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2018

### Ethics and the History of Social Movement Lawyering

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# ETHICS AND THE HISTORY OF SOCIAL MOVEMENT LAWYERING

SUSAN D. CARLE\*

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## INTRODUCTION

In his article, Scott Cummings proposes that there existed an “old canon” concerning how to be a lawyer for progressive social justice causes, which has been replaced by a different “new canon” that envisions the role of movement lawyers quite differently.<sup>1</sup> According to Cummings, old canon lawyering places courts “at the heart of the canonical stories.”<sup>2</sup> New canon lawyering, on the other hand, involves using legal institutions other than courts and focuses on the intersection between law and politics.<sup>3</sup> Cummings gives examples of the old and new ways of lawyering and also draws conclusions about what causes the momentum of social movements to slow. One of Cummings’ central arguments is that the critique of what he calls old canon lawyering is in many respects misplaced.<sup>4</sup>

I wholeheartedly agree with Cummings’ thesis that much of the critique of the “old” way of engaging in social movement lawyering is misplaced; here I offer some additional or alternative reasons why. To sum up my argument, I do not believe there is much of a difference between old versus new perspectives on the range of appropriate *strategies* for social movement lawyering. Historically as today, social movement lawyers understood that sometimes courts are useful but sometimes they are not. Looking in the long view, so-called “old canon” lawyers have understood this just as “new canon” lawyers do. Instead, the most significant difference between the lawyering styles Cummings labels

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1. Scott Cummings, *Law and Social Movements: Reimagining the Progressive Canon*, 2018 WIS. L. REV. 441, 451.

2. *Id.* at 445.

3. *Id.* at 451.

4. *Id.* at 442 (stating that his article “points toward a potentially significant conclusion: that the progressive critique of old canon lawyering is misplaced.”); *id.* at 500 (“the old canon critique of progressive lawyering may have less to do with the advocates and more with the nature of their adversaries.”) (emphasis omitted).

“old” versus “new” canon involves lawyers’ heightened sensitivity to the ethical problems that arise in social movement lawyering. I briefly develop these arguments below.

### I. “OLD CANON” LAWYERING

Cummings indicates that the critique of what he views as “old canon” lawyering is in effect the longstanding critique of legal liberalism.<sup>5</sup> As historian Ken Mack has explained, legal liberalism involves a set of ideas related to seeing

courts as the primary engines of social transformation; formal conceptual categories such as rights and formal remedies such as school desegregation decrees as the principal mechanisms for accomplishing that change; and . . . reforming public institutions (or, in some versions, public and private institutions without much distinction) as a means of transforming the larger society.<sup>6</sup>

Cummings presents several examples of “old canon” lawyering. Each of these, however, belies this definition of what “old canon” or “legal liberal” lawyering involved.

Cummings’ first example involves the twentieth century United States labor movement.<sup>7</sup> Yet the leading canonical stories about the history of the labor movement, which both Christopher Tomlins<sup>8</sup> and William Forbath<sup>9</sup> tell in their classic works, are stories about moving courts out of the way of people trying to solve problems. The initial “hero” in these accounts is federal legislation, in the form of the National Labor Relations Act of 1935 (NLRA), which set up processes that take labor disputes out of the jurisdiction of courts and instead place them in local, voluntary arenas governed by contract law.<sup>10</sup> A federal administrative agency, the National Labor Relations Board (NLRB), serves as referee. Thus, the labor movement does not support the claim that “old canon” lawyering idealized courts as the locus for social change. Courts, prone to issuing anti-labor injunctions and otherwise siding against workers, were the villains in the labor movement story.

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5. *Id.* at 444 (discussing the critique of legal liberalism).

6. Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era before Brown*, 115 YALE L.J. 256, 258 (2005).

7. Cummings, *supra* note 1, at 445–46.

8. See CHRISTOPHER TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960*, at 102 (1985).

9. WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 118–125 (1991).

10. *The NLRB Process*, NAT’L LAB. REL. BOARD, <https://www.nlr.gov/resources/nlr-process> [https://perma.cc/S8C2-4GQ4].

