The Dynamics of Cause Lawyering

Constraints and Opportunities

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History is a story of events and not forces or ideas with predictable courses.

—Hannah Arendt, *The Human Condition*, p. 252

Introduction

Cause lawyering is a distinctive, if not unique, style of legal practice. A heterogeneous category, encompassing lawyers who devote their entire professional lives to a single cause as well as lawyers who are less closely identified with any cause (Hilbink 2003), it is characterized, in the United States and elsewhere, by its difference from conventional, client-centered advocacy (see Simon 1978). The classic, lawyer "as hired gun" approach treats legal professionalism as a set of technical skills available to the highest bidder (Fried 1976; Silver and Cross 2000). As a result, moral and/or political commitment, the defining attributes of cause lawyers, are for most of their peers relegated to the margins of their professional lives (see Simon 1984, 1998). Lawyering, in this conception, is neither a domain for moral or political advocacy nor a place to express a lawyer's beliefs about the way society should be organized, disputes resolved, and values expressed.

For cause lawyers such objectives move from the margins to the center of their professional lives (Sarat 1998). Lawyering is attractive precisely because it is a deeply moral or political activity, a kind of work that encourages pursuit of the right, the good, or the just. Cause lawyers have something to believe in and bring their beliefs to bear in their work lives (Scheingold and Sarat 2004). In this sense they are neither alienated from their work nor anxious about the separation of role from person. Causes offer lawyers the chance to enlist in a partisan pursuit of the good while refusing completely to commodify their professional skills.

This kind of legal practice was pioneered in the United States and has been exported and marketed abroad along with American notions of rights and ideas about the need for an autonomous legal order (see Dezalay and Garth 2002). Yet cause lawyering also has indigenous roots and is locally adapted in many different parts of the world (for examples see Meili 1998; Shamir and Chinski 1998; Sterret 1998; Kidder and Miyazawa 1993). Cause lawyering is, in short, shaped and transformed by legal, professional, and political traditions very different from the United States and by social contexts in which the development of the rule of law would in itself be a substantial achievement. Where it is simply imposed on a local context, it tends not to flourish (Morag-Levine 2001).

Whether here or abroad, cause lawyering exists within a distinctive set of constraints and opens up an equally distinctive set of possibilities. How cause lawyers adapt to those constraints and take advantage of those possibilities is the subject of this book. In the chapters that follow, contributors describe how cause lawyers deal with constraints imposed by the causes/movements with which they are affiliated, the practice settings in which they work, and/or the strategic resources made available to them by their broader legal/political environment. But they also discuss the way lawyers help to fashion those movements, practice settings, and environments in their work as innovators, inventors, and agents of change. It is in this spirit that we title this book *The Worlds Cause Lawyers Make: Structure and Agency in Legal Practice* and that the contributors have examined the mutually constitutive relationship among the social, political, and legal worlds in which cause lawyers operate and which they help to construct.

In two previous edited collections we explored respectively the relations of cause lawyers and the organized legal profession and the way cause lawyering is shaped by, and shapes, processes of political change associated with globalization and democratization. In the first, *Cause Lawyering: Political Commitments and Professional Responsibilities* (Sarat and Scheingold 1998a), we argued that legal professions everywhere both need and, at the same time, are threatened by cause lawyering. They need lawyers who commit themselves and their legal skills to furthering a vision of the good society because this "moral activism" puts a humane face on lawyering and provides an appealing alternative to the value-neutral, "hired gun" imagery that often dogs the legal profession (Sarat and Scheingold 1998b).

Yet cause lawyering is everywhere a deviant strain within the legal profession. Morally activist lawyers share with their clients responsibility for the ends they are promoting in their representation. In so doing, lawyers elevate the pro-

fession's moral posture beyond a crude instrumentalism in which they sell their services without regard to the ends to which those services are put (Scheingold and Sarat 2004). Cause lawyers thus reconnect law and morality, making tangible the idea that lawyering is a "public profession," one whose contribution to society goes beyond the aggregation, assembling, and deployment of technical skills.

In the United States, cause lawyering has been able to gain and maintain a foothold as a consequence of efforts made by the organized bar to protect the profession's own social capital.[1] Hostility to cause lawyering has historically been an expression of the institutional interests of the legal profession—and specifically of its links to corporate wealth and its stake in social and professional stratification. Today the organized profession is no longer quite so hostile to cause lawyering (Sarat 2001). This is due not so much to a change of heart but to the profession's continuing efforts to enhance its reputation by capitalizing on the public resonance of an inclusive understanding of rights and justice—ideals with which cause lawyering, but not the profession as a whole, is identified. It has been, albeit to a limited extent, incorporated into the bar's definition of civic professionalism. This accommodation to cause lawyering represents an acknowledgment not only of the profession's compact with the public but also of its own integrity and its constitutive links to the ideals of liberal democracy—including equal justice under law (Scheingold and Sarat 2004; Halliday 1998).

