to mobilize sufficient political leverage to advance collective interests through noninstitutional means." In the consumer movement cause lawyers have not focused obsessively on a single tactic, like litigation, but have rather "altered their strategy depending on a host of factors, including the existing political climate." Context is important, and what cause lawyering does *for* and *to* movements responds to it. Thus it is only within the past decade "that litigation has become the primary legal mobilization strategy in the

consumer movement." Prior to that time, Meili says, "consumer lawyers were far less prominent in the overall movement, and those who were involved focused their efforts more on community-organizing" and "legislative advocacy" than they did on litigation.

This began to change in the 1980s, when, with the rise in Ronald Reagan and free market conservativism, "legislative advocacy on behalf of consumers became much more difficult." Because the federal government drastically reduced funding for "legal services programs around the country"; because "it became virtually impossible to enact new laws that would in any way regulate the private sector"; and because "the Reagan Administration appointed leaders to consumer protection agencies who were either hostile or indifferent to those agencies' underlying mission," pursuing legislative change became far more difficult. The changing political realities of the 1980s created a kind of "pragmatic shift" in how cause lawyers operated: they "altered their strategy so as to maximize their own political leverage as well as that of individual consumers." This shift led to a number of strategic and organizational changes beginning with an increased emphasis on litigation.

Not surprisingly, the increased prominence of litigation led to a tremendous expansion of consumer cause lawyering within the movement and the growth of a significant distance between consumer cause lawyers and the consumer movement. This finding offers the volume's first, and perhaps, its most dramatic example of the concern of scholars, mentioned at the outset of this introductory chapter, who "warn of lawyer domination of movements." In this instance, Meili argues that the distance between consumer lawyers and consumer activists doesn't just change the relationship between lawyers and the social movement. It has, in addition, transformed the lawyering organization into something akin to its own social movement.

Surprisingly, the increased prominence of litigation has led not toward but away from consumer *rights*. "One of the most striking aspects of the rise in prominence of consumer cause lawyers within the US consumer protection movement," he submits, "has been the concomitant deemphasis on consumer rights within the movement as a whole." Although the consumer movement had great success creating rights in the middle of the twentieth century, many of the lawyers and advocates Meili interviewed "downplay the importance of rights in movement work"; some even see rights as "harming the overall movement." For others, the lack of emphasis on rights stems from "the sheer breadth of issues and concerns that fit within the umbrella of 'consumer protection.'"

The next section—*Lawyers and Activists/Lawyers as Activists: Professional Identities and Movement Politics*—explores the role of legal expertise in social

movements, the professional identities of cause lawyers, and the ways in which movement activism shapes the practice of law. It describes the various roles that cause lawyers play in social movements and asks whether lawyers can be activists and still remain faithful to their professional role. It describes the way nonlawyer activists understand what cause lawyers do *for* and *to* social movements. The chapters in this section highlight the suspicions that seem endemic to the activist–lawyer divide while also taking up the complex negotiations that go on between activists and lawyers.

We begin by considering the question of how influential cause lawyers are in social movements. In "To Lead With Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements," Sandra Levitsky claims that "legal advocacy organizations stand in a formidable position to both dictate the terms of interorganizational relations and influence the direction of movement activity." Taking as her example interorganizational relations in the Chicago gay, lesbian, bisexual, and transgender (GLBT) movement, she argues that "while legal advocacy organizations do assist other organizations in the movement, interorganizational relations are defined by unilateral, rather than interdependent, cooperation." Specifically, "there was little evidence that law organizations . . . relied on the expertise or experience of nonlegal GLBT organizations." Indeed, they "rarely solicited assistance or advice from other organizations in their own legal efforts," and none of the lawyers in her study "could point to a single case in which street protest organizations assisted their efforts."

This often leads to a sense among the social movement organizations that "the agendas of legal advocacy organizations were formulated in an insular, exclusionary way." The feeling that legal organizations were "imposing their agenda on the rest of the movement" leads to resentment. Even when the legal work has been positive and effective, the activists Levitsky interviewed "returned again and again to the point that" legal organizations "have 'forced' their issues onto the rest of the movement." One of the reasons they are able to do so, she argues, is that with budgets that "dwarf those of the rest of the GLBT community," these organizations are able to cultivate media attention and hire full-time professional staffs.

Her findings, Levitsky argues, "stand in stark contrast to the depiction of legal advocacy organizations as just one group among many equivalently positioned actors in a pluralistic movement." In fact, she concludes, actors within movements are "very differently situated"; and, as a result, social movements activists who work with cause lawyering groups risk being (or feeling) overshadowed and marginalized.