To be sure, the statutory and administrative heroes of this canonical story—i.e., the NLRA and the NLRB—though virile and attractive when young, later became tired and ineffectual. Yet even in its older middle age, the NLRB developed administrative law doctrines under the NLRA that provided a site for gains in racial equality in employment during the 1970s and before, as historian Sophia Lee has shown.<sup>11</sup> As Lee argues persuasively, civil rights historians had heretofore failed to place enough emphasis on these administrative arenas for social change lawyering.<sup>12</sup>

In short, the labor movement illustrates that “old canon” lawyering did not necessarily regard courts as the most effective forums for social change. It provides an example of a social movement that successfully moved courts out of the business of primary dispute resolution. The movement utilized a combination of statutory, administrative, and private law to scaffold spaces for contract-based, negotiated solutions to local problems.

Cummings’ second example of the old canon is *Brown v. Board of Education*.<sup>13</sup> *Brown*, to be sure, exemplifies a court-centered campaign for school desegregation. However, this is a story told through the lens of hindsight. At the time that lawyers were engaging in the litigation that led to *Brown*, civil rights advocates saw this initiative as one of many important projects in a multifaceted campaign for racial justice. A perusal of Loren Miller’s important but often-overlooked classic, *The Petitioners*, supports this point.<sup>14</sup> Miller, an important civil rights litigator during the middle years of the twentieth century, published a book toward the end of his life analyzing the United States Supreme Court’s role in the civil rights movement. The book has twenty-nine chapters, each devoted to a different set of Supreme Court precedents relating to the racial justice struggle, including voting rights, lynching, higher education, criminal defense, public accommodations discrimination and residential segregation, among others.<sup>15</sup> On this crowded docket, Miller devotes only one chapter to *Brown*.<sup>16</sup>

My work on an earlier historical phase of what led to the period now called the “civil rights” movement discusses late nineteenth and early twentieth century racial justice activist-lawyers’ views of the courts.<sup>17</sup> The

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11. See Sophia Z. Lee, *Hotspots in a Cold War: The NAACP’s Postwar Workplace Constitutionalism, 1948–1964*, 26 L. & HIST. REV. 327, 328 (2008).

12. See *id.*

13. Cummings, *supra* note 1, at 441 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

14. LOREN MILLER, *THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO* (1966).

15. *Id.*

16. *Id.* at 347–64.

17. SUSAN D. CARLE, *DEFINING THE STRUGGLE: NATIONAL ORGANIZING FOR RACIAL JUSTICE, 1880–1915* (2015).

idea of “test case” litigation already existed.<sup>18</sup> Yet lawyers and other activists held clear-eyed views about the potential of courts. They accurately perceived both the benefits and drawbacks of litigation as a social change tactic. In a period in which the courts were generally unsympathetic to civil rights claims, lawyers understood that they would probably lose civil rights cases.<sup>19</sup> They filed them anyway, for several reasons. One involved organization-building tactics, i.e., having something concrete around which to organize.<sup>20</sup> Another was to highlight the hypocrisy exposed by the contrast between the United States’ founding ideals and its then-current practices.<sup>21</sup> Lawyers talked about using adverse results in litigated cases on the international stage to shame the United States for the failures of its justice system.<sup>22</sup> One leader described Supreme Court justices as “deficient in legal acumen,” and “swayed by colorphobia.”<sup>23</sup> Although these lawyers did share the then commonly-held belief in the potential inherent justice of natural law, they did not think that the human beings charged with enforcing law were anywhere near ready to do justice.<sup>24</sup> Moreover, although this generation of racial justice lawyers litigated cases for strategic reasons, they spent more time fighting legislative battles, both offensive and defensive, at both the national and the state levels.<sup>25</sup>

Racial justice lawyers in this early period were, as I conclude, far from naive legal liberals.<sup>26</sup> I similarly doubt—and have seen little evidence—that lawyers in later eras were.<sup>27</sup> To be sure, in the very different historical era of the 1960s and early 1970s, with a far more sympathetic Court, it did make sense to use the courts as one of many vehicles for bringing about social change. All lawyers make these kinds of strategic judgments about which legal avenues are the most promising to pursue in a particular context, so it seems to me wrong to fault lawyers for such judgments when reasonably made.

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18. *Id.* at 55–56 (discussing late nineteenth-century test case litigation).

