CAUSE LAWYERING AND SOCIAL MOVEMENTS: CAN SOLO AND SMALL FIRM PRACTITIONERS ANCHOR SOCIAL MOVEMENTS?

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ABSTRACT

As the demand for affordable legal services grows, law schools and the legal profession struggle to respond. By examining lessons from successful social movements in the last century, Cause Lawyering and Social Movements: Can Solo and Small Firm Practitioners anchor Social Movements looks at the Law School Consortium Project and its potential to participate in and anchor the social movements of our time. The collaboration of the law schools, networks of solo and small firm attorneys and activists at the local, regional and national level provide key elements for powerful change given the technological developments of the 21st century.

The question of whether solo and small firm practitioners can be cause lawyers has been discussed by many interested people in the topic of cause lawyering. In the first *Cause Lawyering* volume compiled and edited by Austin Sarat and Stuart Scheingold, several authors examine actual small and solo firms where the lawyers clearly meet the criteria articulated by

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Scheingold and Sarat in *Something to Believe In*: "At its core, cause lawyering is about using legal skills to pursue ends and ideals that transcend client service – be those ideals social, cultural, political, economic or indeed, legal" (Sarat & Scheingold, 2004, p. 3). It appears that this question is settled. What is not settled is whether solo and small-firm practitioners can anchor larger social movements in the United States. In an attempt to answer this question, this essay will first examine what differentiates social movements from causes, and what roles lawyers might play. Included in this discussion will be an analysis of the changes happening in social movements in the United States, and the implications for lawyering. Second, there will be an examination of the last century's most successful social movement in which lawyers played an integral role, trying to extract the elements that seem essential, paying particular attention to the National Association for the Advancement of Colored People (NAACP) and the NAACP Legal Defense Fund (LDF). Finally, this work will examine a model in development, the Law School Consortium Project (LSCP), to see if the critical elements exist or can be developed for supporting current social movements. It will look at the LSCP as the mechanism by which law schools and practitioners make it possible to meet the challenge of access to justice and create a space in which "attorneys ... unify profession and belief ... and ... maximize the consonance between moral values and professional practice" (*ibid*., p. 73). It will also examine ways in which the LSCP might equip and support solo and small firm cause practitioners in social movements, and connect those practitioners to the movements themselves.

SOCIAL MOVEMENTS AND LAWYERS

Michael McCann (2004) uses Tilly's 1984 definition of a social movement:

> … a sustained series of interactions between powerholders and persons successfully claiming to speak on behalf of a constituency lacking formal representation, in the course of which those persons make publicly visible demands for changes in the distribution or exercise of power, and back those demands with public demonstrations of support. (p. 508)

McCann clarifies by suggesting that "… social movements aim for a broader scope of social and political transformation than do more conventional political activities … they are animated by more radical inspirational visions of a different, better society" (*ibid.*, p. 509). McCann goes on to use a legal mobilization theory by which to analyze the role of attorneys in social

movements. He asserts that there are three phases: the first phase, the "rights consciousness raising" phase that includes both agenda setting and defining the overall "opportunity structure;" the second phase of leveraging legal theories; and the final "legacy" phase during which there are attempts to institutionalize victories gained through leveraging. He asserts that lawyers are most helpful to social movements in the first and final phase, though most helpful in the first phase: "the first of these entails the process of 'agenda setting,' by which movement actors draw on legal discourses to 'name' and to challenge existing social wrongs or injustices … to make possible the previously unimaginable, by framing problems in such a way that their solution come to appear inevitable"(*ibid.*, p. 511).

A "cause," on the other hand, is something a little more ephemeral.

