MOVEMENT LAWYERING

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This Article explores an important development in American legal theory and practice over the past decade: the rise of "movement lawyering" as an alternative model of public interest advocacy focused on building the power of nonelite constituencies through integrated legal and political strategies. Its central goal is to explain why movement lawyering has gained prominence, define its essential features, and explore what it reveals about the current state of efforts to work out an empirically grounded and normatively appealing vision of the lawyer's role in social change. Toward that end, this Article shows how movement lawyering has long been an important part of progressive legal practice—complicating the standard historical account—while also illuminating the contemporary political and professional shifts that have powered the recent social movement turn. Synthesizing insights from social movement theory and practice, the Article then defines and analyzes the core features of the movement lawyering model—representing "mobilized clients" and deploying "integrated advocacy"—and explores how these features respond to long-standing critiques of public interest advocacy by presenting movement lawyers at their most accountable and effective: taking instructions from activist organizations in client-centered fashion and using law in politically sophisticated ways designed to maximize the potential for sustained social reform. In doing so, the new movement lawyering literature usefully refocuses attention on fundamental questions about the lawyer's role in social change and thereby offers a crucial opportunity to jumpstart a contemporary dialogue—less freighted with the critical canon of the past and more rooted in empirical inquiry—about the conditions in which lawyering is most likely to produce accountable and effective democratic transformation.

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I. INTRODUCTION

Over the past decade, scholars and practitioners have turned greater attention to the role of lawyers in social movements. Although lawyers' work on behalf of movements spans the ideological divide,[1] most recent interest in movement lawyering has come from legal academics and lawyers on the political left. Inspiration has been drawn from diverse quarters: the legal mobilization against repressive antiterrorism policies launched after 9/11[2]; efforts by the labor and immigrant rights movements at the local level to challenge economic exploitation and raise standards in the low-wage economy[3]; the dramatic march to marriage

1. *See generally* ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION (2008); STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191 (2008).

2. *See* Richard L. Abel, *Contesting Legality in the United States After September 11*, *in* FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM 361 (Terence C. Halliday et al. eds., 2007); Laurel E. Fletcher et al., *Defending the Rule of Law: Reconceptualizing Guantánamo Habeas Attorneys*, 44 CONN. L. REV. 617, 646 (2012).

3. *See* Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1 (2009) [hereinafter Cummings, *Hemmed In*]; Scott L. Cummings, *Litigation at Work: Defending Day Labor in Los Angeles*, 58 UCLA L. REV. 1617 (2011) [hereinafter Cummings, *Litigation at Work*]; Scott L. Cummings, *Preemptive Strike: Law in the Campaign for Clean Trucks*, 4 U.C. IRVINE L. REV. 939 (2014) [hereinafter Cummings, *Preemptive Strike*];

equality by LGBT rights lawyers[4]; the outburst of protest against economic unfairness ignited by Occupy Wall Street's reaction to the Great Recession[5]; grassroots activism in response to police violence against communities of color, ignited by the Ferguson riots and coalescing around the Black Lives Matter movement[6]; and recently the explosion of grassroots activism and street protest under the banner "Not Our President" to contest the divisive policies of Donald Trump[7]—igniting around the Muslim Ban, immigration raids, efforts to repeal Obamacare, and the reversal of climate change regulation. Against this backdrop, progressive scholars have produced a rich new literature that places social movements at the center of legal and political transformation, pushing aside a focus on courts and lawyers that has long dominated scholarly analysis.[8]

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see also WORKING FOR JUSTICE: THE L.A. MODEL OF ORGANIZING AND ADVOCACY (Ruth Milkman et al. eds., 2010).

4. *See* ELLEN A. ANDERSON, OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION (2009); DANIEL R. PINELLO, AMERICA'S STRUGGLE FOR SAME-SEX MARRIAGE (2006); KENJI YOSHINO, SPEAK NOW: MARRIAGE EQUALITY ON TRIAL (2015); Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2010); Tom Watts, *From* Windsor *to* Obergefell*: The Struggle for Marriage Equality Continued*, 9 HARV. L. & POL'Y REV. ONLINE S52 (2015).

5. *See* Michael Levitin, *The Triumph of Occupy Wall Street*, ATLANTIC (June 10, 2015), http://www.theatlantic.com/politics/archive/2015/06/the-triumph-of-occupy-wall-street/395408/.

6. *See* Elizabeth Day, #*BlackLivesMatter: The Birth of a New Civil Rights Movement*, GUARDIAN (July 19, 2015, 5:00 AM), http://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement; Janell Ross, *How Black Lives Matter Moved from a Hashtag to a Real Political Force*, WASH. POST (Aug. 19, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/08/19/how-black-lives-matter-moved-from-a-hashtag-to-a-real-political-force/; *see also* Amna A. Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352 (2015).

7 . Christopher Mele & Annie Correal, *'Not Our President': Protests Spread after Donald Trump's Election*, N.Y. TIMES (Nov. 9, 2016), https://www.nytimes.com/2016/11/10/us/trump-election-protests.html?action=click&contentCollection=U.S.&module=RelatedCoverage&region=Marginalia&pgtype=article.

8. For key works, see generally TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT (2011); SUSAN D. CARLE, DEFINING THE STRUGGLE: NATIONAL ORGANIZING FOR RACIAL JUSTICE, 1880–1915 (2013); CAUSE LAWYERS AND SOCIAL MOVEMENTS (Austin Sarat & Stuart Scheingold eds., 2006); JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS (2005); MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); Abel, *supra* note 2; Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61 (2011); Anthony V. Alfieri, *Faith in Community: Representing "Colored Town"*, 95 CALIF. L. REV. 1829 (2007); Sameer Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879 (2007); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements,* 154 U. PA. L. REV. 927 (2006); William N. Eskridge, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014); Gwendolyn M. Leachman, *From Protest to* Perry*: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. DAVIS L. REV. 1667 (2014); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256 (2005); Michael McCann & Helena Silverstein, *Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 261 (Austin Sarat & Stuart Scheingold eds., 1998); Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011); James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941 (1997); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323 (2006); Michael Waterstone et al., *Disability Cause Lawyers*, 53 WM. & MARY L. REV. 1287 (2012). For important work outside the U.S. context, see generally LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY (Boaventura de Sousa Santos & César A. Rodíguez-Garavito

This literature has made essential contributions to understanding how social movement mobilization can change law and society—captured in ideas of "popular constitutionalism"[9] and "demosprudence"[10]—while also showing how lawyers may support that change through an approach to representation in which they collaborate with social movements but do not control them.[11]

This scholarship has complemented and reinforced developments in progressive legal practice, where the label "movement lawyer" has resurfaced after decades of dormancy[12]: now claimed as a call to action by a new generation seeking to surmount the perceived disjuncture between the legalism of conventional public interest law and the dynamism of emerging grassroots movements.[13] In signs of change, legal organizations such as the Center for Constitutional Rights (which fought post-9/11 repression and Guantánamo detention[14]) have created movement-lawyering programs,[15] bolstered by support from foundations that seek to advance the work of movement lawyers around the globe.[16] The aim of these programs has been to profile, and thereby promote, "lawyers and organizers working together within grassroots social justice movements to build power."[17]

This renewed attention to movement lawyering has come at a time in which progressive law and politics are at a crossroads.[18] More than six-

eds., 2005); STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY (Lucie E. White & Jeremy Perelman eds., 2010).

9. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 8 (2004) (associating the idea of popular constitutionalism with giving "ordinary citizens a central and pivotal role in implementing their Constitution").

10. *See* Lani Guinier, *Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 15–16 (2008) (defining demosprudence as "democracy-enhancing" "legal practices that inform and are informed by the wisdom of the people").

11. *See, e.g.*, Jennifer Gordon, *The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CAL. L. REV. 2133 (2007); Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427 (2000).

12. *See* THE RELEVANT LAWYERS 19–38 (Ann Fagan Ginger ed., 1972) (recounting conversations with movement lawyers who spoke at Berkeley summer school).

13. *See (inter)Generation Movement Lawyer 2.0*, LAW AT THE MARGINS, http://lawatthemargins.com/intergeneration-movement-lawyer-2-0/ (last visited July 25, 2017).

14. *See* Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 894 nn.5–6 (2008) [hereinafter Cummings, *Internationalization of Public Interest Law*].

15. *CCR Social Justice Conference 2013: Movement Lawyering in the 21st Century*, CTR. FOR CONST. RTS., http://ccrjustice.org/home/BerthaJusticeInstitute/ccr-social-justice-conference-2013-movement-lawyering-21st-century (last visited July 25, 2017).

16. *See Lawyers*, BERTHA FOUND., http://berthafoundation.org/lawyers (last visited July 25, 2017).

17. *Social Justice Conference 2014*, CTR. FOR CONST. RTS., http://ccrjustice.org/home/BerthaJusticeInstitute/social-justice-conference-2014 (last updated Aug. 13, 2014).

18. The term "progressive" is used here to correspond to the range of views associated with the political left in the United States, beginning in the Progressive Era, focused on shifting power and resources to those at the bottom of social hierarchies, including the poor, racial and ethnic minorities, women, LGBT people, and political dissidents. Its basic tilt is toward the achievement of greater equality as opposed to individual liberty. Progressive in this sense does not refer to a specific set of political policies or legal ideas, but rather to the contest on the political left over fundamental democratic questions: the role of the state in regulating the economy, the redistribution of wealth (and other

ty years after *Brown v. Board of Education*,[19] fifty years after the March on Selma and the passage of the Voting Rights Act, and in the wake of a presidency many saw as the best hope for progressive revival, scholars have begun to reexamine America's civil rights legacy.[20] Particularly as progressives confront an aggressively hostile post-Trump political landscape, this reexamination has spotlighted the question of how social movements should engage with law and lawyers in ways that promote progressive transformation while avoiding mistakes of the past.[21]

Yet the social movement turn in legal scholarship presents new puzzles. When progressive social movements played a dramatic role disrupting and reshaping American politics, they were of little interest to legal scholars. Now that movements have become more constrained by their incorporation in mainstream political processes,[22] they have attracted serious intellectual attention from legal scholars interested in transformative progressive reform. Further, while the law and social movement literature builds on a foundation of empirical research (following the general trajectory of legal scholarship),[23] there remain analytical gaps between the treatment of movements in law and social science. Whereas legal scholars have tended to emphasize social movement solidarity and the power of protest to produce sustainable political and cultural change,[24] social movement scholars have highlighted conflicts both within and across movement organizations,[25] constraints on disruptive political tactics and collective action frames,[26] the limits of movement influence

privileges) to ensure social welfare, and the form and content of equality for marginalized identity-based groups.

19. 347 U.S. 483 (1954).

20. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007); MARTHA MINOW, IN *BROWN*'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK (2010); Mack, *supra* note 8.

21. In constitutional law, some progressives have argued for a minimalist role for the Court in deciding cases of contested social policy. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 10–11, 46 (1999); MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 14 (1999); *cf.* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION 70–71 (2011) (arguing for a theory of constitutional change in which courts are responsive to social movements that succeed in legitimating new constitutional interpretations).

22. *See* David S. Meyer & Sidney Tarrow, *A Movement Society: Contentious Politics for a New Century*, *in* THE SOCIAL MOVEMENT SOCIETY 1, 21 (David S. Meyer & Sidney Tarrow eds., 1998).

23. For an excellent account of the social science underpinnings of the law and social movement literature, see generally Edward L. Rubin, *Passing through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1 (2001).

24. *See, e.g.*, Guinier & Torres, *supra* note 8, at 2757–58.

25. *See* DOUG MCADAM, POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930–1970, 56 (1982) (arguing that the pursuit of external funding was associated with the "dissolution of indigenous support" in social movement organizations); DAVID S. MEYER, THE POLITICS OF PROTEST: SOCIAL MOVEMENTS IN AMERICA 130–32 (2007) (noting splits within social movement coalitions between more institutionally oriented and more radical groups as movements gain greater access to policy making); *see also* Elisabeth S. Clemens & Debra C. Minkoff, *Beyond the Iron Law: Rethinking the Place of Organizations in Social Movement Research*, *in* THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS 155 (David A. Snow et al. eds., 2004); Herbert H. Haines, *Black Radicalization and the Funding of Civil Rights, 1957—1970*, 32 SOC. PROB. 31 (1984).

26. *See* STEVEN M. BUECHLER, UNDERSTANDING SOCIAL MOVEMENTS: THEORIES FROM THE CLASSICAL ERA TO THE PRESENT 153 (2011) (discussing the role of the media in framing social

over policy reform (particularly in the face of countermovement mobilization),[27] and the inevitably cyclical nature of struggle.[28] As legal scholars look to movements as a way to fuse law and transformative politics, social movement scholars point to the professionalization and cooptation of social movement organizations as signs that social movements may become less transformative over time.[29] Against this backdrop, the central goal of this Article is to explore why movement lawyering has gained new prominence in theory and practice, define its essential features, and explore what it reveals about the current state of efforts by progressive scholars to work out an empirically grounded and normatively appealing vision of the lawyer's role in social change.

Toward that end, Part II examines the relation between movement lawyering and progressive legal theory.[30] It argues that the rise of movement lawyering in legal scholarship should be understood as part of the foundational debate over the legacy of *legal liberalism*—a critical account of how lawyers sought to advance progressive social change through impact litigation during the Warren Court era.[31] In this account, lawyers are portrayed as placing "trust in the potential of courts, particularly the Supreme Court" to produce "those specific social reforms that affect large groups of people . . . ."[32] Critical scholars have claimed that the legal liberal approach hampered social movements by diverting political challenges into legal channels,[33] emphasizing individual rights over collective action,[34] confusing rule change for social change, and empowering lawyers to make crucial political decisions without accountability to

movement grievances and the greater potential for sympathetic media reception when movement goals are "narrowly defined"); SUZANNE STAGGENBORG, SOCIAL MOVEMENTS 34–41 (2011) (analyzing debate over the extent to which formalization of movement structure limits protest and other forms of direct action).

27. *See* MEYER, *supra* note 25, at 173–77; *see also* Edwin Amenta & Neal Caren, *The Legislative, Organizational, and Beneficiary Consequences of State-Oriented Challenges*, *in* THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS, *supra* note 25, at 461.

28. *See* DOUG MCADAM ET AL., DYNAMICS OF CONTENTION 28—32 (2001) (discussing recurrent "episodes" of social movement action); SIDNEY G. TARROW, POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS 199—200 (3d ed. 2011) (describing "cycles of contention").

29. *See* Meyer & Tarrow, *supra* note 22, at 20–24 (arguing that social movements have become "institutionalized," resulting in the "routinization" of collective action, the "inclusion" of conventional challengers into mainstream politics, and greater "cooptation").

30. On the progressive lawyering tradition, see CORY SHDAIMAH, NEGOTIATING JUSTICE: PROGRESSIVE LAWYERING, LOW-INCOME CLIENTS, AND THE QUEST FOR SOCIAL CHANGE (2009); Eduardo R.C. Capulong, *Client Activism in Progressive Lawyering Theory*, 16 CLINICAL L. REV. 109 (2009); Susan D. Carle, *Progressive Lawyering in Politically Depressing Times: Can New Models for Institutional Self-Reform Achieve More Effective Structural Change?*, 30 HARV. J.L. & GENDER 323 (2007); Peter Margulies, *Progressive Lawyering and Lost Traditions*, 73 TEX. L. REV. 1139 (1995); William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099 (1994); Ann Southworth, *Taking the Lawyer out of Progressive Lawyering*, 46 STAN. L. REV. 213 (1993).

31. *See generally* Mack, *supra* note 8, at 258.

32. LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 2 (1998).

33. *See* STUART SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 214 (1974).

34. For a synthesis of this critique, see Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 948–58 (2007).

the constituencies they purported to represent.[35] Overall, these critiques have coalesced around two foundational problems: the *accountability* of lawyers to movement constituencies and the *efficacy* of law in producing social change. Part II claims that the new scholarly interest in movement lawyering may be read as the latest effort to respond to these problems and thereby resolve a fundamental tension in the progressive lawyering literature: how to avoid the defects of the old legal liberal model while embracing a vision of lawyering that is at once client-centered and politically transformative.

Part III explores the origins and development of movement lawyering in legal practice. It reframes the standard history of progressive lawyering over the past century by placing social movements at the center of the story and exploring how their evolution has shaped legal advocacy. Doing so spotlights how lawyers from the Progressive era through the post-civil rights period adopted the ideological and methodological perspectives now associated with movement lawyering: accountability to social movement constituencies in defining and executing legal strategy; skepticism about the power of law by itself to transform society without concurrent political organizing and long-term efforts in support of implementation and norm change; and commitment to coordinating legal and political advocacy in context-specific mobilizations to achieve sustainable social change. What varies over time are the conditions in which this legal work takes place: the relative opportunities for political and legal challenges by different social movements, the relative availability of resources for litigation versus other types of movement mobilization, and the relative power of rights discourse as opposed to other frames for expressing collective grievances.[36] Shifts in substantive and strategic emphasis by progressive lawyers and legal organizations over time *respond to* cyclical changes in social movement activism while also *contributing to* them.[37] From this vantage point, what is at stake in historical analysis of progressive legal practice is not the presence or intensity of movement lawyering but rather its various historical forms and contested meanings.

This change in historical framing—viewing progressive lawyering through the lens of social movements—yields two important insights. First, it reveals essential continuities in movement-oriented practice that

35. *See* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004) [hereinafter Simon, *Pragmatist Challenge*].

36. This analysis draws upon key insights of social movement theory. *See* BUECHLER, *supra* note 26, at 188–91 (describing an "attempted synthesis" in social movement theory that integrates perspectives focused on political opportunities, resource mobilization, and framing processes to describe and analyze the origins and impacts of social movements). For a discussion of the role of law in social movement theory, see Chris Hilson, *New Social Movements: The Role of Legal Opportunity*, 9 J. EUR. PUB. POL'Y 238 (2002).

37. Focusing on how structural conditions shape opportunities for legal advocacy does not ignore the agency of lawyers in making choices about whether and how to mobilize law (and the consequences of those choices), but it does present a more complex picture of cause and effect.

call into question the standard legal liberal account, in which lawyer-led, court-centered reform becomes both dominant and distant from social movement activism. In contrast, Part III repositions legal liberalism as the *result of* movement success, rather than a *break from* it. Progressive lawyers in the civil rights period took advantage of the very opportunities for impact litigation that social movements themselves had created—opportunities that then diminished as movement power began to decline.[38] Legal liberalism thus represented a pinnacle achievement of mid-century progressive social movements—a high water mark of political liberalism already under assault. This perspective helps explain why public interest law, created to fulfill the legal liberal promise of social change through legal change, was quickly mismatched with an increasingly conservative political environment—casting doubt on the claim that it was legal liberal lawyering that undermined the power of progressive social movements rather than the reverse.

This reframing leads to the second insight: The new wave of movement lawyering, although building on models of the past, represents a distinct professional response to changing political circumstances. Ongoing skepticism of courts among progressives, combined with a more general blurring of traditional boundaries of expertise, has reoriented lawyers toward multidimensional problem-solving strategies, further fueled by the spread of new technologies. Older social movements (labor, civil rights, environmental) have been reborn and reformulated, pushed forward by new organizing-focused and protest-based collectives (worker centers, Dreamers, Occupy Wall Street, Black Lives Matter). In the legal academy, a distinct approach to professional training has promoted a critical stance toward law and an openness to collaboration and power-sharing with nonlegal actors. In this context, the explicit turn by legal organizations, funders, and law schools toward the language and practice of movement lawyering points toward a *new phase of progressive legal development in a distinctively pragmatic age* marked by collaborative relationships with ambitious social movement organizations committed to principles of democratic governance and operating at different levels of policy making; sophisticated coordination of legal and political strategies; and a broad understanding of the critical legal skills integral to advancing movement goals, which include litigation but also forms of strategic legal counseling, regulatory analysis, transactional planning, and policy negotiation.

Having recovered the origins of movement lawyering and traced its recent evolution, Part IV pivots toward contemporary analysis by examining the meaning and content of movement lawyering in the current professional context. It begins by introducing to the literature a definition of *movement lawyering*: a model of practice in which *lawyers ac-*

38. This framework draws upon the work of legal theorists focused on the relationship between social movements and constitutional change. *See* Jack Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK L. REV. 27, 28 (2005).

countable to marginalized constituencies mobilize law to build power to produce enduring social change through deliberate strategies of linked legal and political advocacy. Part IV then outlines two key operational features associated with movement lawyering practice: the representation of *mobilized clients* and deployment of *integrated advocacy*. Because movement lawyering aims to help marginalized collectives gain power to change structural conditions of inequality, deepen participation in democratic decision making, and change social attitudes and cultural norms, it depends on lawyer accountability to mobilized clients that can play the critical role of social change agent. This aspect of the movement lawyer-client relationship focuses attention on the criteria by which the lawyer selects clients, the degree to which the lawyer engages in organizational capacity building in the absence of already strong social movement groups, and the lawyer's approach to counseling complex democratic organizations with multiple decision makers—all classic problems of professional ethics.

Whereas the movement lawyer's commitment to represent mobilized clients is ultimately a choice of substantive political goals, the adoption of integrated advocacy is a decision about appropriate means. From a tactical perspective, integrated advocacy is a process-based approach to lawyering for social movements designed to support strategic collaboration with nonlawyer activists and encourage analysis about the potential consequences—intended and unintended—of legal interventions. Its essential aim is to break down persistent divisions between lawyers and nonlawyers, litigation and nonlitigation strategies, and court-centered versus politics-centered advocacy campaigns. It does so by deemphasizing the centrality of any one type of legal intervention (like impact litigation) in favor of flexibly coordinating organizational and tactical resources across different institutional spaces—some within formal lawmaking arenas and some outside—to achieve short-term policy reform and long-term cultural and social change.[39]

The Article concludes by reflecting on what is at stake in the new emphasis on social movement lawyering. Part V suggests that, although the new movement lawyering frame usefully brings scholars and practitioners back to fundamental questions about lawyer accountability and legal efficacy, it ultimately leaves them unresolved. The complexity of social movements means that progressive lawyers are inevitably confronted with unavoidable dilemmas: which interests to represent among competing factions, how much deference to accord to the decision-

39. As discussed later, the term "integrated advocacy" has become part of the vocabulary of institutional actors within the field, including lawyers, social movement organizations, and funders. It relates to similar concepts under different labels identified elsewhere. *See* Cummings & NeJaime, *supra* note 4, at 1242 ("multidimensional advocacy"); Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Development*, 95 CALIF. L. REV. 1999, 2004–05 (2007) ("integrative lawyering"); John Kilwein, *Still Trying: Cause Lawyering for the Poor and Disadvantaged in Pittsburgh, Pennsylvania*, *in* CAUSE LAWYERING, *supra* note 8, at 181, 185 ("mobilization lawyering").

making processes of social movement clients, whether to pursue strategies of elite negotiation or grassroots disruption, and how to evaluate the pros and cons of litigation as a social movement tactic. Yet, despite these dilemmas, movement lawyering offers occasion for hope: a sign of ambition among a generation of lawyers eager to strengthen alliances with marginalized communities in the pursuit of a transformative social vision that reclaims parts of the old liberalism while also laying claim to something new.[40] In the end, the real promise of the social movement turn lies in repowering a contemporary dialogue—less freighted by the critical canon of the past—in which scholars and practitioners can create a new account, rooted in more sustained empirical inquiry, of the conditions in which progressive lawyering is most likely to produce accountable and effective social change.

II. WHY MOVEMENT LAWYERING NOW: A THEORETICAL PERSPECTIVE

The turn toward movement lawyering in progressive legal thought and practice reflects a turn away from the vision of lawyering associated with the "rights revolution" of the Warren Court era,[41] which is linked in the scholarly literature to the idea of legal liberalism: a model of social change through law in which activist lawyers use impact litigation to advance progressive policy reform that is validated by activist courts.[42] Accounts of legal liberalism are oriented around the mid-century emergence of new legal organizations committed to the "pursuit of legal rights" for underrepresented groups and interests in American society.[43] In this story, the transformative power of *Brown*, and the carefully planned impact litigation campaign by the National Association for the Advancement of Colored People ("NAACP") that produced it, turned attention and resources toward replicating its success in other areas.[44] A new field of public interest law was created and extended through support by the federal government, the organized bar, and liberal philanthropic organizations like the Ford Foundation.[45] The new public interest lawyers—among them towering figures like Ralph Nader, Marion Wright Edelman, Ruth Bader Ginsburg, Gary Bellow, Ed Sparer, and

40. *Cf.* Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, *in* LEFT LEGALISM/LEFT CRITIQUE 178 (Wendy Brown & Janet Halley eds., 2002) ("The goals of the left project are to change the existing system of social hierarchy, including its class, racial[,] and gender dimensions, in the direction of greater equality and greater participation in public and private government.").

41. *See* CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 4–5 (1998).

42. *See* Simon, *Pragmatist Challenge*, *supra* note 35, at 133–45.

43. JOEL F. HANDLER ET AL., LAWYERS AND THE PURSUIT OF LEGAL RIGHTS 24–39 (1978).

44. *Id.* at 23.

45. *Id.* at 28–32.

others—sought to refashion law as a tool to promote justice for the excluded and oppressed in American society.[46]

It was in response to the perceived limitations of legal liberalism that scholars mounted a critique of the lawyering strategies associated with it. Beginning in the 1970s, two main areas of criticism emerged. The first focused on the problem of lawyer *accountability*. Derrick Bell articulated this problem most forcefully when he argued that NAACP lawyers pursuing integration were doing so in response to elite funders and organizational supporters—in conflict with the interests of African American community members who preferred quality schools even if they remained segregated.[47] The image of NAACP lawyers "serving two masters"—placing their own commitments above client interests[48]—captured broader concerns with legal liberal lawyers using their authority to pursue a vision of the public good at odds with those whom the lawyers claimed to represent.[49]

The second area of criticism focused on the *efficacy* of social reform through law. Critics identified several related problems, all of which focused on the power of law to change social practice and reshape politics. One problem was the difficulty of enforcing new rights pronounced by courts. Critics of legal liberalism argued that courts did not have the institutional capacity to enforce their own judgments and thus reform campaigns centered on judicial law making were misguided. It was in this vein that Gerald Rosenberg made his famous argument against *Brown* and other civil rights era court decisions, pronouncing that "U.S. courts can almost never be effective producers of significant social reform."[50] This criticism of court-centered reform was linked to criticism of the lawyers who pursued it: by framing court-based reform as a "hollow hope," Rosenberg was implicitly criticizing those who had dared to hold out hope—that is, the lawyers who had pursued the very court decisions that Rosenberg claimed had such little impact.[51] Stuart Scheingold, writing earlier, had made this criticism of lawyers more explicitly, suggesting "that the problem with litigative approaches may be less with the strategy than with the strategists."[52]

Scheingold also raised another efficacy-related criticism of legal liberal lawyering, arguing that not only did it produce formal legal change without authentic social change, it also made authentic social change harder to achieve. By pursuing the "myth of rights," he claimed lawyers undermined the power of collective action by promoting "one-on-one

46. *Id.* at 29–45.

47. Bell, *supra* note 35, at 489.

48. *Id.* at 492–93.

49. *See* Lobel, *supra* note 34, at 952; Simon, *Pragmatist Challenge*, *supra* note 35, at 162.

50. GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 338 (1991).

51. Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 818 (2006) (suggesting that "too many" legal groups are "not really serious" about using litigation as part of a "multi-faceted strategy").

52. SCHEINGOLD, *supra* note 33, at 95.

conflicts within the framework of the adversary process" in ways that tended to "fractionalize political action—dividing rather than uniting those who seek change."[53] Along these lines, scholars of the profession suggested elite bar support of public interest law was part of a strategy of taming more radical elements in progressive social movements.[54] Critical Legal Studies ("CLS") scholars pushed this criticism further, arguing that legal liberalism—by presuming American democracy could be redeemed through incremental legal reform—legitimated the inequality built into the status quo and misallocated activist resources better spent on grassroots mobilization.[55] Outside of CLS, scholars claimed that judicial activism was not only insufficient for social reform but potentially detrimental to social movements, leading to backlash in controversial cases, like *Brown*, where public opposition to expanding legal rights was strong.[56] Overall, elements of this story fit together to form a larger critical narrative in which the pursuit of social transformation through legal transformation discounted the voices of the oppressed, legalized politics, galvanized opposition, and demobilized social movements that had built the crowning achievements of political liberalism.