Levitsky's picture of lawyer dominance is, however, not replicated in other contexts. Indeed in the next chapter, Anna-Maria Marshall, focusing her analysis on the movement for environmental justice, describes its efforts to challenge environmental hazards, promote democratic participation in important public decisions, and connect environmental quality to broader issues of social injustice. In each of these areas lawyers "get involved by educating activists about the obscure regulatory and administrative procedures that characterize environmental decision making and by litigating disputes among activists, corporations, and the government." Nonetheless, lawyers are considered outsiders to the movement. Thus, although "environmental justice organizations turn again and again to litigation to pursue their goals," they "often find the legal system inhospitable to their claims, and without the political support of a dynamic movement organization, these legal campaigns usually fail."

At the heart of the matter, according to Marshall, are the conflicting demands faced by social movements when choosing their strategies and tactics: they need to be "convincing with respect to political authorities, legitimate with respect to potential supporters, rewarding with respect to those already active within the movement, and novel in the eyes of the mass media." The demands are not entirely compatible; more "confrontational strategies," for example, "appeal to loyal activists," but "risk alienating the public and policymakers whose support is often necessary to make the changes the movement seeks."

Legal strategies "fit uncomfortably" between institutional and confrontational approaches. Although courts are "state institutions that rely on public norms," legal strategies, Marshall maintains, are also "inherently confrontational." They operate on a number of levels: litigation "clearly attributes responsibility for those grievances to identifiable corporate and state elites," and can "be an effective means of framing . . . conflict" by providing "powerful motivation for participation in movement activity." It is the diverse, multifaceted character of legal and social action—the fact that it does "not fall neatly within the dichotomous institutional and extra-institutional categories but rather lies along a spectrum"—that Marshall suggests sets up potential tension between activists and lawyers.

Still, Marshall maintains that, "lawyers and grassroots activists can cooperate in the use of direct action techniques to advance environmental justice goals," especially when they are "enhanced by mass participation." Although there is "at best (a) tenuous relationship" between cause lawyers and environmental movements, such lawyers often are ideologically committed to the cause and contribute "to the overall movement." Indeed, cause lawyers may be in a unique position to "tailor legal strategies" to fulfill the "participatory potential" of social

movements, and can frequently, despite the resistance of activists, "shape the direction of the movement itself."

Following Marshall, Lynn C. Jones continues the exploration of the ways in which lawyers impact movement processes—of what they do *to* as well as *for* the movements with which they work. To do so, she introduces the concept of framing and goes on to explore how activists and cause lawyers interact within the framing process. She contrasts her approach to traditional sociolegal analysis, with its focus on lawyers acting as 'hired guns' who help movements accomplish particular goals that are set by movement activists. In so doing, they ignore both the interactive character of framing and its ideological work.

Social movement activists, Jones argues, "single out some existing social condition and redefine as unjust what was previously viewed as unfortunate, yet tolerable." Then they "frame the conditions by assigning blame . . . and then suggest a line of action and who should be responsible for such action." Since "all lawyers are granted the task of defining problems, of fitting a clients' grievance into a nameable offense," it stands to reason that cause lawyers will act in a similar capacity in movements, helping to "frame grievances and construct a remedial plan of action." They do so by articulating frames in "legally relevant ways."

Although their use of legalese and their reliance on professional knowledge often confuses and alienates the movement participants, cause lawyers, particularly those who work closely with movements, are, she argues, very much aware of the broader impact of legalization on a movement over time. Accordingly, "activist lawyers do not always automatically turn to litigation, but work to recognize a point where a lawsuit might work best or is the only solution."

There are, moreover, multiple points of convergence. Perhaps none of these is more central than "the criticism of the system of inequality that is perpetuated in this society"—what Jones calls the "haves come out ahead" frame. Because, in addition, the "rights frame" remains the "master frame used by most movements," it would seem "logical that movements will seek corrective action in the courts." Lawyers also participate in "counterframing," namely "attempts to rebut or neutralize an opposing collective action frame or an articulation made by an opposing movement organization." Finally, Jones analyzes what she calls "prognostic or motivational framing," which occurs when lawyers "describe the chance of success in courts and whether using the courts is even appropriate action for the movement to take." In sum, Jones sees the study of framing as important "for explaining the link between movement ideologies, tactical choice, and cause lawyers, regardless of context."