But cause lawyers also threaten the profession by destabilizing the dominant understanding of lawyering. In many countries lawyers are, to varying degrees, pledged to principles of "partisanship" and "nonaccountability" which require that they advocate their clients' causes regardless of their own personal beliefs. By rejecting nonaccountability, if not partisanship, cause lawyers establish a point from which to criticize the dominant understanding from inside the profession itself. They denaturalize and politicize that understanding. Cause lawyering exposes the fact that it is contingent, and constructed, and, in so doing, raises the political question of whose interests the dominant understanding serves. The result threatens ongoing professional projects and puts at risk the political immunity of the legal profession and the legal process.

Our second edited collection, *Cause Lawyering and the State in a Global Era* (Sarat and Scheingold 2001), spoke to a gap in the scholarly literature on the legal profession. Rarely had that literature taken the connection of lawyers and the formation and transformation of states as its subject. Although state transformation and globalization clearly influence, and are influenced by, law and lawyers, with a few notable exceptions, researchers tend to ignore these interde-

pendencies (see Halliday and Karpik 1997). Instead, as Halliday (1998: 3) puts it, most research on lawyers focuses "on the internal organization and behavior of legal professions, overwhelmingly attends to single countries, and within national studies; it is the economic organization and behavior of professions, especially the market for legal services, that has captured most scholarly attention."

Similarly, the literature on state transformation and globalization, again with a few important exceptions (Trubek et al. 1994; Santos 1995; Keck and Sikkink 1997), ignores law and lawyers almost entirely and tends to treat the rule of law as something of a black box. The result is that not only are lawyers neglected but so too is the wealth of research that de-centers law and documents its pervasive presence and constitutive power as social practice throughout civil society, culture, politics, and the economy (McCann 1994: 6–9). *Cause Lawyering and the State in a Global Era* responded to that situation by connecting research on one kind of lawyering, cause lawyering, to the analysis of the state and state transformation in a global era.

Since those books were published, the study of cause lawyering has grown dramatically as a field of research in sociolegal studies and in research on the legal profession (see Hilbink 2003). This book, *The Worlds Cause Lawyers Make: Structure and Agency in Legal Practice*, adds to that growing body of research by turning from the macrosociological and political questions that animated our previous volumes to the connections of lawyers and causes, the settings in which cause lawyers practice, and the ways they marshal social capital and make strategic decisions. At each turn, we note constraints, the givens that shape what cause lawyers do and what cause lawyering can be, while also attending to the dynamic interactions of cause lawyers and the legal, professional, and political contexts in which they operate. Thus we take a constructivist view of cause lawyering,[2] analyzing what cause lawyers do in their day-to-day work, how they do it, and what difference it makes. We describe how they maneuver within a structure of constraints and how they improvise, invent, and create. We are interested in the ways in which cause lawyers fabricate their legal and professional contexts as well as the way those contexts constrain their professional lives.

Structure and Agency

Another way of describing our goal is to say that this book looks at cause lawyering as a form of human action in a field of institutional possibilities and, in so doing, begins the work of locating it in regard to what might be called the "structure-agency" problematic.[3] Structure refers to the social institutions, patterns of behavior, or ways of thinking that shape human behavior, and agency

is the ability of humans to act with conscious intention. Structures both enable and constrain agency, even as they are the results of agentic action (Hay 1995). We will argue that because of the idealism that gives meaning to the work of cause lawyers and because of the way that meaning is refracted through political, professional, and market prisms, cause lawyering provides an especially rich and resonant terrain for inquiring about issues of structure and agency.

The structure-agency debate has at its base the fundamental question: Are we free to act as we please, or are we shaped and governed by social forces beyond our immediate control? (Ritzer 1992). Structuralists are interested in the specific conditions which produce human actions or behavior. For them, it is crucial to recognize the explicit and implicit, the recognized and taken-for-granted, ways in which our actions and behaviors are *produced*. Structuralists insist that the task of social analysis is to explore the reasons for behavior according to the structure/context in which it takes place (Hay 1995). They call our attention to institutions and their practices, to the forces of history, to demographics, such as class, race, and gender, as they work themselves out in situated action. They deny that the human actor is the ultimate social reality. For structuralists, then, as Marx observed, "men make their own history, but not under circumstances of their own choosing" (as cited in Marcuse 1964: 48).