These critical ideas about law and lawyering have held powerful sway over progressive legal thought for the past half-century.[57] They have coalesced around a view of legal liberal lawyering that is disconnected from progressive social movement activism and a contributing cause of movement decline in the post-civil rights era. One can understand the trajectory of progressive legal scholarship over the past twenty-five years as a reaction to this essential narrative: from the critical race theory response to the CLS critique of rights in the 1980s,[58] to efforts by poverty law scholars to develop a normatively appealing theory of progressive lawyering in the 1990s.[59] Poverty law scholars in particular—rejecting what Gerald López called the "regnant" idea that "subordination can be successfully fought by professionals"[60]—advanced an alternative to legal

53. *Id.* at 214.

54. *See* Thomas M. Hilbink, Filling the Void: The Lawyers Constitutional Defense Committee and the 1964 Freedom Summer 13–14 (describing the elite bar's support for the Lawyers' Committee for Civil Rights Under Law as a way of promoting "peaceful solutions" to southern civil rights unrest). In a related vein, Jerold Auerbach describes the corporate bar's embrace of pro bono as a response to the implicit claim by the public interest law movement that corporate lawyering did not serve the public interest. JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN AMERICA 278–82 (1976).

55. For the classic CLS critique of rights, see Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1386 (1984) (arguing that in the contemporary United States, "rights-talk . . . is positively harmful").

56. Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994).

57. Lobel, *supra* note 34, at 938.

58. For the foundational work in this area, see Kimberlé Williams Crenshaw, *Race, Reform, Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1352–56 (1988).

59. *See, e.g.*, Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering*, 1988 WIS. L. REV. 699 (1988).

60. GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 24 (1992).

liberalism, rooted in community, in which lawyers sought to empower marginalized people to actively participate in social struggle.[61]

Critics of poverty law scholarship argued that this empowerment model gave up on structural change for an inchoate ideal of participation that was not clearly connected to viable projects of progressive transformation. From this perspective, critics questioned the poverty law scholars' focus on liberal lawyers dominating poor clients within the lawyer-client relationship, arguing that such micro-analysis diverted attention from the need to plan and execute large-scale campaigns to fight powerful opponents, which could benefit from dedicated lawyer expertise.[62] Other critics suggested that the emphasis on community empowerment rested on an undertheorized and overly romantic notion of community that similarly understated the extent to which progressive lawyers could productively contribute to the struggle for social justice.[63] While progressive legal scholars sought to move beyond this internecine feud by developing more politically ambitious concepts of community-centered lawyering,[64] at the turn of the millennium, an alternative approach that wedwedded the poverty scholars' commitment to grassroots accountability with the legal liberal commitment to structural transformation remained unrealized.

It is in this context that social movements have gained prominence as key actors in progressive legal theory. The important point is that the new scholarly interest in social movements generally and movement lawyering in particular must be understood as the current response to a long-standing problem in progressive legal scholarship: how to connect authentic bottom-up participation by marginalized groups to an accountable and effective strategy for structural reform that targets legal institutions as a critical site of social struggle. Legal liberalism revealed the risks of a model in which lawyers took the lead and courts became a central site of policy contestation. The arrival of movement lawyering in progressive legal scholarship responds to these risks by positing an alternative that aspires to be both client-centered and politically transformative.

Movement lawyers in the new literature follow the leadership of grassroots actors designing social movement campaigns,[65] often using

61. White, *supra* note 59, at 760 (arguing that such lawyering work addressed the "third dimension" of power).

62. Joel F. Handler, *The Presidential Address, 1992: Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC'Y REV. 697, 724 (1992); *see also* Gary L. Blasi, *What's a Theory For?: Notes on Reconstructing Poverty Law Scholarship*, 48 U. MIAMI L. REV. 1063, 1093 (1993–1994) (critiquing the "very limited vision" of "microtheory serving micropractices").

63. *See* Simon, *Dark Secret*, *supra* note 30, at 1107.

64. *See, e.g.*, Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147, 147 (2000); Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 77 FORDHAM L. REV. 1383, 1386 (2009).

65. *See, e.g.*, Anthony V. Alfieri, *Rebellious Pedagogy and Practice*, 23 CLINICAL L. REV. 5, 32–36 (2016); Alexi Nunn Freeman & Jim Freeman, *It's About Power, Not Policy: Movement Lawyering for Large-Scale Social Change*, 23 CLINICAL L. REV. 147, 161–66 (2016); Michael Grinthal, *Power With: Practice Models for Social Justice Lawyering*, 15 U. PA. J.L. & SOC. CHANGE 25, 50–58 (2011).

multiple legal strategies consciously crafted to complement and advance political goals.[66] In this way, the new focus on social movements points toward an affirmative vision of lawyering that seeks to promote popular mobilizations to change law and society through "contentious politics,"[67] which alter the distribution of resources and the balance of power within democracy. Movement lawyering thus asserts a theory about the connection between legal process and social outcomes. By using law as a tool to build capacity to engage in collective action, movement lawyering aspires to broad and deep reform that moves beyond "law on the books" to embed change in social practice and culture. In so doing, it responds to the perceived deficits of the legal liberal model and its bottom-up successors by emphasizing grassroots accountability, large-scale legal reform, long-term implementation, and proactive planning to avoid backlash. In Lani Guinier and Gerald Torres' terms, lawyering for movements is a "participatory, power-sharing process within the lawyer/client relationship," in which lawyers lend their support to nonelites to produce the "cultural shifts that make durable legal change possible."[68]

As will be described more fully in Part IV, within the recent literature, there are two key features associated with movement lawyering that respond to the legal liberal critiques of lawyer accountability and legal efficacy. First, the new stories of movement lawyering emphasize lawyer accountability to politically-activated clients that have the power to set the agenda and execute campaigns.[69] In these accounts, lawyer deference to movement organizational decision making promotes client empowerment through the representation itself.[70]

Second—responding to the legal liberal portrait of top-down impact litigation at odds with political mobilization—the new literature spotlights lawyers who use complex and coordinated legal strategies to achieve political goals: deemphasizing (though not abandoning) litigation. The new movement lawyers are sophisticated in using their legal expertise to advance campaigns in different policy-making contexts[71]—

66. *See, e.g.*, Kathleen M. Erskine & Judy Marblestone, *The Movement Takes the Lead: The Role of Lawyers in the Struggle for a Living Wage in Santa Monica, California*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 8, at 249; Gerald Torres, *Social Movements and the Ethical Construction of Law*, 37 CAP. U. L. REV. 535, 581–82 (2009); *see also* Dean Spade, *Intersectional Resistance and Law Reform*, 38 SIGNS 1031, 1031–32 (2013).

67. CHARLES TILLY & SIDNEY TARROW, CONTENTIOUS POLITICS 4 (2006) ("*Contentious politics* involves interactions in which actors make claims bearing on someone else's interests, leading to coordinated efforts on behalf of shared interests or programs, in which governments are involved as targets, initiators of claims, or third parties.").

68. Guinier & Torres, *supra* note 8, at 2743, 2753.

69. Charles Elsesser, *Community Lawyering — The Role of Lawyers in the Social Justice Movement*, 14 LOY. J. PUB. INT. L. 45, 56 (2013); *see also* Sarah London, *Reproductive Justice: Developing a Lawyering Model*, 13 BERKELEY J. AFR.-AM. L. & POL'Y 71, 99 (2011).

70. Melanie Garcia, *The Lawyer as Gatekeeper: Ethical Guidelines for Representing a Client with a Social Change Agenda*, 24 GEO. J. LEGAL ETHICS 551, 565 (2011) ("[M]ovement advocacy empowers the client to begin more immediately working toward social change with the other members of her community or with members of the relevant social movement.").

71. Gordon, *supra* note 11, at 2139; *see also* Alan K. Chen, *Rights Lawyer Essentialism and the Next Generation of Rights Critics*, 111 MICH. L. REV. 903, 924 (2013) (reviewing RICHARD THOMPSON

for example, strategically advising coalitions on the legal levers available to resist gentrification,[72] drafting legal opinions and policy language to win support for legislative reform,[73] negotiating on behalf of coalitions to win community benefits from private developers,[74] and drafting reports and using media strategies to publicize the legal exploitation of immigrant workers.[75] When litigation is used, it is directed toward advancing specific organizing goals,[76] such as supporting low-wage workers' collective demand for better pay and conditions,[77] enabling day laborers to solicit work on street corners without reprisal,[78] creating case-by-case precedent in individual LGBT parental rights cases that change facts on the ground in order to gradually build support for broader parenting equality goals,[79] representing tenants in housing court as part of a campaign to resist landlords' efforts to convert affordable housing to market-rate units,[80] and defending clients in carefully selected criminal test cases to highlight the unfair application of city zoning laws to undermine immigrant businesses.[81] Rights, in this picture, are tools mobilized by social movement actors to expose injustice and pressure government officials and private actors to commit to change.[82]

FORD, RIGHTS GONE WRONG: HOW LAW CORRUPTS THE STRUGGLE FOR EQUALITY (2011)) ("Public interest lawyers' roles have expanded to include a range of tactics that remain central to the pursuit of rights but comprise a practice that is broader, richer, and ultimately more sustainable than the traditional model of rights litigation."); Jonathan L. Hafetz, *Homeless Legal Advocacy: New Challenges and Directions for the Future*, 30 FORDHAM URB. L.J. 1215, 1246 (2003) (arguing that when combined with other political strategies, "the assertion of legal rights can interact with and complement attempts to develop a broader social movement"); Peter Houtzager & Lucie E. White, *The Long Arc of Pragmatic Economic and Social Rights Advocacy*, *in* STONES OF HOPE, *supra* note 8, at 172, 187 (mapping how economic and social rights advocates in Africa "specifically target national institutions where the new ESR-positive practices are especially likely to 'take' and flourish"); Jayanth K. Krishnan, *Mobilizing Immigrants*, 11 GEO. MASON L. REV. 695, 698 (2003) ("[L]awyers can (and do) still empower immigrants by combining legal strategies with mass-based tactics and by developing important coalition partners in order to improve the present political status of immigrants."); McCann & Silverstein, *supra* note 8, at 266, ("[*N*]*early all of the cause lawyers in our movement studies viewed law, litigation, and legal tactics in a skeptical, politically sophisticated manner.*").

72. Foster & Glick, *supra* note 39, at 2057–65.

73. *See* Cummings, *Preemptive Strike*, *supra* note 3, at 1155.

74. *See* Scott L. Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 8, at 302–35.

75. *See* Cummings, *Hemmed In*, *supra* note 3, at 40, 59.

76. For a historical analysis, see Christopher Coleman et al., *Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest*, 30 LAW & SOC. INQUIRY 663, 668 (2005).

77. Ashar, *supra* note 8, at 1908.

78. *See* Cummings, *Litigation at Work*, *supra* note 3.

79. Margo Schlanger, *Stealth Advocacy Can (Sometimes) Change the World*, 113 MICH. L. REV. 897, 904–11 (2015) (reviewing ALISON L. GASH, BELOW THE RADAR: HOW SILENCE CAN SAVE CIVIL RIGHTS (2015)).

80. Raymond H. Brescia, *Line in the Sand: Progressive Lawyering, "Master Communities," and a Battle for Affordable Housing in New York City*, 73 ALB. L. REV. 715, 755 (2010); *see also* Nicholas Hartigan, *No One Leaves: Community Mobilization as a Response to the Foreclosure Crisis in Massachusetts*, 45 HARV. C.R.-C.L. L. REV. 181 (2010) (describing legal and political mobilization to resist foreclosure).

81. Ingrid V. Eagly, *Criminal Clinics in the Pursuit of Immigrant Rights: Lessons from the* Loncheros, 2 U.C. IRVINE L. REV. 91 (2012).

82. *See* Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683, 1750–52 (2009).

From a theoretical perspective, the turn to movement lawyering thus represents a proposed reconciliation of contested positions and synthesis of competing approaches. By aligning with mobilized clients, movement lawyering embraces a strong version of lawyer accountability to democratically led collectives that themselves claim to stand in for broader constituency interests. By expanding the meaning of legal problem solving to encompass a flexible repertoire of advocacy modes, movement lawyering recognizes the risks of narrowly framed litigation to the overall effectiveness and durability of complex social change efforts. In these ways, the shift toward movement lawyering in legal scholarship, though built upon an empirical methodology (developed through case studies of how lawyering works in the real world), in fact reflects a deeply normative vision of the progressive lawyer's role that seeks to fuse accountable and effective legal interventions in order to advance sustainable social change. Movement lawyering, in this sense, seeks to embrace the legal liberal claim to large-scale social change while avoiding the pitfalls of lawyer overreaching and overinvestment in law. What distinguishes this account from previous post-civil rights visions of progressive lawyering is the explicit adoption of social movements as the engines of ambitious, bottom-up political and cultural transformation, and the affirmation of a positive role for lawyers and legal expertise in support of movement-led campaigns. What is ultimately at stake in the new stories of movement lawyering is the possibility of reimagining—and perhaps breaking free of—the critical legacy of legal liberalism itself.

III. REFRAMING LAWYERS IN SOCIAL MOVEMENTS: AN EMPIRICAL PERSPECTIVE

Ever since the advent of the term "public interest law" in the 1970s,[83] there have been ongoing efforts to rename and thus reclaim the role of lawyers in progressive social change. Each of these branding efforts is fundamentally an ideological exercise in defining the relation of law to politics. In this sense, branding is inherently a normative project that simplifies complex reality, identifies problems with a stylized version of conventional practice, and then posits the newly branded model as an appealing solution. One can understand the creation of the public interest law label in the 1970s as perhaps the most important example in the American legal profession of this type of ideological project: an effort to legitimize the political use of litigation and courts to advance liberal social policy reform by tying it to the lawyer's traditional role to serve the public good.[84] New labels are invariably offered by critics of the old mod-

83. *See* Scott L. Cummings & Ingrid V. Eagly, *After Public Interest Law*, 100 NW. U. L. REV. 1251, 1253 (2006) (reviewing GORDON, *supra* note 8).

84. Gordon Harrison & Sanford M. Jaffe, *Public Interest Law Firms: New Voices for New Constituencies*, 58 A.B.A. J. 459, 462 (1972).

el and are thus built in opposition to the critics' version of the old model's deficiencies.

Legal liberalism is a story of lawyering and adjudication written by its critics—one that presents a view of lawyers seeking to change society by pursuing rights in court as a way of advancing critics' claims about the appropriate role of law in progressive politics. Scholars are now beginning to question that view by examining the ways in which professional ideology and practice were more contested historically than the conventional legal liberal account suggests.[85] As these scholars have pointed out, lawyering before and during the civil rights movement was multifaceted: for example, combining test-case litigation to challenge segregated public accommodations and union discrimination, legislative advocacy to increase funding for African American schools and punish lynching, and community development efforts to build a black business sector and professional class.[86] In this revisionist history, although there were examples of lawyer domination and counterproductive legal campaigns, there were also underappreciated efforts by lawyers to combine law and politics to build social movements, challenge entrenched political power, and transform public attitudes about race and equality. In spotlighting the long arc of legal activism throughout civil rights history, this scholarship presents a more contextualized picture of lawyering growing out of and interacting with rich social movement environments—thus inviting deeper inquiry into how changes in those environments shaped progressive legal practice over time.

This Part takes up that invitation by re-presenting the development of movement lawyering from the Progressive era to the present. It does so by placing social movements at the center of the story and thereby reframing the historical analysis to focus on how such movements have influenced legal practice. This view highlights the ways in which social movements have long relied on legal help while suggesting how the nature of that legal help, and the degree to which it has been coordinated with political strategies, has depended on opportunities for social movements to advance their interests through the political system. Drawing upon the central insights of social movement theory, it explores how the meaning and form of legal mobilization have been shaped by the complex interplay among political opportunities, resources for collective action, and the ideological frames that motivate groups to believe change is possible.[87]

85. *See* Mack, *supra* note 8, at 258–59.

86. *See* CARLE, *supra* note 8, at 115–16, 141, 148–49; GOLUBOFF, *supra* note 20, at 195–96; Mack, *supra* note 8, at 277–80.

87. The classic works are: MCADAM, *supra* note 25 (focusing on the role of political opportunities in shaping social movements); Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611 (2000) (discussing role of grievance framing in mobilizing social movement action); John D. McCarthy & Mayer N. Zald, *Resource Mobilization and Social Movements: A Partial Theory*, 82 AM. J. SOC. 1212 (1977) (focusing on the role of resources and organization in shaping social movements).

By viewing progressive lawyering through the lens of social movements, this Part makes two points. First, it spotlights important continuities in movement-oriented lawyering approaches throughout progressive legal history, extending well before the seminal civil rights period—thereby tracing through a strand obscured by the standard legal liberal account.[88] Doing so calls into question that account by repositioning legal liberalism as a *result of* movement success rather than a break from it. In this view, although there were lawyers who believed that courts would be the vanguard of progressive transformation, the failure of legal liberalism to achieve its most sweeping social reform aspirations was as much a *product of movement decline* as its cause. This leads to the second point: the current wave of movement lawyering, although resonating with models developed before and during the civil rights movement, reflects a particular response to contemporary trends in politics and the profession. Movement lawyering now represents a new phase of progressive legal development marked by collaborative relationships with mobilized social movement organizations and integrated advocacy techniques adapted to a new environment of resurgent progressive movements, pluralistic policy making, and problem-solving professionalism. Situating movement lawyering within the broader political economy of social movement activism thus highlights continuities but also critical differences. In particular, while previous progressive lawyering models played out against the backdrop of national political opportunities for reform, current approaches have developed in a context of ongoing national limits, raising issues of scale and synergy.

88. This reframing links together conversations within contemporary scholarship presenting a revisionist historical account that contests the meaning of legal liberalism. Revisionist scholarship emphasizes the deep disagreements before and after *Brown* over the appropriate types of substantive legal interventions (civil versus economic rights), the appropriate balance between legal and nonlegal strategies, and the amount of investment in impact litigation targeting the Supreme Court. *See* BROWN-NAGIN, *supra* note 8 (analyzing the role of movement lawyers in Atlanta from the 1940s through 1980, focusing on their differences with mainstream civil rights advocates); CARLE, *supra* note 8 (demonstrating how national racial justice organizations at the turn of the twentieth century initiated a range of sophisticated law-related activism that set the stage for later successes); GOLUBOFF, *supra* note 20 (showing how lawyers prior to *Brown* advanced a concept of civil rights that targeted economic as well as legal inequality); KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (2012) (providing a collective biography of African American lawyers during the period of segregation to show how their efforts in court redefined what it meant to represent the community); Mack, *supra* note 8 (contesting the standard legal liberal story by showing how African American lawyers in the pre-*Brown* era experimented with and debated multiple reform strategies in addition to impact litigation); Christopher W. Schmidt, *The Sit-Ins and the State Action Doctrine*, 18 WM. & MARY BILL RTS. J. 767 (2010) (analyzing interplay between sit-ins and Fourteenth Amendment jurisprudence by the Supreme Court).

A. From Progressivism to Liberalism

The coordination of legal and political strategies to advance social movements has a history that stretches far before *Brown*, revealing how movements—both with and without power—have long turned to law as a form of politics by other means.[89] Before the Civil War, the abolition movement fought slavery where it could—promoting state-level reforms outside the South that sought to protect ex-slaves who managed to escape their masters' clutches.[90] Without hope for federal action, abolitionists in the early Republic retained lawyers to ensure enforcement of manumission laws, develop state-level emancipation statutes, and represent African Americans in court, working "on the margins, using loopholes, technicalities, and narrow legal opinions to liberate slaves on a case-by-case basis."[91] Later groups, such as the New Jersey State Anti-Slavery Society, brought test cases challenging fugitive slave laws in state supreme courts and promoted legal reform affording due process for escaped slaves.[92]

After Reconstruction, new social movement politics emerged that profoundly shaped progressive legal advocacy. This was the Gilded Age,[93] marked by the dominance of the trusts, soaring inequality between the new corporate rich and industrial wage earners, and the increasing clash of capital and labor.[94] Law enabled the growth of industrial capitalism through governmental policy and the dedicated expertise of the new "corporate lawyers."[95] Industrial inequality was met by the rise of class-based social movements,[96] which stood for a stronger role for government in the economy to counteract monopolies, empower workers and small

89. *See generally* RICHARD L. ABEL, POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980–1994, at 7–21 (1995).

90. RICHARD S. NEWMAN, TRANSFORMATION OF AMERICAN ABOLITIONISM: FIGHTING SLAVERY IN THE EARLY REPUBLIC 4–15 (2002).

91. *Id.* at 61.

92. *See* Daniel R. Ernst, *Legal Positivism, Abolitionist Litigation, and the New Jersey Slave Case of 1845*, *in* ABOLITIONISM AND AMERICAN LAW 103, 105 (John R. McKivigan ed., 1999); *see also* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975) (showing how judges were complicit in legitimizing slavery by issuing legal rulings that upheld its legality out of adherence to professional role).

93. *See generally* SEAN DENNIS CASHMAN, AMERICA IN THE GILDED AGE: FROM THE DEATH OF LINCOLN TO THE RISE OF THEODORE ROOSEVELT 203–43 (3d ed. 1993).

94. *See* STEVEN J. DINER, A VERY DIFFERENT AGE: AMERICANS OF THE PROGRESSIVE ERA 15, 27 (1998); *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 296–97 (3d ed. 2010).

95. *See* FRIEDMAN, *supra* note 94, at 390–91; EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 17 (2000).

96. Those at the bottom clashed with the industrialists: small farmers charged exorbitant rates by the powerful railroads; miners forced to work twelve-hour days in dangerous conditions; small companies crushed by the trusts; and industrial workers exploited by Taylorist production. *See, e.g.*, FRIEDMAN, *supra* note 94, at 254–56; CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960, at 32–95 (1985).

farmers, and ensure social welfare for the largely immigrant residents of urban slums.[97]

For these movements, a fundamental challenge was how to protect legislative success from Supreme Court review.[98] Building on their majority position, progressive movements channeled efforts into legislative reform, first at the local level and then the federal. Beginning in the 1880s,[99] the labor movement sought legislation curbing the worst abuses of industrial capitalism,[100] aligning with settlement house reformers to win state laws prohibiting child labor, limiting the work day for women and workers in hazardous occupations, and banning tenement production.[101] Outside of this strategy, wider legislative reforms—like the eight-hour workday and minimum wage—were repeatedly invalidated in court under the rationale of "liberty of contract,"[102] which was constitutionalized in *Lochner v. New York*.[103] *Lochnerism* channeled labor strategy more forcefully into collective bargaining,[104] where strike and boycott activity were met with further judicial reprisal,[105] this time in the form of the anti-labor injunction.[106] In these clashes, the labor movement confronted business-backed legal groups—such as the American Anti-Boycott Association and National Lawyers' Committee—which sought to use litigation to challenge state-level economic regulation, battle unionism, and push back against the progressive effort to promote greater federal regulation of the economy.[107] These were incipient right-wing social movements in action. In this battle, courts generally—and the Supreme Court in particular—were seen as the central antagonist of progressive reform-

97. *See* DINER, *supra* note 94, at 14–29.

98. PURCELL, *supra* note 95, at 15.

99. The industrial labor movement began in the immediate aftermath of the Civil War and the American Federation of Labor "was formed in 1886 by craft unionists and dissenters within the Knights . . . ." DINER, *supra* note 94, at 19.

100. *See, e.g.*, WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 43 (1991) (describing efforts to restrict working hours in Illinois).

101. *See* DINER, *supra* note 94, at 21–22. Florence Kelley, a Jane Addams ally at Chicago's Halsted House, pioneered this type of legal reform to outlaw tenement garment production and child labor in Illinois in 1893. *Id.* at 22–23; *see also* NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 11 (2002) (showing success of labor movement at state level, noting that "[b]y 1912, perhaps the apex of Progressive reform, some thirty-eight states had passed child-labor laws and twenty-eight set maximum hours for women workers").

102. FORBATH, *supra* note 100, at 38–48. *See, e.g.*, Adkins v. Children's Hosp. of the D.C., 261 U.S. 525, 560–61 (1923); Hammer v. Dagenhart, 247 U.S. 251, 276 (1918).

103. 198 U.S. 45, 61 (1905).

104. FORBATH, *supra* note 100, at 7.

105. In the postwar period, unions had no legal status and their members were prosecuted for criminal conspiracy for "oppressing" the rights of employers. TOMLINS, *supra* note 96, at 48 (citing Old Dominion S.S. Co. v. McKenna, 30 F. 48 (S.D.N.Y. 1887); Walker v. Cronin, 107 Mass. 555, 567–68 (1871)).

106. *See, e.g.*, Vegelahn v. Guntner, 44 N.E. 1077, 1078 (Mass. 1896). The antilabor injunction was issued by courts on the ground of preventing labor union antitrust violations and protecting employer property rights. FORBATH, *supra* note 100, at 66–97. They were later banned by federal statute. *Id.* at 147–66 (noting that the Clayton Antitrust Act of 1914 banned labor injunctions unless employers could show irreparable harm and then the Norris-LaGuardia Act of 1932 banned them outright).

107. LEE EPSTEIN, CONSERVATIVES IN COURT 17–44 (1985).

ers.[108] It was this core idea—opposing Gilded Age industrial capitalists while affirming the growing power of progressive social movements to mobilize democratic majorities into regulatory and social welfare legislation—that shaped the role of progressive lawyers during this period.

In the Progressive Era, social movements drew legal support from different elements of the bar. In battles over workplace organizing, the labor movement allied with the nonelite bar, securing legal representation from radical lawyers who formed the backbone of what became the National Lawyers Guild ("NLG") in 1937.[109] Groups like the National Consumers League turned to different quarters, sometimes relying on pro bono lawyers—most notably Louis Brandeis—in defending state regulation from business-led attacks.[110] The famous Brandeis brief in *Muller v. Oregon* showed progressive lawyering at its most self-assured[111]: marshalling social science data on the negative health impacts of extreme hours on women workers to support Court deference to state employment regulation,[112] it was a strong riposte to *Lochner*'s judicial activism in favor of industrial elites. The Brandeis brief also expressed a progressive vision of corporate lawyer independence with Brandeis as pro bono counsel using his status to push back against the power of private corporate interests in support of public legislation.[113]

The decline of *Lochnerism* ushered in new roles for progressive lawyers in the New Deal administrative state. President Franklin Roosevelt's threat to pack the Supreme Court led to the "switch in time that saved nine"—a jurisprudential shift that effectively repudiated *Lochner* by upholding Washington's minimum wage law[114]—and thus paved the way for the Court to uphold key aspects of the New Deal. As part of the New Deal, progressive lawyers were called upon to use their expertise to build administrative processes that would help redress economic inequality through technocratic solutions.[115] In doing so, they could (for the time being) avoid thorny questions about what affirmative role courts and lawyers should play in countermajoritarian social reform—a question to

108. PURCELL *supra* note 95, at 14–15.

109. *See History*, NAT'L LAW. GUILD [hereinafter *NLG History*], https://www.nlg.org/about/history (last visited July 31, 2017). The NLG was formed in 1937 to challenge discriminatory policies by the American Bar Association, advance industrial union organizing, and support President Roosevelt's New Deal policies. *Id.*

110. *See* Clement E. Vose, *The National Consumers' League and the Brandeis Brief*, 1 MIDWEST J. POL. SCI. 267, 270 (1957).

111. *See generally* Brief for the State of Oregon, Muller v. Oregon, 208 U.S. 412 (1908) (No. 107).

112. *See* NANCY WOLOCH, *MULLER V. OREGON*: A BRIEF HISTORY WITH DOCUMENTS, 26–33 (1996).

113. *See* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 14 (1988) ("Lawyers were to be the guardians, in the face of threats posed by transitory political and economic powers, of the long-term values of legalism.").

114. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 412 (1937).

115. *See, e.g.*, Roscoe Pound, *The Lawyer as a Social Engineer*, 3 J. PUB. L. 292, 297–98 (1954) (arguing in favor of lawyers engaging in preparatory empirical studies to support legislation and administrative rule-making).

be left to movements advancing justice for African Americans and other minorities in the postwar era.