> Our basic premise is that a 'cause' is not an objective fact 'out there.' A cause, rather, is a socially constructed concept that evolves, if at all, through a process in the course of which experiences, circumstances, memories, and aspirations are framed in a particular way … Yet, inasmuch as the reality of a cause is a constructed and negotiated experience, it is in the very act of legal representation that a cause … is asserted or defused, comprehended or dissolved, recognized or silenced. Cause lawyers, in short, are not simply carriers of a cause but are at the same time its producers: those who shape it, name it, and voice it. (Shamir & Chinski, 1998, p. 231)

Shamir and Chinski suggest that a cause can be or is created in the interaction of a person or group of people and the lawyer with whom they interact. This process is, at its core, the framing of the problem to be solved in the language of justice and fairness that the legal system of the appropriate society can address. This may well be phase one of the building of a social movement, and critical to those who have an issue or grievance within the system. But it implies something narrower than a movement. I adopt this general frame for the purposes of this discussion. Cause lawyers, therefore, become those who are willing to engage in framing issues and fighting for those who bring injustices to them. But a social movement implies a more transforming process of both the group who identify with a particular cause and the society in which the movement is happening. It implies a momentum into the basic cultural mores and structures of the society that cannot be addressed in one particular case, statute or regulation. Instead, it is about using cases, statutes, regulations and much more for a transformational assertion of a fundamental restructuring of beliefs and actions of a society.

While there are elements of McCann's analysis that are helpful in thinking about the role of solo and small firms in social movements, there are several assumptions that seem to be implicit in his structure of analysis: first, both the movement and the opposition/power base are centralized; second, legal

responses are rational and consistent; and third, litigation theories and victories lead to a change in the policy and implementation of the institutions that represent the anti-cause of the movement. All of these assumptions, I would assert, emerge out of a 20th century and linear perspective of social engagement for change. Technology and globalization are changing our basic assumptions about organizing and what constitutes legal engagement with a social movement, therefore changing the role of lawyers and the clients.

TRANSFORMATION OF THE RULES OF ENGAGEMENT

Technological advances allow lawyers to take a more active role as co-producers of social movements. The 2004 United States presidential elections saw a shift in organizing and social activism that is still a little mind-boggling. It was the first time the power of technology was effectively used to create and respond to a need for organization and social dialogue. Millions of people relied on political and/or social commentary web logs or "blogs," websites and information not represented in the mainstream media, for their information and analysis. People met on the internet, worked together, voted for policies, chose media spots and set priorities on a daily (and sometimes hourly) basis. This organizing was highly decentralized in its character, took on some fundamental issues of democratic organization and interest, and, as the election unfolded, created localized communities of interest for engagement at the most local level as well as creating a national voice for collective interests as defined through both structured and unstructured dialogue. This direct contact and coordinated dialogue by and among like-minded individuals was new, invigorating and fast paced. While some of it became linked to a political campaign, this technique was used by both left and right wing activists alike. This dialogue was akin to an open-ended forum for issue development and discussion.

Another interesting element of this new reality was the quick cycling of stages, if they are stages at all. The "conversation" was open to all who were interested, and lawyers who were paying attention began to mobilize and develop legal resources to support, respond to, and take part in the conversation as it unfolded. There was timely mobilization of attorneys to critical states where legal challenges to citizen's rights to vote were expected. Many of those lawyers who responded to the call practice in solo practice and small firm settings. These cause lawyers were able to structure their

responses as the issues began to unfold, both in creating core groups who were researching and developing legal packets and strategies as well as those who were deployed and/or self-deployed to be available as necessary. They were also able to evaluate, shape, and be part of the coordinated response, feeding new information back into the conversation. These quick evaluations and reevaluations were near real-time, which changed not only the legal work but also the ability to be part of a team that includes a vast array of voices in the analysis, and the ability to mobilize resources to a point.

This ability to have access to information, social dialogue, strategic discussions, and model development allows for both a localized and efficient character to a social movement that is substantially different than what has been studied previously, and argues for new methods of analysis and models of response. While McCann's assessment that "legal mobilization politics typically involves reconstructing legal dimensions of inherited social relations, either by turning official but ignored legal norms against existing practices, by re-imagining shared norms in new transformative ways or by importing legal norms from some other realm of social relations into the context of the dispute" (McCann, 2004, p. 510), he overlooks the possibility that lawyers can be co-producers of both the process and the outcome of the social movement. While this was and is a method of work that is being implemented primarily in community change efforts at the local level, this model most effectively articulates the change in the process in which the social change efforts of the election worked. "Rather than an agent presenting a "finished product" to the citizen, agent and citizen together produce the desired transformation" (Whitaker, 1980, p. 240). In the context of social movements, technology allows us to implement a co-production strategy that from the beginning to the conclusion includes both attorneys and citizens in the conversation/dialogue about the social issue or cause, including long-term strategy and short-term tactics. Further, it allows linkages and deployment of resources for highest and best use of talent across a scope of issues.