Critics have identified three primary problems with structuralism (see Archer 1988). First, there is the problem of attributing too much power or influence to too few structures, for example, class in the Marxist tradition and neglecting the plurality of structural influences, which open up spaces of contestation, contingency, and choice. Second, there is the problem of change. Structuralism identifies and attends to repetitive patterns of behavior and action and, as a result, cannot explain how or why changes occur (Taylor 1993). Finally, critics charge that structuralist accounts underestimate the reflexivity and autonomy of human actions. They tend to concentrate on the individual's position in a social hierarchy and do not deal with the ambiguity and ambivalence of human experience.

Agency analysis responds to these criticisms by emphasizing plurality, fluidity, and possibility (Taylor 1993). It portrays individuals as operating with relative freedom in a world in which social forces make things available to the repertoire of human choice. It describes social power as fragmented/pluralized so that no single structure of power can control our actions and emphasizes the volitional character of human action, with individuals deciding what to do from a range of available options (Archer 1988). The agency approach sometimes insists on a methodological individualism and argues that the only reality we can grasp is the deeds/actions of individuals. Moreover, because individuals are aware of their options, choices, and motives, scholars should take

seriously accounts and explanations provided by actors themselves rather than dismissing them as epiphenomenal or ideological.

Today, few stand rigidly on one or another side of the structure-agency debate, and important theorizing has opened up ways of talking about structure and agency in social life that are less binary and oppositional. For example, Giddens's (1984) "structuration theory" combines agency and structure approaches. He argues that structure and agency are "mutually dependent and internally related. Structure only exists through agency and agents have 'rules and resources' . . . which will facilitate or constrain their actions" (cited in McAnulla, n.d.: 3). In Giddens's theory actors are situated, but not inert. Giddens emphasizes reflexivity and assumes a high degree of self-awareness on the part of social actors while also recognizing the influence of structures, contexts, and constraints.[4]

In sociolegal studies, Ewick and Silbey (1998) have provided one of the most important formulations of the dynamic life of structure and agency. According to their work (1998: 39), "the individual and social structure . . . (are) mutually defining. Within this framework," they continue, "consciousness is understood to be part of a reciprocal process in which the meanings given by individuals to their world become patterned, stabilized, and objectified. These meanings, once institutionalized, become part of the material and discursive systems that limit and constrain future meaning making."

They further argue that social life, through its patterns and organization, offers up specific, and limited, opportunities for "thought and action" (Ewick and Silbey 1998: 39). Social difference and temporality matter in shaping the kinds of opportunities that will be available for any individuals. What Sewell (1992) calls "schemas" define the realm of the possible and desirable, imaginable and unimaginable, in any place and at any time. But they are loosely rather than tightly organized; schemas can be altered, though not dispensed with. They can be the subject of resistance, contextual adaptation, and borrowing. They can be used differently in different settings, and those setting-specific differences, in turn, can be used to critique schemas found or used elsewhere in society. As Ewick and Silbey (1998: 40) note, "By applying schemas from one setting in another, people are able to make familiar what may be new and strange; moreover, they can appropriate the legitimacy attached to the familiar to authorize what is unconventional." It is our contention that cause lawyers provide wonderful examples of this borrowing and appropriation, applying the schemas of lawyering and legal professionalism to political action and reciprocally recoding politics as law.

But there is more to social life than cultural codes and values, what Sewell

(1992: 2) calls "fundamental tools for thought." Societies generate resources and material endowments and distribute them in nonrandom ways. These resources and endowments in turn provide greater opportunities for some social actors, expanding the range of the possible. Their absence constrains others, making the world seem more fixed and immutable than it otherwise would be. Schemas require resources in order to be translated into action; resources without cultural codes to direct their use are of little value. This differential distribution of values and material conditions accounts for the stability of social life over time, but also helps explain how, if not why, change occurs. "The possibilities of invoking schemas in a variety of settings," Ewick and Silbey (1998: 41) contend, "open up the potential for generating new resources and thus the ability to challenge or revise cultural meanings or the distribution of resources."

Their argument helps explain how social structure can appear "external and coercive" while not being separate from individual and collective patterns of thought and action (Ewick and Silbey 1998: 41). "Human agency and structure," Sewell (1992: 4) observes, "far from being opposed, in fact presuppose each other." Structures both constrain social action and are open to innovation. Structures are not "immutable constraints"; they are instead "ongoing processes" which establish the "expectations, limits, and contingencies" to which human action is accountable (Ewick and Silbey 1998: 41, 42). Individuals must, if they are to be at all efficacious, deal with these expectations, limits, and contingencies, taking them on, taking them seriously, as the raw material out of which anything new must be fashioned. Yet, through action guided by imagination, individuals can, and do, bring about new possibilities of being in the world.