In the area of civil liberties, the American Civil Liberties Union ("ACLU") began in response to antiwar movement activism during World War I.[116] Yet it quickly expanded to address a range of civil liberties issues around labor organizing, free speech for political dissidents, and secularism—interacting with labor and other radical movements, and using a range of tactics that included litigation, legislative advocacy, and public education.[117] The NLG was also deeply influenced by antiwar activism and political dissidence—with radical lawyers mobilized in the defense of activists prosecuted for antiwar protest and affiliation with the Communist Party.[118]

Yet it was the "race question" that would redefine the role of progressive lawyers in relation to countermajoritarian movements. For African Americans after the Civil War, subordination was the overwhelming and suffocating reality, codified in a total system of segregation. Courts offered little hope—but neither did legislatures. The immediate postwar decade opened a crack in the impregnable fortress of white supremacy—which was quickly filled. Building on the Reconstruction Amendments, southern blacks, one step away from slavery, aligned with radical Republicans to achieve a level of government representation that, although never complete, constituted a "stunning departure in American politics."[119] The failure of the Republicans to convert enough whites to sustain the party in the South, however, brought Reconstruction to a swift and bitter end[120]—sealed with the Supreme Court's imprimatur. Just as the Court protected property owners against the claims of workers, so too did it permit white segregationists to erect Jim Crow.[121] The Court deferred to facially-neutral voting requirements (such as literacy tests and poll taxes) to exclude blacks from the franchise,[122] and interpreted

116. ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE 52 (2012).

117. *Id.* 52–54; *see also* SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 54–60 (1990).

118. *See NLG History*, *supra* note 109.

119. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 355 (1988).

120. *Id.* at 575, 588–95 (describing tumultuous 1877 election in which Democrat Samuel J. Tilden won the popular vote but Republican Rutherford B. Hayes claimed a controversial victory in the electoral college; explaining that in a compromise to preserve Hayes's victory, the federal government withdrew from the South, unleashing the "Redeemer Democrats," who quickly moved to codify pervasive segregation in all aspects of southern life, while reconstituting property rights to ensure that black farmers became locked in a sharecropping system virtually indistinguishable from indentured servitude).

121. In the first case to interpret the Fourteenth Amendment, the Court held that it protected only the narrow range of rights conferred by federal citizenship and not those given by individual states. Slaughter-House Cases, 83 U.S. 36, 80 (1872) (upholding state power to confer a private monopoly over the New Orleans slaughterhouse industry, thereby depriving butchers of the right to exercise their trade, as outside the scope of the Fourteenth Amendment). Thus, the Court signaled its disinclination to use the amendment to restrict the exercise of the state police power in relation to rights deemed to be incident to state citizenship, like education.

122. *See* FRIEDMAN, *supra* note 94, at 384–85.

the Reconstruction Amendments to apply only to "state action," thus undercutting federal legislative efforts to bar discrimination in public accommodations and penalize lynching.[123] It was in this context that the Court upheld racially segregated rail cars in *Plessy v. Ferguson*, concluding that "[i]f one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane."[124]

The political and legal landscape in this "nadir period" framed the black progressive response to law. A key issue was how (and how much) to engage with the state. Early groups, like the Afro-American League, sought to combine work outside and inside the state, supporting race uplift but also engaging in law making when there were opportunities to do so.[125] Tension over the emphasis to put on inside-versus-outside strategies precipitated the demise of important nineteenth century national racial justice organizations; yet, by the time W.E.B. DuBois split from Booker T. Washington to help form the Niagara Movement in 1905, a strategic approach to legal reform had developed targeting a "robust mix of litigation, legislation, and social welfare objectives."[126] African American organizations thus embraced a pragmatic approach to law that included legislative advocacy and impact litigation valued not only for its direct effects but also for its potential to produce high-profile wins that could shift public opinion.[127] When the NAACP formed in 1909, it adopted this pragmatic approach to leverage judicial review of discriminatory laws when feasible.

The litigation campaign to attack segregated schools grew out of this vision. In pursuing $100,000 from the Garland Fund that would enable it to launch "a large-scale, widespread, dramatic campaign to give the Southern Negro his constitutional rights,"[128] the NAACP initially stressed the pragmatic goals of litigation focused on public school equalization: to "make the cost of a dual school system so prohibitive as to speed the abolishment of segregated schools"; to "serve as examples and give courage to Negroes to bring similar actions"; and to "focus as nothing else will public attention north and south upon vicious discrimination."[129]

123. *See* The Civil Rights Cases, 109 U.S. 3, 25–26 (1883) (nullifying Civil Rights Act barring discrimination in public accommodations on the ground that the government did not have power under the Fourteenth Amendment to bar private discrimination); United States v. Harris 106 U.S. 629, 637 (1883) (invalidating Force Act of 1871 imposing federal penalties on local crimes, which sought to punish the KKK for murders that local officials would not prosecute).

124. 163 U.S. 537, 552 (1896).

125. CARLE, *supra* note 8, at 58–59 (describing a successful effort in New York after the *Civil Rights Cases* to pass a bill banning discrimination in insurance). Early test-case litigation resulted in a range of outcomes. *See id.* at 115–16, 192, 205–06 (noting success in early 1900s of Afro-American Council case challenging segregated seating in Jacksonville street cars and Niagara Movement case challenging fine for violating Virginia segregation law prohibiting black seating in first-class train).

126. *Id.* at 289.

127. *Id.*

128. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 132 (1975) (internal quotation omitted).

129. *Id.* On a 6-5 vote by the Garland Fund, the NAACP received the grant that would shape the next twenty-five years of its litigation agenda. MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950, at 13–14 (1987).

Once funding was secured, the NAACP began to pivot away from equalizing segregated schools toward a legal strategy that would "boldly challenge the constitutional validity of segregation *if and when accompanied irremediably by discrimination*"[130]—a move that created divisions within the movement,[131] but reflected the NAACP's pragmatic determination that a direct assault on *Plessy* held the best chance of advancing civil rights despite clear risks.

At the outset of the civil rights movement, lawyers were not single-mindedly committed to pursuing legal rights in court, but rather debated its efficacy in relation to known obstacles and the viability of other options. Richard Kluger's story of the NAACP's march toward *Brown* revealed a group of lawyers who recognized the difficulty of the task they confronted and the certainty of resistance to whatever legal victories they achieved.[132] At the earliest stages of planning, there was controversy. Garland Fund board member and ACLU founder Roger Baldwin was "convinced that the legal approach would misfire 'because the forces that keep the Negro under subjection will find some way of accomplishing their purposes law or no law.'"[133] NAACP staff lawyer Nathan Margold, hired to coordinate the legal campaign after the Garland Fund money was secured, noted in his influential report proposing an attack on separate-but-equal that it would cause "intense opposition, ill-will and strife"; but he nonetheless believed that without an effort to destroy "the constitutional validity of Southern school systems as they exist and are administrated at the present time, . . . we cannot proceed at all."[134] Former Howard Law School vice dean Charles Hamilton Houston, the man selected to lead the campaign, was pragmatic and politically astute. His correspondence with the central office of the NAACP showed he was focused not just on the litigation campaign, but on supporting legislation promoting economic security and outlawing lynching.[135] In advance of the litigation, he made a documentary of black school conditions in South Carolina as evidence of the discriminatory effect of "separate but equal" to promote the campaign among blacks and whites alike.[136] When confronted with questions about the litigation strategy's efficacy, Houston responded shortly: "Nobody needs to explain to a Negro the difference between the law in the books and the law in action."[137]

130. KLUGER, *supra* note 128, at 134.

131. Worried about the impact on labor solidarity, the Garland Fund—with the NAACP's acting secretary Walter White on its board—initially split over whether to give money to the NAACP. But White shored up support by stressing the pragmatic goals of the litigation. TUSHNET, *supra* note 129, at 13–14. When the Garland funding was granted, W.E.B. DuBois objected, arguing in favor of the position he had long condemned: acceptance of segregation and the project of racial uplift. *Id.* at 8 (citing W.E.B. DuBois, *Segregation*, CRISIS, Jan. 1934).

132. KLUGER, *supra* note 128.

133. *Id.* at 132.

134. KLUGER, *supra* note 128, at 135.

135. *Id.* at 162–63.

136. *Id.* at 163–65.

137. Charles H. Houston, *Don't Shout Too Soon*, CRISIS, Mar. 1936, at 79.

The NAACP, buoyed by the Garland Fund and having transitioned to black leadership, initially set its sights on equalizing resources in K-12 education and creating opportunities for university study. Building off legal work begun by lawyers outside the NAACP staff office, the organization won early victories striking down Missouri's segregated law school and a Virginia school board's policy of lower pay for black teachers.[138] Each victory raised the NAACP's profile but also highlighted problems with the equalization argument, which dragged the NAACP into complex and protracted litigation around the adequacy of separate graduate schools for blacks and the appropriateness of awarding teacher pay based on subjective criteria of "merit."[139] By the mid-1940s, organizational pressure was therefore building for a new win outside the framework of equalization.[140] Justice Harlan Stone's Footnote Four in *United States v. Carolene Products*,[141] issued the same year Thurgood Marshall took over the NAACP's legal team, signaled the Court's receptivity to Equal Protection claims directly challenging segregation.

B. Legalism at the End of Liberalism

The NAACP's epic legal campaign, culminating in *Brown*, reoriented the field of progressive legal practice. By aligning the federal courts with a countermajoritarian strategy to protect African American rights against southern Jim Crow laws, it represented a pendulum shift in political opportunity that had already begun to occur with the decline of the *Lochner* era and the legal validation of the New Deal.[142] The NAACP's victory in *Brown* thus underscored the consolidation and extension of the political advances made by the labor and forerunner civil rights movements before it. During the two decades that followed, the federal government, progressive foundations, and the elite bar made important investments to replicate the NAACP's success in other areas, promoting its model of law reform through impact litigation.[143] This was the era of legal liberalism.

By looking at this period through a social movement lens, this Section reframes legal liberalism and its aftermath in two important ways. First, it repositions legal liberalism as the *culmination of the liberal political project rather than the cause of its demise*. By the time legal liberalism came to full institutional fruition (with the creation of public interest law), the moment of political liberalism had already passed—its more

138. Alston v. Sch. Bd. of City of Norfolk, 112 F.2d 992, 997 (4th Cir. 1940); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 352 (1938).

139. TUSHNET, *supra* note 129, at 88.

140. *Id.* at 104 ("The NAACP had not reached the Supreme Court in a segregation case since 1939. By the mid-1940s the staff understood that anything short of a major victory there would have the same effect that strategic litigation was designed to avoid: it would fritter away the NAACP's limited resources without significantly eroding segregation.").

141. 304 U.S. 144, 155 n.4 (1937).

142. *See* TUSHNET, *supra* note 129, at 180.

143. HANDLER ET AL., *supra* note 43, at 26–39.

radical social change ambitions politically contained. From an organizational standpoint, resources and opportunities became misaligned because the close of the Warren Court litigation window undercut the rationale for investment in law reform. As a result, there was a period of complex adjustment, in which lawyers adapted to different possibilities for playing within the new political structure that linked litigation to other forms of advocacy, such as organizing and policy work. Over time, skill sets oriented toward impact litigation were retooled (though still maintained) in an environment of litigation constraint while a new generation of lawyers with different experiences and ideologies entered the field.

Second, this perspective reveals how progressive lawyering was shaped through interactions between social movements and lawyers located within different sectors of the bar. During the civil rights era, lawyers related extensively to social movements and engaged in movement-sensitive advocacy. Although impact litigators were often attuned to how lawsuits would shape organizing—and worked hand-in-hand with organizers—there were also divisions. More radical versions of lawyering seeking broader political change continued to develop as an alternative to impact-litigation-oriented law reform, highlighting ongoing tensions between top-down and bottom-up approaches.[144] The interaction of these approaches, shaped by fractures within progressive movements, defined the development of progressive lawyering in the post-*Brown* era. As top-down investments in impact litigation became poorly adapted to the legal environment, bottom-up practice was challenged by the declining power of movements themselves. Both legal approaches were forced to change in ways that drew them closer together. As a result, the notion of public interest law spread—not just from the left to right, as in the standard story—but from nongovernmental organizations into the private sector and back. Alternative models of progressive lawyering that emerged outside the core public interest field—advanced by radical firms representing nonelites within the civil rights, environmental justice, labor, and other movements[145]—also gained currency, visibility, and funding, which then channeled them back from the periphery into the core.

The founding of liberal public interest law reflected the shifting political opportunity that the Warren Court, and the broader liberal political project, had provided—but simultaneously signaled that project's decline. The 1964 Civil Rights Act was a crowning legislative achievement of the civil rights movement, but it also marked the moment at which conservatives launched an explicit strategy to use race to attract white voters to the Republican party and thus reshape the southern political

144. *See generally* RADICAL LAWYERS: THEIR ROLE IN THE MOVEMENT AND THE COURTS (Jonathan Black ed., 1971) [hereinafter RADICAL LAWYERS].

145. *See, e.g.*, LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 103–33 (2001).

map.[146] The federal legal services program was created a decade after *Brown*, the same year Congress passed the Voting Rights Act and riots burned Los Angeles.[147] When the *Yale Law Journal* hailed the creation of the "new public interest lawyers" in 1970,[148] urban unrest had already rocked several other major U.S. cities, the Chicago Democratic National Convention ended in bitter protests and arrests, Martin Luther King, Jr. and Robert Kennedy had been assassinated, and the Vietnam War had divided the left and alienated the right. By 1973, when *Roe v. Wade* was decided,[149] President Richard Nixon had begun his second term, and the Burger Court had already issued its ruling in *Dandridge v. Williams*,[150] upholding state limits on welfare payments and effectively ending the welfare rights litigation campaign.[151]

The creation of public interest law depended on a unique political convergence: an activist federal government built on New Deal commitments to labor rights and social welfare that fed into investments in antipoverty and civil rights programs[152]; an activist Supreme Court willing to translate its economic liberalism into support for equality in other social spheres[153]; and a powerful philanthropic community led by the Ford Foundation, which capitalized new organizations that populated the public interest field.[154] Public interest law was also supported by the organized bar, which promoted the new efforts while deriving professional benefits from its association.[155] The convergence of these forces at this particular moment represented the apex of power for the labor and civil rights movements that built the New Deal and Great Society.

Instability was thus woven into the public interest law's institutional fabric, which depended on a fragile alliance already under assault.[156] The Ford Foundation's largesse was pivotal to the growth of both legal services and public interest law. Ford funded a pilot project of neighborhood-based legal services and advocated its expansion under the auspices

146. *See* IAN HANEY-LOPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 17–34 (2014) (describing the development of the Southern Strategy).

147. TAYLOR BRANCH, AT CANAAN'S EDGE: AMERICA IN THE KING YEARS 1965–68, at 226–28, 293–99 (2006).

148. *See generally* Note, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970).

149. 410 U.S. 113 (1973).

150. 397 U.S. 471 (1970).

151. *See* MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973, at 131–32 (1993).

152. *See* David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943–1972*, 63 STAN. L. REV. 1071 (2011).

153. TUSHNET, *supra* note 129, at 179.

154. *See* COUNCIL FOR PUB. INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA 40 (1976).

155. *See* STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 43 (2004).

156. *See* David M. Trubek, *Council for Public Interest Law: Balancing the Scales of Justice: Financing Public Interest Law in America*, 1977 WIS. L. REV. 303 (1977) (book review).

of federal sponsorship,[157] which occurred in 1965 with the creation of the Legal Services Program, whose budget quickly grew to $40 million.[158] The program went on a massive hiring spree, recruiting elite law graduates through its prestigious Reginald Heber Smith Fellowship Program, established in 1967.[159] Legal services lawyers deployed impact litigation in coordination with newly created back-up centers to quickly and dramatically expand the number of high-court poverty law cases.[160]

Fearful of subsidized competition, the organized bar's support for the Legal Services Program was grudging but eventually forthcoming, feeding into broader professional efforts to promote the development of public interest law. In 1964, the Lawyers' Committee for Civil Rights was created after President John F. Kennedy's call to the private bar to help promote civil rights enforcement. In 1967, Ford gave the Lawyers' Committee $2 million dollars to "galvanize the large law firms and the leadership of the organized bar in many of the largest cities in the country to form local committees, hire staff, work out a plan using volunteer attorneys to address urban problems, and focus legal efforts on issues of poverty and race."[161]

These top-down efforts to build institutions, supported by elite investment, competed with, but did not displace, bottom-up approaches that sought stronger connections to the frontlines of movement activism. In 1964, the Lawyers Constitutional Defense Committee (a competitor to the bar-sponsored Lawyers' Committee) was developed by the ACLU and other progressive groups (including the Congress on Racial Equality) to send lawyers to the South to protect and defend activists participating in Freedom Summer.[162] Outside this structure, movement lawyers emerged to support direct action in the South, using legal precedent to authorize protest efforts, and deploying litigation as a vehicle to negotiate with cities over the terms of desegregation.[163] Movement lawyering

157. From 1950 to 1960, Ford gave $420,000 to the recently established National Legal Aid and Defenders Association, which was given official status within the ABA as the voice of the legal aid community. COUNCIL FOR PUB. INTEREST LAW, *supra* note 154, at 41–42. In 1963, Ford's "Gray Areas" program created a neighborhood-based legal services office in New Haven, Connecticut. *Id.* at 45. That same year, the Johnson Administration's Committee on Juvenile Delinquency and Youth Crime funded Mobilization for Youth's legal aid program, which was run by Ed Sparer. *Id.* at 47. Two years later, Sparer used Ford money to start the Center on Social Welfare Policy and Law at Columbia, where he launched an impact campaign to create procedural and substantive welfare rights modeled on *Brown*. *Id.* at 48. In 1966, the Center received $200,000 from the newly established federal Legal Services Program. *Id.*

158. EARL JOHNSON, JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM 188 (1974).

159. *Id.* at 179.

160. *Id.* at 189 ("[From 1967–1972,] 219 cases involving the rights of the poor were brought to the high court, 136 were decided on the merits, and 73 of these were won."); *see also* SUSAN E. LAWRENCE, THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING 9 (1990) ("During its nine-year tenure, 1965 through 1974, the LSP sponsored 164 cases before the Supreme Court . . . . The eighty LSP cases that received plenary consideration represent 7 percent of all written opinions handed down during by the Supreme Court during this era.").

161. COUNCIL FOR PUB. INTEREST LAW, *supra* note 154, at 56.

162. *See* Hilbink, *supra* note 54, at 19–20.

163. BROWN-NAGIN, *supra* note 8, at 207.

also developed in connection with the assertive legal activism of the growing NLG,[164] whose small law firm members included well-known figures such as Arthur Kinoy and William Kunstler, who rejected incrementalism and aligned themselves with radical movements in the 1960s and 1970s: the Black Panthers, the American Indian Movement, Students for a Democratic Society, and the Weather Underground.[165] These lawyers deployed their skills in the service of political trials, protest support, and other advocacy designed to build public consciousness and movement power.[166] In perhaps the most dramatic and well-known example of the political trial, NLG lawyers representing antiwar demonstrators (the Chicago 8) outside of the Democratic convention in 1968 used the trial to reject "the very forms of authority upon which the legitimacy of the war itself depended."[167] Other examples included the antiwar coffeehouse movement, in which lawyers from the War Resisters League and American Friends distributed information about the right not to fight and represented deserting soldiers in courts-martial as a tool to organize against the war.[168]

Mainstream public interest law was created against this backdrop and adopted many of its tools. Indeed, there was never any clean line distinguishing mainstream public interest law from movement-oriented alternatives. Many public interest lawyers invested heavily in movement strategies during this period.[169] Mark Tushnet's account of the NAACP's campaign to end public school segregation recalls that Houston sought to bring equalization suits in localities, in part, as a way to increase membership.[170] Martha Davis's history of the welfare rights movement recounts that the legal campaign to expand access to "special grants" for welfare recipients in the 1960s, led by Ed Sparer's Center on Social Welfare Policy and Law, was meant to advance the organizing campaign by George Wiley's National Welfare Rights Organization on that issue.[171]

164. *See generally* A HISTORY OF THE NATIONAL LAWYERS GUILD 1937–1987 (Victor Rabinowitz & Tim Ledwith eds., 1987); RADICAL LAWYERS, *supra* note 144; *see also* Richard L. Abel, *Lawyers and the Power to Change*, 7 LAW & POL'Y 5, 13 (1985); Steve Bachman, *Lawyers, Law, and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1 (1984–1985); Paul Harris, *The San Francisco Community Law Collective*, 7 LAW & POL'Y 19, 20 (1985).

165. *See generally* ARTHUR KINOY, RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE'S LAWYER (1983). Some of these small practices were organized as law collectives or communes, which operated according to principles of nonhierarchical decision making in the service of progressive client causes. *See generally* CO-OPS, COMMUNES AND COLLECTIVES: EXPERIMENTS IN SOCIAL CHANGE IN THE 1960'S AND 1970'S (John Case & Rosemary C.R. Taylor eds., 1979).

166. Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1983).

167. *Id.* at 381.

168. *See* Telephone Interview with Michael Diamond, Professor of Law, Georgetown University Law Center (Aug. 23, 2016).

169. For autobiographical accounts, see generally J.L. CHESTNUT JR. & JULIA CASS, BLACK IN SELMA: THE UNCOMMON LIFE OF J.L. CHESTNUT, JR. (1990); MICHAEL MELTSNER, THE MAKING OF A CIVIL RIGHTS LAWYER (2006).

170. TUSHNET, *supra* note 129, at 42–43.

171. DAVIS, *supra* note 151, at 48–49. Welfare lawyers also inundated welfare departments with demands for hearings in order to force change, while Manhattan legal services attorneys worked with

Many of the "new" public interest lawyers of the 1960s and 1970s rejected a go-at-it-alone strategy focused exclusively on court-based reform.[172] For instance, Marian Wright Edelman, reflecting on her early career at the NAACP in Mississippi, concluded: "The thing I understood after six months there was that you could file all the suits you wanted to, but unless you had a community base you weren't going to get anywhere."[173] Echoing this sentiment, Gary Bellow, former deputy director of California Rural Legal Assistance, called test-case litigation "a dead end," arguing that "'rule' change, without a political base to support it, just doesn't produce any substantial result because rules are not self-executing."[174]

Ralph Nader's success in publicizing auto safety concerns with his book, *Unsafe at Any Speed*, inspired a league of Nader's Raiders, who brought research, publicity, and policy advocacy to bear on regulatory enforcement in the New Deal-era agencies that liberals argued had succumbed to industry capture.[175] These efforts were then brought into the fold of foundation support, as were those of forerunner legal rights groups, the NAACP and ACLU. Ford grants helped to create Nader's Public Citizen in 1971, establish the NAACP's litigation project to abolish the death penalty, and support ACLU projects in the areas of prisoners' rights, women's rights, sexual privacy, and objector amnesty.[176]

This activity was at the cusp of the public interest law movement's explosion—but already near the end of the Rights Revolution.[177] The Warren Court window, closed by 1969, created genuine opportunity for those membership-based groups, the NAACP and ACLU, which predated the founding of public interest law, as well as federal poverty lawyers in the Legal Services Program and public defenders empowered in the wake of *Gideon v. Wainwright*.[178] Many of the seminal Court decisions associated with the Rights Revolution in the United States came from these groups during the Warren Court era,[179] although the Supreme

colleagues at Columbia to devote more organizing resources to welfare advocacy. *See* Telephone Interview with Michael Diamond, *supra* note 168.

172. For additional views on the role of legal aid and public interest lawyers, see Gary Bellow, *Legal Aid in the United States*, 14 CLEARINGHOUSE REV. 337, 338–40 (1980); Edgar S. Cahn & Jean Camper Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1012 (1970); James Lorenz, *Lawyers, Law and the Poor*, 27 GUILD PRAC. 192, 193–95 (1968).

173. *The New Public Interest Lawyers*, *supra* note 148, at 1081.

174. *Id.* at 1077.

175. For background on Nader, see generally ROBERT F. BUCKHORN, NADER: THE PEOPLE'S LAWYER (1972). The classic article criticizing the problem of administrative agency capture and sparking interest in regulatory enforcement was Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1684 (1975).

176. COUNCIL FOR PUB. INTEREST LAW, *supra* note 154, at 44.

177. *See* EPP, *supra* note 41.

178. 372 U.S. 335 (1963).

179. *See* JONATHAN D. CASPER, LAWYERS BEFORE THE WARREN COURT: CIVIL LIBERTIES AND CIVIL RIGHTS, 1957–1966, at 141–51, 170–84 (1972) (detailing the significant role of the ACLU and NAACP in litigating civil liberties and civil rights cases before the Warren Court); COUNCIL FOR PUB. INTEREST LAW, *supra* note 154, at 56 (detailing federal legal services cases in the first six years after its founding).

Court expanded women's rights through the 1970s,[180] and lower courts generally remained more open to liberal rights claims into the 1980s as President Reagan worked to shift the federal bench in a more conservative direction.[181]

Public interest law was thus founded at the moment when the Rights Revolution went into decline. In 1969, there were only fifteen public interest law groups in the United States with less than fifty full-time lawyers.[182] By 1976, the Council for Public Interest Law reported that there were ninety-two nonprofit public interest law organizations, seventy-seven of which were created between 1970 and 1975.[183] Between 1972 and 1975, with President Nixon in the White House and leaders from the Democratic establishment running the Ford Foundation,[184] $130 million was invested in public interest law, with one-third going to the three largest groups.[185] During this period, nearly 40% of all funding for public interest law came from foundations, the majority from Ford,[186] which also supported clinical legal education—the academic counterpart of public interest law.[187]

C. Conservative Contestation and Progressive Adaptation

Public interest law thus began in existential crisis: its strategic *raison d'etre*, impact litigation and agency enforcement, were seriously undermined; its federal funding was imperiled and foundation funding unsustainable; the social movements that had powered its rise were in retreat; and it faced a conservative counterpart, adopting the public interest law form and label, only now better positioned in the more conservative environment to take advantage of critical political assets.[188] Taken together, these changes produced two critical shifts in the public interest law field.

180. *See* KAREN O'CONNOR, WOMEN'S ORGANIZATIONS' USE OF THE COURTS 96–98 (1980).

181. *See* NAN ARON, LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND 18 (1989).

182. COUNCIL FOR PUB. INTEREST LAW, *supra* note 154, at 79.

183. *Id.* Around the same time, Handler and his colleagues' study found eighty-six public interest law firms. Joel F. Handler et al., *The Public Interest Law Industry*, *in* PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 50 (Burton A. Weisbrod et al. eds., 1978). Only four existed prior to 1965, and there were only nineteen by 1969. *Id.* The Handler study also found that from 1972 to 1975, foundation grants constituted just over 40% of the total budget of these organizations. *Id.* at 54 tbl.4.4.

184. Yves Dezalay & Bryant G. Garth, *Constructing Law Out of Power: Investing in Human Rights as an Alternative Political Strategy*, *in* CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 360–61 (Austin Sarat & Stuart Scheingold eds., 2001).

185. These three groups were: the NAACP, the ACLU, and the ACLU Foundation. COUNCIL FOR PUB. INTEREST LAW, *supra* note 154, at 91. The eleven largest public interest groups by income were the ACLU, NAACP, ACLU Foundation, Southern Poverty Law Center, Lawyers' Committee for Civil Rights, Natural Resources Defense Council, Environmental Defense Fund, Native American Rights Fund, National Housing and Economic Development Law Project, Children's Defense Fund, and Mexican American Legal Defense and Educational Fund. *Id.* at 94.

186. *Id.* at 229.

187. Margaret Martin Barry et al., *Clinical Education for this Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 12–13, 18–19 (2001).

188. For the history of this shift, see SOUTHWORTH, *supra* note 1, at 8–40; TELES, *supra* note 1, at 58–89, 220–64.

First, liberal groups had to adjust to the reality of having tooled up to invest in a political and legal regime that no longer existed. And second, they had to increasingly respond to challenges asserted by the incipient conservative public interest law movement.

The institutionalization of public interest law that developed in the first wave after *Brown* both empowered a new type of legal leadership and constrained further innovation. The organizational model of the public interest law firm, with its emphasis on the impact litigation approach pioneered by the NAACP, proved durable as the opportunity structure that enabled its creation changed. The development of the infrastructure for the field and the institutionalization of the concept of "public interest law" was thus a product of historical contingency. As circumstances changed, the firms had to adapt. And while many did, forms and strategies created for court-centered advocacy remained. In the short term, the misalignment between organizational resources and opportunity contributed to frustration on the left as investments in public interest law could not be easily modified in the changing environment. During this period, there was a phase of organizational lag, but also incipient organizational innovation as public interest lawyers, seeking to support progressive movements in retreat, continued to develop multi-faceted strategies, while also testing new private sector organizational formats.