This shift in process allowed by technology provides for a more rapid and cyclical response to problems that become causes (through definition and articulation of rights and remedies), but it also creates the mechanism to link the individual causes in near real-time to a significantly broader community of like-minded people who may then step up to the cause plate and turn it into a social movement – the transformational engagement of fundamental structures- in a much more timely manner. The painstaking organizing needed for a social movement in the 1940s may well be replaced with the model where, within days or weeks, substantial numbers of people around

the globe are mobilized to take to the streets to oppose an impending military action. In this model, the solo or small firm practitioner is not disadvantaged by her choice of practice venue if she is "linked" with like-minded attorneys working with those citizens bringing forth their problems. If those with grievances have access to lawyers who can articulate their grievance, then the possibility of a new cause, and a new (or revived) social movement arises.

THE ROLE OF SOLO AND SMALL FIRM PRACTITIONERS IN THE DELIVERY OF LEGAL SERVICES IN AMERICA

In the town where I grew up there were two lawyers serving all the interests of the community members. In cases brought to trial, one lawyer was appointed to prosecute, while the other worked on behalf of the defense. They handled all the criminal and civil matters in town, knew the basic outlines of the financial conditions of the families in the town, and provided a broad array of services, including pro bono services, to all who came in the door. As American communities become more economically isolated, the poor and working poor have an even more difficult time locating legal services. As Auerbach reminded us, "The country lawyer assured equal opportunity, social mobility, and professional respectability for the man of humblest origins, thereby preserving the democratic flank of the profession" (Sarat & Scheingold, 2004, p. 30).

The only solo and small firm practitioners that appear to be locating in low-income communities today are those with criminal practice areas. But the needs of low-income people are particularly fierce in areas of consumer protection and benefits, both job related and government sponsored, housing, family law matters, and issues surrounding immigration and residency. But establishing a solo or small-firm practice in a low-income community is difficult to do. Developing enough of a bread and butter practice to sustain the "low bono"[1] need is a challenge, in addition to understanding and responding to these matters as part of larger social movements that can nourish and link both the body and soul for the practitioner and the client.

In this country, a much higher percentage of minority and women law graduates begin their own practices right out of law school. The reasons for this phenomenon are multi layered, but include continued exclusion within the profession (Iwaton, 2004, p. B3), and perhaps continued challenges for

the students who are non-white and non-male to compete in a curriculum crafted by a predominately white male faculty (White, 2004, p. 8–10; Statistical Report Table 2004–2005 (AALS website)). But these graduates, many of whom are more likely to have come from low-income backgrounds, are also more likely to provide low bono and pro bono services to those who are in need. These are the cause lawyers examined by Aaron Porter (1998) in his article *Norris, Schmidt, Green, Harris, Higginbotham & Associates: The Sociological Import of Philadelphia Cause Lawyers*:

> Where the personal needs and the social needs of communities converge with the interests of the cause lawyers, the mutual needs of both can be addressed, as we see in the civil right movement's efforts against white domination of other racial groups. (p. 158)

Porter's examination of the role of the African American firm of Norris, Schmidt et al. in Philadelphia clearly shows the importance of the independent firm for African-American lawyers. While this examination was centered in the years between 1950 and 1980, statistics show that these lessons continue to hold true.

> As a consequence of racial and social inequities in our social structure, the practices of black lawyers, including the creation of their professional institutions and bar associations and their involvement in larger social movements against an oppressive white social system fall within the category of fighting for equality under the law and share that ethos. Black lawyers were in effect always involved in cause lawyering. (*ibid.*, p. 157)

While many of those firms are solo and small firm practices, they struggle to find economic success while continuing to serve those in their communities with the greatest need. For cause lawyers in solo and small firms that are rooted in minority communities, the struggle to survive will continue to intensify with the economic times we experience now and in the future.

Even if they are not minority and women practitioners, cause lawyers in private practice have been an important part of the social movement for justice in our country. John Kilwein's examination of the role of 29 lawyers in private practice in Pittsburgh, Pennsylvania is an important work in understanding the lives and choices of these attorneys.