Kevin den Dulk's "In Legal Culture, but Not of It: The Role of Cause Lawyers in Evangelical Legal Mobilization" describes what cause lawyers do *for* and *to*

one of today's most contentious social movements, the evangelical movement that entered public life "during the late 1970s and 1980s" and, unlike Levitsky, den Dulk finds that lawyers and activists exist in a cooperative, if not totally harmonious, relationship.

Focusing primarily on abortion rights and church-state law pertaining to education, den Dulk offers some "theoretical preliminaries" for studying evangelical rights mobilization. First, while many sociolegal scholars view conservative rights mobilization as "simply a status quo reaction to . . . egalitarian rights claims," the "story of evangelical rights mobilization is," den Dulk argues, "more complex than a straightforward account of reactionary conservativism." Indeed, evangelical rights mobilization "did not so much reflect an opposition between egalitarianism and antiegalitarianism as it revealed a conflict over different understandings of equality itself." In other words, evangelical cause lawyers reconstrued and redeployed progressive rights talk.

Den Dulk acknowledges that it is "somewhat surprising . . . that evangelicals have paid so much attention to legal ideas and activism." Indeed, evangelicals "avoided courts as a place for cultural contestation well into the 1970s." On the other hand, although their moral campaigns preceded evangelicalism's overt foray into the legal arena, den Dulk claims that "the movement itself was always intimately linked to the politics of rights," to such an extent that "the distinction between moral/religious grievances and legal rights was thoroughly blurred." It was, however, not until "intellectuals and other elites within the broader world of evangelicalism became convinced that 'secular forces' must be confronted in terms of a theology of activist politics that evangelical cause lawyers emerged." They came to realize that it was necessary "to do more than merely publicize grievances and opportunities for redress"; they had to "provide a religious justification for why progressive rights-mobilization was a threat at all and why their fellow evangelicals ought to mobilize to combat it." It was this realization, den Dulk claims, that led to an "innovative use of rights." Specifically, it was a "confluence of legal and extra-legal ideas" that "shaped the way cause lawyers in the evangelical tradition viewed the efficacy of the politics of rights."

Among the earliest steps in this direction was Jerry Falwell's Moral Majority Legal Defense Foundation, which sought to "defend believers from abridgments of their freedoms and help reclaim a Judeo–Christian heritage that had been lost in thirty years of 'secularist' interpretations of the Constitution." In the area of educational rights, evangelical groups like the Center for Law and Religious Freedom (CLRF) argued for "equal access"—the principle that "religious and nonreligious individuals and groups alike ought to have the same opportunities to [access] public goods." In addition, evangelical leaders made explicit calls

for Christian cultural (and particularly legal) engagement, drawing analogies "between civil disobedience in the civil rights movement and civil disobedience against abortion rights."

The agenda of lawyers for the evangelical movement was, however, broader and more ambitious than can be captured by comparisons to the NAACP Legal Defense Fund and the battle against the legal discrimination suffered by African-Americans. "It is one thing," den Dulk points out, "to defend one's slice of culture, as equal access efforts attempted to do for evangelicals; it is another to attempt to transform the culture as a whole." Evangelicals want to use law to secure a particular kind of freedom, "the freedom to be a certain kind of person, not simply freedom from constraints." For this reason, den Dulk contends, "many evangelical firms expanded their agendas to include matters that are not directly related to the autonomy of religious practices and institutions"—and nothing was (or is) higher on those agendas than abortion. In the evangelical movement, then, we have an instance of cause lawyering motivated by "both legal and extralegal ways of evaluating the social and political world."

"Intersecting Identities: Cause Lawyers as Legal Professionals and Social Movement Actors" concludes this section by exploring "the meaning of lawyers' intersecting professional identities" and focusing on "lawyers' own perceptions and understandings of their roles" in social movements. Drawing on two sets of interview data, Corey Shdaimah argues that cause lawyers see themselves "as part of broader movements for social change and measure themselves against such movements." This is true, Shdaimah contends, "even if the movements with which they identify are incipient [or] otherwise latent."

Among the lawyers she studied, commitment to their respective movements runs deep: "Without exception the lawyers interviewed explicitly chose the legal profession as a means to promote social change"; for most, "it is the cause rather than the law that is the centrifugal [sic] force," and so "the profession as such holds less sway than does the social change goals they wish to pursue." Indeed, for many, "a career in law was not . . . their first choice": more than one of the lawyers had been "involved in social movement activities prior to choosing law," and many chose law only after "weighing the instrumental value of a law degree and the leverage that comes with it."