For the main liberal public interest law organizations, conservative political change meant recalibrating the scope and nature of their litigation in the new environment. Within the first few years of public interest law's founding, litigation was still the central activity of public interest law groups, comprising roughly three-quarters of their activity.[189] Yet the political ambition of this litigation was already being dialed back: liberal lawyers started to craft cases for policy effect in federal circuits or states where the probability of success was high and the likelihood of Supreme Court review was low—either because of the limited geographical scope of the ruling or the ground on which the decision would be rendered. The overall mix of lawyers' activity also reflected adaptation to changing conditions. In this regard, Handler and his colleagues' classic early study revealed that public interest law organizations, on average, devoted 60% of their time to legal work, while focusing roughly one-quarter of their effort on legislative advocacy and research.[190]

As politics moved further to the right, the liberal wing of public interest law continued to grow and change. By the early 1980s, a major study reported on the activities of 158 public interest law organizations (excluding legal services groups), most of which focused on liberal causes.[191] Foundation and government funding had fallen dramatically since

189. HANDLER ET AL., *supra* note 43, at 79 tbl.4.3.

190. Handler et al., *supra* note 183, at 55 tbl.4.5. The researchers also noted that the percentage of legal work in independent public interest law firms devoted to litigation was 54%. *Id.* at 60 tbl.4.9.

191. ARON, *supra* note 181, at 25–26. The study reported that its 158 respondents constituted 71% of surveyed organizations. *Id.* at 25. The study's appendix lists all surveyed organizations, which in-

the previous decade,[192] only partially made up by the introduction of attorney's fees available under new civil rights statutes.[193] While litigation and agency participation remained important, public interest groups reported having "diversified their tactics and activities."[194] Groups were not only expanding the scope of advocacy but were also decentralizing by focusing litigation and other strategies at the state and local level.[195] Even within federal courts, the nature of litigation changed. For example, while the number of prison and jail conditions cases remained stable through the 1970s and 1980s, lawyers' approach to this litigation changed from a "kitchen sink" model, which lumped together wide-ranging complaints, to more narrowly tailored challenges deemed more likely to succeed on specific points of law.[196] In the legal services domain, lawyers emphasized the importance of connecting litigation to direct action and policy making,[197] which they promoted in national trainings in the 1970s as "multi-forum advocacy."[198]

Within liberal public interest law groups, external opportunities and internal resources were at odds. Political conservatism meant less possibility for national-level legal success, and the rise of conservative legal groups meant less agenda-setting power and more playing defense. Progressive social movements (both identity-based and issue-based) used the influence they had achieved through political and judicial action in the prior period—which broke down *de jure* barriers to participation and created new regulatory regimes—to repurpose as political interest groups. The cycle of liberal protest had ended.[199]

Liberal legal organizations sought to adapt by developing new tactical repertoires and ideological frames, supporting local organizing and community development as viable—even if circumscribed—interventions in a period of liberal political quiescence.[200] Some legal services groups, caught in the unresolved tension between their individual

cludes a small number of known conservative organizations, such as the Pacific Legal Foundation and Southeastern Legal Foundation. *Id.* at 137–46.

192. *Id.* at 41 fig.2.4 (stating that foundation grants had fallen to 24% of the overall budget, while the share from the federal government was 18%). The average budget of public interest law organizations had dropped from $815,203 in 1975 to $776,383 in 1983. *Id.* at 50.

193. *Id.* at 41 fig.2.4 (reporting that fees accounted for 9% of overall budgets).

194. *Id.* at 87.

195. *Id.* at 93 ("There are also clusters of centers across the county and more than two dozen public interest firms which now maintain litigation and advocacy work almost entirely at the state and local level.").

196. Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 605 (2006).

197. *See The New Public Interest Lawyers*, *supra* note 148, at 1075 & n.11.

198. The trainings were developed by Bea Moulton, who at the time was the national training director for the Legal Services Corporation, and focused on how legal services lawyers could support local direct action. Email from James V. Rowan, Professor of Law and Director of the Clinical Programs, Northeastern Law School, to Scott L. Cummings, Visiting Professor of Law, Harvard Law School (Mar. 12, 2014) (on file with author).

199. Meyer & Tarrow, *supra* note 22, at 26.

200. Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 463–64 (2001).

service roots and law reform aspirations,[201] experimented with popular education models to rebuild movement consciousness among the disaggregated and disempowered poor, but their efforts were confined by the limits of scale.[202] While these efforts sought to create new connections to reenergize enervated progressive movements, liberal public interest organizations were constrained in their ability to make significant change by preexisting investments in structures and values, as well as funder expectations and the commitments of the lawyers who were drawn to those places to work. This explains the essential continuity in the structure of liberal groups through the 1980s with adjustments in targets (lower-level courts, agencies, and legislatures) and tactics (more policy, education, and research).

On the conservative side, the image was reversed with the rise of various strands of conservative social movement activism that linked back to—and in many respects surpassed—their turn-of-the century predecessors. This was a story about the changing nature of American federalism and the role of interest group politics within it. Traditionally, conservativism viewed its interests as protected through decentralized governance and judicial restraint,[203] while liberals looked to the federal government to build power from the New Deal through the civil rights period.[204] Yet, the political success of legal liberalism sparked new political investments in national conservative strategies, which culminated in Reagan's 1980 election (while shifting power to Republicans in the Senate).[205] Twelve years of Republican presidential governance ensued. The opportunity structure then changed in ways that reversed, or at least complicated, the traditional federalism paradigm. Liberal groups sought state and local routes to reform,[206] while conservatives pursued federal legislative and (increasingly) policy change through courts.[207]

The conservative movement created the opportunity for greater investments in legal strategies: conservative movement leaders, acknowledging the power of rights claiming (though sometimes uncomfortable with the ideological tension it created with their general disavowal of judicial activism[208]), sought to build their own legal infrastructure on the right while undercutting that on the left.[209] The "Powell memo," authored

201. *See* Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism,* 32 UCLA L. REV. 474, 485 (1985).

202. *See* Ruth Buchanan & Louise G. Trubek, *Resistances and Possibilities: A Critical and Practical Look at Public Interest Lawyering*, 19 N.Y.U. REV. L. & SOC. CHANGE 687, 691 (1992).

203. *See* SOUTHWORTH, *supra* note 1, at 108.

204. *See* Michael McCann & Jeffrey Dudas, *Retrenchment . . . and Resurgence? Mapping the Changing Context of Movement Lawyering in the United States*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 8, at 37, 41.

205. *See id.* at 46–47.

206. *See id.* at 54.

207. *See* SOUTHWORTH, *supra* note 1, at 15.

208. TELES, *supra* note 1, at 88.

209. David Luban, *Taking Out the Adversary: The Assault on Progressive Public Interest Lawyers*, 91 CALIF. L. REV. 209, 220–45 (2003) (detailing the attack on progressive public interest law through

by then Chamber of Commerce lawyer and future Supreme Court Justice Lewis Powell, explicitly acknowledged the success of liberal public interest law and the power of the courts to produce change, prompting one lawyer to later reflect that "liberal [public interest law firms] were 'extremely successful,' and conservatives tried to replicate that."[210]

First-wave conservative efforts in the 1980s, focused on creating regional groups on the model of the Pacific Legal Foundation, were limited by close alliance with corporate sponsors that undermined those groups' claim to serve the public good.[211] The next wave of organizations, like the Institute for Justice, publicly distanced themselves from corporate backers, realizing that by "[r]epresenting traditionally liberal clients, . . . it would be possible for conservatives to gain a hearing on a wide range of issues."[212] While conservatives sought to capitalize upon and change the meaning of public interest law's dominant terms and symbols, they also embraced its tactics: deploying impact litigation in combination with an arsenal of other advocacy approaches designed to support the conservative movement's goals.[213] In the first wave of conservative public interest law, insiders complained that business funding constrained case selection and undermined credibility, prompting one conservative leader to urge that "funds are raised to support the cases—not vice versa. This rule is critical not only for the organization's integrity, but also for the mission's success."[214] When the first-wave alliance with local business elites failed to propel the movement forward, new groups emerged that sought to mimic liberal counterparts by defining a coherent ideological mission, severing funding from case selection, focusing on policy change through litigation, and setting their own agenda.[215] These groups started to emphasize the art of building cases from the ground up in areas of specialization and patiently waiting for openings to change the law. As Dan Burt from the Capital Legal Foundation put it: "The policy litigators must turn from the high visibility, big press cases of the last eight years and bring repeated cases in their area of special concentration, which they are prepared to litigate and relitigate until they change the law."[216] Liberal groups during this period learned from conservative success that legal and political strategies were necessarily complementary and mutually reinforcing. Law had to have movements, and movements had to have law.[217]

restrictions on legal services organizations, challenges to IOLTA programs, political interference with law school clinics, and judicial limitations on attorney's fees).

210. SOUTHWORTH, *supra* note 1, at 13.

211. TELES, *supra* note 1, at 68–69.

212. *Id.* at 239.

213. *See* SOUTHWORTH, *supra* note 1, at 149–67.

214. TELES, *supra* note 1, at 87 (quoting Clint Bollick).

215. *Id.*

216. *Id.* at 78–79.

217. *See id.* at 241 (describing how the Institute for Justice, beginning in the 1990s, used a mix of tactics on cases leading to *Kelo*).

Cross-fertilization, however, did not simply move along a liberal to conservative spectrum. Organizational interaction also occurred within the liberal field, which contained for-profit groups that sought to reposition themselves in relation to changed funding and social movement activity. The passage of civil rights laws in the areas of employment discrimination (race, sex, age, and disability) and the availability of attorney's fees in civil rights cases underwrote the expansion of a new wing of the plaintiff's bar that was more firmly linked to the public interest law movement.[218]

Old-line radical firms transitioned into new civil rights litigation boutiques, some of which came to be run by lawyers who had come out of the nonprofit public interest sector and pursued opportunities to litigate large cases nonprofit groups could not afford to take on.[219] In this sense, the spillover effects of social movement success in creating civil rights laws continued to shape the nature of progressive lawyering. In addition, labor law firms carried forward by the surge of labor union activism after the New Deal had to adapt to the labor movement's decline beginning in the 1970s.[220] They did so, in part, by investing in workplace legal strategies outside federal labor law, such as wage-and-hour and employment discrimination litigation, which brought them closer to the civil rights bar.[221] Because boutique private firms offered stable employment at a generally higher pay scale than the nonprofit sector, some began to attract public interest minded students and came to embrace the label.[222]

As this review has suggested, these organizational shifts were part of a broader political restructuring in which the decline of progressive social movements, and the corresponding political ascendance of conservative movements, imposed constraints on progressive lawyers and legal groups. Tracing this restructuring from the highpoint of progressive political influence during the civil rights period through its nadir in the Reagan Revolution shows how the strategic and institutional development of progressive lawyering lagged behind political change: it was the political success of the labor and civil rights movements that created the judicial opportunities and legislative victories that enabled legal liberalism to develop and grow. As progressive political influence began to

218. Stephen C. Yeazell, Brown*, The Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1998–2000 (2004) (linking the advent of fee-shifting statutes to the development of a plaintiff's bar "engaged in litigation as a means of social change").

219. *See* Scott L. Cummings, *Privatizing Public Interest Law*, 35 GEO. J. LEGAL ETHICS 1, 20–22 (2011).

220. *See* Jennifer Gordon, *Law, Lawyers, and Labor: The United Farm Workers' Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PA. J. LAB. & EMP. L. 1, 55 (2005).

221. *See id.* at 62.

222. *See, e.g.*, BERNARD KOTEEN OFFICE OF PUB. INTEREST ADVISING AT HARVARD LAW SCH. & CTR. FOR PUB. INTEREST LAW AT COLUMBIA LAW SCH., PRIVATE PUBLIC INTEREST AND PLAINTIFFS' FIRM GUIDE 14–65 (2013), http://hls.harvard.edu/content/uploads/2015/08/Private-Public-Interest-and-Plaintiffs-Firm-guide.pdf (listing private public interest law firms).

wane, weakened by a complex combination of internal schisms and external opposition, public interest groups established to advance social reform through law were forced to adapt. That adaptation reflected a pendulum swing toward tactical and organizational diversity, alongside a renewed interest in building political power to counter the rise of activated conservatism.

D. Progressive Lawyering in a Pragmatic Age

By the last decade of the millennium, there had been a dramatic realignment of political governance and judicial decision making in American politics. Government regulation of the private sector and funding for social programs had declined, the federal courts had become more conservative, and the economy had become more globalized.[223] For progressives, the 1990s carried forward this basic structural architecture but with some new openings for change: a divided federal government, a still-conservative judiciary, and a centrist Democratic president, whose control of the executive branch and support for economic initiatives created some legal opportunities (for example, in housing and community development), while limiting others (with the passage of welfare reform, a harsh new crime bill, and restrictions on legal services attorneys). The power of individual rights to frame injustice had been fundamentally challenged by conservatives who successfully rebranded claims to economic security and antidiscrimination as either special interest rent seeking (as in the case of the labor movement or "welfare queens"), or as incompatible with the rights of other citizens (as in the case of affirmative action trampling on the rights of meritorious whites). The age of progressive pragmatism had arrived. No longer facing the possibility of transformative programmatic change at the level of the New Deal or Great Society, progressive aspirations focused on solving more discrete social problems and playing defense—in the hopes of laying the groundwork for new forms of "extraparliamentary social motion or movements [to] bring power and pressure to bear on the prevailing status quo."[224]

Lawyers confronted a changed context. Whereas commentators had long called for lawyers to focus on local enforcement of state and federal standards as a critical part of legal reform, the meaning of the "local" began to change for progressives, serving now a source of new legal norms in areas where the federal context was closed. Because traditional funders were invested in helping to maintain organizations they had started, innovation would come from outside the mainstream, supported by different pots of money than first-wave public interest law. Retrenchment and legal setbacks emerged as opportunities to mobilize new funds and energy for the losing side. Liberal and conservative organizations alike

223. *See* McCann & Dudas, *supra* note 204, at 37–49.

224. Cornel West, *The Role of Law in Progressive Politics*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 468, 468 (David Kairys ed., rev. ed. 1990).

sought to break out of the model of one-dimensional advocacy to encompass broader problem-solving strategies that used strategic research and other advocacy efforts to affirmatively reshape the political agenda.[225]

For progressive lawyers to advance social change in this context, they needed to revamp old skills and build connections with resurgent social movements. Doing so would help to define a distinct approach to movement lawyering in the new millennium—one characterized by a more explicit commitment to multidimensional problem-solving strategies alongside new alignments with social movements and support for protest-oriented campaigns. This approach would build upon changes in social movement politics, funding priorities, and educational opportunities that grew out of, and reacted against, the prevailing pragmatism of the age.

The impetus to forge new linkages to social movement organizations came from outside and inside traditional liberal legal organizations, reflecting mechanisms of ongoing organizational realignment and the renewal of progressive movement activity. Externally, old social movement organizations attempted to recalibrate their approaches in a changed political and economic environment, professionalizing in ways that invited new roles for lawyers, while a fresh wave of protest-based activism emerged. A strain of death penalty abolitionism, for example, reformulated as the innocence movement to gain high-profile exonerations.[226] In 2005, more aggressive organizing-centered unions broke from the traditional labor movement to form Change to Win, creating new resources for grassroots legal campaigns in support of low-wage workers.[227] The human rights movement, long associated with the fight against authoritarianism abroad, redirected itself back to the United States to fight President Bush's War on Terror and more generally reframed domestic equality struggles that had languished under the old civil rights paradigm.[228] The fight for marriage equality redefined the LGBT rights movement after the HIV/AIDS crisis of the 1980s and 1990s, thrusting it into the center of debates about culture, religion, and personal freedom, while strategically reengaging courts as sites of social policy development.[229] In 2006, the immigrant rights movement launched mass demonstrations around the country, signaling its new political strength (built in part on reconciliation with the labor movement), while generating resources for legal organizations to protect immigrants from labor abuse

225. TELES, *supra* note 1, at 262–63.

226. For analysis of the innocence movement, see BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2012); BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (2003).

227. *See* Ruth Milkman, *Introduction* to WORKING FOR JUSTICE, *supra* note 3, at 1, 17.

228. *See* Cynthia Soohoo, *Human Rights and the Transformation of the "Civil Rights" and "Civil Liberties" Lawyer*, *in* BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES 71–104 (Cynthia Soohoo et al. eds., 2007).

229. *See* PINELLO, *supra* note 4, at 31; Cummings & NeJaime, *supra* note 4, at 1241.

and support those caught in the expanding criminal immigration regime.[230]

As the country elected a new president whose formative political experience included Alinsky-style organizing on Chicago's South Side, there was an eruption of social movement protest that both echoed back to the more radical phase of the civil rights movement while also disrupting the more pragmatic approach of established movement organizations. Worker centers—community-based groups providing support to low-wage, mostly immigrant, workers—emerged to fill the space vacated by the traditional labor movement by combining service delivery with more activist strategies like pickets and direct actions against exploitative employers.[231] In 2011, responding to the Great Recession and inspired by the Arab Spring, a collection of groups launched Occupy Wall Street—an anti-authoritarian movement that deployed Internet-based organizing and physical occupation of public space to fundamentally challenge the underpinnings of inequality in the American economy, captured in the slogan "We are the 99%."[232] Other movements made sophisticated use of social media and new technology to change the terms of debate. The "Dreamers"—undocumented youth who claimed the right to legalization—deftly fused old and new movement repertoires: occupying public offices (including the office of Arizona Senator John McCain) and engaging in hunger strikes and public protests, while also crafting powerful and expertly produced videos disseminated via YouTube, organizing protests via Facebook, and mobilizing followers on Twitter.[233]

Then, in August 2014, after Michael Brown—an unarmed African American man—was shot and killed by a white police officer in Ferguson, Missouri, mass protests broke out in that city, fortified by a "freedom ride" by allies from around the country.[234] As #BlackLivesMatter became a call to conscience to stop police violence and "(re)build the Black liberation movement,"[235] social media became a powerful tool to advance the cause: videos of police killings and other violence against African Americans went viral, sent through Twitter feeds with their own hashtags.[236] As protests spread in the wake of other high-profile police killings, a spirit of dissident politics was rekindled, prompting some to

230. *See* Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010); Annie Lai, *Confronting Proxy Criminalization*, 92 DENV. U. L. REV. 879 (2015).

231. JANICE FINE, WORKERS CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM 12–13, 100–01 (2006).

232. *See* TODD GITLIN, OCCUPY NATION: THE ROOTS, THE SPIRIT, AND THE PROMISE OF OCCUPY WALL STREET (2012); *see also* Michael L. Haber, *CED After #OWS: From Community Economic Development to Anti-Authoritarian Community Counter-Institutions*, 43 FORDHAM URB. L.J. 1 (2016).

233. *See* WALTER J. NICHOLS, THE DREAMERS: HOW THE UNDOCUMENTED YOUTH MOVEMENT TRANSFORMED THE IMMIGRANT RIGHTS DEBATE 1, 68–69, 85 (2013).

234. Day, *supra* note 6.

235. *About the Black Lives Matter Network*, BLACK LIVES MATTER, http://blacklivesmatter.com/about/ (last visited Aug. 1, 2017).

236. Day, *supra* note 6.

herald the birth of a "new civil rights movement."[237] Whether this was in fact true was almost beside the point. A new wave of progressive social movement politics had resoundingly arrived—one that sought to fuse aggressive protest actions, savvy media strategy, and credible insider politics into a powerful new challenge to inequality.

It was against this backdrop that a new wave of movement lawyering began to take shape. Some organizations at the center of movement activity hired legal staff in the model of social movement in-house and outside counsel. For instance, the National Day Labor Organizing Network ("NDLON"), a coalition of organizations founded in 2001 to protect the rights of immigrants who solicited work in public spaces like street corners, established an in-house legal department to coordinate legal defense for day laborers prosecuted for violating local antisolicitation laws, while developing broader legal and policy strategies to eliminate those laws.[238] Other movement networks developed relationships with lawyers dedicated to their cause. In the aftermath of the Ferguson protests, a group of attorneys came together to form the Black Movement-Law Project to provide "legal support to local communities throughout the country as they demonstrate against police brutality and systemic racism."[239] These lawyering models, embedded in movements whose very existence challenged prevailing notions of what counted as "illegal" activity (police shootings, yes; seeking work, no), necessarily combined defensive legal tactics (representing protestors and workers prosecuted for legal violations) with street-level politics, affirmative lawsuits, and policy development to assert and enact new legal norms. In so doing, lawyers used multiple advocacy tools and relied upon the expertise of community leaders and nonlawyer activists to make the public case for reform, which in turn created opportunities for additional legal challenges to underlying conditions of inequality.[240]

New movement activism also promoted similar shifts toward broader advocacy approaches within mainstream public interest legal organizations, whose lawyers continued to be pragmatic about court-centered

237. *Id.*

238. Cummings, *Litigation at Work*, *supra* note 3, at 1651, 1660–61.

239. *About Us*, BLACK MOVEMENT-L. PROJECT, https://bmlp.org/ (last visited Apr. 21, 2017).

240. For example, one outgrowth of Black Lives Matter has been to spotlight the connection between policing strategies in low-income communities of color and local fiscal strategies for generating city revenue through the collection of fines imposed on the targets of that policing. *See* Frances Robles, *Mistrust Lingers as Ferguson Takes New Tack on Fines*, N.Y. TIMES (Sept. 12, 2014), https://www.nytimes.com/2014/09/13/us/mistrust-lingers-as-ferguson-takes-new-tack-on-fines.html ("[T]he city of Ferguson had the highest number of warrants issued in the state relative to its size. Arrest warrants are often served by municipal courts when someone fails to appear in court to pay fines for a traffic or other violation . . . ."). As attention has been drawn to the disproportionate use of fines on poor people to fund city budgets, legal groups like Equal Justice Under Law have brought lawsuits against municipalities that have succeeded in halting arrests for unpaid traffic tickets and preventing jurisdictions from imprisoning poor defendants in misdemeanor cases for not being able to afford posting bail. *See* Shaila Dewan, *Court by Court, Lawyers Fight Policies that Fall Heavily on the Poor*, N.Y. TIMES (Oct. 23, 2015), https://www.nytimes.com/2015/10/24/us/court-by-court-lawyers-fight-practices-that-punish-the-poor.html.

strategies while drawn to the dynamism of grassroots campaigns. At the beginning of the new millennium, liberal public interest organizations had survived a strong conservative challenge, which included further restrictions on federally funded legal services lawyers and attempts to limit state funding, combined with efforts to undercut the progressive advocacy work of law school clinics.[241] Yet public interest law groups continued to evolve,[242] supporting themselves with a more decentralized and privatized set of funders,[243] while broadening the range of issues on which they worked.[244] Changing politics shifted the substantive focus of public interest law groups from the first wave,[245] while placing less emphasis on traditional legal work.[246] With federal-court-oriented impact litigation still limited by the presence of a conservative majority on the Supreme Court, liberal organizations sought to build new types of coalitions that could promote policy reform, particularly at the local levels, where governments in the home states of many progressive groups tended to be politically sympathetic to their cause. In one study of prominent public interest groups, nearly all reported significant collaboration with grassroots organizational partners,[247] on the theory that "[a]lmost never will a single organization have the capacity to achieve major policy change."[248] These groups also emphasized the strategic use of litigation to gain tactical advantage within movement campaigns and the importance of media strategies to shift public support toward their causes.[249] While local efforts resulted in significant policy success in "progressive cities,"[250] including important extensions of labor and immigrant rights, they were also constrained by opponents' efforts to limit their reach on preemption grounds.[251]

241. *See* Luban, *supra* note 209, at 236–40.

242. By the mid-2000s, there were approximately 1,000 nonprofit public interest law groups (including legal services organizations) on the left and right. Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice, 1975–2004*, 84 N.C. L. REV. 1591, 1605–06 (2006).

243. State and local funding accounted for 28% of financial support for all groups in 2004, while foundation funding was down to about one-third. *Id.* at 1616. For the most prominent groups, individual and corporate funding was 28% and 14%, respectively, of overall budgets. Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2055 (2008).

244. The percent of single-issue groups declined from 29% to 7% between 1975 and 2004. Nielsen & Albiston, *supra* note 242, at 1615.

245. *Id.* (reporting that the overall distribution of work in public interest law organizations shifted away from civil liberties, environmental law, consumer protection, and employment, toward more housing work and investment in issues associated with conservatism).

246. *Id.* at 1611. Although the mean percentage of legal activity remained relatively constant, at around 60%, there were signs of shifts: the amount of effort devoted to research, education, and outreach increased from 14% to 19%, while there were far more groups that reported devoting less than 20% of effort to traditional legal work (from 1% in 1975, to 10% in 2004) and fewer that devoted 100% of their effort to legal work (from 3% to 1%). *Id.*

247. Rhode, *supra* note 243, at 2064.

248. *Id.* (quoting Marcia Greenberger, co-president of the National Women's Law Center).

249. *Id.* at 2064–65.

250. *See generally* Richard C. Schragger, *Is a Progressive City Possible? Reviving Urban Liberalism for the Twenty-First Century*, 7 HARV. L. & POL'Y REV. 231 (2013).

251. *See* Cummings, *Preemptive Strike*, *supra* note 3, at 1117–18 (discussing the use of preemption to limit local expansion of labor protections for low-wage workers).

During this time, mainline public interest law and legal services organizations experienced an infusion of new energy and ideas, sparking innovative initiatives. Postgraduate fellowship programs emerged as an external source of funding attached to the lawyer, rather than the organization, providing a major stimulus. The key funders were the law firm of Skadden, Arps, Slate, Meagher & Flom, which started its program in 1988, and the National Association of Public Interest Law (now Equal Justice Works).[252] These programs were bound by the political and economic interests of their patrons, particularly as Equal Justice Works moved to a law firm funding model.[253] This meant that projects challenging corporate client practices (like those proposing lawsuits against corporate environmental, labor, or consumer violations) were off limits.[254] But they also created new pathways into old organizations that brought opportunities for change. Because fellows developed their own projects and came with their own funding, they had more freedom of action and often used it to fashion different approaches. Although many projects reproduced traditional litigation efforts, there were high-profile examples of innovation by young lawyers whose political sophistication and internalized critiques of past strategies led them to integrate law with other modes of political action and focus on political outcomes rather than legal ones. In a campaign that came to symbolize this innovation, fellows in Los Angeles and San Francisco revealed extensive labor violations in the garment industry, and then used coordinated law and organizing strategies to galvanize an anti-sweatshop movement that ultimately succeeded in making it easier for garment workers to hold manufacturers liable for labor abuse.[255] Campaigns like this became exemplars of successful projects, which were institutionalized around a model in which fellows combined different modes of advocacy (usually litigation, education, and policy advocacy) to achieve results. In advancing a multifaceted strategy, this new generation of lawyers deliberately sought to develop approaches that connected their legal work to the energy created by the immigrant rights, labor, and other progressive movements.

Changes in legal education also promoted these approaches by stressing problem-solving, collaboration, and holistic advocacy. Students engaged in social justice clinics at the turn of the millennium were imbued with a strong sensitivity to client and community-defined political goals.[256] These students entered practice with a critical ethos that they

252. *About The Foundation*, SKADDEN FOUND., https://www.skaddenfellowships.org/about thefoundation (last visited Aug. 21, 2017); *Fellowships and Career Development*, EQUAL JUST. WORKS, http://www.equaljusticeworks.org/post-grad (last visited Aug. 2, 2017).

253. *See* Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 99 (2004) [hereinafter Cummings, *Politics of Pro Bono*].

254. *See id.* at 116.

255. *See generally* Julie A. Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry*, 1 J. GENDER, RACE & JUST. 405 (1998).

256. For examples of texts embodying these ideas, see generally LÓPEZ, *supra* note 60; Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J.

endeavored to implement.[257] Some clinics experimented with movement advocacy models that reinforced the shift toward collaboration and empowerment in practice.[258] Outside the clinics, new law school specializations developed to support public interest minded students through targeted curricular, mentoring, and career counseling resources.[259] These programs taught students to critically evaluate the use of different "modes of advocacy"—litigation, transactional work, policy development, research, communications, education, and organizing—and helped students find a public interest path that ran through not only traditional nonprofits but also small firm practice and large firm pro bono programs.[260] Such educational initiatives reinforced the expansion of the public interest concept across diverse organizational forms and promoted practice models connected to social movements and deploying multiple forms of advocacy to advance their goals. They prepared students for approaches to representation based on shared expertise (with organizers, policy analysts, media strategists, and finance consultants), as well as partnerships with private sector lawyers willing to play important pro bono roles, even if not fully committed to the underlying social movement cause. In this way, legal education contributed to the formation of a distinctive professional identity for progressive lawyers shaped in reaction to the critique of legal liberalism—one that stressed accountability to community, pragmatic problem-solving, and coordinated legal and political advocacy.[261]

As a result, movement-centered lawyering models began to appear more prominently within legal education and practice. Legal educators reported offering free-standing courses examining the "ethics and efficacy of multidimensional advocacy,"[262] as well as "integrated" clinics seek-

2107 (1991); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 BUFF. L. REV. 1 (1990).