> For this project, a cause lawyer is defined as an attorney, in private practice, who focuses on the cause of improving the condition of some identifiable portion of the low income community and other disadvantaged citizens of Pittsburgh. Added to this definition is Menkel-Meadow's notion that by engaging in this kind of work, the cause lawyer incurs personal, physical, economic, or social status risks. (Kilwein, 1998, p. 182)

Kilwein identifies several important elements of cause lawyers who choose private practice, one of which is the continuum of ways in which they practice (*ibid.*, p. 183–186). From individual representation to some

combination of individual representation and impact or mobilization lawyering, the spectrum of ways that they chose to deliver services was also linked to the way they understood the need. For those who provided primarily individual pro bono representation, they understood the primary issue to be lack of access to legal services, with the system of justice fundamentally sound (*ibid.*, p. 187). "Through a steady supply of legal services, the poor would be able to take advantage of existing societal and governmental benefits that are more easily obtained by their financially secure neighbors" (*ibid.*, p. 187). Most of their pro bono referrals came from the Bar association, and they did not participate in impact litigation and other referral networks.

Others were more directly involved in specialized referral networks and were connected to a cause or political organization that they participated in as a citizen member (*ibid.*, p. 188). They were more likely to participate in impact litigation and mobilization efforts, including

> litigation done in conjunction with the ACLU, Neighborhood Legal Services Corporation and other groups that forced state and federal penal institutions in western Pennsylvania to improve institutional conditions; a class action discrimination suit argued with many of the same organization that eventually forced several segregated suburban school district to merge into one more diverse district; and a suit undertaken with the Developmental Disabilities Law Project that resulted in changes in the way local schools dealt with students with various physical and mental challenges. (*ibid.*, p. 189)

Kilwein's findings show that these lawyers facilitated both increased direct service to the poor and work with larger issue and cause organizations.[2] Using Carrie Menkel-Meadow's (1998) definition, all certainly were engaged in cause lawyering:

> … cause lawyering is any activity that seeks to use law-related means or seeks to change laws or regulations to achieve greater social justice – both for particular individuals (drawing on individualistic 'helping' orientations) and for disadvantaged groups. Whether the means and strategies used are legally based 'rights' strategies or more broadly based 'needs' strategies, the goals and purposes of the legal actor are to 'do good' – to seek a more just world – to do 'lawyering for the good.' (p. 37)

Some were also involved in lawyering for social movements. The key elements in this differentiation appear to be (1) linkage to a larger network of people committed to a cause, (2) consistency between personal morality and practice, and (3) ability to work with those who worked deeply on specific issues in society.

"COOPERATING" SOLOS AND SMALL FIRM ATTORNEYS IN LAWYERING FOR SOCIAL MOVEMENTS

Even for national litigation organizations, the importance of local counsel has been acknowledged in many ways. The most powerful articulation of this was by Charles Hamilton Houston as he envisioned the role of the local lawyer in the redesign of Howard University Law School:

> Beginning in the early 1930s, Howard University Law School served as the West Point for a generation of Civil Rights lawyers … Houston's goal involved more than upgrading Howard's academic standing. He intended to train a generation of African-American lawyers who would lead the fight against discrimination. (Ware, 2001, pp. 635–636)

Years later Judge Robert Carter explained:

> The overriding theory of legal education at Howard during those years was that the United States Constitution – in particular, the Civil War Amendments – was a powerful force heretofore virtually untapped, that should be used for social engineering in race relations … A principal objective of the faculty at Howard was to produce lawyers capable of structuring and litigating test cases that would provide effective implementation of these guarantees on behalf of the black community. (*ibid.*)

These lawyers, highly skilled and trained in law that would assist with both the local work and the national challenges that would be needed, spread out across the south founding solo and small firm practices that would cooperate with the NAACP in its national, regional, and local efforts to use litigation strategies as part of the larger set of movement tactics to deliver justice and freedom to blacks in America.

The reorganization of the NAACP in the 1930s to position it as a national litigation organization was led by Charles Hamilton Houston and held within it his wisdom on the relationships between the law school, the national organization, and the locally based attorneys working across the south. He explained that his goals were: "(1) to arouse and strengthen the will of the local communities to demand and fight for their rights; (2) to work out model procedures through actual tests in courts which can be used by local communities is similar cases brought by them on their own initiative and resources …" (*ibid.*, p. 642). He set about to do that by both strengthening the national office's capacity to structure and bring cases that reflected the litigation strategy as decided by the Litigation Committee of the NAACP, and to strengthen the relationship between the national and the local chapters, and the attorneys who led them.