19. *See id.* at 44.

20. *Id.* at 55–56.

21. *See, e.g., id.* at 41.

22. *Id.* at 56 (quoting one lawyer who argued that litigation losses on constitutional law principles would expose the United States to all nations as worthy of contempt).

23. *Id.* at 41.

24. *Id.* at 40 (describing natural law views of lawyers of this period).

25. *Id.* at 58–62, 140–51 (describing state and federal legislative campaigns).

26. *Id.* at 5 (debunking legal liberalism as a motivating force in the historical period examined in the book).

27. Ann Southworth’s important empirical work reaches this conclusion. *See* Ann Southworth, *Lawyers and the “Myth of Rights” in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469, 469 (1999) (concluding that civil rights and poverty lawyers are better described as “engaged political strategists than as myopic technicians”).

*Brown* has become iconic in the literature on the civil rights movement. This is in part because it *was* important, both because the plaintiffs won (which was far from a sure bet, as suggested by the insider report that the first vote among the Court's members came out in favor of the defendants),<sup>28</sup> and because the case eventually led to massive restructuring of student assignments to public schools.

Yet *Brown* has also taken on primary salience in the popular narrative history of the civil rights movement because it fits the normative worldview of prominent voices in telling that story. Scholars such as Yale Law School professor Owen Fiss deeply believed in legal liberalism. *Brown* was the perfect main character for developing that elegant and inspiring narrative.<sup>29</sup> Other scholars have told alternative narratives—about many stops and starts, uncertainties and internal debates, along with much activity in many arenas. These campaigns included work on political matters and economic redistribution, rather than solely on court-focused and formal civic rights issues.<sup>30</sup> Their accounts have not received the same visibility in part because they make for messier and less satisfying popular consumption.

The remedial phase of *Brown* became the subject of Derrick Bell's hard-hitting portrayal.<sup>31</sup> According to Bell, who had been a NAACP Legal Defense Fund (LDF) lawyer handling such cases, LDF insisted that its clients sign on to full school integration as the sole remedial goal of this litigation.<sup>32</sup> LDF did so even when its individual clients (i.e., the minority parents and students relegated to segregated schools) held other goals, such as obtaining more resources for their local schools.<sup>33</sup> That insistence contravened the important legal ethics precept that clients should be entitled to be the final decision-makers concerning the goals of their cases.<sup>34</sup>

This ethics awareness is where I think the real difference between old and new canon lawyering resides. Thanks to Bell and countless others who

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28. See MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–61*, at 187 (1994) (describing Justice Douglas's recollections after the first post-argument conference among the Justices about *Brown*).

29. See, e.g., OWEN FISS, *PILLARS OF JUSTICE: LAWYERS AND THE LIBERAL TRADITION* 1–2 (2017).

30. See, e.g., THOMAS F. JACKSON, *FROM CIVIL RIGHTS TO HUMAN RIGHTS: MARTIN LUTHER KING, JR. AND THE STRUGGLE FOR ECONOMIC JUSTICE* (2007) (exploring civil rights themes related to economic inequality); NIKHIL PAL SINGH, *BLACK IS A COUNTRY: RACE AND THE UNFINISHED STRUGGLE FOR DEMOCRACY* (2004) (investigating activists' work on economic issues).

31. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471 (1976).

32. *Id.* at 489–93.

33. *Id.* at 471.

34. See MODEL RULES OF PROFESSIONAL CONDUCT r. 1.2(a) (AM. BAR ASS'N 1983) (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation . . .”).

have developed a robust literature on ethics in social movement lawyering, social change lawyers do not today dictate to their clients what their goals can or should be. Lawyers understand the importance of being client-centered and following their clients' direction as legal ethics rules require. This, I believe, is the key difference between old and new styles of social movement lawyering.

Example three of Cummings' series of old canon narratives is *Roe v. Wade*.<sup>35</sup> Cummings points out that commentators, even avid feminists, have criticized the Court's reasoning in *Roe*.<sup>36</sup> Yet one cannot blame the problems of *Roe*'s doctrinal grounding on the lawyers in that case. Justice Blackmun wrote the Court's majority opinion, and he chose to introduce a medicalized trimester concept to determine abortion's legality, as well as the concept of balancing a "potential" for life.<sup>37</sup> These approaches did not come from arguments urged on the Court by the parties to the case; instead, Blackmun's prior strong interest in medical matters appears to have been responsible.<sup>38</sup> To be sure, *Roe* also rests on a substantive due process analysis that scholars have found problematic, but it was not the *Roe* litigators who created that doctrinal conundrum.