257. *See* SHDAIMAH, *supra* note 30, at 67–129 (exploring the sophisticated views of urban legal services lawyers about client autonomy and the value of collaboration).

258. *See generally* Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355 (2008).

259. *See generally* Richard L. Abel, *Choosing, Nurturing, Training and Placing Public Interest Law Students*, 70 FORDHAM L. REV. 1563 (2002).

260. Law firm pro bono programs grew significantly during this period and—though generally individual service oriented—could be relied on to support movement efforts enforcing mainstream social welfare guarantees and basic due process rights. Large law firms, for example, were critical in supporting the Supreme Court challenges to Guantánamo detentions. For an analysis of the rise of pro bono, see Cummings, *Politics of Pro Bono*, *supra* note 253.

261. Professionalism scholarship has emphasized the plurality of professional identities within the bar, shaped by practice site or community. *See generally* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION (Robert L. Nelson et al. eds., 1992); LYNN MATHER ET AL., DIVORCE LAWYERS AT WORK (2001). The development of a critical professional ethos among progressive lawyers, shaped in reaction to legal liberalism, suggests that social movement politics have also had an important impact on the meaning and practice of professionalism.

262. *See, e.g.*, *L8667 S. Advocacy in Theory and Practice*, COLUM. L. SCH., http://web.law.columbia.edu/courses/sections/19700#.VtxPWZMrJ-U (last visited Aug. 21, 2017); *see also The Justice Lab*, HARV. L. SCH., http://hls.harvard.edu/academics/curriculum/catalog/index.html?o=68266 (last visited Aug. 21, 2017). These courses were not entirely new. While at Antioch Law School in the 1970s, Michael Diamond recounts developing a course on Multidimensional Problem Solving. *See* Telephone Interview with Michael Diamond, *supra* note 168.

ing to "train social change advocates."[263] At the 2016 clinical law teaching conference, there were panels focused on promoting "movement lawyering in a clinical setting" and "supervising movement lawyering," which focused on how to orient clinical casework toward social movement support and how to train clinical students to be effective social movement advocates.[264] Scholars also sponsored a growing number of movement-themed legal conferences outside of clinical education, exploring the "present and future" of social movements,[265] investigating what causes movement "turning points,"[266] and analyzing "current uprisings and movements in the United States and prospects for coalition building."[267]

Within practice, there were signs of new investments in movement lawyering approaches. ACLU affiliates established special positions to coordinate new programs in integrated advocacy.[268] Under this "new model," the ACLU proposed a plan to "[a]nalyze legislation before it passes, to determine when and how it undermines constitutionally protected freedoms," develop "legislation that supports civil liberties priorities," carry out "aggressive, long-term strategies to address civil liberties under siege," and "expand a powerful education program" to bolster public engagement and legislative accountability.[269] The Center for Constitutional Rights ("CCR") took a leadership role in promoting movement lawyering, sponsoring intensive trainings, conferences, and fellowship programs.[270] To advance these efforts, CCR launched the Bertha Justice Institute to "build a new generation of lawyers and legal workers that have the vision, expertise and determination to create social change."[271] These organizational developments were complemented by

263. *See, e.g.*, Marcy L. Karin & Robin R. Runge, *Toward Integrated Law Clinics that Train Social Change Advocates*, 17 CLINICAL L. REV. 563, 563 (2011).

264. *Movement Lawyering in a Clinical Setting*, ASS'N AM. L. SCHS., EXPLORING COMMUNITY ENGAGEMENT THROUGH CLINICAL EDUCATION 21 (2016) ("This session will explore how clinics can effectively partner with community organizers advocating for political, economic, and/or social change in the communities in which clients live and work."); *Supervising Movement Lawyering*, ASS'N AM. L. SCHS., EXPLORING COMMUNITY ENGAGEMENT THROUGH CLINICAL EDUCATION 32 (2016) ("In this interactive workshop, participants will explore how clinical teachers can produce more thoughtful, strategic, and resourceful allies to social movements; help law students work more effectively with community organizers and other stakeholders; and prompt law students to think critically about the power and limits of their professional role.").

265. *The Present and Future of Civil Rights Movements: Race and Reform in 21st Century America*, DUKE L., https://law.duke.edu/clrp/conference/civilrights/ (last visited Aug. 21, 2017).

266. Symposium, *Toward Justice: Turning Points in Social Movements Past and Future*, IND. MAURER SCH. L. (2016).

267. Symposium, *Emerging Coalitions: Challenging the Structures of Inequality (ClassCrits VIII)*, UNIV. TENN. C.L. (2015). In 2015, the Berkeley Students for Economic and Environmental Justice sponsored a symposium at Berkeley Law School. Lawyers in Social Movements, TUMBLR (Mar. 17, 2015, 12:47 AM), http://www.lawyersinsocialmovements.tumblr.com/.

268. *See, e.g.*, ACLU OF OHIO FOUND., 2013 WORK PLAN 3–4 (2012), http://www.acluohio.org/assets/about/WorkPlan2013.pdf.

269. *Id.* at 3.

270. *Training the Next Generation*, CTR. FOR CONST. RTS., https://ccrjustice.org/home/how-we-work/training-next-generation (last modified Sept. 21, 2016).

271. *The Bertha Justice Institute*, CTR. FOR CONST. RTS. (Nov. 26, 2013), https://ccrjustice.org/home/BerthaJusticeInstitute. Recent CCR events have celebrated "50 Years of Radical Lawyering Since Freedom Summer," and explored "the core strategies, tactics, and skills of movement legal

professional training programs that explored the potential and challenges of coordinating legal and political tactics.[272] For example, the 2014 National Legal Aid and Defenders Association conference asserted as a primary goal the promotion of "aggressive multi-forum advocacy in a changing legal services delivery system."[273] Efforts to promote lawyers' connections to social movements and expand multi-dimensional advocacy were being underwritten by some of the same foundations that fifty years earlier had endowed the court-centered model of public interest law to which they now reacted.[274] In this sense, the liberal legal movement had come full circle, attempting to repower the social movements that had brought it into being a half-century ago while avoiding mistakes of the past.

IV. REDEFINING MOVEMENT LAWYERING

As the historical overview in Part III suggests, movement lawyering is both an extension of legal liberalism and a reaction to political and professional change that succeeded it. This Part shifts from past to present to explore the meaning and content of movement lawyering in contemporary progressive legal practice. What are the elements of movement lawyering that differentiate it from other models of progressive practice that have been offered in the post-civil-rights era?

This Part answers this question by introducing a definition of movement lawyering and a descriptive model that rests on two key features: the representation of *mobilized clients* and the use of *integrated advocacy*. Although both of these features resonate with movement lawyering traditions from the past, there are new points of emphasis and

work." *50 Years of Radical Lawyering Since Freedom Summer*, INST. FOR JUST. & DEMOCRACY IN HAITI, http://www.ijdh.org/2014/06/events-category/50-years-of-radical-lawyering-since-freedom-summer/ (last visited Aug. 21, 2017); *Movement and Community Lawyering*, CTR. FOR CONST. RTS., https://ccrjustice.org/home/get-involved/events/movement-and-community-lawyering (last modified Mar. 4, 2016). For conversations with movement lawyers sponsored by the Bertha Justice Institute, see *Radtalks: What Could Be Possible if the Law Really Stood for Black Lives?*, 19 CUNY L. REV. 91 (2015).

272. *See, e.g.*, A.B.A. STANDING COMMITTEE ON PRO BONO & PUB. SERV. & THE NAT'L LEGAL AID & DEF. ASS'N, 2013 EQUAL JUSTICE CONFERENCE 29 (2013), http://www.americanbar.org/content/dam/aba/events/probono_public_service/2013/05/equal_justice_conference/equal_just_conf2013_programbookWEB.authcheckdam.pdf (describing panel on Community Organizing and Social Justice Lawyering); Lawyers and Worker Centers Conference, UNIV. OF CAL. IRVINE SCH. OF L. (2013).

273. NAT'L LEGAL AID & DEF. ASS'N, 2014 LITIGATION AND ADVOCACY DIRECTOR'S CONFERENCE 2 (2014), http://www.nlada100years.org/sites/default/files/LitDirProgramBookOnline.pdf.

274. *See, e.g.*, National Immigration Law Center, CARNEGIE CORP. N.Y., https://www.carnegie.org/grants/grants-database/grantee/national-immigration-law-center/#!/grants/grants-database/grant/52038.0/ (listing grants to the National Immigration Law Center to advance multiple advocacy strategies around immigrant civic integration) (last visited Aug. 21, 2017); *Grants Database*, FORD FOUND., https://www.fordfoundation.org/work/our-grants/grants-database/ (listing $100,000 grant to the Center for Constitutional Rights for the "creative use of law as a positive force for social change" and $1,225,000 grant to Asian Americans Advancing Justice to "promote a fair and equitable society for all by working for civil and human rights and empowering Asian Americans and Pacific Islanders and other underserved communities").

more explicit efforts to connect lawyering to social movement goals and tactics. Contemporary lawyers are thus redefining the movement model to encompass a set of concrete commitments around practical strategies to advance social movement causes and a professional ideology about the appropriate role of lawyers and law that supports those commitments.

As a definitional matter, movement lawyering is *the mobilization of law through deliberately planned and interconnected advocacy strategies, inside and outside of formal law-making spaces, by lawyers who are accountable to politically marginalized constituencies to build the power of those constituencies to produce and sustain democratic social change goals that they define*. Movement lawyering is therefore a version of cause lawyering in which the cause is defined and advanced by social movement leaders and constituents in dynamic processes of grassroots organization building and community engagement. Movement lawyers are committed to the cause and may participate in its formulation and strategize about its achievement, but their role is anchored by relationships with extant organizations that have ultimate decision-making authority and a legitimate claim to represent the interests of the movement constituency.[275] In this way, movement lawyers seek to help create, sustain, and gain advantages for social movements through their affiliation with and representation of movement organizations and their constituents, typically through the planning and execution of social movement campaigns. This conception depends on a working definition of a social movement, in which the movement itself is understood as a collective challenge to existing authority, advanced through organizational structures, that relies significantly (though not exclusively) upon "noninstitutionalized means of action" (*i.e.*, action that occurs outside of the domain of formally sanctioned law making or dispute resolution).[276] In this model, lawyers either collaborate with or formally represent social movement organizations in devising campaigns to challenge structural causes of inequality and subordination through collective processes of power mapping and campaign design in which movement leaders and constituents identify targets, tactics, and goals—encompassing policy development and implementation, attitudinal change, and movement building. In this way, movement campaigns always have multiple, interconnected purposes: achieving discrete policy wins, building public support, strengthening grassroots participation, and reinforcing the organizational capacity of the movement itself.

Within this framework, movement lawyers view law as a form of politics to be used strategically to advance diverse movement objectives: catalyzing direct action, imposing pressure on policy makers to change and enforce law, and equipping individuals with the power to assert

275. David A. Snow et al., *Mapping the Terrain*, *in* THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS, *supra* note 25, at 3, 10 (discussing the key role of organization in social movements).

276. *Id.* at 6–11.

rights in their day-to-day lives.[277] Because movements are generally characterized by collective challenges outside of institutionalized political channels, movement lawyers deploy law flexibly as part of problem-solving repertoires, in which legal "skills" are construed broadly to include litigation competencies, like brief writing and oral advocacy, but also encompass educating community members about their rights, advising and defending protestors, researching and drafting policy language, writing legal opinions to support policy positions, counseling movement organizations on legal levers that may be pulled to exert pressure on policy makers or private actors in negotiating contexts, and devising mechanisms for monitoring the enforcement of policy.[278]

Committed to translating law on the books into change on the ground, movement lawyers plan for bureaucratic resistance and formulate plans for implementation; they anticipate countermobilization and backlash, and seek to avoid it or minimize its costs. Reaching for large-scale democratic reform, movement lawyering aspires to build more accountable and effective challenges to power. It does so by adopting a movement-centered approach to defining representational ends and means, in which ends are formed through the representation of mobilized clients and means are advanced through integrated advocacy. In this way, movement lawyering is an effort to respond to foundational concerns about lawyer accountability and legal efficacy by reframing the essential structures of legal representation (aligning with active movement stakeholders) and the strategies of legal reform (coordinating different types of legal and political advocacy).

A. Mobilized Clients

Movement lawyering is focused on supporting challenges by marginalized constituencies to change structural conditions of inequality, deepen democratic participation, and shift cultural norms. It therefore depends on lawyer accountability to mobilized clients that play a leadership role in social change campaigns. The relationship between movement lawyers and mobilized clients serves three functions. First, it associates lawyers with organized groups that have the capacity to disrupt and thereby influence politics. In this way, the movement lawyer's decision to represent mobilized clients is, in part, a reflection of the lawyer's commitment to a holistic strategy to influence policy and social outcomes, while building movement power. Second, because mobilized clients come to the lawyer-client relationship with structure and authority, they bring

277. Michael W. McCann, *How Does Law Matter for Social Movements?*, *in* HOW DOES LAW MATTER? 76, 83–98 (Bryant G. Garth & Austin Sarat eds., 1998).

278. For a comprehensive list of such skills, see *Supervising Movement Lawyering*, *supra* note 264, at 34 (listing skills associated with movement lawyering, which include: "integrated, multi-faceted problem-solving," "persuasive advocacy," "collaboration," "cross-cultural competency," "appreciating context," "deep listening," "effective communication," "understanding bias," and "critical self-reflection").

the crucial ability to hold the lawyer accountable for both the construction of representational ends and decisions about strategy to best achieve those ends. Since mobilized clients are empowered, they are better positioned to resist lawyer domination. Third, and relatedly, mobilized clients serve a critical representational role for the broader movement constituency: their organizational structure is built upon a claim to legitimate authority derived from engagement with and leadership of affected constituency members.

Examples of movement lawyering in practice spotlight lawyers representing activist organizations,[279] not the vulnerable or disorganized clients emphasized in the legal liberal model.[280] In 2003, the City University of New York School of Law Immigrant and Refugee Rights Clinic represented a group of workers in a lawsuit against a corporate restaurant chain that had failed to pay them minimum wage and overtime.[281] The lawsuit was coordinated with an organizing campaign targeting the restaurant chain led by the Restaurant Opportunities Center ("ROC-NY"), which was created after 9/11 to "provide support to restaurant workers displaced as a result of the World Trade Center tragedy."[282] ROC-NY uses a "tri-pronged model of change to build power and voice for restaurant workers": protest-based "workplace justice campaigns," partnerships with "high-road" employers, and "research and policy work."[283] In the campaign, clinic lawyers planned the litigation in connection with ROC-NY's organizing effort to pressure the restaurant chain into prospective workplace changes.[284] As clinic director Sameer Ashar described, by embedding the litigation in the campaign, the organizers and workers were better positioned to hold the lawyers accountable.[285]

Other examples emphasize client-centered lawyers taking cues from organizational clients with grassroots power.[286] For example, in Sarah London's account of "integrative lawyering" for reproductive justice, lawyers "reach out to an organized reproductive justice group, such as California Latinas for Reproductive Justice, to determine whether and

279. Thomas M. Hilbink, *You Know the Type: Categories of Cause Lawyering*, 29 LAW & SOC. INQUIRY 657, 664 (2004); *see also* Brian Glick, *Two, Three, Many Rosas! Rebellious Lawyers and Progressive Activist Organizations*, 23 CLINICAL L. REV. 611 (2017).

280. *See* Gordon, *supra* note 11, at 2141 ("[L]awyers largely partner with community organizations rather than representing isolated individuals.").

281. Ashar, *supra* note 8, at 1879–80.

282. *About Us*, RESTAURANT OPPORTUNITIES CTRS. UNITED, http://rocunited.org/about-us/#our-history (last visited Aug. 21, 2017).

283. *Staff & Locals: New York*, RESTAURANT OPPORTUNITIES CTRS. UNITED, http://rocunited.org/staff-and-locals/new-york/ (last visited Aug. 21, 2017).

284. Ashar, *supra* note 8, at 1898–1911.

285. *Id.* at 1918.

286. *See, e.g.*, Gabriel Arkles et al., *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. SOC. JUST. 579, 583 (2010) (describing a model in which lawyers "take leadership from, and support the goals of, community organizing projects"); *see also* Anne Bloom, *Practice Style and Successful Legal Mobilization*, 71 LAW & CONTEMP. PROBS. 1 (2008); Eagly, *supra* note 81; Rebecca A. Sharpless, *More than One Lane Wide: Against Hierarchies of Helping in Progressive Legal Advocacy*, 19 CLINICAL L. REV. 347 (2012).

how lawyers can play a role in helping them achieve their goals."[287] Along these lines, the Women's Employment Rights Clinic at the Golden Gate University School of Law represented the California Domestic Worker Coalition—an organizational client with "clearly articulated goals and transparent decision making"—in a policy campaign to pass a statewide domestic worker bill of rights.[288]

The movement lawyer's focus on representing mobilized clients spotlights three familiar, yet significant, issues in progressive lawyering. One is client selection. In a context of limited legal resources, movement lawyers must make choices among competing demands for their assistance. Because social movements, by definition, have conflicting interests and opposing claims to leadership and agenda-setting authority, how lawyers make client selection decisions invariably involves choosing sides in internal movement debates—implicating the very questions about accountability to broader movement constituencies that the movement lawyering model seeks to minimize. Accordingly, a movement lawyer's choice of client is a decision freighted with political significance. It therefore puts the onus on lawyers to exercise discretion to choose which movement organizations to support based on a careful evaluation of the degree to which such organizations do, in fact, represent a constituency's discernible point of view—so that the choice of client does not simply become a choice of representing the most established or well-funded social movement organization simply by virtue of their power or visibility in the field.

The second issue, also implicating political discretion, is the movement lawyer's approach both to organizational counseling and to managing conflicts that might arise when representing individuals in the context of a broader movement campaign. Although traditional legal ethics treats the representation of organizations as a straightforward exercise in following the clearly defined instructions of an organization's "duly authorized constituents,"[289] scholars have persuasively shown how this view rests on the unhelpful fiction of organizational personhood that obscures underlying governance complexity and potential conflicts of interest.[290] Particularly in a fluid environment of grassroots organizations with nascent or decentralized governance structures, deferring to "authorized constituents" may risk accepting the views of more empowered voices within movement conversations. In these contexts, movement lawyers must make choices about whether to take a more or less activist approach to advising organizational decision makers on how to articulate movement goals, define remedies, or shape strategy.

287. Sarah London, *Reproductive Justice: Developing a Lawyering Model*, 13 BERKELEY J. AFR.-AM. L. & POL'Y 71, 99 (2011).

288. Hina Shah, *Notes from the Field: The Role of the Lawyer in Grassroots Policy Advocacy*, 21 CLINICAL L. REV. 393, 395, 416 (2014).

289. MODEL RULES OF PROF'L CONDUCT r. 1.13(a) (AM. BAR ASS'N 2016).

290. Stephen Ellman, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103, 1115–16 (1992).

Scholars have also focused on the potential for conflicts that arise when movement lawyers represent individuals in order to advance broader movement objectives. The potential for conflict between client interests and commitment to the cause—what David Luban has termed the "double agent problem" in cause lawyering[291]—occurs when the lawyer's commitment runs simultaneously to individual clients and social movement organizations with whom the lawyer is collaborating to further a campaign. This type of conflict may occur, for example, when low-wage workers wish to settle claims of labor violations when organizers seek to keep up the pressure on an employer in order to advance an organizing campaign. Individual clients may theoretically waive such a conflict in advance—effectively agreeing to settle only on terms acceptable to the movement organization—but such waivers have been viewed skeptically by courts, particularly when they are made by less sophisticated clients who are not independently represented by counsel.[292]

Third, the movement lawyering model's emphasis on mobilized clients begs the question of what to do in situations of weak or even nonexistent organizational leadership. Some scholars suggest that in the absence of existing movement infrastructure, lawyers may help build community capacity in order to create the conditions for subsequent movement mobilization.[293] In the absence of existing organizational structure, movement lawyers may also take the initiative to conduct research and initiate lawsuits challenging institutional inequality with the goal of building publicity and hence generating grassroots attention and organizational investments.[294] The ACLU's recent challenge to solitary confinement in New York State is a case in point. Prisoners in solitary are an unorganized and underrepresented group by virtue of their incarceration and isolation. After issuing a report in 2012 detailing the extensive and arbitrary use of extreme isolation as punishment for violation of prison rules—with more than 68,000 extreme isolation sentences issued against prisoners from 2007 to 2011—the ACLU's New York affiliate filed a class action lawsuit against the state's department of corrections.[295] In conjunction with the lawsuit, the ACLU lawyers helped organize a letter writing campaign to pressure the governor to support changing prison practices while also testifying in front of the Inter-American Commission

291. DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 319 (1988).

292. RESTATEMENT (THIRD) OF THE LAW OF LAWYERING § 122, cmt. (d) ("A client's open-ended agreement to consent to all conflicts normally should be ineffective unless the client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent.").

293. *See* Alizabeth Newman, *Bridging the Justice Gap: Building Community by Responding to Individual Need*, 17 CLINICAL L. REV. 615, 619 (2011).

294. *See* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1077–78 (2004) (describing the publicity and stakeholder effect).

295. *See Historic Settlement Overhauls Solitary Confinement in New York*, N.Y.C.L. UNION (Dec. 16, 2015), http://www.nyclu.org/news/historic-settlement-overhauls-solitary-confinement-new-york; Scarlet Kim et al., N.Y.C.L. UNION, BOXED IN: THE TRUE COST OF EXTREME ISOLATION IN NEW YORK'S PRISONS, http://www.americanbar.org/content/dam/aba/administrative/litigation/nyclu_boxedin_report.authcheckdam.pdf.

on Human Rights and collaborating with criminal justice reformers to start a new organization, the New York Campaign for Alternatives to Confinement.[296] Against the backdrop of this legal and political work, the state agreed to a sweeping 2015 settlement, which required it to mandate a massive reduction in the number of prisoners in solitary, a decrease in the length of solitary confinement sentences, and enhanced rehabilitative services.[297] The lawsuit stimulated resources for community organizations to engage in ongoing implementation and to provide transitional support upon reentry, strengthening the organizational base that had been built in connection with the lawsuit itself.[298] Although mirroring the classic lawyer-led reform campaign of legal liberalism, the ACLU's challenge to solitary confinement suggests how such campaigns may be thoughtfully connected to movement-building activities to create opportunities for sustained political engagement by affected constituents and other stakeholders. In short, it suggests how a lawsuit might help spark a movement.

B. Integrated Advocacy

Whereas the representation of mobilized clients is at bottom a choice by the movement lawyer to advance substantive ends, integrated advocacy is about the most effective means to achieve those ends. The essential thrust of integrated advocacy is to break down divisions associated with legal liberalism—between lawyers and nonlawyers, litigation and other forms of advocacy, and courts and other spaces of law making and norm generation—toward the end of producing more democratic and sustainable social change.

This Section discusses three central features of integrated advocacy, which build on the concepts of *organizational*, *tactical*, and *institutional* integration. Organizationally, integrated advocacy emphasizes horizontal relations: building partnerships with social movement organizations in order to strengthen constituent control over the design and implementation of campaigns. In doing so, it seeks to create networks of lawyers and other problem-solvers—across the public and private sectors—who contribute different types of expertise and support to campaign goals. Tactically, the model stresses the contribution of legal advocacy to a comprehensive political strategy; it thus seeks to break down what proponents view as artificial distinctions between law and politics. Toward this end,

296. Elena Landriscina, *New York Subjects Prisoners to Solitary as a Disciplinary Tool of First Resort*, AM. C.L. UNION (Mar. 14, 2013, 1:52 PM), https://www.aclu.org/blog/new-york-subjects-prisoners-solitary-disciplinary-tool-first-resort.

297. Exhibit 1, Settlement Agreement, Leroy Peoples v. Brian Fischer, No. 11-CV-2694 (S.D.N.Y Dec. 15, 2015), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Settlement Agreement.pdf.

298. *See, e.g.*, Michael Schwirtz & Michael Winerip, *New York State Agrees to Overhaul Solitary Confinement in Prisons*, N.Y. TIMES (Dec. 16, 2015), https://www.nytimes.com/2015/12/17/nyregion/new-york-state-agrees-to-overhaul-solitary-confinement-in-prisons.html?_r=0 (stating that the settlement would help to create "'step-down' programs, which will provide mental health counseling, job training, education and drug treatment at several prisons").

lawyers combine modes of advocacy—litigation, policy reform, transactional work, organizing support, media relations, and community education—in order to maximize political pressure and transform public opinion.[299] The utility of litigation is judged relative to campaign goals. It is neither privileged nor discounted, but rather evaluated for its pragmatic impact. Finally, integrated advocacy pursues reform across institutional domains. Depending on the dictates of specific campaigns, lawyers focus efforts in and across plural law-making and norm-generating institutions (courts, legislatures, agencies, and communities) and at multiple scales (local, state, federal, and international).

These features of integrated advocacy are neither completely distinct from each other as a functional matter, nor entirely discontinuous with past movement lawyering practice. As this discussion suggests, there are ways in which each dimension of integrated advocacy is related: organizational relationships will affect tactical choices, which will in turn be shaped by the institutions sought to be influenced in a given campaign. Moreover, because progressive lawyers have long used coordinated legal and political tactics to challenge power and solve social problems, this Section presents integrated advocacy as a pragmatic approach designed to advance movement campaigns based on analysis of specific opportunities for reform in the contemporary political landscape.

1. Organizational

In addition to representing mobilized clients, movement lawyers seek to further build and deepen relationships with social movement organizations outside of direct representation in order to strengthen claims to constituent accountability. In this organizational dimension of integrated advocacy, the impulse is to push away from the legal liberal model of the heroic lawyer, toiling in isolation to craft legal theory that persuades appellate judges of a novel legal position.[300] Instead, examples of integrated advocacy show lawyers embedded in thicker movement contexts, connected by different types of organizational relationships.

There are two main categories of organizational integration. One connects lawyers to nonlawyer activists and community members through horizontal relationships arrayed along a spectrum: from short-term, issue-specific campaign *coalitions* to long-term, multi-issue political *partnerships*. The other type of integration connects lawyers across organizational settings (nonprofit, private, government, and educational),

299. For an overview, see generally CHEN & CUMMINGS, *supra* note 116, at 201–72.

300. *See* Bell, *supra* note 35, at 491 (noting the view of an education expert who opined that "the civil rights attorney labors in a closed setting isolated from most of his clients"). Martha Davis's account of the Center on Social Welfare Policy and Law's welfare rights litigation under Lee Albert epitomized this model. In Davis's terms, Albert's "interests centered around legal principles; his ambitions involved Supreme Court arguments rather than revolution. According to Albert, 'I believed in using lawyer's expertise to provide a leadership role in the movement of cases through higher courts.'" DAVIS, *supra* note 151, at 74.

linking together those with different types of expertise and commitments to the underlying cause. In each case, the move is to decentralize (but not abandon) professional expertise—strengthening its ultimate impact by integrating other forms of organizational knowledge and power.[301]

Cross-disciplinary collaboration between lawyers and nonlawyers is a foundation of integrated advocacy. In this approach, lawyers build relations with nonlegal organizations to amplify their legal claims, connect to organizing campaigns, promote monitoring and compliance over time, and shift public opinion.[302] Building upon the movement lawyer's commitment to representing mobilized clients—and similarly responding to the legal liberal critiques of lawyer accountability and legal efficacy—these collaborations seek to deepen the *participation* of marginalized communities in movement activities and the *impact* of those activities over time.[303]

Examples of integrated advocacy from practice reveal various types of organizational collaboration, which may be roughly grouped by their duration and the issue areas around which they coalesce. In one category, movement lawyers engage in legal work in connection with *coalitions* of organizations that are formed for the purpose of advancing a particular policy reform or organizing goal, typically within a discrete time frame. Coalitions bring together social movement organizations to show depth and breadth of political support for an issue, combine different tactical strengths and access to institutional decision makers, and more effectively use resources and expertise.[304] At times, coalitions allow constituencies that may not be aligned on every issue to come together around campaigns based on interest convergence.

One high-profile example in this regard is visible in the national effort to promote a "blue-green alliance": a coalition of labor and environmental groups that come together intermittently and strategically to solve problems of mutual concern.[305] In a prominent recent blue-green campaign, labor groups (led by the Teamsters union) and environmental groups (led by the Natural Resources Defense Council, or "NRDC") collaborated on a decade-long effort to upgrade conditions for the roughly 16,000 truck drivers serving the ports of Los Angeles and Long Beach—together the largest port complex in the United States.[306] At the outset of

301. This was a core insight of Gerald López in REBELLIOUS LAWYERING, *supra* note 60, at 70.

302. *See* Rhode, *supra* note 243, at 2064–65.

