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CREATIVE LAWYERING FOR SOCIAL CHANGE

Raymond H. Brescia*

Lawyers have long played an integral part in efforts to bring about social change. With an increasing desire to see change in the world, regardless of one's political perspective, there is a growing interest in understanding the role that lawyers can play in bringing about such change. This type of lawyering is complex, however, and faces far more challenges than those the traditional lawyer faces in his or her work. Although all lawyers solve problems on behalf of their clients, the role of the social-change lawyer is more complex because the problems she seeks to address are more complex, mostly because she is not trying to operate within the existing legal system on behalf of her client but, rather, trying to change it. Indeed, the social-change lawyer often faces complex problems that require complex and creative solutions. This article explores the nature of the creativity required of the social-change lawyer by an assessment of three campaigns for social change in which lawyers played prominent roles: the effort to abolish slavery, the campaign to end Jim Crow segregation, and the movement for marriage equality. This review unearths several common components of these campaigns. For example, they typically sought incremental change, used interpretative tools that helped reframe the issues affecting their clients, brought in interdisciplinary perspectives, sought to build coalitions based on areas where the interests of different communities might converge, and were conscious of trends and forces occurring outside the law that were likely to affect the legal campaigns. It is through an assessment of these successful efforts and an

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identification of the common characteristics of such creative problem solving for social change that I hope will serve as inspiration for those working for positive social change, today and in the future.

INTRODUCTION

Whether evidenced by the election of Donald J. Trump to the United States presidency, the Brexit vote in Great Britain, the Women's Marches, or the advocacy for stricter gun laws in the wake of the school shooting in Parkland, Florida, there appears to be a clamoring, on the right and the left, for social change.¹ Many of these efforts are organized at the grassroots level organically, and some are orchestrated by wealthy donors.² Whether organic or orchestrated, many participating in such efforts are dissatisfied with the status quo and seek social change regardless of their political perspective.³ When people seek social change, they often see a problem before them that they want solved, whether it is to end gender-based, workplace harassment and sexual violence⁴ or to relieve corporations of what are perceived as burdensome, "job-killing" regulations.⁵ In

1. Ronald F. Inglehart & Pippa Norris, *Trump, Brexit, and the Rise of Populism: Economic Haves and Cultural Backlash* 9–10 (Harvard Kennedy Sch. Faculty Research Working Paper Series, Paper No. RWP16-026, Aug. 2016) (describing and explaining rise of conservative populism); Michelle Cottle, *How Parkland Students Changed the Gun Debate*, ATLANTIC (Feb. 28, 2018), <https://www.theatlantic.com/politics/archive/2018/02/parkland-students-power/554399/> [<https://perma.cc/QQ44-9EZX>] (describing the role of students in gun control advocacy).

2. Eliza Newlin Carney, *Who's Behind the Women's March?*, AM. PROSPECT (Jan. 19, 2017), <http://prospect.org/article/who%E2%80%99s-behind-women%E2%80%99s-march> [<https://perma.cc/PL8D-QZAR>] (describing grassroots organizing behind the Women's March). *See generally* JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT (2016) (describing funding of conservative groups).

3. *See* THEDA SKOCPOL & VANESSA WILLIAMSON, THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM 25–28 (2016); revg33k, *Forum Post: First Official Release from Occupy Wall Street*, (Sept. 30, 2011), <http://occupywallst.org/forum/first-official-release-from-occupy-wall-street/> [<https://perma.cc/3PB3-PWJ>] (describing "grievances" that motivated actions of the Occupy Wall Street movement).

4. *See* Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 590 (1986) (describing the role of rights claims on behalf of women to advance social change).

5. Elizabeth Kolbert, *The E.P.A.'s Dangerous Anti-Regulatory Policies*, NEW YORKER (June 30, 2017), <https://www.newyorker.com/news/daily-comment/the-epas-dangerous-anti-regulatory-policies> [<https://perma.cc/ZZ76-PZSB>] (describing the formation of a task force within the Trump

what Gillian Hadfield calls a “law-thick world,”⁶ the solutions to address problems like these often involve some change to the legal infrastructure that addresses the social issue that advocates seek to affect when they pursue social change.⁷ And, to effect this social change, creativity in finding solutions is often a critical feature of any effort to change that legal or regulatory infrastructure. In addition to the conscious efforts of individuals, groups, and corporations to effectuate social change through legal and policy advocacy, campaign donations, and community mobilization, social change is also happening whether or not it is driven by forces that may have humans at the center of the change, like commercial ventures that produce technological change,⁸ or occurs despite the best efforts by some to curtail them, like climate change as a product of human activity that sets natural forces and responses in motion.⁹ Whether humans cause these problems directly—and intentionally—or only indirectly—and unintentionally—human agency is central to address the range of problems the world presently faces.¹⁰ Given the complexity of these problems, creativity is needed to craft solutions.¹¹ What is more, the curation of legal, policy, and

Administration to eliminate “job-killing regulations”).

6. See Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)Corporate Practice of Law*, 38 INT’L REV. L. & ECON. 43, 43 (2014).

7. For a description of several campaigns to bring about social change by efforts to change the legal infrastructure in several different legal and policy contexts, see generally DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* (2016) (describing efforts to promote marriage equality, Second Amendment rights, and to protect the rights of detainees held as a result of the law enforcement effort called the War on Terror).

8. See generally KEVIN KELLY, *THE INEVITABLE: UNDERSTANDING THE 12 TECHNOLOGICAL FORCES THAT WILL SHAPE OUR FUTURE* (2016) (describing technological changes that are affecting and will affect the future of the human race).

9. On the impact of human behavior and technological change on the environment and climate, see ELIZABETH KOLBERT, *THE SIXTH EXTINCTION: AN UNNATURAL HISTORY* 92–110 (2014).

10. Erle C. Ellis, *Science Alone Won’t Save the Earth. People Have to Do That.*, N.Y. TIMES (Aug. 11, 2018), <https://www.nytimes.com/2018/08/11/opinion/sunday/science-people-environment-earth.html> [<https://perma.cc/K4UZ-EUAV>] (arguing that human action is essential to address some of the world’s problems like climate change, overpopulation, and reduction in biodiversity).

11. Philip G. Schrag, *Constructing a Clinic*, 3 CLINICAL L. REV. 175, 184 (1996). As Philip Schrag argues, “One of the hallmarks of an effective lawyer is that he or she can (1) recognize those occasions when doing a task by the book is not likely to achieve satisfactory results, (2) figure out a creative alternative, and (3) find the courage to deviate from the accepted norm of practice.” *Id.*

regulatory solutions to these problems will likely be at the center of efforts to address these problems, whether solutions involve building up and increasing or taking away and reducing the size and scope of the legal, policy, and regulatory infrastructure that addresses these problems. If creative problem solving is a necessary element of social change now and in the future, and a core element of this problem solving will require legal, policy, and regulatory responses to these problems, lawyers will be at the center of social change for the foreseeable future.¹² Given the complexity of the problems and the need for creative solutions to address them, it will not be just any lawyers at the center of this change but rather creative ones. If this is the case, can we identify the elements of creative lawyering for social change so that we might understand what it will take to prepare and train lawyers to assume their proper role in efforts to bring about this change? This article attempts to identify these elements by a review of three moments in American social and political history when lawyers played a critical role in crafting creative solutions to thorny social problems.

The lawyers I highlight in this review include several lawyers involved in the effort to end slavery in the United States, those engaged in the legal fight to dismantle the Jim Crow system in the South in the mid-twentieth century, and lawyers committed to the recent effort to bring about marriage equality for the lesbian, gay, bisexual, transgender, and queer (LGBTQ) community. Although the lawyers in these moments were not the sole actors in the social-change effort that unfolded in these particular points in history or even the main drivers of the campaign to end slavery, in all three examples, the lawyers I highlight played key roles in helping to craft not just our understanding of these problems but also creative responses to them.¹³ In at least the last two examples, the creative

12. GILLIAN K. HADFIELD, RULES FOR A FLAT WORLD: WHY HUMANS INVENTED LAW AND HOW TO REINVENT IT FOR A COMPLEX GLOBAL ECONOMY 9 (2017). To turn to Gillian Hadfield again, “[A]ny solutions we think we are developing toward clean energy, reduced poverty, or safer disease-free communities *depend* on developing better legal infrastructure.” *Id.*

13. *See infra* Part II.

lawyers I highlight helped to lead the legal struggle to reconstruct an edifice of inclusion and equality and solve dramatic legal inequalities with an ultimate goal of rectifying broader societal inequalities. The hope is that this review can help unearth lessons from past instances when lawyers used creativity to advance social change, particularly social change that had a legal component at its center, to help inform efforts in the present and future to effect similar social change.

With these goals in mind, this article proceeds as follows. Part I reviews the literature on creativity in the law to show that, contrary to popular perception, there can be creativity to the lawyer's craft generally, and Part I reviews the techniques that lawyers often use when they seek to address their clients' problems creatively. Part I also explores the ways in which social-change lawyering is different from, and can often be more complex than, more traditional lawyering.

Part II explores three examples of instances where lawyers played a significant role in helping advance social change. The hope is that this exploration will help unearth common themes regarding the approaches these lawyers appear to have taken in advancing social change, creatively and intentionally. These three examples involve the effort to end slavery in the United States, the campaign to dismantle Jim Crow, and the effort for recognition of same-sex marriage. These three examples offer critical lessons about what creative lawyering for social change entails.

Part III identifies what I consider to be the five common components of these campaigns for social change. This review suggests that these components include, first, that the lawyers have often proceeded incrementally and in an iterative, experimental fashion. They have looked for ways to build support for their legal position both in the courts of law and in public opinion, seeking a tipping point where the solutions they propose gain and secure traction and ultimately create a new legal paradigm around the problem.¹⁴ Second, creative lawyers advocating for social change

14. On the concept of tipping points in constitutional adjudication, see Suzanne B. Goldberg,

have typically viewed the legal problem that presented itself in a way that others had not viewed it, often taking the arguments of their adversaries, co-opting them, turning them on their heads, reframing them, and shifting them to the lawyers' advantage.¹⁵ Third, creative lawyers are humble enough to incorporate the viewpoints and approaches of other disciplines, bringing different domains into the advocacy effort to strengthen their legal arguments.¹⁶ Fourth, lawyers often seek out, both consciously and unconsciously, what the late Derrick Bell called "Interest Convergence": opportunities for different sectors in society to share a common goal based on their similar, though often different, particular interests.¹⁷ Fifth, creative lawyers for social change often recognize that their advocacy does not appear in a vacuum; it is dependent on and occurs simultaneously with changes occurring in broader society.¹⁸ In these ways, social-change lawyering is interdependent with larger social forces, and the creative lawyer must take these social forces into account when she engages in efforts to bring about social change.

The final section, Part IV explores the implications of this taxonomy of creative social-change lawyering and charts a path forward for those who might want to bring creativity to this endeavor, either because they are currently lawyers advocating for social change, current law students or law faculty, or even those who are simply contemplating going to law school. This article tries to spark a discussion about the proper role of creativity in lawyering at this time of great social ferment when many seek to advance social

Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication, 106 COLUM. L. REV. 1955, 1974–75 (2006).

15. See, e.g., *Sweatt v. Painter*, 339 U.S. 629, 633–35 (1950) (discussion of litigation strategy of the NAACP LDF, where the lawyers argued not only that "separate but equal" was unconstitutional but also that the alternative law school for African-American students set up by the University of Texas may have been separate but was not equal); see *infra* text accompanying notes 152–169.

16. See *infra* text accompanying notes 170–184 (describing marriage equality litigation that included testimony from experts from fields other than law).

17. See *infra* Part III.D and citations contained therein.

18. See *infra* text accompanying notes 145–49 (describing President Lincoln's decision to withhold the release of the Emancipation Proclamation until there was a Union victory on the field of battle).

change and alter the legal landscape to address what they see as societal ills.

I. Creative Problem Solving and the Law

A. Lawyering as Creative Problem Solving

The world's natural resources are under threat, and the ability to feed a growing global population faces serious challenges due to the specter of drought, the inundation of farmlands, the erosion of top soil, and other problems caused by climate change.¹⁹ Armed conflict in the Middle East and Africa,²⁰ political unrest in South America,²¹ and criminal terror in Central America have created a global refugee crisis.²² The rise of authoritarianism and a hard-edged form of conservative populism threaten the rule of law.²³ A threat to the rule of law, in turn, is a challenge for economic growth, as fairness, consistency, and predictability in governance is directly correlated

19. KOLBERT, *supra* note 9, at 92–110 (describing the impact of human behavior and technological change on the environment and climate); Marshall Burke & David Lobell, *Climate Effects on Food Security*, in CLIMATE CHANGE AND FOOD SECURITY: ADAPTING AGRICULTURE TO A WARMER WORLD 13, 18–21 (Marshall Burke & David Lobell eds., 2010) (describing risks to food supply from climate change).

20. See Mark Lynch & Laurie Brand, *Refugees and Displacement in the Middle East*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Mar. 29, 2017), <http://carnegieendowment.org/2017/03/29/refugees-and-displacement-in-middle-east-pub-68479> [<https://perma.cc/D439-PUZ2>] (explaining that the wars in Syria and Iraq have yielded “the greatest share of the Middle East’s refugees in recent years” and that “North African states . . . have emerged as key transit hubs for refugee flows into Europe).

21. See Lucia Newman, *Nicaragua Unrest: New Refugee Crisis Unfolding in Latin America*, AL JAZEERA (Aug. 5, 2018), <https://www.aljazeera.com/news/2018/08/nicaragua-unrest-refugee-crisis-unfolding-latin-america-180805095729411.html> [<https://perma.cc/VN9Y-KN4F>] (reporting that 23,000 Nicaraguans have applied for asylum in Costa Rica to escape persecution in Nicaragua).

22. See Maya Averbuch, *The Neverending Cycles of Central American Refugees*, MEDIUM (Aug. 29, 2018), <https://medium.com/s/greatescape/the-neverending-cycles-of-central-american-refugees-5f740f01bbe5> [<https://perma.cc/E67P-S3YD>] (explaining that many Central Americans flee to escape the criminal violence of gangs such as MS-13).

23. For a description of the components of the notion of the rule of law, see PAUL GOWDER, *THE RULE OF LAW IN THE REAL WORLD* 7 (2016). The recent confirmation of Justice Brett Kavanaugh to the U.S. Supreme Court, which raises questions about judicial independence and impartiality (two critical components of the rule of law), has been described as a threat to the rule of law. Roger Cohen, *Opinion, An Insidious and Contagious American Presidency*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/opinion/trump-kavanaugh-confirmation-justice.html> [<https://perma.cc/44JN-CD5C>].

with the economic health of a nation, as well as its long-term survival.²⁴ Rapid technological change, which is a product of compounding technological innovation, is already remaking society and is likely to have dramatic effects on social and economic relations for generations.²⁵ Whether it is autonomous vehicles, the Internet of Things, or Big Data and artificial intelligence, the rapid increase in computing power that has been unleashed could address some of the world's problems, like pedestrian, passenger, and driver deaths from automobiles,²⁶ but has also created new problems, like privacy breaches, cybersecurity, and threats of a drone or unmanned vehicle delivering a dirty bomb or, worse, a nuclear payload from a remote location on the other side of the planet.²⁷ Rapid technological change has also remade the economic landscape and stands to alter the relationship of many workers to their employers, a shift we are already seeing in the sharing economy.²⁸ Whether it is complete displacement from automation or a shift from regular employment to sporadic, contract, "on demand" work, the relationship of many of the world's workers, in diverse fields such as truck transport, manufacturing, and even the law, are likely to see dramatic changes to the ways in which they relate to their employers and earn a living over the coming decades.²⁹ Furthermore, as the evidence of the use of

24. DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY* 428–37 (2012).

25. STEVE CASE, *THE THIRD WAVE: AN ENTREPRENEUR'S VISION OF THE FUTURE* 185–200 (2016) (assessing the potential impact of technological change on economic development and economic opportunity); THOMAS L. FRIEDMAN, *THANK YOU FOR BEING LATE: AN OPTIMIST'S GUIDE TO THRIVING IN THE AGE OF ACCELERATIONS* 19–184 (2016) (describing the forces of computing power, the Internet, globalization, and climate change and their impact on the future).