What is a far more fair criticism of the two main litigators in *Roe*—Sarah Weddington and Linda Coffee (who were so inexperienced that neither had tried a case before)—is that they viewed their client, Norma McCorvey, as a mere excuse for bringing a test case.<sup>39</sup> As McCorvey has expressed many times since the case, she in retrospect felt "used" by and Weddington and Coffee.<sup>40</sup> Indeed, multiple players on both sides of the abortion battle have "co-authored" with and otherwise deployed McCorvey for various political positions over the years.<sup>41</sup> McCorvey of course deserves her own agency in the development of her viewpoints. Although her views about abortion have changed, she has far more consistently voiced resentment at the condescension she felt that well-educated and wealthier activists exhibited toward her as a struggling,

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35. Cummings, *supra* note 1, at 441 (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

36. *Id.* at 447–48 (noting criticism of *Roe*).

37. *Roe*, 410 U.S. at 115, 150.

38. See MARIAN FAUX, *ROE V. WADE: THE UNTOLD STORY OF THE LANDMARK SUPREME COURT DECISION THAT MADE ABORTION LEGAL* 289, 297, 301 (1988) (describing Blackmun's medically focused view).

39. *Id.* at 11 (describing lawyers' motives for taking this case as "primarily ideological").

40. See, e.g., NORMA MCCORVEY, *I AM ROE* 127 (1994) [hereinafter MCCORVEY I] ("I was nothing to Sarah and Linda, nothing more than just a name on a piece of paper"); NORMA MCCORVEY, *WON BY LOVE* 21 (1997) [hereinafter MCCORVEY II] ("Sarah had all the time in the world for me before I signed up as her plaintiff, but once she had my signature, I was a blue-collar, rough-talking embarrassment."); *id.* at 29 (claiming Weddington "used" her).

41. Compare MCCORVEY I, *supra* note 40, with MCCORVEY II, *supra* note 40.

working-class woman.<sup>42</sup> Lawyering across class divides raises precisely the kinds of ethics issues in which “new canon” ethics scholars have been intensely interested.<sup>43</sup>

One hopes that the more ethically sensitive social movement lawyers of today would have handled McCorvey’s situation differently, exploring what their client truly wanted and striving to help her understand what the law could and could not do for her. Such lawyering might even have led to a more fitting case theory, which might have emphasized the financial dimensions of McCorvey’s inability to terminate her pregnancy—though it is doubtful that this case theory would have been met with the Court’s favor given its unsympathetic jurisprudence on matters of economic inequality.

In sum, to the extent that *Roe* is an example of old canon lawyering, it arguably stands as an example of the insufficient care old canon lawyers paid to the primacy of clients’ agency in charting the goals for test cases brought in their names.

*Roe* does not, to my mind, illustrate that old canon lawyers were too focused on court-centered social change strategies. Marian Faux’s account of the litigation illustrates this point well.<sup>44</sup> As Faux points out, the activists supporting *Roe v. Wade* were by no means placing their faith in a favorable verdict from the United States Supreme Court.<sup>45</sup> In fact, as in *Brown*, the fate of the case was far from certain.<sup>46</sup> Activists were battling hard on many fronts. They fought a major legislative campaign for pro-choice legislation in Texas, which they lost, and they then fought a major defensive campaign in New York to prevent the rolling back of pro-choice legislation in that state, which they again lost, to their surprise and dismay.<sup>47</sup> In the meantime, abortion became a major political issue that figured prominently at the highest level of the United States electoral process after Richard Nixon identified it as a useful wedge issue and began campaigning against it in his presidential reelection campaign.<sup>48</sup>

Activists on the pro-choice side fought among each other. Some were radical, some very moderate, and some in between. They disagreed among themselves about strategy and ideology just as activists in contemporary,

42. MCCORVEY II, *supra* note 40, at 2, 29, 33–34, 35, 45, 46 (expressing resentment at her treatment by activists in the pro-choice movement).