303. *See* Guinier & Torres, *supra* note 8, at 2743, 2753.

304. *See, e.g.*, Suzanne Staggenborg, *Coalition Work in the Pro-Choice Movement: Organizational and Environmental Opportunities and Obstacles*, 33 SOC. PROB. 374, 375 (1986) (finding that coalitions emerged both when external opportunities "are ripe for the achievement of movement goals" and in response to a "crisis"); *see also* Caroline Bettinger-Lopez & Susan Sturm, *International Union, U.A.W. v. Johnson Controls*: The History of Litigation Alliances and Mobilization to Challenge Fetal Protection Policies, at 2–3 (Columbia Pub. Law, Research Paper No. 07-145, 2007) (arguing that, in high-stakes impact litigation, *amicus* brief mobilization can promote coalition-building to win legal victories, but perhaps is not as effective in producing sustainable social change as more integrated problem-solving approaches combining litigation with public education and legislative advocacy).

305. *See* Cummings, *Preemptive Strike*, *supra* note 3, at 1043.

306. *Id.* at 940–45, 980.

the campaign, most of these drivers were legally designated by trucking companies as independent contractors, which meant they were responsible for the acquisition and operating costs of their trucks and were excluded from labor protections, including the right to organize.[307] As a result, port drivers constituted a low-wage, heavily immigrant, work force whose poverty prevented them from basic truck maintenance and upgrading—leaving them with an aging fleet that ran on diesel fuel, a known carcinogen.[308] The goal of the campaign was to help pass a local policy that would require port trucking companies to treat their drivers as employees, rather than independent contractors (a change referred to as "employee conversion"), while purchasing new clean fuel trucks.[309] By doing so, the campaign sought to force the companies to internalize the costs of labor and environmental compliance, and thereby provide a long-term solution to the joint problems that port trucking produced: low-wage work and environmental pollution.[310] In 2008, the campaign succeeded in passing a local ordinance, called the Clean Truck Program, and, although the employee conversion provision was struck down in court, the overall policy was hailed for successfully reducing diesel emissions and advancing new green initiatives at both ports.[311]

Such coalition efforts create diverse lawyering roles. Movement lawyers in coalition-based campaigns may sometimes directly represent the coalition, as in the earlier example of the Golden Gate law clinic's representation of the California Domestic Worker Coalition to help analyze and draft the Domestic Worker Bill of Rights.[312] At other times, though, movement lawyers may represent only one coalition member, or even none at all, and yet play active roles as co-participants with other organizational leaders in helping to design, plan, and execute campaigns. In the Los Angeles port trucking campaign, for example, an environmental justice lawyer for the NRDC—which joined the coalition to "build effective power"—served on the coalition steering committee, "where his role was to put legal issues 'on the table' so that coalition members could understand the 'legal constraints' before evaluating the policy issues."[313] Although technically representing the NRDC, the lawyer used his legal expertise to analyze issues from two perspectives: "trying to do what's best for the environment [and] broader coalition, but [also] mindful of: if this ends up in the courtroom, how is this policy going to play out before a judge?"[314]

307. *Id.* at 978.
308. *Id.* at 980.
309. *Id.* at 943.
310. *Id.*
311. *Id.* at 1145.
312. That coalition included a membership organization of immigrant women (Mujeres Unidas y Activas), a domestic worker cooperative (La Colectiva), a worker center (Pilipino Workers Center), an immigrant rights group (the Coalition for Humane Immigrant Rights of Los Angeles), and a labor organizing group (People Organized to Win Employment Rights). Shah, *supra* note 288, at 403–04.
313. Cummings, *Preemptive Strike*, *supra* note 3, at 1049–50.
314. *Id.* at 1050.

In another example from Los Angeles, community development and labor groups formed a coalition to fight against gentrification and the displacement of low-income residents from downtown Los Angeles. The coalition—led by an affordable housing developer, an economic justice organizing group, and a community-labor organization—succeeded in negotiating the nation's first community benefits agreements with the developer of a major sports and entertainment complex adjacent to the Los Angeles Staples Center, now known as L.A. Live.[315] In that effort, a movement lawyer with his own solo practice was retained to represent one of the coalition partners.[316] Although the lawyer went "out of [his] way not to have conversations with other coalition members in order to [avoid making] them [his] client," he did play a key role in advising the negotiating team, which was comprised of leaders from the respective coalition organizations.[317] In that capacity, the lawyer viewed his role as trying to "minimize the amount [his] skills were needed" and "let the organizers and the clients do most of the talking," while catching contracting traps set by the developer and fine-tuning details of the agreement as worked out by the parties.[318] Another lawyer in the campaign, who worked at an environmental justice group, viewed her role as "translator": taking the complex legal material coming out of the developer negotiations and making it understandable for community members, while also providing crucial legal leverage in the campaign by identifying flaws in the developer's environmental impact report.[319]

Unlike these coalition efforts, *partnerships* tend to develop between legal and nonlegal groups in the same social movement field to advance a coordinated strategy, often encompassing multiple issues over a long-term time horizon. Such partnerships rest on social movement organizational specialization, in which movement lawyering organizations build sustained relationships with policy or grassroots counterparts with which they strategize and plan over time in order to advance a suite of related political and culture-shifting goals. A prominent example came out of the LGBT rights movement, where movement lawyers in a key battleground state, California, worked closely with leaders from two organizations—Equality California, the public education and legislative advocacy arm of the LGBT movement, and the Williams Center, a research think tank based at UCLA—to develop the legal and political strategy to challenge restrictions on same-sex marriage in California and beyond.[320] At key points in the campaign, movement lawyers from the ACLU, Lambda Legal, and the National Center for Lesbian Rights closely collaborated with

315. *See* Cummings, *Mobilization Lawyering*, *supra* note 74, at 302–335.

316. *Id.* at 320.

317. Scott L. Cummings, An Equal Place: Lawyers in the Movement to Transform the Los Angeles Economy, Chapter 7, Retail Workers: Negotiating Community Benefits (unpublished manuscript) (on file with author).

318. *Id.* at 11.

319. *Id.*

320. Cummings & NeJaime, *supra* note 4, at 1316.

Equality California and Williams Center leaders to achieve critical victories.[321] In a pivotal example, the state's comprehensive domestic partnership law, passed in 2003, was drafted by Lambda Legal lawyers, while Equality California's director coordinated outside pressure on key legislators and the Williams Center issued an influential report demonstrating that the law would increase state tax revenues by over $10 million per year—helping to persuade Governor Gray Davis to sign the bill into law.[322] When the San Francisco mayor's decision to issue marriage licenses to same-sex couples the following year ended up in court, that domestic partnership law became a linchpin of the movement's central legal argument on behalf of marriage: domestic partnership—a status that was explicitly "inferior to marriage"—was so comprehensive as to constitute "marriage in all but name," and, thus, the move from domestic partnership to marriage should be viewed as only a "small step" for the court to take.[323]

The anti-sweatshop campaign introduced in Part III provides another example of the value of organizational partnerships. There, movement lawyers from the Asian Pacific American Legal Center ("APALC") developed strategic partnerships with policy and grassroots organizations to challenge sweatshop conditions in the Los Angeles garment industry.[324] The campaign was ignited by a historic legal victory by APALC lawyers in a case finding garment manufacturers jointly liable as employers for their contractors' enslavement of Thai workers in an El Monte, California sweatshop.[325] The campaign focused on extending the joint liability principle of that victory to transform labor relations in the broader garment industry by holding retailers and manufacturers legally responsible for the pervasive labor violations committed through the extensive network of contract shops that actually produced garments.[326] The strategy combined impact litigation to hold individual garment companies accountable and to create precedent, a statewide legislative campaign to extend the joint liability model throughout the industry, and a grassroots organizing effort to empower workers and put pressure on companies. It was spearheaded by a carefully designed partnership between APALC lawyers and activists from two other organizations: Sweatshop Watch, established with allies from key immigrant rights and labor organizations "to be the media advocacy and public policy arm of the anti-sweatshop movement,"[327] and the Garment Worker Center, created with support from APALC, Sweatshop Watch, and other immigrant worker organizational partners to be "the Los Angeles anti-sweatshop movement's organizing arm to target labor abuse in the garment indus-

321. *See*, *e.g.*, *id.* at 1300.
322. *Id.* at 1265–67.
323. *Id.* at 1253, 1274, 1287.
324. Cummings, *Hemmed In*, *supra* note 3, at 39–51.
325. *Id.* at 20.
326. *Id.* at 40.
327. *Id.* at 43.

try—one of the first 'multiracial, multilingual garment workers' centers in the country.'"[328] This trio of organizations—held together by steering committees with overlapping movement leaders—tightly coordinated various pieces of a campaign that succeeded in winning settlements from major garment companies, passing a new state law requiring companies to guarantee the unpaid wages of contract employees, and helping such employees navigate a new administrative process in the state labor commission established under the law to recover lost wages.[329]

In addition to these inter-disciplinary organizational connections, integrated advocacy also relies upon linkages built among lawyers across legal practice sites.[330] Professional trends toward greater specialization, the rise of organized pro bono, a well-developed plaintiff's bar, and restrictions on funding for nongovernmental legal organizations have boosted public-private partnerships within progressive legal practice,[331] particularly when high-stakes and expensive litigation *is* a salient feature of a social movement campaign. In addition, government lawyers charged with legally evaluating and defending policy may be thrust into the center of movement campaigns, working closely with movement lawyers to play key roles in advancing reforms. Law school clinics, at times more autonomous and open to experimentation, may also provide critical legal support. What is notable about these intra-professional connections is that they bring together lawyers with different experiences and commitments in the service of movement goals.

In the ports campaign discussed earlier, labor lawyers from a small private firm provided critical legal analysis in support of the coalition's argument to policy makers that converting truck drivers from independent contractors to employees was within local government power, while the city retained big-firm lawyers from powerhouse Kaye Scholer to defend the Clean Truck Program against industry litigation once it was enacted.[332] Government lawyers were also important gatekeepers in the Clean Truck Program's passage: lawyers from the Los Angeles city attorney's office and the mayor's general counsel met with movement attorneys to solidify the legal justification for the program and draft operational language; city attorneys also worked with Kaye Scholer lawyers in defending the program, all the way through the Supreme Court.[333]

Similarly, in the California marriage-equality campaign, movement lawyers (along with private firm pro bono counsel) joined with attorneys

328. *Id.* at 48.

329. *Id.* at 65–70.

330. *See generally* Louise Trubek & M. Elizabeth Kransberger, *Critical Lawyers: Social Justice and the Structures of Private Practice*, *in* CAUSE LAWYERING, *supra* note 8, at 201–226.

331. *See generally* Kathryn A. Sabbeth, *What's Money Got to Do with It? Public Interest Lawyering and Profit*, 91 DENV. U. L. REV. 441 (2014).

332. Cummings, *Preemptive Strike*, *supra* note 3, at 1009, 1069; *see also* Scott L. Cummings, *Law in the Labor Movement's Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 CALIF. L. REV. 1927, 1988–91 (2007) (describing use of private lawyers in campaign to stop Wal-Mart big-box store).

333. Cummings, *Preemptive Strike*, *supra* note 3, at 1068, 1070, 1097.

from the San Francisco city attorney's office—who were assigned to defend the city's decision to issue marriage licenses to same-sex couples in 2004—to litigate the California Supreme Court case striking down California's marriage ban.[334] Although initially at odds over how to approach the suit, movement lawyers and city attorneys became "joined at the hip," coordinating strategy and dividing issue areas for briefing in order to present the most effective arguments to the Court.[335] These examples illustrate how the multi-faceted nature of movement campaigns invite, and sometimes require, legal participation by nonmovement lawyers—both in private practice and "inside the state"[336]—to achieve ultimate success. A key skill of movement lawyers in these contexts therefore is identifying pragmatic legal partnerships, even with lawyers with whom movement advocates may not see ideologically or strategically eye-to-eye, and building relationships to maintain support for the ultimate cause or minimize the risk of a bad outcome.[337]

Law school clinics have been important organizational partners in movement campaigns. The Immigrant Rights Clinic at the University of California, Irvine School of Law represented eighteen hotel workers denied meal and rest breaks by the Hilton Long Beach Hotel in the state labor commission process as part of a multi-year unionization campaign led by the hotel workers union, UNITE HERE Local 11.[338] Other clinics have provided criminal defense representation in connection with movement campaigns. The Criminal Defense Clinic at the UCLA School of Law represented a Latino lunch truck vendor prosecuted for violating a local ordinance limiting the amount of time such trucks could be parked.[339] The case grew out of an organizing campaign led by *La Asociación de Loncheros L.A. Familia United de California*, a network of immigrant lunch truck owners who asked the clinic "to pursue a single member's case to test the validity of the law."[340] The clinic succeeded in winning the vendor's case on appeal, in which the judge held the ordinance to be unconstitutional, permitting the vendor to receive a refund of his fines and giving the *Asociación* "the legal victory [it] hoped for."[341] More recently, the St. Louis University Litigation Clinic gained acquittals for two protestors who were arrested on failure-to-comply charges in

334. Cummings & NeJaime, *supra* note 4, at 1281–93.

335. *Id.* at 1285.

336. *See generally* Doug NeJaime, *Cause Lawyers Inside the State*, 81 FORDHAM L. REV. 649 (2012).

337. *See, e.g.*, Cummings & NeJaime, *supra* note 4, at 1299–1304 (describing the efforts of LGBT rights lawyers to maintain involvement in the marriage equality litigation initiated over their objection by Ted Olson and David Boies).

338. *See generally* Sameer M. Ashar et al., *Advancing Low-Wage Worker Organizing Through Legal Representation*, 47 CLEARINGHOUSE REV. 313 (2013).

339. Eagly, *supra* note 81, at 92.

340. *Id.* at 105.

341. *Id.* at 108.

Ferguson, Missouri following the 2014 shooting of Michael Brown.[342] These collaborations illuminate how law school clinical programs—with access to resources, control over case dockets, and incentives to participate in and thereby expose students to innovative advocacy—can serve as important organizational partners in social movement campaigns: playing the role of movement counsel as they train the next generation of movement lawyers.

2. Tactical

In addition to broadening the scope of organizational relationships in which movement lawyers participate, integrated advocacy also reframes the work that movement lawyers do: moving from the narrow lens of technical legal skill (especially litigation) to the broader art of persuasion. Within this framework, advocacy is understood as the process of telling compelling stories to those in positions of decision-making power and the wider public.[343] Such stories exert pressure and build support for political and cultural change. To do this, lawyers deploy different, but interrelated, modes of advocacy: litigation, but also policy advocacy, organizing support, media work, and community education.[344] Law-Lawyers add value to movement campaigns by using their problem-solving skills to integrate these tactical modes, contributing to the construction of movement narratives that seek to shift understandings of the structural underpinnings of inequality and offer ways to address them.[345]

Two preliminary points are important. First, it is necessary to distinguish movement goals, strategies, and tactics.[346] *Goals* refer to ultimate movement objectives: for example, changing an unjust law, increasing access to services, enhancing conditions for workers within a particular industry, or changing cultural norms to promote diversity and inclusion. *Strategies* refer to overall plans for achieving a goal: conscious decisions made by movement actors in pursuit of an objective, encompassing a plan of action that generally targets particular decision makers, identifies resources and pressure points, and proceeds through sequential steps to-

342. Stephen Deere, *Judge Hands Down Two More Not-Guilty Verdicts in Cases Stemming from Ferguson Protests*, ST. LOUIS POST-DISPATCH (May 17, 2016), http://www.stltoday.com/news/local/crime-and-courts/article_4b0813a7-3d16-50b5-b789-398f004dd370.html.

343. I owe this insight to Gary Blasi's materials for a class entitled Problem-Solving in the Public Interest.

344. *See* McCann & Silverstein, *supra* note 8, at 261. In this vein, Gary Blasi describes how advocacy for residents of slum housing in downtown Los Angeles might have benefited from "[l]itigation, organizing, and other modes of advocacy" to challenge the use of government funds to sponsor redevelopment that fueled gentrification. *See* Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, 42 LOY. L.A. L. Rev. 913, 923 (2009).

345. *See* Karin & Runge, *supra* note 263, at 568 (stating that educating lawyers in this approach requires providing "the opportunity for law students to identify and to address the underlying social justice problems facing individual clients and communities, to engage in social change advocacy in multiple forums, and to develop skills in multiple areas").

346. *See* Lee A. Smithey, *Social Movement Strategy, Tactics, and Collective Identity*, 3/4 SOC. COMPASS 658 (2009); Verta Taylor & Nella Van Dyke, *"Get Up, Stand Up": Tactical Repertoires of Social Movements*, *in* THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS, *supra* note 25, at 263.

ward the predefined goal.[347] Although ideally deliberate and forward-looking, movement strategies in the real world are never neat or precise; instead, they are developed under conditions of deep uncertainty through a contest of competing views espoused by leaders with different organizational and normative perspectives.[348] Nonetheless, out of the welter of intra-movement exchange, strategies develop and adapt: sometimes through structured planning and other times through more informal processes of leadership give-and-take. In contrast, *tactics* are the discrete means that movement actors use to advance goals pursuant to strategies. A movement's tactical repertoire consists of activities such as public education and media relations, litigation and lobbying, and disruptive activities (for example, protests, marches, boycotts, and sit-ins). The crucial point is that, in the movement lawyering model, *such tactics are deliberately coordinated by movement lawyers and other stakeholders, and executed according to an overarching strategy designed to maximize their combined power to advance the movement-defined goal*. This leads to the second point, which is that, within movement campaigns, there are times when movement lawyers themselves directly implement a diverse range of tactics, while in other instances, lawyers coordinate different tactical approaches with nonlawyer allies.

As Part III described, this model of tactical integration has deep roots in the civil rights period and before. Contemporary examples of movement lawyering pick up on the theme of connecting litigation to base-building and organizing, but also move beyond it in ways that suggest a broader conception of how multi-faceted advocacy tactics might fit together and be mutually reinforcing in social movement campaigns. In contrast to earlier stories, new accounts of movement lawyering reveal a self-conscious and often explicit commitment to a social change methodology built upon sophisticated insights from social movement theory and practice. Through contextualized analyses of legal advocacy embedded within broader social movement activism, these accounts illuminate *the interconnected use of tactics outside of court, as well as efforts to synchronize litigation with a comprehensive movement strategy*. Overall, these stories underscore both the degree to which campaign objectives shape the range of tactics deployed and how, within a given campaign, movement lawyers attempt to deliberately think through tactical relationships in order to maximize their impact.

Recent examples of movement lawyering make a point of emphasizing the ways that lawyers mobilize law outside of courts, showing how nonlitigation modes of advocacy involve "real" lawyering that can prove valuable—and even decisive—in particular types of social movement campaigns. These stories do not present movement lawyers as operating outside of conventional legal roles, but rather portray their advocacy

347. *See* MEYER, *supra* note 25, at 82 ("A strategy is a combination of a claim (or demand), a tactic, and a site (or venue).").

348. *See* Jeff A. Larson, *Social Movements and Tactical Choice*, 7 SOC. COMPASS 866, 867 (2013).

work as a movement-based application of the type of legal work that lawyers typically do for clients. From this perspective, nonlitigation advocacy is both affirmed as essential to specific campaigns and linked together in ways that reveal deliberate planning and execution.

The significance of nonlitigation tactics is perhaps most apparent in descriptions of social movement policy campaigns. Returning to the campaign to pass a Clean Truck Program at the Ports of Los Angeles and Long Beach, a critical role played by the lawyers was shepherding that policy through the complex process of administrative review. Lawyers for the environmental and labor coalition members each drafted legal opinions supporting the authority of cities to enact a law requiring trucking companies to hire employee drivers and purchase clean fuel trucks under the market participation exception to the federal preemption doctrine.[349] Those opinions were essential documents in policy negotiations with city officials: providing legal credibility that gave officials confidence that if they spent political capital on passing the Clean Truck Program, there was a good chance it would be upheld in court.[350] The legal opinions were used as part of an overall campaign strategy in which environmental lawyers at the NRDC wielded the threat of litigation to bring city officials to the table, labor movement leaders used their political clout to push those officials to cut a deal, and grassroots coalition partners staged public actions (which included a 100-truck caravan to the Port of Long Beach) and mobilized community members to make statements at critical public hearings.[351]

In a related example, Jennifer Gordon describes a policy campaign by a coalition of labor and immigrant rights groups—led by the Workplace Project—to pass the 1997 New York Unpaid Wages Prohibition Act, which dramatically increased civil and criminal penalties against employers who failed to pay their workers minimum wage and overtime.[352] Gordon's account of the campaign stresses the strategic interrelation among the campaign's research, lobbying, and media tactics. First, the Workplace Project's legal clinic, which represented individual workers in wage enforcement cases in the state's labor agency, compiled research on the labor agency's drastic under-enforcement of valid worker claims and mistreatment of workers attempting to file cases; this research became the basis for worker affidavits used in sympathetic news reports, filed in public hearings, and presented to the state labor agency and law makers.[353] Second, the coalition drafted legislative language to address the problem of under-enforcement, crafted policy arguments framed

349. Cummings, *Preemptive Strike*, *supra* note 3, at 1068–70.

350. *Id.* at 1155.

351. *Id.* at 1064–65, 1153.

352. Jennifer Gordon, *The Campaign for the Unpaid Wages Prohibition Act: Latino Immigrants Change New York Wage Law* (Carnegie Endowment, Int'l Migration Policy Program, Working Paper No. 4, 1999), http://carnegieendowment.org/1999/08/01/campaign-for-unpaid-wages-prohibition-act-latino-immigrants-change-new-york-wage-law-pub-513.

353. *Id.* at 6–7.

around the key idea of preventing unfair competition by employers "who undercut legitimate businesses by paying less than minimum wage,"[354] and effectively neutralized key Republican legislators hostile to the bill, garnering support from business allies unhappy about unfair competition and buoyed by the powerful voices of immigrant workers who led the lobbying sessions. Finally, the coalition developed a strong outreach and media strategy, stressing the scope of the problem and the support of the business community, which resulted in positive coverage including a lead editorial in the *New York Times*.[355] Together, these tactics helped to gain passage of one of the nation's strongest pro-labor bills, benefitting a largely immigrant workforce, by legislators known for their anti-labor and anti-immigrant politics.[356]

Even in policy campaigns such as these, in which affirmative litigation is not a centerpiece, movement lawyers nonetheless must *anticipate* the grounds on which opponents might mount a legal challenge to movement action and seek to prospectively minimize the risk of damage to the movement's policy goals or public position. In this sense, affirmative movement organizing and policy advocacy always operates in the shadow of potential countermovement legal mobilization to limit or reverse movement gains—and thus requires concurrent defensive worst-case-scenario planning.[357] This was a key feature in the ports campaign for a Clean Truck Program, where policy development and drafting occurred in the shadow of the trucking industry's threat to challenge the policy on preemption grounds. The fact that the industry challenge succeeded in striking down the critical employee conversion piece of the Los Angeles program,[358] despite careful legal planning to avoid that precise outcome, underscores both how important prospective legal analysis is to movement policy campaigns and how uncertain predictions about judicial behavior ultimately are in the face of doctrinal ambiguity.

Defensive litigation may also be crucial in campaigns that rely on protest. In addition to defending protestors criminally charged with breaking the law, movement lawyers may be called upon to provide additional forms of legal defense. In the anti-sweatshop campaign discussed above, defensive litigation became a central part of the campaign's culminating case: used to protect coalition members engaged in organizing against prominent Los Angeles-based garment retailer, Forever 21, accused of contracting with manufacturers that systematically violated the labor rights of cut-and-sew workers.[359] In that campaign, Forever 21's law firm brought suit against activists who staged coordinated boycotts against the retailer's stores, charging the activists with "defamation, in-

354. *Id.* at 8.
355. *Id.* at 16.
356. *Id.* at 10.
357. *Cf.* Michael C. Dorf & Sidney Tarrow, *Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena*, 39 LAW & SOC. INQUIRY 449 (2014).
358. Cummings, *Preemptive Strike*, *supra* note 3, at 1117–18.
359. Cummings, *Hemmed In*, *supra* note 3, at 52.

terference with prospective business advantage, unfair business practices, and nuisance."[360] In response, movement lawyers from APALC enlisted the ACLU, along with private attorneys from a pro bono law firm and the NLG, to file an anti-SLAPP ("Strategic Litigation Against Public Participation") suit, arguing that Forever 21 was violating the protestors' free speech—and ultimately forcing the retailer to withdraw its action.[361]

When affirmative litigation *is* a key feature of a social movement campaign, tactical integration focuses on how to link that litigation to different modes of advocacy: either surrounding the litigation with other tactics in order to strengthen its direct impact, designing the litigation to indirectly advance advocacy in other domains—or both. In so doing, movement lawyers seek both to affirm the significant power that litigation has to change institutional behavior and potentially influence public attitudes, while also responding to some of its limits.[362] Movement lawyers thus remain committed to impact litigation, and believe in the value of building favorable precedent, but seek to do so in ways that are responsive to critiques of litigation and sensitive to underwrite broader mobilization efforts.

Within the integrated advocacy framework, movement lawyers recognize that there are times when claiming rights in court is essential to challenge structural injustice: litigation may produce concrete short-term benefits that improve movement constituents' material conditions, force tangible changes in institutional behavior, or directly expand the possibility of political participation. On the front end of movement campaigns, integrated advocacy seeks to strengthen the potential for litigation to achieve these positive outcomes; on the back end, it directs attention to issues of enforcement and implementation.

At the outset of litigation, movement lawyers plan for how to fold in other modes of advocacy—especially organizing and media relations[363]—to exert coordinated pressure on litigation targets as part of a broader "mobilization template."[364] The anti-sweatshop campaign offers an important case in point. There, movement lawyers from APALC, in collaboration with their policy and organizing partners, designed an impact-litigation campaign to "extend the joint employer theory developed in the Thai worker case more broadly within the industry—setting a precedent that would force other manufacturers and retailers to take seriously

360. *Id.* at 55.

361. *Id.*

362. For an assessment of the enforcement value of litigation, see Joanna Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023 (2010).

363. In a sign that this type of integrated strategy is catching hold within the funding world, the Skadden Foundation, which funds public interest fellowships, has organized webinars on "strategies for increasing access to the media, in order to leverage the media's power to assist clients and draw public awareness to pressing public interest issues." Skadden Found., *The Power of the Media: How to Gain Access and Leverage It*, VIMEO (Oct. 2, 2014) https://vimeo.com/skaddenarps/review/119167685/59fb051e04.