Houston developed a four pronged agenda for the running the legal campaign: "Houston's first tenet … go nowhere without local support, but at the same time to assume the responsibility for cultivating that support … The social and public factors must be developed at least along with and, if possible, before the actual litigation commences. Second, Houston emphasized loyalty to the cause of racial justice over loyalty to any particular organization or issue … The third salient feature of Houston's vision was his emphasis on using African-American attorneys … both in order to tap their creative energies and to build unity … Much of Houston's success can be traced to his extensive revision of Howard Law Schools' curriculum … Finally, Houston closely supervised the work of local attorneys … often solicited suggestions from the local attorneys and requested that they research specific aspects of the local situation" (Burch, 1995, pp. 135–138).

This agenda that blended the training received at the law school, the work of the national office and strategy with the work of the local, well-trained attorneys led to a winning strategy for the NAACP: "The Association needed the local leaders to build and maintain the grass-roots support essential to successful civil rights litigation … The local leaders also learned to defer to the NAACP attorneys on matters of legal strategy. The combined efforts protected the later success in the court room" (*ibid.*, p. 143). This model developed in the 1930s has remained the principal model for the NAACP though the significance of the litigation relationship began to change when the NAACP Legal Defense and Education Fund (LDF) was spun off in the 1950s. While operating as fundamentally integrated with the NAACP for a period of time, eventually (and pursuant to the appointment of Greenberg as the chief counsel of LDF) LDF became more independent and began to pursue its own litigation goals and organization building strategies.

Over and over again, the internship program has been referred to as the principal way in which the LDF won the hearts and minds of the attorneys who would become the cooperating attorneys for its work. This ability to acculturate and train the attorneys in the core values and principles of the organization serves the organization in much the way the 1930s training effort at Howard served the NAACP during the key litigation campaigns from the 1930s through the 1950s. This has been and continues to be key to LDF's ability to coordinate planned litigation strategies: "LDF retains close ties with the special set of cooperating attorneys which it trained and who had spent a year at headquarters before starting a law practice in southern communities; for many of them, the organization is the 'single largest

client'" (Wasby, 1984, p. 122). While LDF has a core of staff attorneys, they work one on one with the cooperating attorneys. "Staff attorneys prefer to work with cooperating attorneys who do much work, but 'need support and help': this may include inexperienced attorneys whom the staff attorneys can thus train 'in civil rights and skills'" (*ibid.*) Further, LDF supports these cooperating attorneys financially as well as through training once they are in the field. This financial support is key for developing the loyalty and one on one relationships that allow the LDF to rely on these attorneys for consistent performance with LDF acting as "a parent legal firm with law offices all over the country" (*ibid.*, p. 123). But LDF also understands the importance to its reach and connection beyond implementing its own legal agenda. "Cooperating attorneys … 'tend to know local people and problems better,' being local leaders with 'knowledge that is indispensable'" (*ibid.*). As Robert L. Rabin (1975) sees it, "The LDF is a partnership – a mix of staff and cooperating attorneys managing a nationwide, heavy-volume caseload through a pooling of professional resources. It is the viability of the local cooperating attorneys that serves as a crucial link between the organization and its clientele" (p. 218).

Other models of coordination of resources were developed in the 1900s. They used the work of national and local legal services organizations that coordinated with local attorneys in different causes. These models tended to rely on the pro bono resources of large firms, leading to a very different outcome.[3] While large firms have been and continue to be instrumental allies in social movements, they often find themselves at odds with transformational movements that challenge the core values and structures of society which often benefit their larger clients. Further, they are not the focus of this piece, and therefore this model will not be explored further herein.