26. ERIK BRYNJOLFSSON & ANDREW MCAFEE, *THE SECOND MACHINE AGE: WORK, PROGRESS, AND PROSPERITY IN A TIME OF BRILLIANT TECHNOLOGIES* 190–202 (2014) (discussing the superiority of human intelligence and abilities compared to machine learning and artificial intelligence).

27. *See* BENJAMIN WITTES & GABRIELLA BLUM, *THE FUTURE OF VIOLENCE: ROBOTS AND GERMS, HACKERS AND DRONES: CONFRONTING A NEW AGE OF THREAT* 1–10 (2015) (discussing the threats posed by new technologies for global security).

28. *See, e.g.*, BRYNJOLFSSON & MCAFEE, *supra* note 26, at 204–45 (describing short- and long-term solutions for dealing with the technological change the authors predict for the immediate future).

29. FRIEDMAN, *supra* note 25, at 203–43 (identifying strategies for dealing with the impact of technology on employment); KELLY, *supra* note 8, at 29–60 (assessing the role of machine learning and artificial intelligence on employment opportunities in a range of industries); ALEC ROSS, *THE INDUSTRIES OF THE FUTURE* 35–42 (2016) (discussing the role of automation and artificial intelligence

modern technologies like the Internet and social media to undermine elections in several democratic nations is overwhelming, it is apparent that sometimes the forces described above—like authoritarianism, technological change, and threats to the rule of law—compound each other. In this way, technological advances can support efforts to undermine the rule of law, exacerbating the threats to stability and democracy.³⁰ Similarly, technological change is having a dramatic impact on economic well-being across the world, creating vast wealth for a few people and increasing inequality in some nations.³¹ These problems are all crying out for a solution, and lawyers are in the problem-solving business.

For Gerald Lopez, “Lawyering means problem-solving.”³² Similarly, for Carrie Menkel-Meadow, a lawyer is a “professional with formal legal training who employs law, as well as other relevant disciplines, to solve human problems and disputes, plan transactions, [and] prepare legal instruments and regulations”³³ Lawyers

on employment prospects of various industries); RICHARD SUSSKIND & DANIEL SUSSKIND, *THE FUTURE OF THE PROFESSIONS: HOW TECHNOLOGY WILL TRANSFORM THE WORK OF HUMAN EXPERTS* 45–99 (2015) (discussing the role of technology on various professions, including the legal profession). For an assessment of the impact of these forces on the legal profession, see, for example, BENJAMIN H. BARTON, *GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION* 191–214 (2015) (discussing the role of technology in improving access to justice); DEBORAH L. RHODE, *THE TROUBLE WITH LAWYERS* 9–10 (2015) (describing the “drivers of change” in the legal profession, including new technologies); RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* 98–141 (2010) (describing technologies that threaten to “disrupt” the legal profession).

30. See, e.g., Evan Osnos, *Can Mark Zuckerberg Fix Facebook Before It Breaks Democracy?*, *NEW YORKER* (Sept. 17, 2018), <https://www.newyorker.com/magazine/2018/09/17/can-mark-zuckerberg-fix-facebook-before-it-breaks-democracy> [<https://perma.cc/M6JH-NHR8>]; Scott Shane & Mark Mazzetti, *The Plot to Subvert an Election: Unraveling the Russia Story So Far*, *N.Y. TIMES* (Sept. 20, 2018), <https://www.nytimes.com/interactive/2018/09/20/us/politics/russia-interference-election-trump-clinton.html> [<https://perma.cc/2GED-X8JM>] (describing efforts of the government of the Russian Federation and private Russian forces to undermine the 2016 election in the United States);

31. All of these forces also have a potential impact on economic inequality. See, e.g., JAMES BESSEN, *LEARNING BY DOING: THE REAL CONNECTION BETWEEN INNOVATION, WAGES, AND WEALTH* 222–28 (2015) (discussing the role of social mobility and social role flexibility in labor’s adaptation to technological change as a way to address economic inequality brought about by technological change); THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 304–06 (2014) (discussing the interplay of technology, education, and inequality); DOUGLAS RUSHKOFF, *THROWING ROCKS AT THE GOOGLE BUS: HOW GROWTH BECAME THE ENEMY OF PROSPERITY* 222–39 (2016) (describing ways technology can help combat economic inequality and foster sustainable prosperity).

32. Gerald P. Lopez, *Lay Lawyering*, 32 *UCLA L. REV.* 1, 2 (1984).

33. Carrie Menkel-Meadow, Symposium, *The Lawyer as Problem Solver and Third-Party Neutral*:

often find themselves in the “problem space,” where they must either find solutions or make situations more complex to advance a client’s interest.³⁴ According to Gary Blasi: “At bottom, lawyering entails solving (or making worse) problems of clients and others, under conditions of extraordinary complexity and uncertainty, in a virtually infinite range of settings.”³⁵ The American Bar Association describes problem solving and legal analysis as the two “conceptual foundations for virtually all aspects of legal practice”³⁶ But lawyers do more than bring mere technical skill to this problem space. As Paul Brest argues, a lawyer must certainly use her legal training and judgment to address a client’s problem; she must also understand the other constraints—like the political setting or the economic capacity with which a client operates—that bind the client’s actions.³⁷ Indeed, as he and Linda Hamilton Krieger explain: “[F]inding the best solution—a solution that addresses all of the client’s concerns—usually requires more than technical legal skill.”³⁸ Lawyers thus solve client problems that have a legal component to them, taking into account a range of interests and needs in the pursuit of solutions that address those needs.³⁹

But what role does creativity play in lawyering and problem solving? According to Marjorie Shultz and Sheldon Zebeck, creativity is one of the core lawyering skills that they have identified as essential to contemporary law practice.⁴⁰ Legal problem solving

Creativity and Non-Partisanship in Lawyering, 72 TEMP. L. REV. 785, 793–94 (1999).

34. Sometimes, lawyers, particularly social-change lawyers, make problems worse for their adversaries in order to gain leverage against their clients’ opponents. See, e.g., Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 331 (1995) (describing how lawyers can solve problems or make them worse).

35. *Id.* at 317.

36. AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 135 (1992) [hereinafter NARROWING THE GAP].

37. See Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 L. & CONTEMP. PROBS. 5, 8 (1995).

38. Paul Brest & Linda Hamilton Krieger, Symposium, *Lawyers as Problem Solvers*, 72 TEMP. L. REV. 811, 811 (1999).

39. See, e.g., Brest, *supra* note 37, at 8.

40. See MARJORIE M. SHULTZ & SHELDON ZEBECK, IDENTIFICATION, DEVELOPMENT, AND VALIDATION OF PREDICTORS FOR SUCCESSFUL LAWYERING 24–26 (2008).

tends to require some degree of creativity, regardless of the nature of the work involved.⁴¹ When engaging in creative problem solving, Menkel-Meadow argues that the lawyer uses analogy and metaphor, draws lessons and insights from other fields, “extend[s] a line of reasoning, principle or solution beyond its original purpose,” challenges conventional assumptions, deploys narrative, and reframes problems by looking at them from different perspectives.⁴² Another way to think about these approaches is that they represent what is sometimes called “lateral thinking”: moving beyond purely linear, analytical thought and shifting mental paradigms.⁴³ Similar to Menkel-Meadow, Linda Morton has identified the characteristics of creative problem solving in the law as including a focus on the “underlying needs and interests . . . of individuals as well as society,” an analysis of the values at stake in a situation, including those of an individual but also society as a whole, the use of interdisciplinary resources, a focus on problem prevention, and “self-reflection and analysis.”⁴⁴

B. Problem Solving and Social-Change Lawyering

Although the problem-solving work of a lawyer often involves creativity, particularly when she is asked to solve complex problems, the lawyer who works for social change—however she defines that change—faces unique challenges that add another layer, or layers, of complexity to the lawyer’s work and the choices she must make.⁴⁵

41. See Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97, 102–03 (2001). As Menkel-Meadow points out: “The creative legal problem solver . . . must learn to navigate within the seas of optimistic creativity, the swells of dynamic interaction with others (client and other counsel and parties) and the oceans of realistic legal possibility.” *Id.* at 103.

42. *Id.* at 122–25; see also BARRY NALEBUFF & IAN AYRES, *WHY NOT?: HOW TO USE EVERYDAY INGENUITY TO SOLVE PROBLEMS BIG AND SMALL* 135–37, 142–44 (2003) (exploring strategies for creative problem solving).

43. See EDWARD DE BONO, *SERIOUS CREATIVITY: USING THE POWER OF LATERAL THINKING TO CREATE NEW IDEAS* 15, 51–56 (1992).

44. Linda Morton, *Teaching Creative Problem Solving: A Paradigmatic Approach*, 34 CAL. W. L. REV. 375, 378 (1998).

45. See William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DEPAUL J. SOC. JUST. 7, 10 (2007) (“Those who practice social justice law are essentially swimming upstream while

Social-change lawyers certainly must bring creativity to their work to solve the complex problems that they are often asked to solve, or have taken upon themselves to solve, but the role they assume when seeking to address social problems takes on new dimensions beyond those that traditional lawyers must address.

1. *Social-Change Lawyers Work to Change the System*

The most important difference between a social-change lawyer and a traditional lawyer is that the social-change lawyer is generally working to change the legal infrastructure affecting her client's life.⁴⁶ The traditional lawyer, by contrast, generally works within that infrastructure.⁴⁷ Certainly, there are situations where a traditional lawyer might argue for a novel or creative take on a particular precedent to gain an advantage for a specific client, but the social-change lawyer generally works for broader, societal change, and the novel or creative arguments about precedent can, at times, have tremendous impact on not just her client but society more broadly. The lawyers who argued *Obergefell v. Hodges*⁴⁸ were claiming recognition of their clients' marital relationships. A traditional lawyer might do that when seeking recognition of spousal support on behalf of a client. But the arguments the traditional lawyer might make are likely asking for recognition for the client within existing definitions of marital relations. The marriage-equality lawyers were arguing, similarly, for recognition of LGBTQ relationships using existing legal frameworks; in fact, that was the point of the marriage-equality effort.⁴⁹ But, what that required was a new understanding of not just

others are on their way down.”).

46. See, e.g., Louise G. Trubek, *Embedded Practices: Lawyers, Clients, and Social Change*, 31 HARV. C.R.-C.L. L. REV. 415, n.2 (1996) (describing social-change lawyering).

47. Even Alexis de Tocqueville, in his visits to early 19th century America, recognized the “general spirit” of the legal profession at the time as “eminently conservative and anti-democratic.” ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 274 (Phillips Bradley ed., Henry Reeve trans., Knopf 3d ed. 1946) (1835).

48. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

49. NATHANIEL FRANK, *AWAKENING: HOW GAYS AND LESBIANS BROUGHT MARRIAGE EQUALITY TO AMERICA* 7–8 (2017) (describing marriage equality movement's demands); see also Molly Ball, *The Marriage Plot: Inside This Year's Epic Campaign for Gay Equality*, ATLANTIC (Dec. 11, 2012),

marital relations but also the Equal Protection Clause itself.⁵⁰ This is just one example of a situation in which the social-change lawyer is often arguing not inside the system but seeking to change the system itself, making her job much more complicated and challenging than that of the traditional lawyer in many instances.⁵¹

2. *Social-Change Lawyers Must Strive to Empower Their Clients and Not Further Marginalize Them.*

Not only must social-change lawyers work to improve the lives of their clients and the communities in which they live, they must also strive to ensure that they are placing the clients out in front of the advocacy, thereby empowering them.⁵² The wave of legal advocates that emerged in the wake of the successes of the Civil Rights Movement in the late 1960s and early 1970s and the work they shouldered on behalf of marginalized groups generated critiques of lawyer-driven advocacy.⁵³ Some raised concerns that lawyer-driven advocacy—often focused on lawyer-centric strategies like litigation—ran the risk of disempowering grassroots groups and detracting from efforts to build grassroots campaigns and, ultimately, grassroots power.⁵⁴ Moreover, some critics argued that these lawyer-

<http://www.theatlantic.com/politics/archive/2012/12/the-marriage-plot-inside-this-years-epic-campaign-for-gay-equality/265865/> [<https://perma.cc/C8UQ-U67D>].

50. FRANK, *supra* note 49, at 353 (describing marriage equality advocates' equal protection arguments).

51. Martha Minow, *Law and Social Change*, 62 UMKC L. REV. 171, 176–82 (1993) (describing the types of changes the social-change lawyer pursues).

52. Anthony V. Alfieri, *Reconstructing Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2123–30 (1991) (describing the importance of client empowerment in social-change advocacy).

53. The scholarship critiquing lawyer-driven advocacy is vast. *See, e.g.*, GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992); Richard L. Abel, *Lawyers and the Power to Change*, 7 L. & POL'Y 5, 6 (1985); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 524–32 (1994) (arguing for the centrality of client voice in case development); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFFALO L. REV. 1, 5, 45–46 (1990).

54. Anthony V. Alfieri, *(Un)Covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805, 806 (2008) (arguing that effective social-change efforts require coalition building).

driven strategies, on their own, fail to lead to lasting change.⁵⁵ Lasting change is difficult to achieve when efforts to promote social change do not fundamentally attack and alter existing power relations.⁵⁶ Making matters worse, there is a threat that advocacy that places the lawyer at the center of the work can even further marginalize clients, typically by casting and treating the clients as victims rather than recognizing the potential of their own power as individuals and groups of individuals to pursue and obtain self-determination, autonomy, and power.⁵⁷ Thus, social-change lawyers should strive to put their client at the center of their work so as not to further marginalize them. Society does that enough. The traditional lawyer likely does not face similar challenges.

55. See, e.g., RICHARD DELGADO & JEAN STEFANCIC, FAILED REVOLUTIONS: SOCIAL REFORM AND THE LIMITS OF LEGAL IMAGINATION 1 (1994); MICHAEL W. MCCANN, TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM 107–08 (1986); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 12 (2d ed. 2008); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE xvii–xxv (1974); Abel, *supra* note 53, at 8; Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L.Q.* 619, 620–21, 661 (1992); Stephen Wexler, *Practicing Law for Poor People*, 79 *YALE L.J.* 1049, 1049 (1970).

56. See, e.g., Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 *N.Y.U. REV. L. & SOC. CHANGE* 659, 688–89 (1987); Steve Bachmann, *Lawyers, Law, and Social Change*, 13 *N.Y.U. REV. L. & SOC. CHANGE* 1, 31–33 (1985).

57. For the critique of lawyer-centric, social-change advocacy, see LÓPEZ, *supra* note 53, at 39; Alfieri, *supra* note 52, at 2110–11; White, *supra* note 53, at 20–21. For the argument that client-empowerment strategies face their own limitations when these strategies must still take into account the social structures, and the limitations of those structures, within which clients find themselves, see Frank Munger, *Rights in the Shadow of Class: Poverty, Welfare, and the Law*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 330, 336–37 (Austin Sarat ed., 2004); Gary L. Blasi, Symposium, *What's a Theory For?: Notes on Reconstructing Poverty Law Scholarship*, 48 *U. MIAMI L. REV.* 1063, 1092 (1994); William H. Simon, Symposium, *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, 1101–02 (1994). As I have argued elsewhere:

Conscientious and committed progressive lawyers now struggle with these challenges: How to ensure that legal advocacy is meaningful to the lives of clients; that it is grounded in broader movements for political change; that it combines a range of tactics—direct services, mass mobilization, community education and law reform; that it is responsive to the day-to-day needs of the communities those lawyers serve; and that it takes into account the political realities in such a way that a legal victory in one arena will not be snuffed out by a political loss in another.

Raymond H. Brescia, *Line in the Sand: Progressive Lawyering, “Master Communities,” and a Battle for Affordable Housing in New York City*, 73 *ALBANY L. REV.* 715, 727 (2010).

3. *Social-Change Lawyers Have Different Constraints in Case Selection*

There is also a unique financial component to the lawyer–client relationship that exists between the social-change lawyer and her clients when compared to that typically involved in the traditional lawyer–client relationship.⁵⁸ This different relationship can have ramifications for the actions the lawyer takes, or does not take, on behalf of her client. In the typical lawyer–client relationship in the contemporary legal profession, the lawyer is paid on a fee-for-service basis, often at an hourly rate, and sometimes based on a flat fee depending on the service she provides.⁵⁹ Sometimes a lawyer proceeds on a contingency-fee basis, where she bears the risk of an unsuccessful outcome and only receives compensation if she is successful on behalf of her client.⁶⁰ Each of these relationships hinges on the economic relationship between the lawyer and the client; the client often makes decisions based on an economic calculus of whether it is worth it to proceed with the representation

58. Thelton Henderson, *Social Change, Judicial Activism, and the Public Lawyer*, 12 WASH U. J.L. & POL'Y 33, 33–34 (2003).