43. See, e.g., Binny Miller, *Give Them Back Their Lives: Client Narrative and Case Theory*, 93 MICH. L. REV. 485, 485–90 (1994) (exploring how differing socioeconomic class locations affect relationships between clients and lawyers).

44. FAUX, *supra* note 38.

45. See *id.* at 253.

46. *Id.* at 276 (noting that new Court appointments had begun to tilt the Court in a more conservative direction).

47. See, e.g., *id.* at 201, 215, 258 (describing various legislative efforts and failures).

48. *Id.* at 257, 261.



messy social change movements do.<sup>49</sup> This messiness existed in the past just as it does today; it is the process of constructing historical memory that makes long-ago events seem more coherent than contemporary situations.

Thus, in the *Roe v. Wade* example too, I do not see any significant difference between old and new canon lawyering with regard to basic choices among strategic options. Like all major social change campaigns, activists on and within both sides of the debate about abortion policy, including lawyers, used every political and legal forum available and did so with a messy variety of emphases and goals. Activist lawyers do this today just as they did historically during the times of “old canon” lawyering. Social movement lawyers may be *better* as strategists today, but they are not qualitatively *different* as strategists. What does differ about new canon social movement lawyering—at least among most progressive-leaning activist-lawyers—is an ethical sensibility that thinks far harder about lawyers’ duties to be client-centered in their work.

Further support for my thesis that there has been a substantial qualitative change in social movement lawyers’ ethical sensibilities comes from my research on early racial justice activism. In this work, I came across a number of examples of social movement lawyers disregarding their clients by dropping and settling cases without client permission when it seemed expedient to do so.<sup>50</sup> A plausible hypothesis worth exploring more fully posits that an important difference between old and new canon lawyering involves the amount of attention lawyers paid to their ethics duties to clients.

Cummings’ final example of old canon lawyering involves welfare rights. Relying largely on Martha Davis’s critical account of lawyers’ role in the welfare rights movement,<sup>51</sup> Cummings points out that litigation-centered advocacy on welfare rights largely failed.<sup>52</sup> Moreover, these failures led to critiques of litigation and court-centered strategies for achieving social change.<sup>53</sup> Yet poor people’s movements over the twentieth century were not always litigation focused, as scholars such as

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49. See, e.g., *id.* at 208–11 (describing these contentious differences).

50. See, e.g., CARLE, *supra* note 17, at 62–64 (documenting examples of cases civil rights lawyers settled without consultation with clients). These were grassroots lawyers, operating on minimal income and confronting major race discrimination barriers. Only some found it possible to sustain themselves through full-time law practice.

51. MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973 (1993) (cited in Cummings, *supra* note 1, at 448–449 & n. 38).

52. Cummings, *supra* note 1, at 450.

53. *Id.*

Frances Fox Piven, Richard Cloward,<sup>54</sup> and Tomiko Brown-Nagin show.<sup>55</sup> The perspective one holds about what “old canon” lawyering involved can depend on which aspects of a complex collective movement one emphasizes. If one focuses on court-centered strategies, one may conclude that a complex social change movement was too focused on court-centered strategies, but that may be because that is the part of the elephant one is touching.

## II. NEW CANON LAWYERING

Cummings argues that new canon lawyering differs from old canon lawyering in that, *inter alia*, new canon lawyers pay more attention to institutions other than courts as well as to the intersection of law and politics.<sup>56</sup> As I have already argued, old canon lawyers paid attention to institutions other than courts and to the intersection of law and politics as well. Cummings adds a third feature of new canon lawyering with which I agree—namely, that new canon lawyers are more sensitive to the relationship between their political and ideological lawyering goals, on the one hand, and the obligations they owe the human beings who stand before them as clients, on the other.<sup>57</sup> They are, in other words, more attuned to legal ethics. There are interesting historical reasons for this development, arising out of Bell’s critique of the post-*Brown* lawyers, as discussed above, and leading to the development of a rich literature on the ethics of so-called “public interest” and “social movement” lawyers, as Cummings and many other legal scholars have traced.<sup>58</sup>

This short Response provides too little room to delve deeply into the intellectual history of this literature, but a brief overview is in order. Lucie White’s early work modelled a methodology based on a microanalysis of the ethics of client-lawyer interactions.<sup>59</sup> A sampling of the most cited

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54. See generally FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* (1971) (arguing that disruption and insurgency proved the most successful means for poor people to cause change).