Whether for the NAACP, the LDF or for other organizations that worked with and coordinated with lawyers not inside their organizations to meet the needs of the cause and deepen the work to respond to the developing social movement, there were several challenges to be met: training, coordination (both between the coordinator and those being coordinated and also between the social organizations and clients and the legal team itself), referrals and issue identification, legal theory development, and support (both financial and technical) for the lawyers in the field who were involved. As our society becomes more complex these challenges are multiplied. As our communities of interest become more dispersed, the natural lines of communication are tested. Houston's model for the NAACP benefited from the segregation it contested. Almost all African American lawyers were going to attend Howard University School of Law. Developing a

curriculum to train civil right lawyers meant training them in one location and in one curriculum. The network of African American lawyers was small and coherent, bound by social networks inside and by exclusion from those outside the network. Today's African American lawyers go to every law school in the country, live in almost every community and socialize in complex social circles. While there remains some cohesive networking, the complexity of coordination can no longer rely on the social bonds of alumnae or neighborhood connection.

The lessons of the LDF are similarly rich. The training model of the fellowship program shows the importance of being able to use deep research and training in a subject area "in house" to share and train in the field. The social relationships built while developing facts and theories that are implemented in the local areas by committed community-based lawyers strengthen and give nuance to the legal theories applied in the real world by those who have been given the luxury of deep theoretical exploration.

For both models, the linkage with local leadership has been critical to success. To develop a movement, the grievance that the client brings through the door must be given the language and remedy of a cause. When that cause is connected through larger reflection to similar or identical causes across the county and the globe, and linked to activist organizations that can bridge legal strategies and theories to the social theories and structures that live in the "microsites" of power in each local community, social movements emerge. The linking up and down the chain of training, coordination, and vision with the local leadership and resources to move forward people in the most local of ways that they live their lives is key to the success of the past, and I would posit, key to the success of the future. Doing this in our ever more complex and atomized world is the challenge of today's cause lawyers.

LESSONS OF COMMUNITY-BASED CAUSE LAWYERS

Community-based lawyers are integral to the life of the community in which they reside. They provide leadership in local organizations and a window into and a voice about the day-to-day struggles where our society is hammering out issues of justice:

> A poststructural rethinking of the democratic project does, however, afford some respite … Post-structural theories locate domination in cross-cutting social cleavages (race, gender, sexual orientation, age, etc.) and at microsites of power (the family, the workplace, schools, social service agencies, and the like). These microsites present less

> daunting targets for cause lawyers, who in effect turn away from high-impact, class action litigation and/or frontal assault on the institutions of the state. They focus instead on the empowerment of individual or perhaps small groups of clients. With less at stake politically and more at stake legally, legal institutions may well come closer to living up to their professed ideals.'' (Sarat & Scheingold, 1998, p. 9)

Understanding this opportunity for change in the positioning of both local and cultural struggles for justice out of a centralized and planned litigation strategy into the hearts and minds of the ''microsites of power'' may well be the best option for cause lawyers linked to social movements and their causes in this early part of this century.

As the NAACP learned in the 1920s and early 1930s, without a centralized process for reflection about what is happening in a larger context and people who are thinking about local activity in the context of the national and international picture, you risk actions that are effective for one client but bring about results that will, in fact, hurt the movement in the long run (Burch, 1995, p. 195). While there are some organizations and issue groups that have some coordination, the possibilities for solo and small firm cause lawyers that are being provided by the advances in technology are breathtaking.

TECHNOLOGY AND CAUSE LAWYERING FOR THE SOLO AND SMALL FIRM PRACTITIONER

The model that I would suggest is a powerful model and can be the basis of a cause lawyering network of solo and small firm practitioners. It begins with the same basic understanding of the central position of solo and small firm practitioners as has been said of all cause lawyers:

> Cause lawyering cuts against the grain of a widely accepted belief that law and lawyers are supposed to be apolitical agents for resolving society's conflicts while somehow remaining unsullied by them … Cause lawyering is not about neutrality but about choosing sides. Put another way, cause lawyers are focused on the broader stakes of litigation rather than on the justiciable conflict as such or on the narrow interests of the parties to that conflict. Cases have significance to cause lawyers not as ends in themselves but as means to advance causes to which the lawyers are committed. Cause lawyers choose cases, clients and careers according to what they stand for. The essential question is whether there is something at stake in which the cause lawyer believes and is, thus worth fighting for. (Scheingold, 1998, p. 118)

Because social movements are by their nature based in many actions and many locations, it is critical to provide a teeming array of entry points for