Traditional law firms will take your newly-minted diploma and your ability to think like a lawyer, . . . and they will train and mentor you. . . . The client will usually pay for at least a part, if not most, of that training through something with which we're all familiar: the billable hour.

If, however, you want to work for a legal aid office, or some other nonprofit public interest group that has scant resources, you might well receive a stack of files and find out that you are on your own to learn lawyering as you go, perhaps even by trial-and-error. There is virtually no budget in most of these operations for training new attorneys, and, of course, the billable hour is not applicable in this setting.

Id.

59. John M. A. DiPippa, *Lawyers, Clients, and Money*, 18 U. ARK. LITTLE ROCK L.J. 95, 105–28 (1995) (describing contours of traditional lawyer-client retainer agreements).

60. See *When You Need a Lawyer—Legal Fees and Expenses*, AM. B. ASS'N (Mar. 18, 2013), https://www.americanbar.org/groups/public_education/resources/law_issues_for_consumers/lawyerfees_contingent.html [https://perma.cc/LT97-RAKC]. The American Bar Association explains contingency fees as follows:

In a contingent fee arrangement, the lawyer agrees to accept a fixed percentage (often one[-]third) of the recovery, which is the amount finally paid to the client. If you win the case, the lawyer's fee comes out of the money awarded to you. If you lose, neither you nor the lawyer will get any money, but you will not be required to pay your attorney for the work done on the case.

Id.

based on—to put it crudely—how much justice she can afford.⁶¹ Thus, critical tactical decisions may come down to whether the client wishes to pay for the service offered by the lawyer.⁶² A client may wish to spare no expense and give the lawyer great freedom to make tactical decisions, regardless of the cost.⁶³ The client may choose certain tactics based solely on a cost-benefit calculus of the likely gains possible through the use of different tactics and the potential outcomes and risks associated with those tactics.⁶⁴ Of course, though cost may impact the tactical choices a lawyer might make on behalf of a client, with the decisions about those choices made with the client's cost consciousness in mind, it is also entirely possible that the lawyer and client may have no tactical choices to make because the client foregoes legal representation altogether based on the perceived costs associated with that representation and the likely benefits that might accrue, or, more simply, because she cannot afford any level of service from the lawyer.⁶⁵ Indeed, many Americans face their legal problems without a lawyer, with cost being one of the main contributing factors to their decision to proceed or not to proceed with representation.⁶⁶ In many ways, this is a relatively easy decision. The client consults with the lawyer, makes a decision on the likely

61. MARC GALANTER, *LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE* 244–45 (2006) (describing cartoon that originally ran in the *New Yorker* in which a lawyer asks his client, “You’ve got a pretty good case, Mr. Pitkin. How much justice can you afford?”).

62. See Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1789–90 (2001) (explaining that defendants who hire their own counsel are often no better off than if they had been represented by a public defender because those individuals are typically only slightly better off than the indigent).

63. John T. Woodall, *Commonsense Principles of Civil Litigation*, 52 *AM. JUR. TRIALS* 1, § 38 (1994) (describing lawyer-client decision-making around expenses in litigation).

64. Robert P. Burns & Steven Lubet, *Division of Authority Between Attorney and Client: The Case of the Benevolent Otolaryngologist*, 2003 *U. ILL. L. REV.* 1275, 1294–96 (2003) (discussing the poorly defined boundaries between ends and means). For the tension in civil rights litigation when representing groups of clients in navigating these poorly defined boundaries, see generally William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 *YALE L.J.* 1623 (1997).

65. On the deliberations around ends and means between the lawyer and her client, see, for example ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 132–34 (1995).

66. On the reasons why Americans often forego legal representation, with cost being just one such reason, see REBECCA SANDEFUR, *ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY* 12–13 (2014).

costs and potential benefits of representation, and decides how she would like the lawyer to proceed.⁶⁷

In the social-change context, the calculus is often much different. There is certainly some small degree of overlap in the approaches used by some social-change lawyers and those used in traditional settings. With certain social-change-oriented fields of practice—like employment discrimination, employee wage-and-hour rights, police brutality actions, and social security benefits—social-change lawyers may operate from within the private bar, charging contingency fees for their work and taking a portion of the award they may win on behalf of their clients or earning remuneration through fee-shifting provisions in the statutes governing the claims.⁶⁸ At the same time, the possibility of contingency-fee arrangements often crowds out the work of the social-change lawyer, who might make strategic decisions about the types of cases she tends to take based on whether a particular client might have other options for representation based on the availability of lawyers from the private bar willing to take the client's case through a contingency-fee-based retainer.⁶⁹

But in other fields—where there are few contingency-fee opportunities, where the private bar might see the client's claim as too risky to take (even on contingency), or where fee-shifting might not be available—the social-change lawyer will typically work in a

67. On some of the elements of the decision to accept a client for representation in the traditional lawyer-client setting, see generally W. Bradley Wendel, *Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection*, 34 HOFSTRA L. REV. 987 (2006).

68. On the role of fee-shifting statutes in civil rights litigation, see, for example, Rochelle Cooper Dreyfuss, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 COLUM. L. REV. 346 (1980). For a description of recent developments in the jurisprudence around fee-shifting in civil rights cases, see generally Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087 (2007).

69. In addition to the desire to serve only the client who may not have private options available to her for representation, a nonprofit group may experience some resistance from the private bar upon which it relies for donations should it take on cases that may generate fees. What is more, legal services organizations funded by the U.S. Legal Services Corporation face a bar on accepting fee-generating cases. On some of the tensions around nonprofit organizations and some of these issues around fees, see, for example, Catherine R. Albiston & Laura Beth Nielsen, *Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why It Matters for Social Change*, 39 L. & SOC. INQUIRY 62, 82–85 (2014).

nonprofit legal services provider, whether that provider is a small, local organization that addresses local concerns, or a large, national organization that seeks to promote a national agenda in a particular field.⁷⁰ Indeed, the diversity of issues that nonprofit lawyers address is quite large, from animal rights and environmental justice to claims on behalf of the transgender community and the rights of low-wage immigrant workers.⁷¹ For lawyers not operating in fields typically dominated by paying clients, or clients who can be served through contingency-fee arrangements, lawyers face a different calculus when it comes to the costs associated with providing representation.⁷² They must find funding to provide the representation, and that funding might come from a government entity, a private foundation, or a private donor.⁷³ Although the decision to take on a case in the traditional lawyer–client relationship may come down to whether a particular client will pay for the services that she will receive from the lawyer, in the social-change setting, the lawyer must make a different calculation: whether the case is one that fits within the constraints that may be imposed by the donor or the source of funds.⁷⁴ If the source is a government entity, the client must fit within the constraints imposed by that source, which is typically a function of the income of the client or the nature of the case.⁷⁵ If the source of the funds that might allow the representation of the client is a private foundation or an individual donor, the lawyer must ensure she provides services consistent with the donor’s intent.⁷⁶

70. For a description of the activities of public interest legal organizations, see generally, Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2017 (2008).

71. On the range of goals of various public interest legal organizations, see *id.* at 2036–37.

72. See Carrie Johnson, *Legal Help for the Poor in ‘State of Crisis,’* NPR (June 15, 2012, 3:57 AM), <https://www.npr.org/2012/06/15/154925376/legal-help-for-the-poor-in-state-of-crisis> [<https://perma.cc/DE3T-MZ32>].

73. For a discussion of the different sources of funding for public interest legal organizations, see Rhode, *supra* note 70, at 2054–58.

74. On the priority-setting process in public interest legal organizations and the role of funders in influencing that process, see Rhode, *supra* note 70, at 2049–53.

75. See Rhode, *supra* note 62, at 1787.

76. See MARTHA R. MAHONEY ET AL., *SOCIAL JUSTICE PROFESSIONALS, COMMUNITIES AND LAW* 87 (2003) (arguing that “[f]unding legal work for social justice remains a political battleground in at least three major areas . . . : the adequacy of resources to the need; the constitutionality of restrictions on

The decision to represent a particular client in a particular case is not made simply on whether the client fits within the confines imposed by the sources of funds that the organization receives. Although that is certainly a baseline requirement—i.e., the lawyer’s organization typically must have funding to provide the services—the organization will also take into account other concerns when considering whether to take on the case. In a world of scarce resources, legal organizations may impose a sort of “lifeboat” ethics when making decisions with respect to which cases to take.⁷⁷ The degree of complexity of the case may make it so resource intensive that the decision to accept the case might mean that the organization is unable to accept other clients who might also fit within the categories of cases that the organization handles. If, for example, the lawyer takes on a complicated eviction case, then, even if she were to save the client’s apartment, that representation might mean that three other families go without representation and face eviction as a result. Lawyers in these situations must make decisions about which cases to take based on some rubric of cost, merit, resources required, likely benefits that might flow from the representation, and the opportunity cost associated with rejecting other clients.⁷⁸ Although these decisions come down to resource constraints and cost-benefits analyses, not unlike the factors that weigh on the client in the traditional attorney–client relationship, the social-change lawyer and the organization in which she works typically make the decision whether to accept the case for representation. This, unlike in the traditional lawyer–client relationship where the cost-benefit analysis is made by the client, adds a layer of complexity to the work that is

lawyers who are funded by the government to serve poor clients; and the constitutionality of additional sources of funding for services for low-income people raised through legislation”).

77. On so-called “lifeboat ethics” in the context of climate change, see Garrett Hardin, *Living on a Lifeboat*, in *MANAGING THE COMMONS* 210–25 (John A. Baden & Douglas S. Noonan eds., 2d ed. 1998).

78. For a discussion of opportunity costs, see generally Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

mostly not present in the traditional setting.⁷⁹ A private lawyer certainly may make the decision that despite a client's desire for representation, the lawyer may not take on the case, based on her present workload or other factors.⁸⁰ These decisions do not take on the same degree of complexity in the social-change setting. They may not take on the same moral or social weight either. A private lawyer turning down a paying client probably can rest assured that that client will find another lawyer to represent her; that is not always, or even often, the case with the social-change lawyer.⁸¹

Moreover, for the social-change lawyer, there is often another aspect of the decision to take on a case: whether a particular client's case presents itself as a vehicle for furthering the lawyer's social-change goals or agenda.⁸² In other words, one client's case may offer the lawyer an opportunity to advance the social-change goals that she wants to pursue. The factors that go into the decision as to whether a particular case might advance the social change the lawyer wants to see are often quite complex, offering another degree of complexity to legal advocacy for social change.⁸³ For many social-change lawyers, as with any lawyers, the primary issue they must face when deciding whether they can take a case is often, first, whether the case has merit

79. For a discussion of some of the considerations that go into the decision to accept or reject cases in the nonprofit, social-change context, see Paul R. Tremblay, *A "Very Moral Type of God": Triage Among Poor Clients*, 67 *FORDHAM L. REV.* 2475 (1999). One tension facing a lawyer engaged in eviction defense work may entail when she is asked to defend a case involving allegations that a client is engaged in drug trafficking or sale. *Id.* at 2519. Putting aside problems of proof, racial profiling, the notion that every defendant is entitled to due process and access to justice, and over-policing in and prosecution of members of certain communities for the distribution and sale of particular narcotics, is the vigorous defense of an actual and violent drug dealer in the best interests of the community, and the other tenants, a lawyer might serve? As a former legal services attorney who often represented tenant associations in large tenement buildings, my group clients would often resist my efforts to provide representation to tenants who they felt may endanger the safety of the other residents in their building.

80. For a discussion of some of the pressures on public interest lawyers, at least in the context of a public defender's office, that affect the acceptance of cases, see, for example, AM. BAR. ASS'N, *TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 2* (2002).

81. See Tremblay, *supra* note 79, at 2475.

82. See generally Michael Diamond, *Community Lawyering: Revising the Old Neighborhood*, 32 *COL. HUM. RTS. L. REV.* 67 (2000), reprinted in MAHONEY, ET AL., *supra* note 76, at 182–83 (noting that a “lawyer is constrained both by codes of professional responsibility and ethical considerations, which may restrict the lawyer’s ability or willingness to advocate such a course”).

83. *Id.* at 181.

and second, whether the lawyer thinks she can win it. But whether one can win the case is often, itself, a question involving a highly complicated calculus, as is the case with all lawyering. For the social-change lawyer, however, even defining what a win is can be complicated.⁸⁴ The lawyer may score a moral victory, delay an eviction or deportation, or apply enough political pressure on a government agency that it decides to change a policy even when that policy is upheld by the courts.⁸⁵ Some of these same considerations may play into the traditional lawyer's calculus, but the decision to proceed is often left to the client in that setting. In the social-change setting, the lawyer will have to balance the interest of the client before her, the interest of the broader community in seeing the policy challenged, and the interests of the funders of the organization in seeing activity consistent with the organizational goals that the funder supports. These other interests may weigh on the social-change lawyer in other ways as well, which introduces considerations that the traditional lawyer does not typically face.⁸⁶

4. Social-Change Lawyers Face Different Opportunity Costs Related to the Trade-Off between Direct Services and Law-Reform Activities

Another aspect of social-change lawyering that emerges in the face of resource constraints is that to pursue a long-term legal strategy, when resources are committed to that strategy (toward what is often

84. For the public interest lawyer, defining what a win is may be difficult, but identifying the direct and even the indirect effects of legal strategies can also be complex. In his landmark work, *Rights at Work*, Michael McCann described some of the indirect effects of legal strategies as their ability to mobilize constituents, frame a consciousness among group members, and build infrastructure within a movement, among others. MICHAEL MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* 280–84 (1994).

85. In social movement lawyering, a lawyer and the client or clients that she represents can also gain movement, momentum and strength by losing in the courts. For a reflection on this dynamic, see generally Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011).

86. On the tension that sometimes exists between representing particular clients, meeting an institution's social-change goals, and addressing the needs of the broader community, see, for example, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L. J. 470 (1976).

called law reform), that necessarily means that these resources are channeled away from direct services that might solve a particular client's immediate problem without addressing larger social-change goals.⁸⁷ Although long- and short-term strategies do not need to be in tension, they can be when an organization does not have the resources to do both, and it must choose between law reform and other similar strategies and emergency, direct, and atomized services to individual clients.⁸⁸ When members of the community face real harm in the absence of legal interventions, social-change lawyers can face a devastating choice: prevent an eviction, defend against the loss of custody of a child, or secure public-assistance benefits on the one hand, or, on the other hand, pursue strategies that might restructure the legal relationships over time, such that fewer members of the community face these harrowing outcomes.⁸⁹ In some ways, these choices may have become less complex for some lawyers because they have fewer choices to make: cutbacks to federal funding for legal-services programs and restrictions imposed on the funding mean that lawyers in programs receiving funds from this source are able to serve fewer clients and have fewer tactical choices to choose from.⁹⁰ This means that lawyers who do not face these restrictions

87. For a description of this tension between law-reform strategies and the provision of direct services in social-change advocacy, see MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973, at 33–34 (1993). For an argument that effective social-change advocacy should couple targeted, individual case representation with organizing and legislative reform, see Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106, 122 (1977).

88. On navigating the tension between engaging in impact litigation and delivering meaningful services to individual clients, see DAVIS, *supra* note 87, at 33.

89. In recent years, organizations have begun to use long-term legal and political strategies while also addressing the day-to-day needs of their clients. For a description of one organization, the Workplace Project in New York state, see JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 78–79 (2009).