55. See generally TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (2012) (discussing the grassroots strategies of the welfare rights mothers in contrast to the litigation strategies of Thurgood Marshall and the NAACP).

56. Cummings, *supra* note 1, at 451 (“new canon stories focus on legal institutions outside of court; they are primarily concerned with the interaction between law and politics . . .”).

57. *Id.* (new canon stories “portray lawyers as sensitive to movement dynamics and the potential for overreaching . . .”).

58. See, e.g., Scott Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645 (2017) (tracing the history of movement lawyering through a legal ethicists’ eyes).

59. Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) (analyzing the ethics of her interactions with a legal aid client early in her practice career).

subsequent works in this genre<sup>60</sup> includes Tony Alfieri's call for lawyers to pay more attention to client narratives,<sup>61</sup> Robert Dinerstein's classic article exploring reasons for client-centered counseling "based on political empowerment . . . for clients who historically and currently need political empowerment,"<sup>62</sup> and William Rubenstein's exploration of conflicts issues in group litigation with civil rights goals.<sup>63</sup> Ann Southworth surveyed what social movement lawyers actually thought about the ethics question of the appropriate allocation of decision-making responsibilities between lawyers and clients and concluded that these lawyers held nuanced and varied opinions.<sup>64</sup>

By the early 2000s, Cummings had become an important voice in this developing literature, identifying the "movement lawyering" paradigm, as opposed to public interest or poverty lawyering, as an important area for more specific study.<sup>65</sup> Around the same time, progressive scholars interested in poverty lawyering began to call on lawyers to adopt an expanded ethics focus on duties to communities rather than individuals alone.<sup>66</sup> Moral philosopher, clinician and ethics scholar Kate Kruse synthesized various strands of this scholarship, exploring the

strategies of a new generation of lawyers practicing law for socially and politically disadvantaged clients [by] seeking greater participation from clients in the formation of collective goals, while at the same time recognizing that the clients'

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60. The articles featured here come up as among the most cited works in Westlaw using the search terms "social movement" and "legal ethics" and lawyer!.

61. Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2146–47 (1991) (urging lawyers for low-income clients to pay more attention to client narratives).

62. Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 505 (1990).

63. William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1625 (1997) (examining how legal ethics considerations should structure group decisions in civil rights litigation).

64. Ann Southworth, *Lawyer-Client Decisionmaking in Civil Rights and Poverty Practice: An Empirical Study of Lawyers' Norms*, 9 GEO. J. LEGAL ETHICS 1101, 1101 (1996) (presenting results of a survey of lawyers' views about ethics issues).

65. See, e.g., Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 443 (2001) (analyzing legal ethics and other issues posed by lawyering that combines grassroots organizing with legal advocacy).

66. See, e.g., Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427 (2000) (explaining ethical and other arguments for involving clients in collective efforts to speak for themselves about injustice); Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67 (2000) (arguing that lawyers should become "more active in organizing and developing client groups and in developing and implementing strategies that increase the long-term political power of clients").

capacity for voicing collective values may have to be consciously created, rather than merely received.<sup>67</sup>

Cummings and Rhode collaborated on synthesizing the state of this scholarship,<sup>68</sup> and Cummings' work then exploded in a string of articles on social movement lawyering, of which the piece under discussion is but one example.

Where this ethics scholarship will go is not yet clear. What is certain, I propose, is that it is the *ethics* of movement lawyering, far more than the selection of strategies or tactics, that has changed over time. Indeed, Cummings' examples of new canon lawyering show that new canon lawyers *do* use courts when there are good reasons to do so, just as old canon lawyers used strategies other than courts in many instances. In Cummings' first example, the Los Angeles anti-sweatshop campaign, he discusses an important lawsuit filed to enforce certain key legal principles.<sup>69</sup> Lawyers and activists used this precedent to design "an impact litigation template."<sup>70</sup> Activists combined this work with a media strategy and worker organizing. Their strategic decision was "not to rely on litigation alone and instead to build an advocacy infrastructure that would complement and bolster law."<sup>71</sup> The same can be said for virtually any social movement that seeks to use and/or change law; activists combine multiple strategies and tactics, including litigation where warranted.