Considering Structure and Agency in Three Domains of Cause Lawyering

Studies of lawyers and the legal profession are relative latecomers to the structure-agency debate. Where legal profession scholars attend to it they tend to focus either on the structures which constrain legal practice, giving it its shape and organization (e.g., Heinz and Laumann 1982), the ways lawyers act collectively to create favorable conditions within which they can market their services (Abel 1981), or how they contribute to the development of particular types of political institutions (Halliday and Karpik 1997). Others have analyzed structural transformations in different practice settings (compare Galanter and Paley 1991 and Seron 1992). Still others, emphasizing agency, look at the play of ideology in the legal profession (Gordon 1984) and the microdynamics of lawyer-client interactions (see Sarat and Felstiner 1995).

Legal profession scholars have generally not drawn on the kind of work done by Ewick and Silbey (1998) to combine structure-agency analysis. They have explored neither the ways in which law and professional norms define the field within which lawyers work nor how they rework both. One important exception is found in the work of Nelson and Trubek (1992a: 22). Borrowing from Bourdieu's (1977) theory of practice, they develop "an analytic framework that integrates studies of structural and organizational changes with studies of the reactions and perceptions of the actors involved in the changing systems . . . (and accepts) that the actions of lawyers reflect choices that are neither totally unconstrained nor totally determined structurally." Their framework "unites political economy and phenomenology" and suggests that professional ideals are partly "formed within the workplace and partly are designed, consciously or unconsciously, by lawyers for the promotion of their economic, power, and status goals. Thus lawyers' 'ideals' carry within themselves heavy traces of . . . structure."

In addition, Halliday (1999) has advanced a theory of the relationship between lawyer professionalism and political liberalism that combines structure and agency approaches. He argues (1999: 1016) that "a theory of professional action, like the general theory of action, must incorporate a *motivational theory of action.*" But it must also attend to what he calls (1999: 1017) the "*institutional structure of politics.*" Halliday (1999) points out, in particular, that in the research so far carried out on cause lawyers there has been little explicit attention given to the play of constraints and opportunities, to the ways cause lawyers deal with the worlds they inherit and yet make space within those worlds for new possibilities.[5] He advocates (1999: 1054–55) an agenda of research that attends to "the interplay of jurisdictional control, status politics, (and) economic benefit" alongside "ideological, aesthetic, altruistic, and civic motivations" in the worlds of cause lawyers.

Following Nelson and Trubek's (1992a) and Halliday's (1999) suggestions, *The Worlds Cause Lawyers Make: Structure and Agency in Legal Practice* describes the ways cause lawyers work in, and on, a field of constraints generated by the complex intersections of legality, professionalism, and politics. We see cause lawyers as operating within a relatively distinctive "arena" of practice. According to Nelson and Trubek (1992b: 179), "Conceptions of lawyer professionalism reflect 'the arenas' in which they are produced, that is the particular institutional settings in which groups construct, explicitly or implicitly, models of the law and of lawyering. The arenas perspective allows for the possibility that different groups will develop different versions of the professional ideal in response to a variety of political, ideological, and situational concerns."

Legality, professionalism, and politics are the general structural components that shape cause lawyering. Each consists of a historically specific set of cultural schemas and resources that define the limits of the possible. But they also provide the material with which cause lawyers can and do work. Law, professionalism, and politics are mixed and remixed in distinctive combinations by lawyers in different societies, in different historical periods, serving different causes, and working in different practice settings. How they think and what they do in their everyday work helps to produce, reproduce, and transform the schemas and resources made available to them by their legal, professional, and political worlds.

As we see their work, cause lawyers operate within a set of taken-for-granted assumptions about the boundaries between law and politics, about the meaning of professionalism, and about the place of politics in law and the learned professions. In addition, they work with, and against, prevailing conceptions of how legal practices can and should be organized, and what lawyers, qua lawyers, can and should do. Because they exist in a marginalized position in regard to the professional project of organized legal professions, they have greater room to maneuver than those who hew to the conventional version of law practice.

By their difference they help give meaning to the professional mainstream even as they innovate, invent, and transgress. By and through their actions, they construct and transform the boundary between law and politics, fabricating political action with legal tools and legal action that responds to political necessity. They construct the causes and movements they serve even as their relation to those causes shapes what they can do and how they can do it. At the same time, it is important to acknowledge, as we will detail below, that the ideals that drive cause lawyers undergo their own transformations out of the welter of personal, political, and professional circumstance that constitute the praxis of cause lawyering. As they carve out their own ways of practicing law, cause lawyers carry forward traditional understandings of lawyer work even as they reshape them. They use social capital and professional skill to define strategies, sometimes operating well within those understandings, sometimes pushing to, and beyond, their limits.

To open up analysis of structure and agency in the work of cause lawyers we focus on three different, though related, domains—lawyer relations with causes, their practice settings, and strategic decision-making. These domains do not exhaust the range of possibilities. They do, however, provide a way of beginning to map the play of constraints and opportunities in the work of cause lawyers.