90. On the funding cutbacks and programmatic restrictions on federal legal services grantees, see ALAN W. HOUSEMAN & LINDA E. PERLE, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 36–37 (2007), <https://www.clasp.org/sites/default/files/public/resources-and-publications/publication-1/0158.pdf> [<https://perma.cc/FUM4-NHYW>] (describing restrictions); Rhode, *supra* note 70, at 2038. On the tensions over LSC-funded law reform efforts and direct services, see William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960's to the 1990's*, 17 ST. LOUIS U. PUB. L. REV. 241, 241–42 (1998).

have more clients to choose from (meaning greater complexity and choices), even as the overwhelming majority of low-income people face their legal problems without legal assistance.⁹¹

5. *Social-Change Lawyering Often Involves Complex Goals*

Putting aside the questions of how resources should be deployed in the service of social change and whether lawyers should choose between direct services and longer-term strategies, there are often other larger interests that the social-change lawyer must weigh in the decision to take on a case.⁹² If the cause she promotes is a goal identified by a particular community-based organization or the expansion of rights for a particular social or demographic group, taking on a case, pressing certain rights, and bringing them to the attention of the courts and the general public can sometimes undermine the long-term interests of the cause that the lawyer supports. This can spark a backlash and a retrenchment of rights through the adoption of legislation that undermines any victory that the lawyer may achieve in the courts, either through the acts of a hostile legislature or an electorate willing to adopt a ballot initiative to scale back or reverse the lawyer's victories.⁹³ In the marriage-equality context, lawyers won victories in the state courts in several states only to have those victories undermined by legislative action

91. By some estimates, eighty percent of the legal needs of the indigent, and forty to sixty percent of the legal needs of the middle class, go unmet. *See, e.g.*, ALBERT H. CANTRIL, *AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE* (1996) https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/downloads/agendaforaccess.authcheckdam.pdf [<https://perma.cc/7Y CZ-C7UG>] (describing legal needs of moderate-income Americans); LEGAL SERVS. CORP., *SERVING THE CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS: A SPECIAL REPORT TO CONGRESS 12-13* (2000) (describing unmet legal needs of the poor); ROY W. REESE & CAROLYN A. ELDRED, *LEGAL NEEDS AMONG LOW-INCOME AND MODERATE-INCOME HOUSEHOLDS: SUMMARY OF FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY 7-17* (1994) (describing legal needs of low- and moderate-income households). Deborah Rhode argues that it is likely that these studies likely *underestimate* the true scope of the unmet legal needs of these populations. Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 *GEO. J. LEGAL ETHICS* 369, 397-98 (2004).

92. *See* John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 *FORDHAM L. REV.* 1927, 1934-35 (1999).

93. *Id.* at 1932 (“[C]ause lawyers must continually threaten and challenge dominant understandings of the professional role and the larger process within which that role is performed.”).

and ballot initiatives.⁹⁴ Thus, when considering the interests of the client that presents herself for representation to the social-change lawyer, that lawyer often must balance the interests of that client against other interests.⁹⁵ However, once the lawyer accepts the case for representation, these other interests should generally factor less in the decisions that transpire throughout the course of the representation. But, before the lawyer agrees to accept the representation of the client, these issues will likely weigh heavily on her decision to proceed or not to proceed with the case.⁹⁶

6. *Social-Change Lawyers Must Often Choose Between More Complex Tactics in Pursuit of Complex Goals*

If a lawyer decides to take on the case, another decision that the lawyer must make in the social-change setting, often in consultation with the client, is the tactics she will deploy in proceeding with the representation. In the traditional attorney–client relationship, these decisions might present themselves in a more straightforward way. The client wants to purchase property. She wants to sue over a breach of contract. The goals are often more discrete and more easily identifiable in these traditional settings. For the social-change lawyer, the goals she might pursue may be more amorphous and present more challenging problems to solve.⁹⁷ The lawyer’s social-change objectives might include improving the treatment of a particular social group generally or protecting a community from a particularly

94. See Timothy D. Lytton, *The NRA, the Brady Campaign, & the Politics of Gun Litigation*, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* 152, 166 (Timothy D. Lytton ed., 2005) (describing legislative backlash after gun control lawsuits filed against gun manufacturers).

95. On the tension between client and other interests in social-change lawyering, see Bell, *supra* note 86, at 488–93; Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 *CLINICAL L. REV.* 147, 158–59 (2000).

96. There is an extensive scholarship on public interest intake decisions, much of which is collected in Anthony V. Alfieri, *Impoverished Practices*, 81 *GEO. L.J.* 2567, 2595–618 (1993).

97. For a discussion of cause lawyering, see Anna-Maria Marshall & Daniel Crocker Hale, *Cause Lawyering*, 10 *ANN. REV. L. & SOC. SCI.* 301, 307 (2014) (“A poor person whose heat is turned off is exposed to the risks and vagaries of the legal system in a way that an advocacy organization promoting prayer in school is not. These factors shape the nature of the clients’ interactions with the cause lawyers who represent them.”).

destructive government or business practice. The goals and the tactics that one might use to achieve them may not present themselves in an obvious fashion. When the goals are themselves less defined, the lawyer will often find that choosing among tactics is more complex. The lawyer, in consultation with the client, will likely weigh the potential costs and benefits of the different tactics to achieve the overarching goals of the representation, introducing even more complexity into the situation.⁹⁸

7. Social-Change Lawyers May Find It Difficult to Identify the Client.

There is another layer of complexity beyond defining the goals of the representation or the tactics used to achieve them. Indeed, social-change lawyering sometimes involves debate over identifying the client in each situation.⁹⁹ Is the client the individual or group who presents himself, herself, or itself to the lawyer for representation? Or is the client someone or some group that the lawyer has identified as a strategic partner serving to advance the cause that the lawyer seeks to further?¹⁰⁰ Sometimes the social-change lawyer goes out in search of the appropriate client who may serve as a participant in the social-change strategy because that idealized and sought-after client's situation is sympathetic or compelling. The client's situation may offer a salient narrative that illuminates the plight of those whose situations the social-change lawyer wants to improve. It may also present facts that help garner support from the courts, policymakers, or legislators whom the lawyer may need to convince to embrace and

98. For a discussion of the lawyer's role in these situations, see generally William L.F. Felstiner, Richard Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC'Y REV. 631 (1980).

99. Michael Grinthal, *Power With: Practice Models for Social Justice Lawyering*, 15 U. PA. J.L. & SOC. CHANGE 25, 31–34 (2011) (discussing models of litigation on behalf of groups of individuals and tensions that can arise in social-change lawyering).

100. Robert L. Rabin, *Lawyers for Social Change: Perspective on Public Interest Law*, 28 STAN. L. REV. 207, 234 (1976) (“[W]hen a public interest firm identifies a critical issue, it rarely has any difficulty in finding a client willing to pursue the matter.”).

advance the cause.¹⁰¹ This search for the client or clients that help fill this narrative role might mean that the client in these settings may assume a different role than one in the traditional lawyer–client relationship.¹⁰² Contemporary legal ethics requires even the social-change lawyer to maintain a relationship with every client such that the client controls the critical ends of the representation.¹⁰³ When the lawyer may have a different sense of who the client is in any given situation—whether it is the person who is the nominal representative plaintiff in a class action, the community that the individual represents, or someone or some other entity or group—the lawyer’s sense of whom she serves may change. The social-change lawyer may thus perceive that she is entitled to have a different relationship with a specific client in a particular matter because the social-change lawyer might see a living, breathing client as representing some larger cause or interest. This then means that the process of identifying the clients’ interests and needs, and the tactics the lawyer should pursue, becomes more complex, and the lawyer, whether or not we like it, must try to understand who the client is, what the client wants, and how the lawyer should proceed on the client’s behalf. But all of that depends on how the lawyer defines the client. When the client is an amorphous group like “the community,” with no clear spokesperson or constituent who can provide guidance to the lawyer as to the interests and preferred tactics of the client, the process of identifying both who the client is and how the lawyer should proceed becomes more challenging.¹⁰⁴ Admittedly, some lawyers may feel that this gives them license to proceed as they see fit, substituting

101. See Marshall & Hale, *supra* note 97, at 312 (arguing that “many cause lawyers enjoy more collaborative relationships with their clients . . . [the] clients . . . tend to be social movement organizations, for whom additional resources may be helpful in directing their attorneys’ energies”).

102. See *id.* (“These organizational practices may draw cause lawyers into the ambit of activism, where they share in a movement’s collective identity, and that identity, in turn, shapes the way that cause lawyers practice law.”).

103. See generally Marshall, *supra* note 95. For a discussion of some of the legal ethics issues that arise in group settings, see Lynn A. Baker, *Aggregate Settlements and Attorney Liability: The Evolving Landscape*, 44 HOFSTRA L. REV. 291, 298–305 (2015).

104. For an exploration of some of these issues, see generally Raymond H. Brescia et al., *Who’s in Charge Anyway? A Proposal for Community-Based Legal Services*, 25 FORDHAM URB. L.J. 831 (1998).

their sense of what that undefined, incorporeal “client” wants; for other lawyers, who truly want to ensure that they proceed with the interests of a client or clients at the center of what they do, that process becomes only harder, not easier.¹⁰⁵

C. What Complexity Means for Social-Change Lawyers

When comparing the social-change lawyer’s role to that of what I have called a traditional lawyers, it would appear that there is some greater level of complexity that adds to the general complexity of the problem that the lawyer is attempting to address. The decision to accept or reject a client often has different components in the social-change context when compared to that decision in the traditional, private relationship. In fact, that identity of the client may itself shift when the lawyer is engaged in social-change lawyering. In turn, that shift in the identity of the client means that the considerations and factors that a lawyer must weigh are also different and more complex.¹⁰⁶ So, the additional complexity often centers around which clients to accept for representation, which strategies to deploy to achieve their goals, the tactics to use in pursuing those strategies, the direction the lawyer should take, and whom to take direction from when pursuing those tactics and strategies. To a certain extent, some of these decisions play a role in the traditional lawyer–client relationship, but generally, they involve a greater deal of complexity in the social-change context. This complexity brings new dimensions to problem solving in this type of advocacy, requiring a greater degree of creativity from the social-change lawyer in pursuing solutions to the problems.

Despite these additional considerations that lawyers working for social change have faced when engaging in creative problem solving for their clients (however they define those clients), lawyers have long played roles in attempting to help engineer social change. The unsuccessful litigation that led to the Supreme Court’s decision in

105. *Id.* at 857–58.

106. *Id.* at 856–57.

Plessy v. Ferguson, which enshrined the doctrine of “separate but equal,” was in many ways the product of the type of legal campaign that became commonplace by the 1970s.¹⁰⁷ The prominent role that lawyers played in the Civil Rights Movement helped to serve as a model for efforts of progressive lawyers that have sought to promote environmental protection, women’s rights, the rights of different racial and ethnic groups such as the Latinx and Asian-American communities, and LGBTQ rights.¹⁰⁸ It also prompted the rise of conservative legal organizations that promoted a probusiness or libertarian agenda through the courts.¹⁰⁹

With some degree of urgency, there is a growing understanding that the law must be used to promote social justice and social change, but there is also an emerging appreciation for the fact that there is not just one way to use the law to promote social justice and that those who would use the law to do so must be sensitive to community needs. This work is thus not only tactically flexible “but also responsive and accountable to community interests and needs.”¹¹⁰ Scott Cummings describes this reemergence, with a focus on advocates seeking to promote workers’ rights, as follows: “[L]abor activists have, in fact, begun to leverage a broader range of legal regimes to advance multiple labor goals, from direct worker mobilization to the protection and expansion of unionized industries.”¹¹¹ They have done this by filing suits pressing international human rights claims “to mobilize immigrant workers,”¹¹² bringing land use claims “in an effort to block big-box

107. For a discussion about the effort of early social-change lawyers to challenge Jim Crow, unsuccessfully, in the campaign that ultimately led to the Supreme Court’s decision in *Plessy v. Ferguson*, see CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL HISTORICAL INTERPRETATION* 28–60 (1988).

108. For an overview of the role of some of these identity-based groups on social change, see generally William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002).

109. On the emergence of conservative legal organizations, see generally ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* 1–2 (2008).

110. Brescia, *supra* note 57, at 727.

111. Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1, 4 (2009) (citations omitted).

112. *Id.*

retailers from entering markets dominated by unionized groceries,”¹¹³ and “threatened environmental lawsuits”¹¹⁴ to strengthen their negotiating position when seeking “community benefit agreements with labor-friendly provisions.”¹¹⁵ Cummings argues that this suggests that “a more fundamental reorientation is under way within the labor movement”¹¹⁶ because activists are adopting what he calls a “legal pluralist”¹¹⁷ approach, which recognizes the many ways in which the law interacts with the employer-employee relationship to “leverage the power of law to advance labor goals.”¹¹⁸ This work is thus a “more politically integrated, tactically versatile model of legal practice,”¹¹⁹ where legal victories are only “moments in broader campaigns to stimulate collective action and leverage political reform”¹²⁰ as opposed to ends in themselves. As Cummings further explains, litigation affords advocates just “one of many problem[-]solving tools,” and clients are “allies to be educated and empowered for future struggles.”¹²¹ Other scholars have identified the ways in which low-wage worker legal advocacy has embraced this accountable and tactically pluralistic approach.¹²²

This embrace is also evident in the housing context.¹²³ In my own work and research, I was a part of, and attempted to assess, the

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Cummings, *supra* note 111, at 5.

118. *Id.*

119. *Id.* at 6.

120. *Id.* (citation omitted).

121. *Id.*

122. See, e.g., JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 72 (2005) (describing work of the Workplace Project in Hempstead, New York); Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 *CLINICAL L. REV.* 355, 391–93 (2008) (describing legal advocacy with restaurant workers in New York City); Cummings, *supra* note 111, at 9–61 (describing the attempt to provide representation to sweatshop workers in Los Angeles).

123. See, e.g., Gary Bellow & Jeanne Charne, *Paths Not Yet Taken: Some Comments on Feldman’s Critique of Legal Services Practice*, 83 *GEO. L.J.* 1633 app. 2 at 1664–68 (1995) (describing “Eviction Free Zone” in Massachusetts); Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, 42 *LOY. L.A. L. REV.* 913, 913 (2009) (describing legal advocacy in support of tenant association in Los Angeles); Brescia, *supra* note 57, at 716–17 (describing effort to preserve affordable housing in New York City through the use of a range of legal tactics); Judith E. Koons, *Fair Housing*

coordinated effort to fight the radical transformation of what were once middle-class and working poor housing developments in New York City, Peter Cooper Village, and Stuyvesant Town, into luxury housing for the very rich.¹²⁴ That effort—which combined community education, grassroots organizing, direct services through brief advice and assistance and direct representation, and an affirmative class action case—ultimately prevented the conversion of affordable housing to unaffordable housing.¹²⁵ This was done in a tactically pluralistic way in collaboration with a range of community partners, including an engaged, local elected official, a robust tenant association, and nonprofit lawyers and private lawyers working on contingency.¹²⁶ That work showed that lawyers from different backgrounds and experiences had a range of tactics to bring about important social change or at least prevent an erosion of significant economic rights from befalling the residents of these developments.¹²⁷ This required effective coalition building and efficient delivery of targeted, customized, and focused representation and assistance to balance the need for direct services that would prevent displacement while bringing tactical affirmative litigation to ensure the protection of broader comprehensive rights for the collective benefit of the residents of these developments. This tactical pluralism provided effective relief and required creativity in terms of pulling together both the different strands of the services to be provided as well as the individuals and organizations that would provide them. The complex problem of preserving affordable housing required innovative legal and advocacy strategies, as well as a diverse team of stakeholders and service providers, to bring about a successful outcome.¹²⁸

and Community Empowerment: Where the Roof Meets Redemption, 4 GEO. J. ON FIGHTING POVERTY 75, 87–95 (1996) (describing techniques utilized to prevent housing displacement due to urban redevelopment).

124. Brescia, *supra* note 57, at 716–17.

125. *See id.* at 717 (describing campaign).

126. *Id.* at 716–17.

127. *Id.* at 717.

128. *Id.*

The work of labor rights activists and the housing lawyers involved in the effort to defend affordable housing in New York City shows that lawyers engaged in problem solving in pursuit of social change face additional creative challenges that add new dimensions to their work when compared to the work of traditional lawyers. Despite these challenges, as the following Part shows using just three examples (though there are many more from which to choose), lawyers working for social change have helped bring about dramatic change by playing a role in reforming the legal institutions that structure the relations between individuals, communities, broader society, and the government. Lawyers have helped spark meaningful change in terms of improving civil, political, and human rights for countless millions of Americans.¹²⁹ Thus, lawyers have found ways to confront the complexities associated with social-change lawyering with creativity and zeal, helping to advance new understandings of the United States Constitution, the laws, and social relations in the United States.¹³⁰ I will highlight lessons we can learn from the examples of these successful efforts to bring about positive social change, particularly efforts which involved creative solutions to solving complex social problems. The next section uses three examples of lawyers playing a role in addressing complex social problems through legal advocacy to identify some of the common approaches and themes of these lawyers.