Cummings discusses other organizations and campaigns, all of which he describes as combining multiple strategies with litigation.<sup>72</sup> He points to intra-movement dissent as a distinguishing feature of new canon lawyering,<sup>73</sup> though of course, as Cummings well knows, intra-movement disagreements are a characteristic of virtually all social movements, as I have already noted with respect to *Roe*. Cummings' example of "Litigating Human Rights in the War on Terror,"<sup>74</sup> as he phrases it, involves human rights activists primarily fighting a campaign through the courts. This makes perfect sense given that the human rights needing protection belonged to persons lacking the power to mobilize politically. Cummings points out those mobilization strategies included other targets as well, such

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67. Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 153 (2010).

68. Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603 (2009).

69. Cummings, *supra* note 1, at 454–55 (discussing *Bureerong v. Uvawas*, 922 F. Supp. 1450 (C.D. Cal. 1996)).

70. *Id.* at 456.

71. *Id.*

72. *Id.* at 457 (discussing cases activists filed against fashion retailers).

73. *Id.* at 459.

74. *Id.* at 460.

as media, foreign governments, the United Nations and other international bodies.<sup>75</sup> By way of comparison showing similarities, one may turn to an excellent account of the NAACP's strategy to highlight race discrimination as a human rights issue before the United Nations.<sup>76</sup> Everything new turns out to be old again.

Next Cummings discusses the Marriage Equality Movement (MEM), tracing how brilliant strategists started with state law victories and only pushed for a United States Supreme Court constitutional ruling after they had won over the hearts and minds of voters.<sup>77</sup> To be sure, this was a brilliantly conceived and orchestrated campaign, based on sophisticated use of media strategies and polling data.<sup>78</sup> While I agree that it is different in sophistication from all that came before, I do not believe the MEM was different in kind.

Although it has thus far succeeded in avoiding the problems of severe backlash, as Cummings points out, the future of *Obergefell v. Hodges*<sup>79</sup> is unclear as I write this given a probable shift in the political balance among the members of the United States Supreme Court. State pro equality law can probably continue to stand, but the constitutional law principle enshrining marriage rights for gay and lesbian people across the land may not. This vulnerability to changing ideologies among the majority of justices on the Supreme Court is a perennial problem that social change movements face in relying on Supreme Court precedents. Note, however, that the "old canon" case of *Brown*, despite having faced political backlash at the time, now seems inviolate, showing that short-term political fallout does not necessarily predict long-term staying power. Instead, it seems that principles of justice that endure political backlash, if they survive, may potentially be inoculated from future political challenge.

Moreover, it bears noting, *Obergefell* has been criticized for murky doctrinal grounding, much like *Roe v. Wade* was decades ago as already discussed.<sup>80</sup> The forces that may render social movement gains fragile are many. At bottom, what Cummings' case studies show is that social change through law in *any* of its many possible forms involves a messy, unpredictable, fragile and reversible process, precisely due to the complex interactions among politics, popular opinion, case law, constitutional principles, counter-mobilizations and a host of other factors.

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75. *Id.* at 468.

76. See CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955 (2003) (tracing the NAACP's campaign to highlight race discrimination as an international human rights issue before the United Nations).

77. Cummings, *supra* note 1, at 473–78.

78. *Id.* at 475.

79. 135 S. Ct. 2584 (2015).

80. See *supra* notes 35–38 and accompanying text.

One can make similar points about Cummings' next case studies, involving immigrants' rights and the "Movement for Black Lives."<sup>81</sup> Immigrants' rights activists have combined legislative and litigation campaigns, and their lawyers have "remained skeptical of courts"<sup>82</sup>—as well they should have given courts' hostility to their clients—just as lawyers in the early stages of racial justice organizing did for the very same reason, as already discussed. What Cummings eloquently describes as being different about these "new canon" campaigns is the care lawyers take to stay in sync with their clients' perspectives and decisions as opposed to adopting an attitude of lawyer knows best.<sup>83</sup> Cummings often characterizes this approach as a strategic difference between old and new canon lawyering, whereas I would characterize it as a difference in ethical sensibilities.