Despite the "initial optimism expressed by left-activist cause lawyers who started their practice in a political and social climate that augured hope, much of that initial hope was not realized." Given the kind of political and legal climate McCann and Dudas describe, these deeply committed cause lawyers were forced to adapt to new realities—coming to terms, that is, with their "inability to bring about more systematic changes." Accordingly, Shdaimah notes that, "the benefits

that they are able to secure through the legal processes can seem meager and inconsequential." Yet they recognize that "working within existing systems in order to be relevant is dangerous but necessary." To do otherwise would be, she argues, "to ignore people who experience need in pursuit of some imagined future theoretical integrity."

From a more affirmative perspective, Shdaimah argues that cause lawyers working for progressive social movements still can "give voice to individuals who would otherwise not be heard." Voice can, in turn, "foster a greater sense of citizen participation in the forums in which marginalized citizens are rarely heard." Additionally, lawyers act as "hubs on a metaphoric wheel, with clients as the spokes." In other words, lawyers can create networks of similarly situated individuals and in so doing help build movements. Incremental legal actions, moreover, "expose the system's unfairness by helping clients to express their dissatisfaction in legal forums," and the language of rights "can serve to rally and energize movements." Finally, Shdaimah notes that lawyers can work with clients to create "shared narratives of responsibility and injustice that legitimate clients' grievances and indict oppressive and unfair systems." This legitimation is particularly important "when social movement constituents' experiences are not otherwise validated by the public."

Shdaimah also looks beyond the way left-activist cause lawyers serve social movements and discovers that they, like Meili's consumer lawyers, "see themselves as a social movement sector made up of different social movement organizations that have a common agenda." Such a view allows lawyers working for progressive causes to view resource constraints through social movement lenses and to collaborate in ongoing projects, which "draw on each organization's and individual's expertise in an attempt to garner more funds and to leverage resources." She also notes that, "social movement theories are helpful in explaining the motivation and material support they draw from the collective identity. In particular, she claims that, "most cause lawyers need to see themselves as part of a larger collective with a shared agenda in order to keep social movement fires burning or to nurture incipient social movements."

The next section—*Beyond Litigation: Other Roles, Other Styles for Cause Lawyers in Social Movements*—describes cause lawyers participating in campaigns for legislative change and working in the shadow of new legislation. It highlights the ways in which cause lawyers shape legal change by inventing new legal devices and attending to their implementation. Moreover, the last chapter in this section describes new strategies of cooperation and negotiation, of joint problem solving, between movement lawyers and their counterparts in government that reflect the emergence of new types of legal ordering.

In their chapter, Kathleen Erskine and Judy Marblestone analyze a "localized movement"—the Santa Monica living wage campaign—while "paying particular attention to how lawyers participated in this dynamic fight." They trace the development of a movement that had its roots in "a small group of community activists," and later grew to encompass scores of community volunteers, Santa Monica resident activists, clergy, union members and leaders, city council members, lawyers, law students, and more. Given the wide breadth of involvement, it comes as no surprise that the tactics employed—from legal, to legislative, to direct action—were Erskine and Marblestone note, diverse, and that the movement faced multiple obstacles in its efforts.

But, can one say that such varied actions constituted a social movement? Erskine and Marblestone define a social movement as a "sustained attempt by people on the margins of power, or those working on behalf of the marginalized people, to effect change and thereby reallocate resources or power," and argue that by this definition the Santa Monica struggle counts as a social movement. Nonetheless, the authors acknowledge that the Santa Monica living wage movement's leaders and activists themselves "have different views on whether the living wage struggle was a "social movement." Although there is "consensus that the fight for a LWO (Living Wage Ordinance) in Santa Monica" was "part of a nationwide effort to advance rights of low-wage workers," it also occurred under a "largely sympathetic city council," in a city "historically known for its radicalism and political activism, and when the differences between the 'haves' and the 'have nots' were starker than they had perhaps ever been." For this reason and others, Erskine and Marblestone choose to characterize the Santa Monica LWO campaign as simultaneously separate from, but connected to, a larger national living wage movement.

As for the place of cause lawyering in this movement, Erskine and Marblestone stress that "the attempt to pass a living wage in Santa Monica involved a large and diverse coalition," and, within that coalition, "lawyers played at most a supporting role." By and large, these lawyers "did not develop strategy," and even those "lawyers acting in a traditional lawyer's role were not the leaders of the coalition." They were "not closely involved with the framing of the issue"; by and large "they took direction from the movement's leaders and provided specific assistance, or acted simply as volunteers and activists in the various mobilizing efforts of the coalition." Their services included "shaping strategy, drafting an ordinance, and waging campaigns to get the ordinance passed and defend against multiple anticipated challenges."