364. Cummings, *Litigation at Work*, *supra* note 3, at 1649.

their responsibility to ensure labor standards were met."[365] The cases were carefully selected against high-profile targets engaged in egregious (but not atypical) practices in order to maximize their strategic effect. Impact cases were "coordinated with a media campaign: the filing of each suit [was] timed with a press conference and media contacts [were] used to pressure defendants to agree to worker demands."[366] This strategy also used protest tactics, like the Forever 21 boycott, to place additional pressure on garment companies and succeeded in winning a string of high-profile settlements for garment workers against major fashion companies including Forever 21, City Girl, BCBG, and XOXO.[367]

A similar strategy was used by advocates at NDLON and the Mexican American Legal Defense and Education Fund ("MALDEF"), who developed a blueprint for challenging antisolicitation laws banning day laborers—most of whom were recently arrived immigrant men[368]—from seeking work in public spaces like street corners.[369] By the early 2000s, roughly forty cities in the greater Los Angeles area had passed such laws.[370] To challenge them, NDLON organized day laborers at key hiring sites into committees, on whose behalf MALDEF filed lawsuits arguing that the laws violated day laborers' First Amendment right to seek employment.[371] When the lawsuits were filed, NDLON and MALDEF would "stage a public event, marching from the day labor site to city hall."[372] This was done to jointly advance the legal strategy (by pressuring city officials to negotiate) and the organizing strategy (by promoting worker participation). In the words of the main MALDEF lawyer in the campaign: "Working together we could accomplish the legal policy goal and NDLON could organize groups around California."[373] Using this model, the campaign succeeded in winning a dramatic legal victory in the Ninth Circuit Court of Appeals invalidating most of the day labor antisolicitation laws around the region.[374] In addition to coordinating the litigation, organizing, and media efforts in specific legal challenges, movement lawyers supported the campaign by playing a range of other roles: organizing students to pose as day laborers and getting local news media to film their arrest, coordinating favorable news editorials and other media coverage, negotiating with construction retailers to set up day labor sites, testifying at city council hearings against proposed ordinances, drafting legislation, and briefing public defenders charged with representing day

365. Cummings, *Hemmed In*, *supra* note 3, at 40.
366. *Id.*
367. *Id.* at 41–42, 57.
368. Cummings, *Litigation at Work*, *supra* note 3, at 1626–27.
369. *Id.* at 1649–52.
370. *Id.* at 1663.
371. *Id*. at 1652.
372. *Id.*
373. *Id.*
374. Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936 (9th Cir. 2011) (en banc) (striking down ordinance prohibiting day laborers from soliciting work in public).

laborers prosecuted under the antisolicitation laws on the larger campaign stakes.[375]

At the back end of impact litigation campaigns, integrated advocacy seeks solutions to enforcement problems. In the anti-sweatshop campaign, the failure of garment workers to recover against employers even after winning judgments—owing in part to corporate shell games in which employers would claim to go out of business and reorganize in another guise—gave rise to more systematic enforcement efforts.[376] These included the creation of a new organization in 2007, Wage Justice, solely dedicated to using "innovative legal theories and legal tools borrowed from commercial collections law" to collect "back wages and penalties owed to low-income workers."[377] Building on this effort, labor and immigrant rights groups formed the Los Angeles Coalition Against Wage Theft,[378] which produced groundbreaking reports documenting the extent of wage theft in Los Angeles and around the country,[379] and helped lobby for the creation of enforcement divisions in the City and County of Los Angeles to prosecute and enforce wage theft in the region.[380]

As these campaigns reveal, litigation may be designed by movement lawyers to reinforce other advocacy strategies that are either operating in parallel to the litigation or planned for the future. Litigation, in this sense, is used for its "indirect" or "radiating" effects on other types of movement work.[381] Rather than enervate movements by individualizing conflicts, integrated advocacy seeks to use rights strategically and flexibly to build collective power at the grassroots level. Michael Grinthal's analysis of movement lawyering shows how litigation may serve as a "scaffolding" for local mobilization, describing a campaign by Christian right groups in which litigation was coordinated with local organizing to advance their goal of using public school space for religious purposes.[382] A recent account of lawyers in the disability rights movement similarly spotlights how they have combined lower court litigation with local mobilization to produce wide-ranging settlements affecting large groups of

375. Cummings, *Litigation at Work*, *supra* note 3, at 1687.

376. Cummings, *Hemmed In*, *supra* note 3, at 59–61.

377. *Legal Strategies*, WAGE JUST., http://wagejustice.org/?page_id=4 (last visited Aug. 4, 2017).

378. *See Los Angeles Coalition Against Wage Theft*, FACEBOOK, https://www.facebook.com/stopLAwagetheft?ref=br_tf (last visited Aug. 4, 2017).

379. ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES (2009), http://nelp.3cdn.net/e47053 8bfa5a7e7a46_2um6br7o3.pdf (last visited Apr. 22, 2017); Ruth Milkman et al., *Wage Theft and Workplace Violations in Los Angeles: The Failure of Employment and Labor Law for Low-Wage Workers* (2010), http://www.labor.ucla.edu/publication/wage-theft-and-workplace-violations-in-los-angeles/.

380. *See* Abby Sewell, *L.A. County Sets Up Wage Enforcement Program to Police New Minimum Wage Rules*, L.A. TIMES (Nov. 17, 2015), http://www.latimes.com/local/lanow/la-me-ln-county-wage-enforcement-20151117-story.html; David Zahniser, *Will L.A. Put Money Behind Wage Theft Crackdown?*, L.A. TIMES (June 8, 2015), http://www.latimes.com/local/cityhall/la-me-wage-theft-funding-20150608-story.html.

381. *See* JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 209–22 (1978); Marc Galanter, *The Radiating Effects of Courts*, *in* EMPIRICAL THEORIES ABOUT COURTS 117, 117–42 (Keith O. Boyum & Lynn Mather eds., 1983).

382. Grinthal, *supra* note 65, at 53.

disabled people, thus advancing the movement's goal of promoting social integration while avoiding the barriers erected by narrow Supreme Court rulings that restrict the reach of the Americans with Disabilities Act.[383]

Other portraits of movement lawyering illustrate the design of litigation campaigns to influence the policy-making process. Commentators have emphasized the potential of litigation to force decision makers to the policy-making table by invalidating existing laws and imposing costs,[384] and some of the new movement lawyering stories demonstrate this dynamic. In the lunch truck campaign recounted above, for example, the criminal case was selected by the movement organization to be litigated by the UCLA clinic in order to undermine the existing municipal ordinance, freeing *Asociación* members to "have sufficient time for other organizational objectives, such as promoting a positive image of catering vendors, building their core leadership, and working with local stakeholders to draft truck-friendly laws."[385] Successful litigation also raises the public salience of issues, reveals significant enforcement gaps, creates models for possible statutory reform, and gives advocates credibility with lawmakers that can push long-stalled legislation forward. In the anti-sweatshop campaign, advocates had repeatedly failed, since the 1970s, to pass a statewide joint employer law holding garment companies liable for the labor violations of contractors.[386] Yet, in the wake of the prominent Thai worker litigation, advocates were able to capitalize on the opportunity created by increased public attention to the issue (and state government leadership more receptive to change) to help push through a comprehensive new state law establishing that any company "engaged in garment manufacturing . . . shall guarantee payment of the applicable minimum wage and overtime compensation, as required by law, that are due" from its contractors.[387]

Sometimes, the interaction between litigation and policy advocacy runs in the opposite direction: with policy advocacy structured to positively influence litigation. In the California campaign for marriage equality described above, movement lawyers coordinated with the movement's policy advocacy group, Equality California, to draft the state's domestic partnership law in ways that were deliberately designed to strengthen the planned equal protection litigation challenge to the state's same-sex marriage ban.[388] As drafted, the domestic partnership bill granted same-sex couples the "same rights, protections, and benefits" as opposite-sex spouses and contained extensive legislative findings documenting discrimination against same-sex couples and affirming their role as good parents and caregivers.[389] This language was consciously inserted

383. Waterstone et al., *supra* note 8, at 1338–42.
384. McCann, *supra* note 277, at 90.
385. Eagly, *supra* note 81, at 105.
386. Cummings, *Hemmed In*, *supra* note 3.
387. *Id.* at 46.
388. Cummings & NeJaime, *supra* note 4, at 1313.
389. *Id.* at 1267–68.

to set up a later equal protection challenge by creating, "through the legislative process[,] a body of findings and policy on same-sex couples [showing] how they are equal in every way . . . [in order to] set up suspect class arguments."[390] When a frontal challenge to the same-sex marriage ban in California was successfully litigated five years later, the California Supreme Court specifically referred to the fact that same-sex couples, through domestic partnership, were already accorded the full benefits of marriage to support its holding that their exclusion from marriage could only be based on illegal animus.[391] That decision was ultimately nullified by statewide initiative, Proposition 8, but it marked a turning point in the marriage equality movement: drawing intense national attention and reinforcing similar coordinated efforts to pass marriage and domestic partnership laws in roughly two dozen states[392]—collectively setting the stage for the sweeping Supreme Court victory to come in *Obergefell v. Hodges*.[393]

The marriage campaign also draws attention to a final dimension of integrated advocacy: the use of litigation and policy development in connection with media strategies in efforts to shape positive public opinion. Scholars have suggested that judicial decision making and policy development tends to follow changes in public opinion, citing the movement for same-sex marriage as a case in point; on this view, premature legal change at large variance with public opinion can produce backlash.[394] As seen in the national marriage movement, however, movement advocates sought to use the pro-movement narratives developed through litigation and the legitimacy conferred by judicial and legislative acceptance of movement policy positions to shape public opinion in pro-movement directions. This approach suggests that movement advocacy to change law, at least when carefully planned and orchestrated with a thoughtful public relations campaign, can help to win hearts and minds as well.[395]

3. Institutional

As the discussion of the relation between legal change and attitudinal change already suggests, the concept of integrated advocacy rests on a complex understanding of how law operates within different types of political and social institutions. Borrowing Susan Strum's terms, integrated advocacy can be said to operate within a *multi-level systems frame-*

390. *Id.* at 1268.

391. *Id.* at 1293.

392. *See Same-Sex Marriage Laws*, NAT'L CONF. ST. LEGISLATURES (June 26, 2015), http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx.

393. 135 S. Ct. 2584 (2015).

394. *See* MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 169 (2013).

395. Although this is an empirically controversial theory, movement lawyers seem to be now poised on the cutting edge of testing it. For example, there is some recent evidence that policy change in favor of same-sex marriage, either through courts or legislatures, accelerated positive shifts in public opinion. Andrew R. Flores & Scott Barclay, *Backlash, Consensus, Legitimacy, or Polarization: The Effect of Same-Sex Marriage Policy on Mass Attitudes*, 69 POL. RES. Q. 43, 43–56 (2015).

work, in which actors are simultaneously situated in interconnected domains of power and normative pluralism, within which law is one tool for influencing values and behavior.[396] In deploying integrated advocacy strategies, lawyers seek to connect change processes together within multiple domains of people's lived experiences: some within formal lawmaking institutions, like courts and legislatures, and some outside, on the streets through protest or in everyday interactions at home and work. As with organizational and tactical integration, the key point about these institutional efforts from a movement lawyering perspective is that they are *deliberately planned and linked*.

Institutional integration draws attention to what Richard Abel calls the "spatial configuration of power"—the idea that "polities allocate power across various levels of the state hierarchy from apex to base" and that within different spatial units, there are opportunities for law to be produced and used as a tool to constrain power.[397] What this means for movement lawyers is that planning and executing strategic campaigns requires thinking through the relationship between distinct domains of law making (for example, courts and legislatures at different levels of government), how they are influenced by extra-legal sites of norm generation (particularly social movement challenges at the grassroots level), how legal change interacts with the public's preexisting views (potentially shaping pro-movement attitudes or causing backlash), and how legal rights are translated into legal consciousness among movement constituents (equipping them to mobilize law in their day-to-day encounters with power holders). These struggles to leverage law and norms from one institutional site to influence decision making or behavior in another occur across multiple spatial directions—*bottom-up*, *sideways*, and *top-down*—that are mapped out here.

Recent social movement legal scholarship has been most attuned to *bottom-up* norm generation, legal change, and culture-shifting projects. Scholars in this literature have focused on how social movement mobilization from below may succeed in transforming legal doctrine. In these accounts, legal change occurs after social movements at the grassroots level assert a new interpretation of a social norm, convince the public of the legitimacy of that new interpretation through sustained social struggle, and ultimately persuade courts to validate the interpretation as constitutional law.[398] Central examples of this bottom-up dynamic, in which norms spiral up into law, include: Guinier and Torres's account of the Montgomery Bus Boycott, in which the Montgomery Improvement Association's courageous mobilization succeeded in breaking the city's seg-

396. *See* Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equality in Higher Education*, 29 HARV. J.L. & GENDER 247, 249–50 (2006).

397. Richard L. Abel, *Speaking Law to Power: Occasions for Cause Lawyering*, *in* CAUSE LAWYERING, *supra* note 8, at 69, 69–70.

398. For the seminal work explicating this idea, see BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); Balkin, *supra* note 38; Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2595 (2003).

regated bus system and making new law in the form of a decisive Supreme Court ruling[399]; Reva Siegel's analysis of how the debate over women's rights, framed by the clash between Equal Rights Amendment ("ERA") movement activists and their opponents, profoundly shaped sex discrimination doctrine[400]; and William Eskridge's comprehensive treatment of how identity-based social movements, asserting a politics of recognition, "generate constitutional facts" and spark normative contests that create new doctrinal ideas, which sometimes get adopted by the Supreme Court.[401] Although generally optimistic about the power of movements to reshape law, this new social movement scholarship also contains stories of failure. In Chris Schmidt's account of the student sit-ins of the 1960s, it is the Supreme Court's ultimate reluctance to legitimate civil disobedience by extending the reach of the Fourteenth Amendment to private property owners that prevented the sit-ins from dislodging the linchpin state action requirement.[402] The role of movement lawyering in these campaigns is not the focal point of analysis. The stories do, however, offer practical lessons: drawing attention to the critical importance of movements naming injustice, framing normative solutions, and defending those solutions in the face of recrimination and reprisal. Movement lawyers can play crucial roles in these normative exchanges by protecting the free speech rights of movement actors, retelling and legitimizing their stories in courts and other law-making bodies, and gradually building precedent that helps influence public opinion and validate new legal principles over time.

In addition to bottom-up efforts to translate norms into law, there are *sideways* strategies to import norms and legal ideas from one institutional arena to produce change in another. Human rights scholars have identified "boomerang" patterns, in which domestic activists enlist international human rights norms external to their legal system as leverage to challenge abuses by domestic power holders.[403] Movement lawyering can involve similar efforts to leverage external sources of legal legitimacy to fortify movement campaigns. After 9/11, the Center for Constitutional Rights and the ACLU used human rights in multiple fora to contest the detention of so-called enemy combatants at Guantánamo Bay and in se-

399. Guinier & Torres, *supra* note 8, at 2777–83.

400. Siegel, *supra* note 8, at 1366–1414.

401. Eskridge, *supra* note 8, at 2194–2202. Sociolegal scholars have also recently focused on how bottom-up norm generation by activists ends up shaping legal doctrine. George Lovell and his colleagues recount how labor activists in Alaskan canning companies articulated a "radical egalitarian" normative worldview, in which institutional racism against Filipino workers, rather than individualized intent, resulted in their disparate treatment. The study analyzed how labor activists sought to use Title VII litigation to advance a union organizing campaign around that normative view, ultimately running into a hostile Supreme Court, whose ruling in *Wards Cove v. Atonio* narrowed the doctrinal grounds for a disparate impact theory, constituting the "death throe" of progressive workers' rights advocacy. George I. Lovell et al., *Covering Legal Mobilization: A Bottom-Up Analysis of* Wards Cove v. Atonio, 41 LAW & SOC. INQUIRY 61, 61–62 (2016).

402. Schmidt, *supra* note 88, at 771–72.

403. MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 12–13 (1998).

cret CIA "black sites."[404] The organizations petitioned the Inter-American Commission to determine the legal status of detainees under international law, filed amicus briefs raising international claims in the major Supreme Court cases asserting detainees' right to *habeas corpus* and challenging military commissions, and filed appearances before United Nations bodies challenging the validity of secret renditions.[405]

Within the domestic political system, movement lawyers make similar shifts from one law-making institution to another to advance their positions: asking local jurisdictions to fix problems created by the federal system, courts to correct problems made by legislatures, and vice versa. This type of continuous jurisdictional maneuvering has defined the ports campaign in Los Angeles. There, the labor movement's effort to devise a local strategy to require port trucking companies to convert their drivers to employees was motivated at the outset by the failure of federal labor law to protect those workers. Local policy makers, in turn, were motivated to pass a Clean Truck Program to avoid further litigation by environmental groups. When industry opponents challenged the program in court, labor activists and lawyers went to Congress to try to amend the federal law that the Ninth Circuit had held preempted the Clean Truck Program—attempting to carve out a specific exception to permit employee conversion.[406] When that failed, lawyers associated with the movement represented truck drivers in the state labor commission and court to challenge trucking companies for misclassifying drivers as independent contractors, using that litigation to pressure companies to convert their drivers and accept unionization.[407] As that litigation met limited success, movement leaders returned to the city to consider other legal strategies for blocking port entry for independent-contractor firms.[408] The ports struggle still continues with concurrent institutional efforts moving forward: misclassification litigation in court, union organizing in the workplace, and rule-making and legislative efforts at the port and local government level.[409]

Finally, movement lawyering focuses on *top-down* efforts to bring legal rights from the legal system to the ground level where they can be understood and mobilized by affected individuals to access legal benefits, enforce legal protections, and perhaps galvanize further activism. In this role, movement lawyers seek to translate "law on the books" into "law in action," raising the legal consciousness of movement constituents so that they can fight for their own rights and help others to do the same. Jennifer Gordon's analysis of the Workplace Project offers a classic account of this type of movement lawyering work. In it, she recounts how the use of "rights talk" about employment protection in the center's legal clinics

404. Cummings, *Internationalization of Public Interest Law*, *supra* note 14, at 1001–02.
405. *Id.*
406. Cummings, *Preemptive Strike*, *supra* note 3.
407. *Id.* at 1141.
408. *Id.*
409. *Id.* at 1161.

"became a springboard that launched a vision of justice that went far beyond the law's provisions," spurring low-wage immigrant workers to organize collectively against employer abuse and governmental inaction.[410] Other scholars have similarly shown how strategies to promote rights consciousness have helped in some contexts to enhance legal enforcement in the workplace,[411] spark grassroots organizing,[412] and promote feelings of empowerment among movement constituents.[413]

In practice, these types of legal, policy, and culture-shifting projects are dynamic and iterative: they play out over multiple cycles in complex ways that can never be fully predicted or mapped out. Integrated advocacy reframes these dynamics in affirmative terms: presenting them as empirical facts to be studied, understood, planned for, and (when things do not go as planned) revised. In contrast to the negative spiral story of legal liberalism (in which legal mobilization in court undercut political mobilization on the ground), integrated advocacy envisions a pathway for embedding change at one level that creates positive feedback loops in others: grassroots activism by movement constituents changes norms and practices, those changes shape policy reform, that reform further reinforces norm change so that the reform itself is implemented in daily life, and that implementation then strengthens the movement's base in ways that produce new changes in a widening circle of democratic transformation.[414] The key is that movement lawyers may intervene at different levels to build and fortify these cycles. Their work is affirmative, prospective, and ongoing. In this regard, movement lawyers do not simply rely on virtuous cycles to emerge nor, once started, do lawyers presume that the cycles will endure. To the contrary, they presume that any struggle for political or economic redistribution is going to provoke strong countermobilization that will persist over time, with opponents seeking out the most favorable institutional levels upon which to assert opposition. Thus, rather than viewing their goal as advancing policy change that constitutes a decisive victory, movement lawyers appreciate that integrated advocacy is a repeat-player process in which success must be defended and extended over time. In this sense, the opposition itself becomes integrated into the movement lawyer's frame of analysis.

410. GORDON, *supra* note 8, at 150.

411. *See, e.g.*, Ashar, *supra* note 8, at 1911–13 (discussing role of workers in asserting their rights in campaign against restaurant labor violations).

412. *See, e.g.*, Cummings, *Hemmed In*, *supra* note 3, at 48–51 (discussing creation of Garment Worker Center as site for rights education and worker organizing).

413. *See, e.g.*, Melanie Garcia, *The Lawyer as Gatekeeper: Ethical Guidelines for Representing a Client with a Social Change Agenda*, 24 GEO. J. LEGAL ETHICS 551, 565 (2011) ("[M]ovement advocacy empowers the client to begin more immediately working toward social change with other members of her community or with members of the relevant social movement.").

414. Reflecting on the work of economic and social rights advocates in Africa, Peter Houtzanger and Lucie White posit a social change model that connects local mobilization at the grassroots level to processes of institutional change that are translated into reform in the policy arena, creating political openings that deepen local participation in a virtuous cycle. Houtzager & White, *supra* note 71, at 181–90.

In the end, what is most notable about integrated advocacy is what it suggests about the content and power of the movement lawyering approach to social change. Ultimately, movement lawyering is not just an empirically grounded model, but a prescriptive theory connecting legal means to social change ends. Its fundamental normative claim is that *how* legal advocacy is conducted affects *what* it may achieve. By repositioning the role of lawyers within a broader framework of social movement activism, movement lawyering holds out the promise that deepening connections—among organizations, tactics, and institutions—will ultimately yield more accountable and enduring change. Whether movement lawyering can, in fact, achieve that promise is a critical question for this generation of progressive scholars and practitioners to now confront.

V. THE MOVEMENT TURN IN PROGRESSIVE LAWYERING—WHAT IS AT STAKE?

What does the impulse to use the label *movement lawyering* say about the current state of progressive legal practice? How should scholars and practitioners evaluate both the process by which movement lawyers engage in advocacy and the outcomes they achieve? And what lessons does the new movement lawyering have to teach about the possibility of authentic egalitarian partnership between lawyers and members of marginalized groups in the pursuit of social transformation?

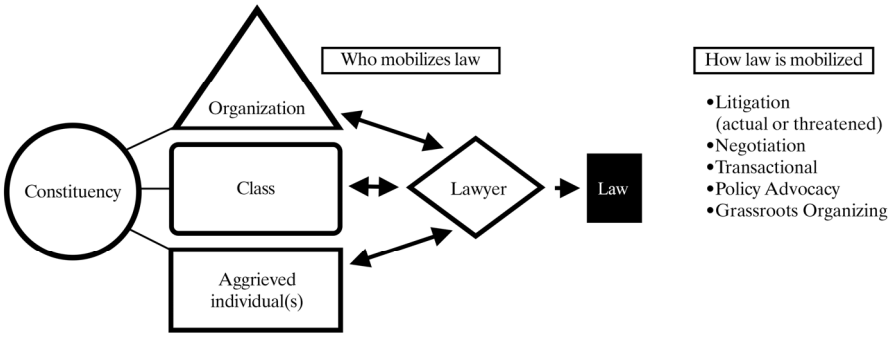
Reacting to these questions, this Part offers a set of preliminary thoughts sparked by the new movement lawyering—an agenda for further inquiry rather than a definitive analysis. It frames these thoughts by returning to the two central issues raised by critics of legal liberalism—accountability and efficacy—to which movement lawyering responds. *Accountability*, the idea that lawyers act in ways that closely correspond to and directly advance the interests of client and constituency, focuses on the question: *who decides?* As Part IV argued, movement lawyering seeks to locate decision-making power firmly in the hands of the very people whose lives social movements seek to change by representing mobilized clients and collaborating with nonlegal organizational partners. *Efficacy*, the idea that law can be an effective tool in changing social norms and practices, while building sustained democratic engagement, focuses on the question: *what works?* As Part IV suggested, movement lawyering seeks to answer this question by allocating legal resources to support groups with the power to make change, while developing strategies that leverage the comparative tactical advantages of different modes of advocacy and the comparative institutional advantages of different law-making bodies to maximum effect. This Part more deeply explores the movement lawyering response to the problems of lawyer accountability and legal efficacy, suggesting that—although movement lawyering helpfully reframes these central issues—it ultimately leaves them unresolved.

A. Accountability: Who Decides?

In general, lawyering for social movements raises questions of *who* drives a campaign and *how* it operates. In gauging accountability risks, it is important to start with precisely what legal representation looks like in movement campaigns and what types of professional values lawyers bring to bear. How do the lawyers involved in movements understand their role and how do they enact that understanding in engaging constituent members and devising legal strategy? How do lawyers structure the specific legal relationships with the constituencies they claim to represent? Are lawyers engaged in traditional models of representation or are they redefining representational structures in ways that seek to respond to the gap between their interests and those of the constituencies?

In terms of primary actors, we can think of movement lawyering as involving a range of individuals and groups, depending on the context. The lawyer-client relationship can be formed either at the initiative of the clients, who seek out lawyers in specific interest-advancing cases, or by the lawyers, who develop a plan of law reform and then seek out the cases and clients that might maximize the chance for a positive outcome. This latter, lawyer-driven approach is associated with the famous "test case" strategy pioneered by the NAACP in its desegregation campaign and adopted by other legal groups. The lawyer's decision-making power vis-à-vis specific clients in the test case context is the central accountability concern raised by critics of legal liberalism.[415]

FIGURE 1: LEGAL MOBILIZATION: ACTORS AND TYPES



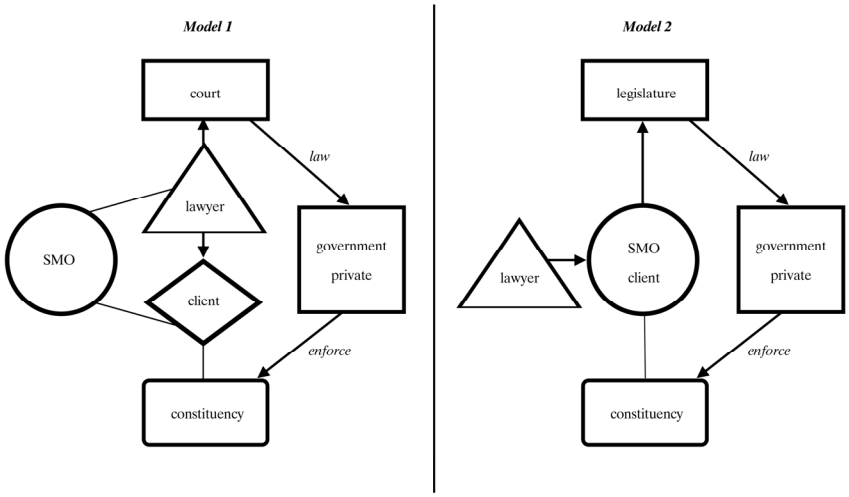
As Figure 1 shows, lawyering that aims to advance systemic social change (beyond resolving an individual client's dispute) invariably involves a *double representation*: (1) the lawyer represents a specific client, and (2) that client is deemed to have some legitimate claim to represent a broader constituency whose interests are at stake. This may occur through: *individual* representation, in which the lawyer takes on the case of a client whose grievance stands in for collective grievances of a broad-

415. *See supra* footnotes 47–49 and accompanying text.

er group and whose case may be resolved in ways that fix the broader group problem or draw attention and resources to it; *class* representation, in which the lawyer initiates a class action to redress collective problems of a diffuse or disorganized constituency; and *organizational* representation, in which the lawyer represents an already-formed group in advancing a group-defined project, which could be promoting policy reform, building affordable housing in the community, or litigating a claim in which the group is deemed to have standing to represent its members (as is typical, for example, in environmental litigation).

The structure of representation in the movement lawyering context depends, in part, on the type of reform campaign. Figure 2 depicts two types of legal campaigns—one that seeks policy reform through court and the other through politics—and corresponding representational structures.

FIGURE 2: STRUCTURE OF LEGAL REPRESENTATION BY CAMPAIGN TYPE



Model 1 is the classic impact lawsuit in which lawyers represent clients in asking courts to enforce law against public or private actors to redress a constituent grievance. Here, the ethical concern for the lawyer relates primarily to the degree to which coordination with the outside social movement organization ("SMO") violates the lawyer's responsibility to advance client interests without conflicts and to avoid third-party influence. Movement lawyers have sought to use a variety of strategies to enhance the degree to which the clients' interests correspond to the SMOs without abdicating their primary duties to the clients, most of which focus on organizing and information sharing at the outset of campaigns designed to promote interest convergence. Direct representation of an SMO in a policy reform campaign (Model 2) avoids the potential

divergence between client and SMO interests; here, it is possible for the lawyers to simultaneously adopt the movement's cause, defined by the SMO, while maintaining a traditional professional relationship. This model, however, does not eliminate accountability concerns but rather shifts analysis to the question of how the lawyer relates to SMO representatives and how accountable those representatives are to the constituency.

As this suggests, in the double-representation format, lawyer accountability concerns tend to arise in two ways. First, the lawyer may *select* a client whom a substantial portion of the constituency does not accept as a legitimate stand-in for its interests. Second, even if the client is a legitimate representative, the lawyer may resolve the case on terms that present a *conflict*: by helping the client but not the broader constituency (*e.g.*, by entering into a confidential settlement in which a defendant accepts no responsibility and does not agree to change behavior) or by persuading the client to accept a position that the lawyer believes to be in the constituency's best interest, even if it conflicts with what the client may want (*e.g.*, by rejecting a settlement in the hope of getting a favorable ruling on the merits that sets precedent).

How to address these concerns has been a question at the center of progressive legal debate since legal liberalism. Scholars have proposed a range of solutions. To address the first problem of client selection, some have argued for a constituency referendum on important collective issues that authorizes lawyers to pursue cases to advance those issues upon which there is substantial agreement.[416] Others have suggested that sustained community engagement by lawyers may help guide them in choosing which clients to represent.[417]

With respect to the second problem of how to resolve conflict between the interests of client and constituency during the course of representation, approaches have ranged from client-centered or facilitative approaches, which counsel for strong lawyer deference to the client irrespective of the lawyer's own view or those of other stakeholders[418]; to middle-ground alliance or collaborative approaches, in which the lawyer's active, long-term political and dialogic relationships with the client community give her standing to make discretionary judgments in client matters about how to balance client and constituent concerns[419]; to more

416. William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1655 (1997).

417. Gary Bellow, *Steady Work: A Practitioner's Reflection on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 302 (1996).

418. Richard D. Marsico, *Working for Social Change and Preserving Client Autonomy: Is There a Role for "Facilitative" Lawyering?*, 1 CLINICAL L. REV. 639, 659 (1995) ("[R]ather than playing the role of organizer or consciousness-raiser, the facilitative lawyer steps back, does not become deeply involved in the client's full range of activities, and instead seeks to provide the technical legal advice and assistance the client seeks.").