II. Lawyering for Social Change

This Part describes the role that lawyers played in three moments of significant social change in the United States: the effort to combat slavery, the decades-long struggle for civil rights for African Americans, and the campaign for marriage equality for members of the LGBTQ community. In the first example, much larger forces played a greater role in ultimately bringing about an end to slavery.

129. *See infra* Part II.

130. *See generally* COLE, *supra* note 7 (describing several legal advocacy campaigns in recent decades).

Yet, lawyers played an important role in addressing the treatment of slaves in the law, particularly escaped slaves, and that approach helped inform the larger effort to end slavery.¹³¹ In the Civil Rights Movement and the effort to attain marriage equality, lawyers played central roles (and at least in the Civil Rights Movement, subsequent critiques have argued that their role was *too* central).¹³² In each of these examples, however, the lawyers' work did not operate in a vacuum. All of the lawyers were sensitive to forces playing out in the wider world, brought in other disciplines to support their efforts, and sought to form broad coalitions. What follows is a description of each of these three examples of lawyers working for social change. Subsequent parts explore some common themes that emerge from this analysis as well as what this analysis might say about creative lawyering for social change now and in the future.

A. Lawyers and the Abolition of Slavery in the United States

The first example to explore recounts the efforts of two lawyers who played roles in the effort to end slavery in the United States: one famous and one not-so-famous. Of course, lawyers had a significant hand in crafting the laws that first enshrined slavery in the United States Constitution¹³³ and then in the many legislative compromises and proposals that ultimately proved unsuccessful in either maintaining or ending slavery, with the failure of the efforts to end slavery peaceably ultimately leading to the United States Civil War.¹³⁴ One of the main tensions between the Northern and Southern states was the Fugitive Slave Act, which had been updated as part of the package of legislative measures that became the Compromise of 1850.¹³⁵ The 1850 version of the law allowed any slave holder whose

131. ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 159 (1975).

132. *See, e.g.*, Bell, Jr., *supra* note 86, at 490, n.59.

133. JILL LEPORE, *THESE TRUTHS: A HISTORY OF THE UNITED STATES* 119 (2018) (describing makeup of the Constitutional Convention of 1787, including roughly half of those in attendance being lawyers).

134. *Id.*

135. JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 78–88 (describing Fugitive Slave Law as part of the Compromise of 1850 and the tensions that arose from it).

slave escaped to a free state or territory to petition federal authorities to return that slave to his or her master.¹³⁶ Riots would sometimes occur in free states when federal authorities would move in to enforce the law because abolitionists would seek to protect the escaped slave from a return to bondage.¹³⁷

With the outbreak of the Civil War, a question remained whether a slave holder from a Confederate state (or even a non-seceding slave state like Maryland) could enforce the law despite the open hostilities.¹³⁸ An abolitionist general in the Union Army in the Western theater, John C. Frémont, issued a military proclamation freeing the slaves of any slave holder in Missouri who took up arms in rebellion.¹³⁹ Abolitionists cheered this move, but conservatives in the north did not approve of it. President Abraham Lincoln was concerned that these efforts might alienate border states that still recognized slavery. Ultimately, Frémont rescinded the order.¹⁴⁰

Another Union officer, Benjamin Butler, a lawyer-turned-general who was commanding Fort Monroe—a Union garrison in northern Virginia—took a slightly different approach. This creative approach helped advance the abolitionist cause on firmer ground than Frémont's efforts had done.¹⁴¹ When three slaves who had been forced to assist the Confederate forces in building breastworks across the river from the Union fortress slipped away under the cover of darkness behind Union lines and presented themselves to Butler, he was forced to confront the applicability and enforceability of the Fugitive Slave Act. Butler seems to have had a complicated view of slavery.¹⁴² Because he was a northern Democrat before the war, some paint him as an abolitionist, and others reveal he very much feared

136. Fugitive Slave Act, ch. 60, 9 Stat. 462, 463 (1850) (repealed 1864). On the role of judges in enforcing the fugitive slave laws, see generally COVER, *supra* note 131.

137. See Roy E. Finkenbine, *Christiana Riot (1851)*, in *SLAVERY IN THE UNITED STATES: A SOCIAL, POLITICAL, AND HISTORICAL ENCYCLOPEDIA* (VOL. I) 222 (Junius P. Rodriguez, ed., 2007) for an account of one riot.

138. *Id.*

139. JOHN FABIAN WITT, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 198 (2012).

140. *Id.* at 202.

141. *Id.*

142. *Id.*

that free slaves might, if armed, rise up in rebellion and strike out mercilessly against slave owners and their families.¹⁴³

Nevertheless, as any self-respecting lawyer should do when faced with whether to apply a law to a particular situation, he consulted the text of the Fugitive Slave Act.¹⁴⁴ For Butler, a plain reading of the law seemed to require that a slave owner residing in a slave state could petition federal authorities for return of an escaped slave.¹⁴⁵ But, Butler read the law literally, and took into account the position of the slave states, those in open rebellion like Virginia, from which these slaves had escaped.¹⁴⁶ That position held that Virginia, because it had claimed that it seceded from the Union, was no longer a state.¹⁴⁷ And if it was no longer a state, a slave owner from Virginia could no longer claim rights under the Fugitive Slave Act.¹⁴⁸

Moreover, Butler took into account the role the slaves had played in supporting the enemy troops across the river. They had been dragooned into helping to build fortifications opposing the Union position and thus had supported the Confederate war effort.¹⁴⁹ Logically, if Butler had come across a cache of Confederate gunpowder or cannons, it would be preposterous to expect that he would return “contraband” of war to the rebel forces. Butler claimed that the slaves were no different; they too were contraband, and he would not return them to the Southern side.¹⁵⁰ Again, Butler used his

143. MARTIN A. KLEIN, HISTORICAL DICTIONARY OF SLAVERY AND ABOLITION 76 (2002); *see also* WITT, *supra* note 139, at 202 (describing Butler as “no abolitionist, at least not at the beginning of the war”). For Southerners, he was later dubbed “the Devil of New Orleans” for what are described as heavy-handed and corrupt tactics when he was in command of the Union occupation there. *See generally* CHESTER G. HEARN, WHEN THE DEVIL CAME DOWN TO DIXIE: BEN BUTLER IN NEW ORLEANS (1997). According to his autobiography, Butler fought for the Union not out of opposition to slavery; he defended the Southern states’ rights to pass their own laws regarding the institution. BENJAMIN BUTLER, BUTLER’S BOOK: AUTOBIOGRAPHY AND PERSONAL REMINISCENCES OF MAJOR-GENERAL BENJAMIN BUTLER 129–136 (2014).

144. BUTLER, *supra* note 143, at 131.

145. *Id.* at 128.

146. JAMES OAKES, FREEDOM NATIONAL: THE DESTRUCTION OF SLAVERY IN THE UNITED STATES, 1861–1865, at 96 (2012).

147. *Id.*

148. *Id.*

149. *Id.* at 95.

150. DAVID HERBERT DONALD, LINCOLN 343 (1995).

enemy's own logic against it, arguing that slaves were property and used to aid in the enemy war effort. As such, he determined he should not return them. Indeed, when a Confederate officer, acting as an emissary of the Confederate Colonel, whom Butler knew from his days as a politician, appeared under flag of truce to claim ownership of the slaves, reclaim the slaves, and enforce the Fugitive Slave Act, Butler refused.¹⁵¹ According to Butler's autobiography, he told the adversary the following: "I mean to take Virginia at her word, as declared in the ordinance of secession passed yesterday. I am under no constitutional obligations to a foreign country, which Virginia now claims to be."¹⁵² Butler's position angered abolitionists like Frederick Douglass, who proclaimed that these escaped slaves were not to be considered contraband as if they were pistols;¹⁵³ nevertheless, Butler's clever use of the Southern arguments to undermine their position seemed to offer a basis upon which Butler could conclude that he was under no obligation to return the escaped slaves. It would also solve a problem that President Lincoln faced: how to hold his coalition—a collection of factions that included those who wanted to abolish slavery and those who wanted to save the Union—together. The value of this decision for assuaging the different factions within Lincoln's coalition was not lost on an editorial published in the *Atlantic Monthly* at the time. It stated:

There is often great virtue in such technical phrases in shaping public opinion. They commend practical action to a class of minds little developed in the direction of the sentiments, which would be repelled by formulas of a broader and nobler import. The venerable gentleman, who wears gold spectacles and reads a conservative daily, prefers confiscation to emancipation. He is reluctant to have slaves declared freemen, but has no objection to their

151. WITT, *supra* note 139, at 202–03.

152. BUTLER, *supra* note 143, at 257.

153. WITT, *supra* note 139, at 202–03.

being declared contrabands. His whole nature rises in insurrection when Beecher preaches in a sermon that a thing ought to be done because it is a duty, but he yields gracefully when Butler issues an order commanding it to be done because it is a military necessity.¹⁵⁴

Nevertheless, Butler's position put another lawyer, Abraham Lincoln, in an uncomfortable spot, just as Frémont had been in months earlier. As said, Lincoln had a fragile coalition of unionists, who were supporting the war effort to preserve the republic, and abolitionists, who believed it was a crusade to end slavery.¹⁵⁵ Lincoln needed some way to tie this coalition together, and he considered the question of whether to bring escaped slaves and free blacks into the war effort by arming them and forming black regiments to fight on the Union side.¹⁵⁶ He knew he was depleting his stock of eligible fighting men in the North and saw the opportunity that presented itself of recruiting thousands of blacks to join the war effort.¹⁵⁷ But he also knew that he would have to take steps toward freeing the slaves, at least escaped slaves and those liberated from southern territories, to offer these potential recruits and the abolitionists who supported freeing the slaves cause to support black enlistment.¹⁵⁸ His policies toward slavery over the years had evolved.¹⁵⁹ At times, he supported colonization for freed slaves, and at others, he supported compensation for slave owners who might be forced to give up their slaves.¹⁶⁰ Lincoln ultimately settled on the notion that to keep his

154. Edward L. Pierce, *The Contrabands at Fort Monroe*, ATLANTIC MONTHLY, July 1861, at 627. The individual referred to in the excerpt as "Beecher" is likely Presbyterian minister Lyman Beecher, father of Harriet Beecher Stowe, who authored the abolitionist publication *Uncle Tom's Cabin*. *Id.*

155. DONALD, *supra* note 150, at 313.

156. *Id.* at 373–76.

157. *Id.*

158. *Id.*

159. *Lincoln's Evolving Thoughts on Slavery and Freedom*, NPR (Oct. 11, 2010, 12:11 PM), <https://www.npr.org/2010/10/11/130489804/lincolns-evolving-thoughts-on-slavery-and-freedom> [<https://perma.cc/JN7G-T9K7>].

160. DONALD, *supra* note 150, at 343; *Lincoln's Evolving Thoughts on Slavery and Freedom*, *supra* note 159.

coalition together, he would need to support the enlistment of black troops while giving them and their supporters a reason to enlist. Lincoln believed that this would satisfy the unionists who recognized the need to recruit black troops to support the war effort and the desire of the abolitionists to end slavery, at least in the South.¹⁶¹ This two-pronged approach culminated in the drafting of Emancipation Proclamation, which freed slaves in occupied territories and those who escaped to Union lines (a recognition, in a way, of the predicament in which Butler found himself and a nod to his on-the-fly solution). But Lincoln still faced another hurdle before he could release the Proclamation.

The Union war effort had stalled. General McClellan's campaign to strike decisively at the heart of the Confederacy had ground to a frustrating halt on the Virginia peninsula.¹⁶² Grant had not yet emerged as the brilliant and dogged tactician that he later proved to be in subsequent years, and his campaign in the Mississippi was not going well.¹⁶³ The major foreign powers of Great Britain and France watched developments in the war with great interest, poised to recognize the Confederacy, if not aid it outright, if it appeared that the South might be able to secure some kind of brokered peace and remain intact.¹⁶⁴ Were Lincoln to release the Emancipation Proclamation at a point when the Union war effort was going poorly, he might seem weak, and its issuance a desperate, last-ditch effort to alter the course of the war. Lincoln needed a victory on the battlefield to give him an opening in which he could issue the Proclamation. He got one when Robert E. Lee tested the Union resolve in a march on Maryland, a slave state that, the Southern general felt, might have welcomed Confederate troops as heroes as opposed to invaders. This move would also likely have had the effect of drawing McClellan's

161. DONALD, *supra* note 150, at 373–76.

162. *Id.* at 369–70.

163. *See, e.g.*, MCPHERSON, *supra* note 135, at 578 (describing failure of the first Vicksburg campaign).

164. *Id.* at 383 (describing Confederate efforts for diplomatic recognition from Great Britain and France).

troops away from their likely march on Richmond. But, “Little Napoleon,” as he was called, never exhibited any of the French emperor’s aggressiveness on the battlefield. McClellan’s forces clashed with Lee’s near the tiny town of Antietam in Maryland, which ultimately lent its name to the bloody melee that ensued there.¹⁶⁵ Although historians often consider the battle a stalemate, Lee’s retreat from the field, after both sides suffered heavy losses, gave Lincoln the opportunity he needed to claim victory and issue the Emancipation Proclamation at one of the few high points of the war for the North, at least to that point.¹⁶⁶ This edict helped unite Lincoln’s fragile coalition around the cause of ending slavery because it was the effort to end slavery, in Lincoln’s eyes, that would ultimately bring about the preservation of the Union.

Lincoln’s chosen tactics in promoting abolition, at least in the Confederate states, was consistent with a prior statement on the interplay between abolition and maintaining the integrity of the nation. In a letter to abolitionist publisher Horace Greeley, Lincoln emphasized that his primary goal was to save the Union.¹⁶⁷ To do so, he believed he needed to end slavery. Thus, his war aims and those of the abolitionists who sought to end slavery converged. Lincoln wrote:

My paramount object in this struggle is to save the Union, and not either to save or destroy slavery. If I could save the Union without freeing any slave, I would do it; if I could save it by freeing all the slaves, I would do it; and if I could save it by freeing some and leaving others alone, I would also do that.

What I do about slavery and the [colored] race, I do because I believe it helps to save the Union; and what I

165. DONALD, *supra* note 150, at 374. It is telling that the divisions between the North and South were so deep that the battle is often referred to not as the Battle of Antietam in the South but as the Battle of Sharpsburg. *Battle of Antietam*, HISTORY, <https://www.history.com/topics/american-civil-war/battle-of-antietam> [<https://perma.cc/4EXL-AA4M>] (last updated Oct. 2, 2018).

166. DONALD, *supra* note 150, at 374.

167. Letter from Abraham Lincoln, President of the U.S., to Horace Greeley (Aug. 22, 1862) in SPEECHES AND LETTERS OF ABRAHAM LINCOLN 194–95 (Merwin Roe ed. photo. reprt. 1912) (1907).

forbear, I forbear because I do not believe it would help to save the Union.¹⁶⁸

Lincoln's issuance of the Emancipation Proclamation was consistent with this approach. It satisfied the abolitionists for sure but also tied the unionists to the abolitionist cause by linking emancipation directly to the war effort. As one excerpt of the Proclamation reads:

And I further declare and make known that such persons of suitable condition will be received into the armed service of the United States to garrison forts, positions, stations, and other places, and to man vessels of all sorts in said service.¹⁶⁹

Lincoln, the tactician, proved to be adept and creative at using a legal strategy—here, the Emancipation Proclamation—and timing it in light of a major development in the war (the Battle of Antietam) to help achieve what appears to have been his ultimate social-change goal: preservation of the Union.

Of course, the cause of civil rights would not end with the victory of Union forces or even passage of the Reconstruction Amendments to the Constitution. The next example to highlight is the effort to end Jim Crow segregation, which followed the collapse of the effort to reform the South in the wake of Reconstruction.¹⁷⁰

B. Lawyers and the End of Jim Crow

Unlike most discussions of this legal campaign, hatched in the offices of the National Association for the Advancement of Colored

168. *Id.* at 194–95.