Finally, Cummings describes the movement spurred by Black Lives Matter (BLM) and similar work.<sup>84</sup> Again, many of the admirable gains Cummings captures in the way new canon lawyers interact with the BLM organizations go to lawyers' ethics in relation to clients or social movement constituencies rather than to strategic choices about what mechanisms to employ in working for social change.<sup>85</sup> What I find most interesting and different from the old canon period is the contemporary focus on how traditional social power continues to operate within social movements and lawyers' ethical responsibilities to attend to such factors. Thus, Cummings writes, "some voices within the growing BLM movement . . . are critical of how mainstream legal responses . . . have reinforced the marginalization of already-marginalized voices within the broader movement for police accountability and undermined more fundamental criminal justice reform."<sup>86</sup> The origins of these concerns arise from feminist critiques of the male-dominated leadership of the left, which emerged in the 1960s and 1970s, followed by black women's critiques of white women's feminism, and a host of other serious, thoughtful work on understanding how power works within social movements as in other institutions.<sup>87</sup>

In a final section, Cummings outlines the lessons he sees embedded in his case studies. Here he tends to conflate the aspect of his argument that has the most merit—i.e., the development of a social movement

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81. See Cummings, *supra* note 1, at 478–94.

82. *Id.* at 482.

83. See *id.* at 478–87.

84. *Id.* at 487–94.

85. See *id.*

86. *Id.* at 493 (citing Amna Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018)).

87. See, e.g., CHERRIE MORAGA ET AL., EDS., *THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR* (2d ed. 1983) (collecting critiques of how social privilege operates in the feminist movement).

lawyering sensibility calling for deeper ethical reflection—with an aspect I find far less convincing. He writes, “the form of legal mobilization in new canon campaigns thus diverges from the old canon emphasis on lawyer control and elite planning oriented toward rights-based court challenges.”<sup>88</sup> Yet I see no inherent or necessary connection between lawyer control and elite planning, on the one hand, and rights-based court challenges, on the other. The two concepts—(1) lawyer domination and (2) strategic decisions about campaign tactics—are not inherently correlated—at least, more research testing that proposition would be required to reach this conclusion.

Similarly, Cummings’ case examples belie his conclusion that “in the absence of a political movement, litigation becomes a central tool to check government power.”<sup>89</sup> As I have discussed, his examples all show political strategies and litigation occurring together. Cummings makes many observations that are undeniably accurate; for example, it is easier to enforce negative rights through constitutional law than positive rights to the resources needed for human flourishing;<sup>90</sup> backlash and counter-mobilization remain persistent threats to attempts at deep social change; and the more radical versus more mainstream wings of social movements tend to disagree with each other.<sup>91</sup> Cummings ends his fascinating article with the thought that perhaps the critique of the old canon “may have less to do with the advocates and more with the nature of their adversaries.”<sup>92</sup> I disagree. As I have argued, the key difference his examples highlight has to do with the changing *ethical sensibilities* of the lawyers involved.

### CONCLUSION

To be sure, lawyers with stronger ethical sensibilities about their duties to clients and social movement constituencies may be more efficacious, especially if we believe that clients are more reliable ultimate judges as to what is in their best interests than their lawyers are. If that is true, then delivering client-centered lawyering to those without easy access to the levers of power may offer the best odds for bringing about a more just world. Of course, this assumption is itself the product of ideologies specific to an historical context. It may be that future generations of scholars and activists will have different understandings of appropriate social movement lawyering ethics, just as reflection on the

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88. Cummings, *supra* note 1, at 494.

89. *Id.* at 495.

90. *Id.* at 498 (noting the usual framing of Supreme Court arguments “around vindication of negative liberty interests rather than affirmative claims of equality.”) (citation omitted).

91. *Id.* at 500.

92. *Id.*

social movement lawyers of the twentieth century introduced a different ethical sensibility concerning social movement lawyers' duties to clients. The growing opus of Cummings' important work most certainly will continue to lead that ongoing charge.