419. *See* Michael R. Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67, 102 (2000) ("[U]nder appropriate circumstances, my own strengths,

assertive justice-based approaches, in which constituent interests are viewed as indeterminate and conflictual, and thus the lawyer—who must inevitably exercise discretion based on her own values—is empowered to make decisions in ways that advance her best judgment about what justice requires.[420]

Movement lawyering weighs into this debate. It responds to the accountability concerns in the double-representation format by situating lawyers in thick movement contexts in which other stakeholders influence their decisions about who to represent and how to do so, and then emphasizing lawyering for mobilized clients that have the power and authority to hold lawyers to account. In this way, movement lawyers seek to address the double-representation problem in the social movement context by representing clients that, in turn, legitimately represent the movement's constituency. As the examples in Part IV revealed, lawyers do so by representing a movement organization directly, representing an individual at the direction of a movement organization (or coalition) to advance the movement's goals, or initiating a class action as part of a strategy designed in conjunction with movement organizations. In each case, lawyers are accountable to "a movement, not a class."[421] Movement lawyering thereby asserts a strong version of lawyer accountability by shifting the perspective from legal liberal lawyers representing vulnerable individuals or diffuse classes to movement lawyers representing mobilized organizations.[422]

Yet this framing of the accountability issue raises substantial questions at the core of progressive lawyering theory to which movement scholars have paid insufficient attention. What does it mean to represent a movement? Who has organizational or individual standing to legitimately speak on a movement's behalf? How do lawyers select among conflicting movement viewpoints about goals and strategies? And what happens when there is only a weak or even non-existent movement infrastructure?[423] Taking these questions as a point of departure, the remainder of this Section offers observations about the deeper accountability challenges of movement lawyering and how scholars and practitioners might think about them going forward.

One observation, raised in Part IV's discussion of mobilized clients, relates to the exercise of political judgment by lawyers in their represen-

insights, and abilities can enhance the strategies and activities of clients from . . . [subordinated] communities.").

420. *See, e.g.*, WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LEGAL ETHICS 9 (1998).

421. Guinier & Torres, *supra* note 8, at 2782.

422. *Cf.* Simon, *Pragmatist Challenge*, *supra* note 35, at 162 ("[Legal liberalism] leaves the client vulnerable to the lawyer.").

423. Sometimes organizational representation is not attainable since there are many instances in which movements are not mobilized yet social wrongs persist that could be addressed by law. Martha R. Mahoney, *"Democracy Begins at Home"– Notes from the Grassroots on Inequality, Voters, and Lawyers*, 63 MIAMI L. REV. 1 (2008) (detailing the role of lawyers in advancing the right to vote in the absence of political participation and grassroots organization).

tational choices. A key point about the new movement lawyering literature is that it is oriented around a strong version of lawyer deference to autonomous clients. Movement lawyers are presented following the instructions of social movement organizational clients and answering to organizational allies for decisions about which clients to represent and how. In this way, the literature emphasizes the key point that lawyers are not placing their own conceptions of the "public interest" above the client's interests, but rather are rigorously client-centered. This client-centered approach then meshes with aspirations of political transformation by identifying the client with social movement power. In this way, movement lawyering proposes to combine conventional norms of lawyer deference with ambitious progressive social change—simultaneously avoiding the critique of legal liberalism (not enough lawyer deference) and the critique of client-centered lawyering (not enough ambitious progressive social change).

Yet it is not clear how well movement lawyering ultimately resolves this dilemma both because, as discussed above, the representation of organizational clients raises its own concerns about lawyer influence, agenda setting, and preferring some group interests over others, and because movement lawyers are not accountable for the choice of who to represent in the first instance. This representational ambiguity emerges from the essential ambiguity of a social movement.

The definition of "social movements" is an issue around which there has been much debate within sociology. Social movement scholars generally agree that a movement is typically associated with collective grievances shared by a constituency of "low status or socially marginal citizens"[424]; an organizational structure through which those grievances are expressed and constituent participation mobilized; and the use of insurgent or noninstitutionalized political tactics, like protest and other direct action, that operate outside of, disrupt, and thus put pressure on power holders.[425] Scholars greatly diverge, however, on what each element looks like in practical terms and the degree to which each must be present. The boundaries of movements are porous and contested, and there is particular disagreement about the role of organizations within movements. Resource mobilization theorists view organizational structures as essential to overcoming movement collective action problems.[426] In contrast, political process theorists tend to view organization more skeptically as necessary to initiate direct action, but prone to become ossified, hierarchical, and oriented around organizational maintenance rather than political mobilization.[427] In general, scholars have described movements as at-

424. Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1508 (2005).

425. *Id.*

426. McCarthy & Zald, *supra* note 87, at 1218.

427. FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL xxi (1977) ("Organizations endure . . . by abandoning their oppositional politics.").

tempting to balance commitments to "participatory democracy" with the need for structure and leadership to frame issues, plan strategy, and minimize internal conflict.[428] Within this complex and fluid milieu are organizations with different degrees of funding, participation, and formality (some that are more professionalized and others more grassroots), which are associated with different ideological positions within movements, running from conservative to mainstream to radical.

Movement lawyers intervene in this complex environment, navigating significant representational challenges in contexts in which decision making is diffuse and contested. Collective action is messy precisely because the interests of group members inevitably conflict.[429] Work on behalf of coalitions may give lawyers more claim to "represent the movement," yet coalitions comprised of multiple organizations with different levels of power and resources can submerge internal schisms and sometimes may even give an air of legitimacy to groups that do not genuinely reflect the range of constituent interests. Lawyers who work within coalitions, serving on leadership committees without representing the coalition as a whole, necessarily influence decision making based on their own values or those of movement organizations with which the lawyers are most closely aligned.

The key point is, given the organizational diversity and conflict that defines social movement environments, *lawyers must make political choices about which groups to represent, or which interests within complex organizations to support, and such political choices ultimately require taking sides*. Whether such side-taking is more or less fraught than in other situations in which progressive lawyers intervene to advance change—such as class representation—is a deeply complicated, context-specific issue that invites greater empirical attention.

This picture of organizational complexity challenges the common framing of movement lawyering, in which clients are depicted as finite organizations having coherent interests that can be communicated to lawyers in determinate ways. As Tomiko Brown-Nagin puts it, to be most effective in pursuing transformative social change goals, "movements approach law and lawyers deliberately and strategically, if at all."[430] Yet, in positing movement clients with discernible interests that can be "deliberately and strategically" communicated to lawyers, the literature may overstate the organizational representativeness and autonomy of particular movement groups and understate the element of lawyer discretion in selecting and shaping them. It seems completely fair to say that *specific movement organizations* approach lawyers deliberately and strategically. That, however, begs the question of which interests such organizations advance and how representative they are. Also, as

428. STAGGENBORG, *supra* note 26, at 36.

429. "Poor people are not more likely than non-poor people to have consensus about their interests." Simon, *Dark Secret*, *supra* note 30, at 1107.

430. Brown-Nagin, *supra* note 424, at 1502.

Brown shows, there are times when precisely because of the lack of favorable conditions for political mobilization, legal advocacy may precede—and even help spark—social movement activism. The NAACP's Charles Hamilton Houston and Thurgood Marshall were courageous movement lawyers by all accounts, but their legal challenge to *Plessy* did more to galvanize organizational development in the civil rights movement than respond to it.

Because lawyers in social movements have to exercise political judgment in choosing sides in contentious intra-movement debates, it can be difficult to differentiate movement from nonmovement lawyers in contexts of political conflict, where it is tempting to identify the "movement lawyer" with the lawyer for the movement interests with which one feels politically sympathetic. In this sense, labeling someone a "movement lawyer"—and casting others outside that category—may be more a political judgment than a professional one. Thus, when scholars criticize lawyers for lacking accountability to movements, they may actually be suggesting that those lawyers *have chosen to represent the wrong side in intra-movement disputes*. In this way, scholars may conflate first-order representational problems of lawyer accountability to clients (does the lawyer serve the client's best interests?) with second-order representational problems of organizational accountability to the broader movement constituency (does the client serve the movement's best interests?).

In the end, the debate over movement lawyer accountability is ultimately one over who should author social change and how. Within this debate, although it makes sense to judge lawyers for their political choices about where to locate themselves within movements and to compare those choices to similar ones by nonlawyer activists, it may be less true to the complex reality of social movements to suggest that some of those choices "count" as movement lawyering more than others. The ultimate question is *to whom* lawyers are accountable within movements rather than *whether* they are so. This is true even when lawyers represent movement organizations since their choice of which organization to represent, and which interests within organizations to support, are political choices to be evaluated on their own merits.

So too should lawyers be judged for the other ways that they shape the nature of social movement politics, both deliberately and unintentionally. Lawyers' conscious political actions range from deciding to help certain individuals to start organizations when none exist to allocating scarce professional resources to particular movement legal cases over others. Even without deliberate intent, decisions to litigate certain issues by lawyers may raise the salience of those issues in ways that divert resources away from more radical elements.[431] How we evaluate these lawyering choices depends on how accountable the choices are to movement

431. Leachman, supra note 8, at 1673.

interests—but also on whether we think the substantive goals are good and the means well-suited to advance them.

One may therefore think of movement lawyering as a perspective that reframes, but does not fundamentally resolve, enduring questions about professional role. Thus, even as lawyers seek to integrate their tactics into broader movement strategy, they invariably confront conflicts of interest that raise concerns about the legitimacy of their efforts. Jules Lobel's description of lawyers who use "courts as a forum for protest" highlights this problem.[432] As he notes, in the movement lawyering context, "[t]he legal struggle is . . . a part of a broader political campaign, not the engine of change itself . . . ." But the process of using court cases to "further a public dialogue or a political movement" "radically redefines the role of the lawyer," who "does not act as the neutral detached advocate posited by the traditional model, nor even the less detached, elite, sympathetic and empathetic legal expert of the law reform model."[433] Rather, movement lawyers must build their case based on "broad moral and political themes," looking at "the interaction between the litigation and the broader interests of their clients and the movements they represent," thus creating "the potential to come into conflict with the needs and interest of the individual clients . . . ."[434]

Perhaps movement lawyers manage this conflict in more legitimate ways than the legal liberal lawyers that Bell charged with "serving two masters" by anchoring decision making in well-defined movement interests. However, knowing whether this is so requires understanding who gets to define the movement's interests and how they relate to the interests of clients standing in to represent the movement in a particular case. Claiming the legitimacy of movement lawyering by asserting the legitimacy of movement goals begs key questions: which movement organizations and leaders are empowered to set the movement's agenda, how inclusive is the agenda-setting process, how strong and widespread are dissenting views, and how well-informed and committed are clients recruited to be involved in movement-centered cases. The accountability problem in movement lawyering thus presents itself in a different guise—not to be easily evaded.

B. Efficacy: What Works?

As the discussion above suggests, assessing the efficacy of law as a social movement tool involves judging whether the *means* used achieved the *end* defined. How one measures success turns on the criteria used for evaluation. Those criteria relate to the *nature of the particular goal pursued*: for example, changing law on the books, promoting enforcement of a law that redistributes material resources or political power, changing

432. Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477 (2004).
433. *Id.* at 480, 530, 546.
434. *Id.* at 548, 550, 555.

attitudes and behaviors in ways that enhance feelings of belonging or participation, or building community and solidarity with a particular group. The criteria for evaluating success also relate to the *scope and ambition of the particular goal selected*: does the goal reflect an incremental change or a radical one, does it require modest adjustments within the system as it exists or significant modifications to the system's basic architecture, does it ask for an extension of widely held values or does it demand a dramatic change of values? How one thinks about these criteria shapes evaluation of strategy—the means deployed to achieve the social change goal. Strategic decisions rarely, if ever, turn on whether to pursue *either* law *or* politics, but rather in a given context, the question is what mix of legal and political mobilization makes sense, in what order, and to what effect. Judging these types of strategic decisions also involves deciding on a perspective for evaluation. Should evaluation proceed from some objective reference point, from the political perspective of the person doing the evaluation, from the point of view of the advocates who devise strategy, or from the vantage point of those whose lives are ultimately affected?

The social movement turn in progressive lawyering reflects a set of ideas, some explicit and some not, about how legal means impact political ends. This Section concludes by reflecting on some of these ideas, knitting together insights raised throughout the Article to help start a productive discussion about what movement lawyering promises and what it can achieve.

First, starting with a consideration of *ends*, it is useful to think about the basic political tilt of contemporary movement lawyering in relation to substantive policy objectives as well as goals of constituent activation and political participation. The historical analysis presented in Part III underscored the important role of the broader structure of political opportunity in shaping the aims of progressive legal advocacy. Pre-New Deal progressive lawyering was structured in part by the hostility of the Supreme Court to economic regulation and sought to keep the Court out of majoritarian policy making.[435] Civil rights lawyering in the postwar era took the opposite tack, enlisting the Court to reverse the majoritarianism of Southern Jim Crow.[436] Radical lawyers and scholars reacting to the legal liberal approach associated with civil rights lawyering rejected its claimed incrementalism in favor of fundamental systemic restructuring—more democratic socialism and less liberal individualism.[437] The rise of the conservative movement challenged this aspiration and unraveled many of the policy achievements that the New Deal-Civil Rights coalition had achieved.[438]

435. Scott L. Cummings, *The Puzzle of Social Movements in American Legal Theory*, 64 UCLA L. REV. (forthcoming 2017).

436. *Id.*

437. *Id.*

438. *Id.*

From the most macro-level point of view, one can see in the new movement lawyering literature some element of recovering aspects of what was lost with the decline of political liberalism, combined with continued efforts to deepen that liberalism in ways that are more directly responsive to those most marginalized by entrenched structures of subordination and inequality. Thus, at one level, the stories of movement lawlawyering recounted in Part IV reflect a domestic project that seeks to rebuild old movements that powered the New Deal,[439] and invest in new movements that carry forward the civil rights movement's equality ideal,[440] while simultaneously engaging in a national politics of pragmatism in the hope of saving what remains of progressive institutions. This pragmatic approach is expressed in efforts to preserve the legal services program after decades of funding cuts and substantive restrictions, protect the status and social justice mission of clinical legal education from the new emphasis on market-based skills,[441] and defend liberal public interest law from the conservative counter-movement.[442] These national-level efforts are coupled with progressive local politics of redistribution, taking advantage of the opportunities afforded by demographic change and municipal power to deepen the rights of workers, immigrants, LGBT people, and members of other marginalized groups.[443] The upswing in more radical grassroots activism (Occupy Wall Street, Black Lives Matter, Dreamers, Trans Liberation) reflects ongoing demands within liberalism to make it more inclusive, transparent, and humane. Despite the importance of radical voices in these efforts, however, the political thrust of new movement lawyering, on the whole, is toward *advancing projects associated with mainstream political liberalism, rather than representing a radical break from it*.

It is important to note that, within movement lawyering projects, activating grassroots participation and sustaining bottom-up political mobilization remain key goals; they are, however, goals advanced through mechanisms that may be distinguished from two other accounts of progressive lawyering that emphasize the value of participation: one associated with the poverty law scholarship of the 1990s focused on client empowerment and the second advanced by William Simon under the rubric of legal pragmatism.

As discussed in Part II, one scholarly reaction to the legal liberal focus on individual rights and lawyer expertise—and its negative conse-

439. *See* Cummings, *Preemptive Strike*, *supra* note 3 (labor movement).

440. *See* Cummings & NeJaime, *supra* note 4 (marriage equality); Gordon, *supra* note 8 (immigrant rights).

441. *See* Sameer M. Ashar, *Deep Critique and Democratic Lawyering in Clinical Practice*, 104 CAL. L. REV. 201, 204 (2016).

442. *See* Luban, *supra* note 209, at 209–13; Louise Trubek, *Public Interest Law: Facing the Problems of Maturity*, 33 U. ARK. LITTLE ROCK L. REV. 417, 427 (2011).

443. *See, e.g.*, Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153 (2011).

quences for collective action and client empowerment[444]—was to argue for greater client and community participation in and around the process of legal representation. Poverty law scholars in the 1990s offered productive ways for lawyers to think about incorporating client voices more directly into legal claim making, and to create spaces within and adjacent to litigation to mobilize client participation.[445] In contrast, discussions of movement lawyering place less emphasis on lawyer-enabled participation and more emphasis on traditional conceptions of role specialization and lawyer expertise. Lawyers promote participation by using their legal expertise to support movement organizations, which are the vehicles through which participation occurs. At bottom, movement lawyering places more of an emphasis on building power than achieving participation as such—although the two are linked.

Movement lawyering may also be distinguished from an approach to progressive lawyering that William Simon has called "legal pragmatism," which he associates with promoting civic participation in flexible, negotiated policy processes oriented toward developing sustainable long-term solutions to complex social problems.[446] In contrast to legal liberalism's emphasis on litigation in court to protect individual rights against government and corporate invasion, Simon's approach is focused on the development of new institutional arrangements outside of traditional court settings that enlist stakeholders (including public and private sector representatives) in developing and monitoring new-governance-style arrangements that privilege information production and revisable standards as mechanisms for creating the political buy-in for sustainable reform. Simon's key examples are drug courts that emphasize diversion and treatment,[447] and "second-generation" antidiscrimination policies that commit employers to up-front transparency in hiring criteria and "continuous monitoring based on benchmarks, goals, and indicators of various kinds, including data on hiring and promotions by race or gender."[448]

Like movement lawyering proponents, Simon starts from a similar critique of legal liberalism but ends in a different place, which rests on a distinctive set of ideas about the relationship between participation and policy reform. He contends that liberal lawyers faltered in the post-*Brown* period by focusing too much on protecting individuals from state and private power through litigation, which disconnected lawyers from other social change actors and organizations.[449] In response, Simon sug-

444. For a classic articulation of this critique, see generally Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970).

445. *See* Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987–88).

446. Simon, *Pragmatist Challenge*, *supra* note 35, at 181–98 (describing operating premises of legal pragmatism).

447. *Id.* at 199–202.

448. *Id.* at 204.

449. *Id.* at 139.

gests that the appropriate role of legal advocacy is to promote "associative democracy" by fostering "participation through nongovernmental organizations."[450] The end goal of such participation is to "facilitate a more decentralized and flexible mode of policy implementation,"[451] in which rules are negotiated by local stakeholders, benchmarks are continuously revised, and information is constantly pooled. In this way, Simon connects a particular form of participation—collective action through nongovernmental organizations in public-private partnerships—with a normative theory of social change through policy experimentation, which is claimed to be more accountable and sustainable because it induces "a type of education and acculturation that potentially creates support for the policies."[452]

Movement lawyering, though starting with a similar skepticism of individual rights-based approaches, responds by supporting a quite different brand of participation: one rooted in the power of episodic disruption outside of the institutional challenges at the core of the pragmatist vision.[453] In this sense, movement lawyering, particularly through its focus on representing mobilized clients through integrated advocacy, distinguishes itself methodologically and normatively from Simon's view of legal pragmatism. Movement lawyering views participation primarily as a vehicle of *collective mobilization*: channeling constituent grievances into organized challenges to the status quo.[454] *It thus values participation insofar as it produces collectives with power to destabilize existing institutional arrangements in order to exert pressure to help constituents win more political voice and material gains*. A movement lawyer would thus view constituent participation in the type of negotiated public-private policy making at the heart of legal pragmatism opportunistically, as one potential strategy in a broader struggle rather than a core goal. While movement lawyering seeks organizational connection to promote participation and enhance accountability, it does so with different political objectives: sometimes to advance new governance, and other times to strengthen old governance; sometimes to decentralize input into state processes, and other times to centralize power in movements outside the state. In this sense, movement lawyering *sub*sumes pragmatism in Simon's sense, but is not *con*sumed by it. Rather, organizational connections are created to build power in order to advance strategies "that work" in a specific context.

This discussion of the value of participation draws attention to the *second* dimension of the efficacy analysis, which is a consideration of which *means* best promote a social movement's ends. As indicated

450. *Id.* at 175.

451. *Id.* at 176.

452. *Id.* at 175–76.

453. Indeed, Simon acknowledges this point indirectly, arguing that associative democracy relies on nonprofit groups to protect against government and corporate power, "rather than relying primarily on spontaneous unorganized citizen action." *Id.* at 175.

454. WILLIAM GAMSON, THE STRATEGY OF SOCIAL PROTEST 12 (1975).

above, movement lawyering rests on a theory of social change in which deep transformation comes from outside the conventional political system through collective challenges by organized groups. Disruption of normal politics is the key leverage that movements exert. The emphasis on disruption is in tension with conventional insider strategies, such as litigation, which as legal liberal critics have long argued, have the potential to coopt movements rather than expand their power. And, indeed, much of the current debate over the role of law in social movements—despite the emphasis on multifaceted tactics and integrated advocacy—is still primarily about the degree to which litigation and courts help or hurt social movement mobilization.[455]

Two strong themes have emerged in the recent social movement literature. First, flowing out of the bottom-up view of social change, scholars have suggested that legal change generally occurs after movements have succeeded in shifting social norms, laying the groundwork for new political coalitions that appoint new judges, who (following their party preferences and also influenced by new social movement-produced norms) find occasion to change the law in pro-movement directions.[456] In this framework, legal change on its own without antecedent norm change cannot force people to change their behavior (leading to the problem of enforcement); further, legal change that occurs too far ahead of norm change is likely to produce backlash, hurting the very movements legal change intends to help. These ideas about the relation of legal and cultural change inform a second important movement lawyering theme, which stresses the circumscribed role of litigation in social movements. Scholars in the new social movement literature have generally accepted critical accounts emphasizing the limited instrumental power of litigation to push society in progressive directions. Accordingly, the literature overall can be read to advance the claim that the most appropriate role for litigation in social movements is the strategic mobilization of rights as tools toward the achievement of goals outside of the litigation itself—indirect effects—such as organizing or gaining favorable publicity.

Both themes reinforce a skeptical perspective toward litigation and courts—echoing ideas first articulated by critics of legal liberalism forty years ago and made famous by scholars who argued that rights were a "myth" and courts a "hollow hope" for social change.[457] It is not surprising that the new movement literature, in responding to the critiques of legal liberalism, would end up accepting some of the core critical claims. Yet, as movement lawyering evolves, scholars and practitioners should be mindful of the ways that it may carry forward empirically contestable ideas about the power of litigation and courts to influence society or privilege a conception of social movement power, rooted in stories from the

455. *See generally* Albiston, *supra* note 8.

456. *See, e.g.*, Balkin, *supra* note 38, at 28–36.

457. *See* ROSENBERG, *supra* note 50, 363–43 (advancing the "hollow hope" thesis); SCHEINGOLD, *supra* note 33, at 5 (1974) (discussing the "myth of rights").

civil rights era, which may not be as apt in contemporary politics. There are two concerns. The first, powerfully articulated by Orly Lobel, is that focusing on the indirect effects of litigation—its use as a tool to achieve organizing outcomes—may cause progressive lawyers to understate the ways in which courts *do*, in fact, exercise coercive power that may change people's behaviors and attitudes about controversial topics.[458] And the second is that, in building a model of lawyering around social movements, lawyers may be too eager to endow movements with outsized power to change society (particularly now that progressive movements have been evenly matched, even outmatched, by conservative counterparts) or too quick to see movement activity all around—so pervasive that it becomes prosaic. Responding to these concerns going forward, progressives should seek to embrace the potential of movement lawyering, finding the synergy between law and politics, while taking care not to oversell the movement and undersell the lawyering—potentially switching out one "hollow hope" for another.

VI. CONCLUSION

The idea of progressive lawyers lending their skills and power to social movements to achieve greater justice and equality for marginalized groups is both politically appealing and normatively desirable. It is an idea that has come into greater focus as a range of progressive causes have seen revitalized movement activity and a growing number of legal scholars and practitioners have shown new interest in what it means to be a movement lawyer. Against this theoretical and practical backdrop, this Article has advanced three main ideas.

First, it has argued that the turn toward movement lawyering in legal theory and practice reflects ongoing anxieties over the accountability of lawyers and the efficacy of legal strategies in progressive movements for social reform—anxieties that date back to the critique of legal liberalism and are now resurfacing in the new conversation about the potential of movement lawyering.

Second, this Article has claimed that although some version of movement lawyering has long existed within the legal profession, shaped by shifting opportunities and resources for political mobilization by marginalized groups, the contemporary idea of movement lawyering has taken on a particular meaning in the current political context. Thus, on the one hand, what is "new" about movement lawyering is really "old": drawing upon models of progressive legal practice that have long existed, albeit under different names. Yet, on the other hand, the movement turn in progressive lawyering has responded to elements of real change: a change in progressive politics that has refocused attention on the transformative potential of social movements and a change in the professional

458. Lobel, *supra* note 34, at 948–58.

self-conception of progressive lawyers that has made them receptive to movement-centered practice.

Third, synthesizing elements of change, this Article has introduced a new definition of movement lawyering, oriented toward building the power of marginalized constituencies through linked legal and political strategies, and premised upon the twin features of representing mobilized clients and deploying integrated advocacy. These twin features, in turn, precisely respond to legal liberal anxieties by presenting movement lawyers at their most accountable and effective: taking instructions from activist organizations in client-centered fashion and deploying law in politically sophisticated ways designed to maximize the potential for deep and sustained democratic change.

In conclusion, this Article has offered a preliminary appraisal of what is at stake—professionally, politically, and practically—in the new social movement turn in progressive lawyering. It has argued that movement lawyering does not ultimately avoid the central legal liberal problems of lawyer accountability and efficacy, but rather reframes them in a different light and thus resurfaces old debates. How lawyers choose to align themselves with different elements of complex movements reprises questions about lawyer control and conflicts. Discussions of backlash and rights mobilization reproduce debates about the tradeoffs of litigation and the power of judicial reform to change society. If critics judged legal liberalism harshly because of perceived failures of accountability and efficacy, it is now fair to appraise movement lawyering by these very same metrics.

Such an appraisal would force a deeper reckoning with both the complexity of lawyer accountability to movements and the challenges to movement-led social change, particularly in the contemporary political environment. The idea of a social movement has become its own brand, an ideology that different interest groups adopt to cloak their activity in the legitimacy of grassroots participation. The dividing lines, however, between authentic social movements and professionalized interest groups are increasingly blurry in the current political environment, raising important questions about just how far progressive movements can go to change society, particularly when conservative movements have risen to claim the legitimacy and repertoire of their liberal counterparts. In this context, what is at stake in debates over movement lawyering is not simply the superiority of different advocacy approaches, but fundamental disagreements about theories of social change—and the role of elite politics, professional expertise, and litigation within them.

Yet the new social movement turn in progressive lawyering, by helping to gain a deeper appreciation of the stakes, provides opportunity for innovation and occasion for hope—which is the fuel that powers progressive lawyers' pursuit of a better society. On the ground, the thoughtfulness and skill with which progressive lawyers are now engaging movement organizations and developing integrated advocacy campaigns

signals the potential of new partnerships and power. And in the academy, the movement lawyering idea is being carried forward by a new generation of scholars, less weighted down by old fights, who have succeeded in changing the terms of the debate over the legacy of legal liberalism by holding a different mirror to the past that reflects a brighter light toward the future.

Looking backward, the new movement scholarship has focused attention on the ambiguity and contradictions inherent in the practice of legal liberalism itself. Doing so has forced a reconsideration of the conventional historical view of lawyers during the civil rights period by presenting them as less litigation-focused and court-centered than previously understood—while also revealing the ways in which nonlawyer movement leaders faced their own crises of accountability and efficacy. This revised history has created space for rethinking a path forward: rehabilitating the image of sophisticated, pragmatic, and idealistic lawyering in the service of core progressive values, which encompass both a robust regulatory state and an activated democratic public.

It is in this sense that the new movement lawyering may be seen as not just pivoting away from legal liberalism, but as an effort to redeem it on different grounds. For many of the new movement lawyers and scholars, holding a transformative vision means having ideals that reframe pieces of the very liberalism that earlier critics had, in their day, rejected—but which seem like the foundation of a distant project, parts of which are worth struggling to revive, all the while continuing to extend and deepen democratic principles of inclusion, equality, and participation. From this perspective, instead of seeing legalism and liberalism as oppositional or in tension, the new movement lawyering may be read as an attempt to reclaim legal liberalism—smart, savvy legal liberalism—as necessary to the realization of a progressive political project. In this respect, although the social movement turn may not resolve the dilemmas of progressive lawyering, it can help set the agenda for a reenergized dialogue on the integration of progressive legal theory and practice.