169. The Emancipation Proclamation, Proclamation No. 95, 12 Stat. 1268, 1269 (1863); *see also* Sandra L. Rierson, *The Thirteenth Amendment as a Model for Revolution*, 35 VT. L. REV. 765, 851–57 (2011) (describing the Emancipation Proclamation and its effects).

170. DAVID BRION DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD* 327 (2006) (tracing rise of Jim Crow to the demise of Reconstruction).

People (NAACP) Legal Defense Fund (LDF) and those of other legal allies, I will not start with a discussion of the landmark case *Brown v. Board of Education*, in which the Supreme Court ruled unanimously that segregation in educational institutions violated the Equal Protection Clause of the Fifth and Fourteenth Amendments to the Constitution.¹⁷¹ This was the beginning of the end of the institutional edifice of Jim Crow. The paradigm of social-change litigation, which took direct legal aim at segregation in broad-based challenges, had its predecessors in more modest, incremental, and narrowly crafted challenges. This eventually assisted other institutions in their efforts to build the legal case that could serve as a base to successfully launch the broader attack on segregation.¹⁷²

Heman Sweatt was a postman in Texas who wanted to go to law school in the late 1940s.¹⁷³ The problem was that there were no law schools in the state of Texas that admitted African Americans.¹⁷⁴ Sweatt submitted his application to the University of Texas School of Law, asserting that because the state university system did not have a separate law school for African Americans, the law school had to admit him.¹⁷⁵ The state hastily put together what it tried to call a law school, but that entity had no full-time faculty (it “borrowed” faculty from the main law school), no law books, no alumni base, and no accreditation.¹⁷⁶ The LDF challenged the university’s solution to the Sweatt application, arguing that, yes, segregation was unconstitutional.¹⁷⁷ The lawyers also had a fallback position,

171. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). For a history of the *Brown* litigation, see generally RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 263 (1975).

172. On early challenges to segregation in education and other contexts, see GARY M. LAVERGNE, *BEFORE BROWN: HEMAN MARION SWEATT, THURGOOD MARSHALL, AND THE LONG ROAD TO JUSTICE* 73–85 (2010) (addressing early challenges to segregation in education and other contexts); MARK V. TUSHNET, *THE NAACP: LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950*, at 70 (1987). For a description of civil rights organizing before these campaigns, see SUSAN D. CARLE, *DEFINING THE STRUGGLE: NATIONAL ORGANIZING FOR RACIAL JUSTICE, 1880–1915*, at 6 (2013).

173. LAVERGNE, *supra* note 172, at 5.

174. *Id.*

175. *Sweatt v. Painter*, 339 U.S. 629, 632 (1950); LAVERGNE, *supra* note 172, at 95.

176. *Sweatt*, 339 U.S. at 633.

177. LAVERGNE, *supra* note 172, at 97.

however. They argued that, taking the holding in *Plessy v. Ferguson* literally, if the university planned on offering separate institutions, the system had to make those institutions equal.¹⁷⁸

By any objective measure, the law school for African Americans was in no way equal to that offered to white students in the University of Texas system. The unaccredited school for African Americans with no faculty, essentially no students, and no books could not measure up to the University of Texas's school of law, which had 850 students, a vast alumni network, 65,000 books in its library, and full accreditation.¹⁷⁹ Even when the case went to trial and the law school for African Americans had twenty-three students, five full-time faculty, and 10,000 books, it still could not compare in quality or degree to the opportunities afforded to the students enrolled in the all-white institution.¹⁸⁰ Even putting aside these objective measures, the LDF lawyers also argued that a law school is so much more than the books in its library or the physical accommodations. A law school is a platform for knowledge exchange and a network that creates mentorships and job opportunities for its students. It connects those students to the bench and the broader practicing bar. A good law school is more than just the sum of its parts and develops value to its students because of the relationship of those parts to each other and the broader community. A law school with fewer faculty, no alumni network, and weak ties to the broader community could not possibly afford its students with the same opportunities that the University of Texas's law school for whites offered its students.¹⁸¹

Although the lawyers knew all of these things about the qualities that make a great law school, they knew something else as well. They intuited that the judges would also know this about a law school.¹⁸²

178. *Id.* at 100.

179. *Sweatt*, 339 U.S. at 633.

180. *Id.*

181. See LAVERGNE, *supra* note 172, at 101–02 (noting Justice Robert Jackson's incredulity in oral argument in a prior case regarding the University of Oklahoma's arguments about separate and equal law schools).

182. On the legal strategy in *Sweatt* and the other graduate school cases, see CONSTANCE BAKER

The judges before whom such a case would come would all have gone to law school and know the ineffable qualities of a good law school, and they could compare the extent to which two law schools were comparable along these difficult to measure metrics. Although the LDF had tried to bring other somewhat successful lawsuits challenging segregation in other graduate and professional schools, it was the action filed against segregation in a separate and unequal law school where they gained the greatest legal traction.¹⁸³ Although they would certainly include a direct challenge to segregation itself, and they enlisted the support of an anthropologist (who was also a lawyer) to make the claim that segregation was itself stigmatizing (foreshadowing the arguments they made in *Brown*), they also relied on a secondary position that even if one recognized that separate but equal was still the law of the land and *Plessy* was good law, if one took *Plessy* seriously, the separate and clearly unequal institution set up as the law school for African Americans in the University of Texas law school would not pass muster.¹⁸⁴ Moreover, by challenging the way in which segregation operated in an institution that judges would understand well, the LDF lawyers made a brilliant tactical decision to appeal to the judge's own appreciation for the special qualities upon which one can compare separate institutions, more so, perhaps, than they might understand other institutions that the LDF might target.¹⁸⁵ Ultimately, the Supreme Court unanimously concluded in *Sweatt v. Painter* not that segregation was unconstitutional on its face, but, rather, that the operation of a

MOTLEY, EQUAL JUSTICE UNDER LAW 60, 64 (1998), and JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 69–78 (1994).

183. For a review of these earlier setbacks, see TUSHNET, *supra* note 172, at 70–104. On the strategy of targeting segregation in graduate schools, see ROBERT J. COTTROL, *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* 58–76 (2003). The NAACP had begun to gain traction with these cases involving graduate schools, however, and, on the same day the Court decided *Sweatt*, it ruled that onerous conditions imposed on a student seeking a graduate degree in a school of education were also unconstitutional. See *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637, 642 (1950); *Sipuel v. Bd. of Regents*, 332 U.S. 631, 632–33 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349 (1938).

184. LAVERGNE, *supra* note 172, at 103–05 (describing trial strategy in *Sweatt*).

185. *Sweatt*, 339 U.S. at 634.

separate—and clearly unequal—law school for African Americans could not pass constitutional muster.¹⁸⁶

One of the reasons—apart from the objective criteria—that the Court reached this conclusion was that it was “more important” that the law school for whites “possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school.”¹⁸⁷ These qualities included but were not limited to the following: the “reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions[,] and prestige.”¹⁸⁸ Although the Court could easily differentiate the two schools along objective criteria, the Court concluded that “[i]t is difficult to believe that one who had a free choice between these law schools would consider the question close.”¹⁸⁹ Moreover, “Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.”¹⁹⁰ The school for African Americans “excludes from its student body members of the racial groups which number 85% of the population of the [s]tate and include most of the lawyers, witnesses, jurors, judges[,] and other officials with whom [the] petitioner will inevitably be dealing when he becomes a member of the Texas Bar.”¹⁹¹ For these reasons, the Court could not conclude “that the education offered [to the] petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.”¹⁹²

In many ways, this incremental challenge to segregation ultimately set the stage for the lawyers’ work that followed in bringing the broader challenges to segregation in primary and secondary educational institutions in several jurisdictions across the country that

186. *Id.* at 635.

187. *Id.* at 634.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Sweatt*, 339 U.S. at 634.

192. *Id.*

would culminate in the victory in *Brown*. In those challenges, the LDF lawyers brought in experts from other disciplines, like sociology, to establish that segregation had a stigmatizing effect.¹⁹³ They built on the arguments made in *Sweatt* that separate was inherently unequal, and, once again, the Supreme Court ruled unanimously in their favor, this time concluding that separate but equal would no longer stand.¹⁹⁴

C. *Lawyers and Marriage Equality*

The final example to examine is the work of the lawyers who helped lead the successful campaign for recognition of marriage equality for the LGBTQ community. That campaign, which was really many campaigns—the first of which began in the early 1990s in Hawaii—proceeded in fits and starts.¹⁹⁵ There were victories in the courts in Hawaii, Vermont, and Massachusetts on state constitutional grounds, but at least some of those victories were undermined by legislative action or the work of advocacy groups that organized ballot initiatives to overrule those courts by adopting constitutional amendments that barred recognition of same-sex marriage.¹⁹⁶ In addition, fear that states where same-sex marriage was not legal would be expected to recognize same-sex marriages from states where they were legal prompted Congress to take legislative action and pass the Defense of Marriage Act (DOMA). The DOMA allowed states the option to refuse to recognize a same-sex marriage with respect to a range of federal benefits that accrued to married heterosexuals.¹⁹⁷ Moreover, the forces aligned against marriage equality gained enough momentum that they sought to introduce anti-same-sex marriage ballot initiatives in many states, mostly timed

193. See MOTLEY, *supra* note 182, at 61–73 (describing use of experts in *Brown* trials); e.g., KLUGER, *supra* note 171, at 315–39.

194. MOTLEY, *supra* note 182, at 102, 104–05.

195. FRANK, *supra* note 49, at 169 (describing LGBTQ rights advocacy in state courts).

196. *Id.* at 165.

197. Defense of Marriage Act, Pub. L. No. 104-199, § 2(a), 110 Stat. 2419, 2419 (1996), *invalidated* by *United States v. Windsor*, 570 U.S. 744 (2013).

to generate conservative voter turnout for the 2004 presidential election.¹⁹⁸ Most of these ballot initiatives succeeded.¹⁹⁹ When conservative groups sought to promote a ballot initiative in California, a deeply liberal state, many thought they had gone too far and that the state's voters would reject it.²⁰⁰

On election night 2008, when the nation was electing its first African-American president, and voters in California voted overwhelmingly in his favor, Californian voters passed so-called Proposition 8, which banned same-sex marriage in the state.²⁰¹ This came as a shock to advocates for same-sex marriage across the nation, leading them to take stock of their efforts and consider what, if anything, they might do differently in the future to promote same-sex marriage and rebound from this devastating defeat.²⁰²

Advocates in the LGBTQ community and their allies conducted a review of their efforts in an attempt to defeat Proposition 8.²⁰³ They worked with researchers to conduct focus groups and surveys of voters to assess what they had done wrong and how they might change their strategies and tactics.²⁰⁴ This review produced startling results.²⁰⁵ They learned that the way they had been going about promoting same-sex marriage was all wrong. They had made legalistic arguments, like same-sex couples were denied hospital visiting privileges and other benefits granted to heterosexual couples.²⁰⁶ These types of arguments, they learned, left many potential allies cold and led them to believe that the marriage-equality advocates were seeking something different than what heterosexual couples achieved through marriage.²⁰⁷ Voters told advocates that they thought the advocates were looking for special

198. FRANK, *supra* note 49, at 164.

199. *Id.*

200. *Id.* at 177.

201. *Id.* at 186–87.

202. *See* Ball, *supra* note 49.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

treatment for same-sex couples. For the advocates, nothing was further from the truth. Indeed, what the advocates wanted was simply *equal* treatment: i.e., marriage *equality*.²⁰⁸ They took this feedback to heart and began to shift their message in subtle yet powerful ways. They began to advocate for marriage equality, not same-sex marriage.²⁰⁹ They stressed that what the LGBTQ community wanted was equal recognition of their relationships and equal access to the institution of marriage on the same terms as heterosexual couples.²¹⁰ This subtle shift began to turn the tide.²¹¹

In addition to the shift in messaging, as with the desegregation litigation, legal advocates challenging Proposition 8 in the courts deployed sociology and psychology expert witnesses to undermine the key arguments of the ballot initiative's supporters.²¹²

In 2012, just four years after the devastating loss in California, advocates won ballot initiatives in Maine, Minnesota, Maryland and Washington State.²¹³ Two years later, they won a challenge to certain core aspects of DOMA in *United States v. Windsor*.²¹⁴ Finally, in 2015, they won the landmark *Obergefell v. Hodges* case,²¹⁵ which established that states could not deny members of the LGBTQ community access to marriage. Justice Kennedy, writing for the majority, sided with those who favored the marriage equality

208. FRANK, *supra* note 49, at 96, 162–63.

209. *See id.* at 167.

210. *See id.* at 7–8.

211. *See id.* at 188.

212. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 952 (N.D. Cal. 2010). In *Perry v. Schwarzenegger*, Letitia Anne Peplau, Distinguished Research Professor of Psychology Emerita at UCLA, testified that most individuals who marry benefit socially, physically, and psychologically as a result of being married. Transcript of Proceedings at 574, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (No. C 09-2292-VRW). She further testified that same-sex relationships are similar in quality and nature to heterosexual relationships and if allowed to marry, same-sex couples would derive the same benefits as heterosexual couples. *Id.* Michael Lamb, a Psychology Professor at the University of Cambridge, provided testimony regarding parenting, explaining that research has shown that effective parenting does not require opposite sex parents. *Id.* at 1013–14. *See generally* KENJI YOSHINO, SPEAK NOW: MARRIAGE EQUALITY ON TRIAL: THE STORY OF HOLLINGSWORTH V. PERRY (2015) (recounts Proposition 8 litigation).

213. FRANK, *supra* note 49, at 285, 287.

214. *United States v. Windsor*, 570 U.S. 744, 774 (2013).

215. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

arguments as opposed to the “special treatment” arguments that preceded the loss in the Proposition 8 fight. Justice Kennedy wrote:

[B]y virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the [s]tates have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.²¹⁶

The triumph of the marriage-equality campaign follows a tradition of creative lawyering for social change that dates back to the Civil War era and even to the framing of the United States Constitution. I have used three examples of lawyers who contributed to successful efforts to bring about social change. Are there common lessons that one can draw from these experiences? The next Part addresses this question.

III. A Taxonomy of Creative Social-Change Lawyering

This review of the role of lawyers in the campaigns to end slavery in the United States, defeat Jim Crow, and advance the cause of marriage equality for the LGBTQ community reveals some common themes of that work and the ways in which lawyers working for social change can adopt creative strategies for promoting that change.

216. *Id.* at 2601–02.

As the following discussion shows, some of these themes include that the work is often incremental and iterative; it involves what is sometimes referred to as “reframing”—looking at issues in new, and different ways, especially the arguments of one’s opponents; it often borrows from other disciplines; it seeks out opportunities for interest convergence among otherwise disparate groups; and it does not operate in a vacuum in that it is often conscious of corresponding events in society that might have a bearing on the ways in which legal strategies will be perceived and whether or not they will be supported at a particular point in time. This Part discusses each of these characteristics, in turn.

A. Incremental, Iterative Advocacy

Probably the main common feature of these three examples of creative lawyering is that each involved incremental and iterative steps. For the end of slavery, although the factions within Lincoln’s fragile coalition may have disagreed about what the North’s goals should be, the smaller steps taken to address the issue of escaped slaves finding themselves among Union troops helped lay the groundwork for what ultimately became the Emancipation Proclamation and, at the conclusion of the war, ratification of the Thirteenth Amendment during Reconstruction. Lincoln did not announce an end to slavery at the outset of the war. If he had done so, he might have faced the prospect of the border states that had both remained slave holding but also stayed in the Union deciding to secede or at least not supporting the war effort. Similarly, conservatives in the North might have aligned themselves behind the war effort for the purpose of preserving the Union but might not have embraced such an effort if they perceived it as primarily a campaign to end slavery. The incremental steps taken by Union generals like Frémont and, more effectively, the attorney and fortress commander, General Butler, helped lay the groundwork for the Emancipation Proclamation, through which Lincoln was able to satisfy different portions of his fragile coalition. This incremental, iterative strategy shows that doing nothing about slavery was unacceptable to the

abolitionists, but Frémont's strategy went too far for some. In the end, Butler's approach seemed to be just right, a balancing of interests that tied abolition to the war effort. It is possible that this type of approach, accomplished through experimentation and iteration, may have helped show Lincoln the way forward by revealing a strategy that could bind the different fractious portions of his ruling coalition.