That lawyers could play such diverse, multifunctional roles is a testament to the range and complexity of cause lawyering today, but it also is a consequence

of the structural constraints of California's political process. Erskine and Marblestone point out that "individual groups can use the electoral process to challenge legislative mandates via the referendum and ballot initiative process." This means that litigation may be "much less likely [to succeed] than in states where citizens do not have the power to challenge laws directly."

Not surprisingly, then, Erskine and Marblestone find that the Santa Monica LWO lawyers "do not fall easily" into any recognizable cause lawyering categories. They are a kind of unique hybrid, resembling "with some overlap, staff activists, independent cause lawyers, and nonpracticing lawyers." Indeed, "several attorneys who were very active in the Santa Monica LWO campaign rarely viewed themselves as 'lawyers' in their participation." Many of them "were drawn to the cause as interested citizens or volunteers and only acted as lawyers when specifically asked to do something requiring their particular legal knowledge and skills." What emerges is an image of lawyering consistent with what Scheingold (2004) calls "the new politics of rights," which focuses on "the indeterminacy of rights and their negation through competing myths." In this view, litigation is only "one arrow in a quiver that includes" many other options that can be brought out under the right circumstances.

In "A Movement in the Wake of a New Law: The United Farm Workers and the California Agricultural Labor Relations Act," Jennifer Gordon examines a facet of the relationship between cause lawyering and social movements that has received little attention in traditional sociolegal studies: the question of how new legislation affects social movements and cause lawyering. The passage of a law establishing new rights is, Gordon argues, "a moment of great importance in a social movement's history"; it is "a triumph, a measure of the movement's power." But, "it is also a pivotal time, when the movement must negotiate a shift in its relationship to the state as it moves from an outside force to at least something of an inside player."

Because labor law and its impact on the labor movement have received a wealth of attention from historians and legal scholars outside the law and social movements field, Gordon examines the National Labor Relations Act's "relationship to the social movements that beget it." She describes a sharp upward surge in the wake of the new law, followed by a long, slow process of co-optation, restriction, and decline and argues that this trajectory contrasts with much law and social movement scholarship says a movement should expect in the wake of the establishment of new rights. In this scholarship, the legacy of new rights is seen as growing "richer over time," and the period immediately following new legislation is supposed to be "particularly challenging for movements."

To complicate this picture Gordon describes the impact of the passage of the California Agriculture Labor Relations Act in 1975 on the United Farm Workers (UFW). This case is particularly apt, she says, because "the UFW was as much or more a social movement as it was a union." UFW organizer Cesar Chavez acted creatively: using collective action tactics like fasts and providing community services. This creativity also involved the use of law, which "played an important role in the union's success." The controlling question UFW lawyers asked was never "what are our rights here?" but rather "how can we best turn this legal situation to the union's organizing advantage?"

This led, most prominently, to legislative victories for the UFW—legislative victories that, Gordon contends, produced mixed results. She describes the "implementation phase"—the phase that follows a major legislative victory—which she defines as "the period when the precise contours of the new right that the movement has won are delineated and the mechanisms for its enforcement are established and put into play." She observes that "legislative proclamations of rights are at least as vulnerable to subversion as their judge-made cousins," given their often "high public" visibility and "potentially more far-reaching character." Although legislative action can provide "a window of opportunity in which the advantaged side can press its advantage if it is ready to do so," such an opportunity is "tempered by a variety of challenges that the law itself introduces," creating "an inherently unstable situation."

Beyond backlash and delayed implementation, and "in addition to the obvious route of repeal or amendment," Gordon notes that there are "many other ways for powerful opponents to invalidate a law." And yet, she ends by pointing out that "these tactics do not rob a movement of its agency, its capacity to continue to work in innovative and strategic ways in the face of new challenges," or its ability to "maintain an independent stance vis-a-vis the state."

Cause Lawyers and Social Movements concludes by examining the stance of movements and their lawyers toward the state in an emerging "postregulatory" era. In "Mobilization Lawyering: Community Economic Development Movement in the Figueroa Corridor" Scott Cummings argues that we are witnessing a transformation in the American political system from "hard regulation to soft governance," and he suggests that the role of cause lawyers is fundamentally different today than it was fifty years ago.