Similarly, the LDF's iterative, incremental approach also helped to lay the groundwork for the campaign that ultimately succeeded in bringing about the victory in *Brown v. Board of Education* and the end to Jim Crow in education. These successes helped light a fire among the activists that helped them bring about changes in public accommodations, housing, and voting through legislative victories, the organizing for which had been prompted by the end of separate but equal. The LDF lawyers in *Sweatt* and other similar cases, took on smaller, individual institutions rather than those they eventually assailed in the collection of cases that led to *Brown*, which attacked the broader edifice of Jim Crow. Although these lawyers certainly challenged Jim Crow directly, cases like *Sweatt* afforded the judges an opportunity to slowly chip away at the broader system. By filing this sort of smaller, probing attack against an institution like a law school, an institution the judges would understand, they made it possible to show that a school system would have a hard time offering separate *and* equal institutions.

Incrementalism also helps advocates develop different types of arguments, field test them, explore how well they are received by a wider audience, and bring back the feedback from those efforts to further hone those arguments in broader contexts. In many ways, this iterative, incremental approach is akin to the concept known as "design thinking,"²¹⁷ which is sometimes seen as having four main components: inspiration, synthesis, ideation and experimentation, and

217. See TOM KELLEY & DAVID KELLEY, CREATIVE CONFIDENCE: UNLEASHING THE CREATIVE POTENTIAL WITHIN US ALL 24–25 (2013).

implementation.²¹⁸ The inspiration phase is investigatory. It involves communicating with those who are most affected by a problem or issue to work with them to explore potential solutions.²¹⁹ Once the inspiration phase is complete (although, in some ways, it is never really complete), the design thinker moves into the ideation and experimentation phase, where prototypes are developed and field tested to assess their effectiveness in terms of addressing the problem at hand.²²⁰ The results of this rapid prototyping help to create a feedback loop, and the original efforts and tactics are then altered in response to the data received through the successes and failures of those prototypes to create new prototypes and run new experiments.²²¹ After successful prototyping, a finished product or idea can go mainstream, although the experimentation, iteration, feedback, and modification are ongoing processes.²²² This design-thinking approach is similar to how Linda Morton describes legal creative problem solving.²²³ That process, for her, includes identification of the problem, understanding it, posing solutions, choosing solutions, implementing solutions, and engaging in a final analysis of the chosen solutions.²²⁴ Similarly, the ABA's 1992 report identifies several technical steps related to problem solving, including identification of the problem, the generation of solutions to the problem, developing and implementing a plan of action, and remaining open to new information and ideas.²²⁵

A design-thinking approach to creative problem solving would seem perfectly suited for social-change advocacy in the legal context.²²⁶ Lawyers can gather the perspectives of their clients to

218. See *id.* at 22–24; see also TIM BROWN, CHANGE BY DESIGN 16 (2009) (describing design thinking); Tim Brown, *Design Thinking*, HARV. BUS. REV., June 2008, at 88–91 (describing design thinking).

219. KELLEY & KELLEY, *supra* note 217, at 22.

220. *Id.*

221. *Id.* at 23–24.

222. See *id.* at 24.

223. Morton, *supra* note 44, at 376–77.

224. *Id.*

225. See NARROWING THE GAP, *supra* note 36, at 141–48.

226. See Tim Brown, *Why Social Innovators Need Design Thinking*, STAN. SOC. INNOVATION REV.

understand the problems they are trying to solve and begin to develop solutions to these problems. Additionally, they can prototype potential solutions based on that fact-finding process, can launch prototypes of the solutions into the world to see how they fare, bring feedback from those efforts to craft more robust solutions, and then take more dramatic steps based on those iterated prototypes and the lessons learned from the prototyping process and the feedback loop it generates.²²⁷

B. Interpretive Creativity

We also see in these examples that the creative lawyers seeking social change engaged in a degree of interpretative creativity, often reframing the legal issues in new ways or borrowing from their opponents' arguments and using those arguments against them. Menkel-Meadow calls this notion of reframing finding new "entry points"—a new way of looking at a problem from different perspectives.²²⁸ Of course, many lawyers spend much of their time interpreting statutes, regulations, contracts, and behavior in light of all three, but social-change lawyers are often in a more difficult position than traditional lawyers because their paths to interpretative success are narrower. They are trying to change the status quo and alter the legal infrastructure that governs behavior within that status quo. Common interpretations of the scope and contours of that infrastructure gain some interpretive force because of the widely

(Nov. 15, 2011), https://ssir.org/articles/entry/why_social_innovators_need_design_thinking [<https://perma.cc/TL6W-4DXH>]; see also Paul Brest et al., *Problem Solving, Human-Centered Design, and Strategic Processes*, STAN. CTR. ON PHILANTHROPY & CIV. SOC'Y, <http://pacscenter.stanford.edu/wp-content/uploads/2015/09/Download-the-full-article-here.pdf> [<https://perma.cc/K3KC-CA8W>] (last updated Oct. 19, 2015) (discussing the intersection of problem solving and design thinking).

227. See Margaret Hagan, *Design Thinking and Law: A Perfect Match*, L. PRAC. TODAY (Jan. 2014), http://www.americanbar.org/content/newsletter/publications/law_practice_today_home/lpt-archives/2014/january14/design-thinking-and-law.html [<https://perma.cc/55VK-LHUT>] (exploring the ways in which lawyers can incorporate design thinking into their practice); see also Tim Brown & Jocelyn Wyatt, *Design Thinking for Social Innovation*, STAN. SOC. INNOVATION REV., Winter 2010, at 32, 35.

228. Menkel-Meadow, *supra* note 41, at 123, 139.

shared and widely accepted understandings of their meaning. Of course, this forces the social-change lawyer to be more creative in her interpretive efforts and can leave her with little choice but to attempt to seize upon her opponents' arguments, embrace them, and bend them to support the social-change lawyer's position.²²⁹

This is often apparent in many efforts by lawyers to advance social change. They may have little support for their own positions, so they turn to the positions of their opponents to show the hypocrisy of them or the fact that they are based on weak legal force themselves.²³⁰ This is often an important asset for the social-change advocate fighting long odds. Malcolm Gladwell, in his work *David and Goliath: Underdogs, Misfits, and the Art of Battling Giants*, points out that our perception of power asymmetries are often wrong.²³¹ The very qualities that may appear to give strength to a dominant individual or entity are often a source of great weakness.²³² The Biblical Goliath was weighted down by his bulk and heavy armor.²³³ Turkish fortifications were easily overrun by Lawrence of Arabia's nimble Bedouin cavalry.²³⁴ For the social-change lawyer, when the arguments of her adversary, that might have enjoyed support from what might have been seen as common-sense arguments, are held up to rigorous analysis, they often collapse under their own weight.

In the decades leading up to the decision in *Obergefell*, advocates for the rights of the LGBTQ community won victories in the Supreme Court showing that a state constitutional amendment in Colorado stripping local communities of the ability to pass pro-

229. See generally Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and the Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006). Reva Siegel's research into the demise of the Equal Rights Amendment shows how opponents of the amendment were able to seize upon some of the arguments of the proponents of the amendment, take those arguments to what those opponents portrayed as their logical extremeness, and help defeat its passage. See *id.* at 1385–87.

230. See *id.* at 1364.

231. MALCOLM GLADWELL, *DAVID AND GOLIATH: UNDERDOGS, MISFITS, AND THE ART OF BATTLING GIANTS* 12–15 (2013).

232. *Id.* at 6.

233. *Id.* at 11.

234. See *id.* at 22.

LGQBTQ rights ordinances, and laws against sodomy, were based on little more than the moral preferences of legislators that could not withstand careful scrutiny.²³⁵ Similarly, in the state courts of New York, a legal definition of family that appeared based on little more than traditional notions, with no basis in law, failed to recognize the many ways in which families form and their members recognize themselves as such.²³⁶ The arguments supporting the opponents' position might have been, at one time, consistent with the common sensibilities of some portion of the population and might have, at one time, seemed inevitable and subject to little criticism. When analyzed for their sources and their logic, however, these arguments proved insufficient to support discriminatory treatment through the force of law.

At the same time, if the force of the common-sense support for the opponent's position is too strong to overcome a direct attack, the social-change lawyer often uses her opponents' own arguments against them. We saw this in Butler's controversial cooption of Southern arguments about property and secession to justify his refusal to enforce the Fugitive Slave Act. Similarly, although the LDF challenged segregation directly in *Sweatt*, they also tried another line of argument: that even accepting separate but equal as the law of the land, the separate law school for African Americans was not, in fact, equal by any measure.²³⁷ Thus, forcing their opponents to defend their own position, these positions became untenable on the facts.

Artist Pablo Picasso is sometimes quoted as having said that "good artists copy, great artists steal."²³⁸ Perhaps the best, most creative

235. See *Lawrence v. Texas*, 539 U.S. 558, 560 (2003) (finding Texas anti-sodomy statute advanced no legitimate state interest); *Romer v. Evans*, 517 U.S. 620, 620 (1996) (finding Colorado state law that prohibited local governments from passing LGBTQ protections was based on discriminatory animus and could not survive rational basis scrutiny).

236. *Braschi v. Stahl Assoc.*, 543 N.E.2d 49, 51–53 (N.Y. 1989) (rejecting narrow and formalistic definition of family in housing regulations in favor of a functional, realistic approach). For a discussion of the *Braschi* case, see CARLOS A. BALL, FROM THE CLOSET TO THE COURTROOM: FIVE LGBT RIGHTS LAWSUITS THAT HAVE CHANGED OUR NATION 51–53 (2010).

237. *Sweatt v. Painter*, 339 U.S. 629, 633–34 (1950).

238. WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS 73 (2009).

social-change lawyers also steal—they just steal from their opponents.

C. *Interdisciplinary Approaches*

Another common feature of the social-change efforts highlighted here is that the lawyers in at least two of the three examples, the LDF lawyers and the marriage-equality advocates, explicitly incorporated interdisciplinary approaches in their advocacy.²³⁹ Thurgood Marshall brought together sociologists, historians, political scientists, educators, and anthropologists while planning the anti-segregation strategy.²⁴⁰ The *Sweatt* trial, like those that would lead to the Supreme Court's decision in *Brown*, included expert testimony from another discipline. In fact, anthropologist Robert Redfield, chairman of the Department of Anthropology at the University of Chicago, embodied interdisciplinarity: he held a doctorate in anthropology, as well as a law degree.²⁴¹ Redfield testified about the lack of differences in the educational capacity of African Americans as compared to whites, as well as the dangers of segregation in education, particularly as the dangers related to the price that society pays for the distrust that segregation creates among the population.²⁴² In *Brown*, Thurgood Marshall and the legal team used the research and testimony of psychiatrist Frederic Wertham and sociologist Kenneth B. Clark to show the harmful effects of segregation on African-American children.²⁴³

239. See *supra* Part II. At the same time, arguments supporting the abolitionist cause did not come just from lawyers, as prominent journalists, businessmen, and religious officials were leaders in the Abolitionist Movement. See, e.g., RICHARD S. NEWMAN, THE TRANSFORMATION OF AMERICAN ABOLITIONISM: FIGHTING SLAVERY IN THE EARLY REPUBLIC 4–39 (2002) (describing leadership in the Pennsylvania Abolition Society in the early 19th century as including lawyers, businessmen, and preachers).

240. LISA ALDRED ET AL., THURGOOD MARSHALL 80 (1993); JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 209 (1998).

241. KLUGER, *supra* note 171, at 331.

242. *Id.* at 263.

243. Anders Walker, *Blackboard Jungle: Delinquency, Desegregation, and the Cultural Politics of Brown*, 110 COLUM. L. REV. 1911, 1921–22 (citation omitted) (describing the use of experts in the *Brown* litigation).

In the marriage equality litigation, lawyer's utilized expert witnesses in the trial courts to show the complete lack of evidence in support of the opponents' positions—that marriage could not be open to same-sex couples because children did not fare well when reared in families headed by parents of the same sex.²⁴⁴ In addition, in the wake of the failure to defeat Proposition 8, advocates enlisted the support of researchers in surveying and conducting focus groups to understand the failure of the campaign's messaging strategies.²⁴⁵

In many ways, the social-change lawyer's use of interdisciplinary strategies builds on the iterative and interpretative approaches described above in that it helps to reframe arguments and tests other theories against perceived wisdom and common understandings of the law and society that may need to change to bring about wider social change. These interdisciplinary approaches are not new, as Louis Brandeis, then a practicing lawyer in the early 20th century, used social science to support his legal claims.²⁴⁶ By incorporating disciplines other than law, social-change advocates widen their own lenses when they view a problem and begin to see legal issues in a different light, which then helps them frame their arguments and present new theories and new ways of looking at the world to judges, juries, policymakers, legislators, and the general public. In turn, these theories, informed by interdisciplinary views, might find an audience more receptive to these arguments because they help that audience see the law in different ways, undermining traditional understandings and interpretations of the law and social relations. Those new understandings and interpretations can lead to the social change that lawyers and those whom she serves may seek to bring about.

244. FRANK, *supra* note 49, at 113–14 (discussing dueling expert witnesses regarding same-sex-couple parenting).

245. Ball, *supra* note 49 (describing effort to assess campaign's failure to prevent passage of Proposition 8 in California in 2008).

246. Philippa Strum, *Brandeis and the Living Constitution*, in *BRANDEIS AND AMERICA* 118, 120 (Nelson L. Dawson ed., 1989).

D. Interest Convergence

President Lincoln and the lawyers for the Civil Rights Movement knew not only that they could build a coalition to achieve their social-change goals but that they had to do so, and they both crafted these coalitions around the interests that different members and groups shared.²⁴⁷ This convergence of interests helped build and sustain critical coalitions necessary to support and advance the social-change movement that the leaders and their lawyers wanted to bring about. Derrick Bell first identified the notion that interest convergence could justify changes to our collective understanding of constitutional law.²⁴⁸ Bell first articulated his Interest-Convergence Theory in response to Herbert Wechsler's argument critiquing the Court's decision in *Brown*.²⁴⁹ Wechsler argued that *Brown* was not supportable by what he called "neutral principles": when a court "reach[es] judgment on analysis and reasons quite transcending the immediate result that is achieved."²⁵⁰ Wechsler argued that promoting the freedom of association of blacks could not undermine the freedom of association of whites.²⁵¹

Countering Wechsler, Bell asserted that the shared interests between the black community and a large proportion of the white community justified the decision in *Brown*.²⁵² For Bell, the interests of blacks (and others) in seeking an end to segregation aligned with

247. See *supra* Part II.

248. See generally Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

249. *Id.* at 518.

250. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

251. *Id.* at 34. As Wechsler argued:

[I]f the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimension, not unlike many others that involve the highest freedoms—conflicts that Professor Sutherland has recently described. Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?

Id. (footnote omitted).

252. Bell, Jr., *supra* note 248, at 523.

national white elites who were concerned with the United States's standing in the world, particularly as it sought to maintain its influence in post-colonial nations where the Soviet Union was using the Jim Crow system as a wedge between the United States and potential allies.²⁵³ Mary Dudziak's archival research lends ample support for Bell's explanation of the forces that aligned to bring about the unanimous decision in *Brown*.²⁵⁴

Bell used the Interest-Convergence Theory to explain and justify the Court's decision in *Brown*.²⁵⁵ Some have taken this theory a step further, as a way to not just understand but also to promote social change generally; when one wants to advance social change, one should look for an alignment of interests among different factions and communities and seek out ways to build coalitions around the aligned interests.²⁵⁶ However, the theory itself is not above critique, and some argue that it is flawed in that it appears to discount the agency of advocates in spurring social change, suggesting that one needs to wait for interests to converge to bring about social

253. *Id.* at 524–25.

254. See Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 118–19 (1988). Dudziak's review concluded the following:

The Truman Administration recognized and responded to this threat, marshalling evidence in its amicus briefs on the foreign policy implications of the desegregation cases. The Eisenhower Administration took advantage of the denouement, prominently using *Brown* in its propaganda efforts. Although American racism would continue to pose foreign policy difficulties from time to time, and the Soviet Union would continue to use it as a propaganda theme, *Brown* helped to undercut the more powerful anti-American arguments. *Brown* laundered the principles of democracy in the eyes of the world. The decision announced that racial segregation and American constitutional rights were inconsistent with each other. After *Brown*, the State Department could blame racism on the Klan and the crazies. They could argue that the American Constitution provided for effective social change. And, most importantly, they could point to the *Brown* decision as evidence that racism was at odds with the principles of American democracy. This foreign policy angle, this Cold War imperative, was one of the critical factors driving the federal government's postwar civil rights efforts.