This has its roots, according to Cummings, in the "conservative backlash" against big government politics. The backlash was "framed in terms of moral and efficiency-based critiques"—leading to a reduction in "the role of the federal government in service provision." The result has been "a new set of more localized and market-oriented governance structures that depart from

federal command-and-control regulation in favor of public–private partnerships, greater stakeholder participation in rule-making, and greater flexibility in rule structures." These "public–private partnerships [are] designed to leverage outside investment while maintaining a degree of low-income community control"—thus constituting a "pragmatic response" to larger political shifts.

Cummings notes that "litigation strategies of the type pioneered by the NAACP, ACLU, and federal legal services lawyers are suspect in an environment where courts are no longer receptive to expansive rights claims, administrative agencies have lost their centralized authority, and basic welfare entitlements have been eliminated." Accordingly, "legal strategies that emphasize collaboration with political decision makers or cooperation between public and private partners appear more in line with political realities." Cummings maintains, this new "governance lawyering style" is also "a potentially superior method of social change, capable of mobilizing grassroots resources in a way that traditional rights strategies cannot."

He offers Community Economic Development (CED) lawyering as an example of this new method and this new lawyering style. The CED, itself, is neighborhood-based and dedicated to the building of affordable housing and is typically served by "transactional lawyers." Their goal is to "mediate between community-based nonprofit organizations, public funders, and private investors in order to design institutions that foster economic revitalization." Whereas traditional movement lawyers might deploy litigation in an effort to "mobilize claims of legal rights to advance large-scale political reform, CED lawyers attempt to mobilize community participation to change local economic circumstances through the creation of innovative institutional structures." But unlike other social movements' tactics, "CED is not connected to protest politics and broad-based movements"; indeed, it is "parochial" and "seeks to preserve community boundaries while increasing their control of resources."

Because of its "orientation toward the market, its rejection of rights strategies against the state, and its involvement in grassroots organizations," CED lawyering "occupies an ambiguous position along the spectrum of cause lawyering." Resisting Hilbink's typology, which distinguishes among categories of cause lawyers by "comparing their views about the fairness and legitimacy of the legal system," Cummings contends that CED lawyering is in fact defined in large part by "its relative disinterest in the legal system as such." CED, he continues, "does not map nicely onto a 'law versus politics' divide, largely because CED operates within the domain of private law, where negotiated economic relationships are privileged and political considerations are submerged." In sum, the CED movement itself "appears to diverge from conventional understandings

of social movements." And, not surprisingly, CED lawyering "does not break down neatly along the political axis of left and right."

Cummings analyzes in detail the tactics of CED organizing, but the unconventional nature of the movement and its lawyers remains the prominent theme throughout—a reminder that, in the postregulatory state, lawyers and social movements are often difficult, if not impossible to classify by old norms or rigid standards.

The research assembled in *Cause Lawyers and Social Movements* provides a comprehensive overview of what cause lawyers do *for* and *to* the movements they serve. The chapters in this book highlight the benefits activists derive when they enlist legal expertise as well as the costs they incur and the ways in which cause lawyering itself is transformed by movements. They assess the circumstances under which legalizing social and political conflict spurs on, as well as siphons off, the kind of grassroots energy that gives social movements their distinctive character and power. Furthermore, they examine ways in which cause lawyers can help to politicize legality and thus serve social movements in their own idiom. Throughout, they remind us that contingencies shape what cause lawyers do *for* and *to* movements, that movements have their own histories, and that both movements and their lawyers are responsive to the constraints our legal, political, and social history imposes and the opportunities that they make available.

Notes

1. McCann (2004: 508) suggests the need for a broader perspective on social movements. In his view, "Social movements aim for a broader scope of social and political transformation than do most more conventional political activities. Although social movements may press for tangible short-term goals within the existing structure of relations, they are animated by more radical aspirational visions of a different, better society. *Second*, social movements often employ a wide range of tactics, as do parties and interest groups, but they are far more prone to rely on communicative strategies of information disclosure and media campaigns as well as disruptive "symbolic" tactics such as protests, marches, strikes, and the like that halt or upset ongoing social practices. . . . *Third*, social movements tend to develop from core constituencies of nonelites whose social position reflects relatively low degrees of wealth, prestige, or political clout. Although movements may find leadership or alliance among elites and powerful organizations, the core "indigenous population" of social movements tends to be "the nonpowerful, the nonwealthy and the nonfamous.""

2. Our view that civil rights lawyers were caught up in the myth of rights is challenged by Mack (2005).

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