Id. (footnotes omitted).

255. See generally Bell, Jr., *supra* note 248.

256. For a collection of scholarship applying Interest-Convergence Theory to other contexts, see Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 154–55 nn.25–28 (2011). For an example of scholarship considering Interest-Convergence Theory as a way to spur social change, see generally David A. Singleton, *Interest Convergence and the Education of African-American Boys in Cincinnati: Motivating Suburban Whites to Embrace Interdistrict Education Reform*, 34 N. KY. L. REV. 663 (2007).

change.²⁵⁷ But lawyers who support efforts to bring about social change can turn to the Interest-Convergence Theory as an organizing principle and guide to work with clients and partners to be the agents of that change.

Although Bell identified the convergence of interests that were at the center of the Civil Rights Movement's advocacy, this idea appears in the two other examples described above.²⁵⁸ First, Lincoln tied ending slavery to preserving the union. To hold his coalition together, Lincoln knew that he needed to address the slavery question and seek to bring about its end. However, Lincoln could only go so far with his Emancipation Proclamation, however, and slavery was not abolished in the border states that both maintained slaveholding yet remained loyal to the Union. For those who saw victory on the battlefield as essential to preserving the Union, freeing the slaves in Confederate states and territories occupied by Union forces increased the number of eligible males available to serve as troops in the Union army. The North's martial strategy, particularly in the latter years of the conflict, was to field much larger armies, attack Southern forces at as many points as possible to test their capacity, and strike at critical transportation and supply hubs.²⁵⁹ Each aspect of this strategy needed as many troops as possible, and Lincoln knew that he could increase recruitment by making former slaves available to join the

257. Driver, *supra* note 256, at 175. Justin Driver argues that Interest-Convergence Theory has its flaws because it discounts the role of the agency of the actors who seek to promote social change:

The interest-convergence thesis accords an almost complete absence of agency to two groups of actors who exercise a great deal of control regarding the advancement of black interests: the black citizenry and the white judiciary. By implicitly encouraging black citizens to await the magical moment when their interests converge with the white majority, the interest-convergence thesis sharply discounts the capacity of black people to participate in their own uplift. Conversely, by reducing white judges to mere functionaries who do the bidding of the white establishment, the interest-convergence thesis simultaneously diminishes the culpability of white judges who exercise their authority to maintain the existing racial hierarchy and denies the credit owed to white members of the judiciary who challenge that hierarchy.

Id. (footnote omitted). For a response to Driver, see Kevin Terry, *Community Dreams and Nightmares: Arizona, Ethnic Studies, and the Continued Relevance of Derrick Bell's Interest-Convergence Thesis*, 88 N.Y.U. L. REV. 1483, 1494–95 (2013).

258. See *supra* Part II.

259. MCPHERSON, *supra* note 135, at 721–22.

army to carry out these strategic goals. The Emancipation Proclamation ultimately satisfied his coalition's goals by tying the abolition of slavery to preserving the Union.

For the marriage-equality advocates within the LGBTQ movement, there was not always support for the effort to promote same-sex marriage rights. As Nathaniel Frank recounts in his work *Awakening: How Gays and Lesbians Brought Marriage Equality to America*,²⁶⁰ members of the more radical elements of the LGBTQ movement did not support the effort to recognize same-sex marriage initially, but different strains of the movement would ultimately coalesced around the idea of marriage equality as a way to accomplish broader protections for the community, gain respect, counter discrimination, and attain cultural acceptance of LGBTQ members and relationships.²⁶¹ This sort of interest convergence also occurred outside the movement itself. After President Obama signaled his support for marriage equality, the NAACP announced its own support for the effort, which represented a shift for the African-American community after the results of the Proposition 8 vote in California showed communities of color narrowly supporting the ban.²⁶² The NAACP identified a robust interpretation of the Equal Protection Clause that was consistent with what marriage-equality advocates sought given their own interests and views on the applicable constitutional protections.²⁶³

In each of these situations, Bell's Interest-Convergence approach seems to represent an aspect of the lawyers' strategies: keep fragile

260. See FRANK, *supra* note 49.

261. See *id.* at 59–76 (describing evolution of LGBTQ rights activism around AIDS, reform of anti-sodomy laws, and adoption that brought different strands of that advocacy together in the form of support for marriage equality).

262. Peter Wallsten & Scott Wilson, *Obama Endorses Gay Marriage, Says Same-Sex Couples Should Have Right to Wed*, WASH. POST (May 9, 2012), https://www.washingtonpost.com/politics/2012/05/09/gIQAivsWDU_story.html?noredirect=on&utm_term=.1be0969bcbf6 [https://perma.cc/J8EG-PSHA].

263. Peter Wallsten, *NAACP Endorses Same-Sex Marriage*, WASH. POST (May 19, 2012), https://www.washingtonpost.com/blogs/election-2012/post/naacp-endorses-same-sex-marriage/2012/05/19/gIQA5SFSbU_blog.html?utm_term=.14d28dca5985 [https://perma.cc/X9PY-B3SP].

coalitions together and bring new groups into the coalition through the thoughtful curation of shared interests.

E. Interdependence

Similarly, the legal advocates in each of these situations did not advocate in a vacuum and were always conscious of events and trends in culture and society generally. Lincoln waited for a victory on the battlefield before he released the Emancipation Proclamation. A deeply religious man, Lincoln is sometimes described as waiting for a victory because he sought a spiritual sign that his cause was just.²⁶⁴ He and his cabinet advisors were also keenly aware that releasing the Proclamation when the North was losing the war would be seen as an act of desperation.²⁶⁵ Lincoln's willingness to create a new legal approach toward slaves that had escaped from lands controlled by Confederate forces was in some ways beholden to the larger forces at play as he considered the Proclamation's release. Moreover, Lincoln struck a delicate balance in the manner and timing of the issuance of the proclamation, particularly as it related to both enhancing the northern forces' capacity to recruit more able-bodied soldiers as well as preserving the slaveholding status of loyal border states.

With the lawyers supporting the Civil Rights Movement, they were keenly aware of the predicament in which national leaders found themselves on the geopolitical stage. Lawyers exploited the fact that the standing of the United States with developing nations while the country was engaged in competition with Soviet Bloc countries for global influence.²⁶⁶ Throughout the course of the Civil Rights Movement's struggle in the courts, and while the movement went from the courts to the streets and the halls of Congress in the 1960s, the national security and foreign policy components of the

264. WITT, *supra* note 139, at 214–15.

265. *Id.* at 214.

266. *See, e.g.*, Brief for the United States as Amicus Curiae at 7, *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) (No. 8), 1952 WL 82045 (arguing that Jim Crow frustrated and undermined foreign diplomacy).

civil rights strategy played a role in the movement's advocacy to bring about legislative changes to private accommodations, housing, and voting rights.²⁶⁷ This aspect of the strategy was not lost on national leaders. In a conversation with Dr. Martin Luther King, Jr., President Lyndon B. Johnson praised his legislative efforts in promoting civil rights, referencing the Civil Rights Act of 1964, as follows: "I think the greatest achievement in foreign policy [of the Johnson administration] . . . was the passage of the 1964 Civil Rights Act."²⁶⁸

Progressive advocates have also shifted their focus away from the federal courts in many instances as a reaction to the ways in which the federal judiciary has become more conservative because the Reagan Administration began to use the judicial appointment power to select more overtly partisan judges.²⁶⁹ This practice continued through the presidency of George W. Bush and has proceeded apace during the Trump Administration.²⁷⁰ As a part of this campaign, at least originally, officials in the Reagan Administration sought to curtail the type of social-change litigation, like *Brown*, that became known as public law litigation.²⁷¹ This effort was designed to protect not only federal actors from judicial oversight but also state- and local-government allies of the Administration from judicial intervention in their practices.²⁷² In what Derrick Bell might have called an "interest convergence," probusiness forces also advocated

267. *Conversation with MARTIN LUTHER KING and OFFICE SECRETARY, January 15, 1965*, MILLER CTR. PUB. AFFS., <http://millercenter.org/presidentialrecordings/lbj-wh6501.04-6736> [<https://perma.cc/6BAL-LH7C>].

268. *Id.*

269. Charlie Savage, *Trump Is Rapidly Reshaping the Judiciary. Here's How.*, NY TIMES (Nov. 11, 2017), <https://www.nytimes.com/2017/11/11/us/politics/trump-judiciary-appeals-courts-conservatives.html> [<https://perma.cc/TC5Y-4MRS>].

270. *Id.*

271. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

272. Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1552 (2014) (describing how the first issue the Reagan Administration attempted to address in terms of litigation reform was limiting access to courts to pursue federal rights, not torts that business interests might seek to limit).

for relief from litigation.²⁷³ First, members of the judiciary, for political reasons or out of a desire to control their own dockets, sought mechanisms for reining in many different types of litigation, including public law and social-change litigation.²⁷⁴ Indeed, in decisions such as *Bell Atlantic v. Twombly*²⁷⁵ and *Ashcroft v. Iqbal*,²⁷⁶ the Supreme Court altered the rules of pleading to require litigants to set forth their claims and defenses with such specificity that they might render their claims plausible in the eyes of the judge.²⁷⁷ Second, courts have made the dispositive remedy of summary judgment more readily available by interpreting Rule 56 and other rules of the Federal Rules of Civil Procedure more favorably for moving parties so that they might avoid a trial on the merits.²⁷⁸ Third, courts have interpreted fee-shifting statutes more narrowly than in the past, making contingency-fee cases less attractive to the private bar.²⁷⁹ Fourth, courts have taken a more expansive view of

273. Bell, Jr., *supra* note 248, at 523. In recent years, according to a compelling empirical study, litigants looking for a judiciary more favorable to business interests found it, at least in the Supreme Court. See Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1471–72 (2013) (finding more pro-business Justices in the Roberts Court than in previous eras).

274. See Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1859–67 (2014) (describing growth of civil caseloads and judicial response thereto); see also Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1114 (2006) (describing “hostility” to “litigation” as a driving force behind procedural jurisprudence of the Rehnquist Court). Siegel’s analysis of the decisions of the Rehnquist Court led him to conclude as follows: “The common thread throughout is doubt in the efficacy of a lawsuit as a mechanism for resolving the problem at hand, coupled perhaps with a disproportionate animosity towards those who believe otherwise.” *Id.* at 1115; see also Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 823–40 (2011) (raising prospect that expanded access to the courts can provoke a judicial backlash out of concerns over increased court dockets).

275. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

276. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

277. See, e.g., Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 17–23 (2010) (describing the *Twombly* and *Iqbal* decisions and their impact on pleading requirements in civil cases in the federal courts).

278. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1016–21 (2003) (noting “shifting judicial attitude” in favor of more readily granting summary judgment).

279. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 610 (2001); Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1133 (2007) (describing *Buckhannon* as part of an “ominous shift of power away from private enforcement of

government immunity for both state and local officials.²⁸⁰ In addition, courts have raised the standard for certifying expert witnesses,²⁸¹ made class actions more difficult to commence and sustain,²⁸² recognized the enforceability of arbitration clauses,²⁸³ and refused to engage in oversight of institutions that are the subject of reform litigation.²⁸⁴ Owen Fiss has described these and other trends away from public law litigation as a “counterrevolution” in the courts.²⁸⁵ As a result, in many instances progressive lawyers have had to explore tactics for promoting progressive social-change objectives other than through the filing of high-profile impact litigation in the federal courts.

In many ways, the fact that the federal courts have become more hostile to public-law litigation in general and, by extension, social-change litigation in particular has led to the type of pluralistic approaches that many social-change lawyers are adopting. These lawyers seek out new avenues for redress and advocacy apart from looking solely to the federal courts as the venue for and the target of advocacy.²⁸⁶ Although litigation is a common tactic used by progressive lawyers, many have turned to state courts as the forum in

rights toward government power both to resist civil rights mandates and to control the enforcement of these rights”).

280. Erwin Chemerinsky, *Closing the Courthouse Doors*, 90 DENV. U. L. REV. 317, 322–26 (2012) (describing the trend toward recognizing government immunity in different settings).

281. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–93 (1993) (setting standard for recognition of expert witness); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 554–56 (2010) (describing the impact of *Daubert* on civil rights litigation).

282. For a description of these trends, see Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Conception, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011).

283. *Id.*

284. See, e.g., Catherine Y. Kim, *Changed Circumstances: The Federal Rules of Civil Procedure and the Future of Institutional Reform Litigation After Horne v. Flores*, 46 U.C. DAVIS L. REV. 1435, 1466–68 (2013) (describing judicial endorsement of institutional defendants’ efforts to terminate consent decrees in public law litigation); Jason Parkin, *Aging Injunctions and the Legacy of Institutional Reform Litigation*, 70 VAND. L. REV. 167, 187 (2017) (noting that institutional reform litigation “has lost much of the prominence and momentum it had during its initial phases”).

285. Owen M. Fiss, *The Supreme Court 1978 Term: Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 5 (1979); see also Siegel, *supra* note 274, at 1114 (describing the Rehnquist Court’s “litigation hostility” as a “powerful force shaping the Court’s basal understanding of its institutional project”).

286. See *supra* Part I.C.

which to litigate claims based on state constitutions and state law.²⁸⁷ But litigation alone is not the only tactic used by lawyers working for social change. The lawyers also engaged in legislative advocacy,²⁸⁸ policy change,²⁸⁹ community development efforts through the provision of transactional legal services,²⁹⁰ and supporting grassroots organizing.²⁹¹

Because the *Brown* litigation preceded this conservative backlash in the courts, and some would argue it was the reason for backlash,²⁹² we must turn to the tactics of the marriage equality movement to assess whether or not turning away from federal courts is a part of that pluralistic, tactical approach embedded in a *realpolitik* that recognizes these wider trends in society in general and their ramifications on the federal judiciary. As we saw with Lincoln in the Battle of Antietam and civil rights advocates' recognition of the role that foreign policy interests could play in applying pressure on the federal government to support their cause, marriage-equality advocates waited until the point where the wider aims could be served by litigating in federal court despite the obstacles described above. These advocates chose to litigate in state courts under state constitutional provisions until the opportunity presented itself to bring the broader challenge to prohibitions on same-sex marriage under the United States Constitution. At the same time, the landmark

287. See, e.g., Heather K. Gerken, *A New Progressive Federalism*, 24 DEMOCRACY J. 37 (2012), <https://democracyjournal.org/magazine/24/a-new-progressive-federalism/> [https://perma.cc/AZP5-FUF2] (describing role of state actors and embrace of state fora for the pursuit of progressive policy goals).

288. Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 991 (describing value and role of legislative advocacy in social-change lawyering).

289. See, e.g., Bill Ong Hing, *Legal Services Support Centers and Rebellious Advocacy: A Case Study of the Immigrant Legal Resource Center*, 28 WASH. U. J.L. & POL'Y 265, 267–68 (2008) (describing, among other things, policy work of social-change organization).

290. See Carmen Huertas-Noble, *Promoting Worker-Owned Cooperatives as a CED Empowerment Strategy: A Case Study of Colors and Lawyering in Support of Participatory Decision-Making and Meaningful Social Change*, 17 CLINICAL L. REV. 255, 255–56 (2010) (offering case study of transactional, progressive lawyering).

291. Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 460 (2001) (providing overview of progressive lawyering and community organizing).

292. SCHEINGOLD, *supra* note 55, at xviii–xix.

cases of the LGBTQ rights advocacy—*Lawrence v. Texas*,²⁹³ *United States v. Windsor*,²⁹⁴ and *Obergefell v. Hodges*²⁹⁵—were all filed in federal court and made their way to the Supreme Court of the United States. For each of these cases, a federal constitutional issue was at the heart of the litigation, and even if the case had begun in state court, the Supreme Court would have been the ultimate arbiter of the claims. The litigants might have had a choice of where they might file the case, but there was no doubt about where the cases would ultimately end up. At the same time, with the painstaking, incremental work of marriage-equality advocacy, that work, seeking out strategic victories where they could find them to create a critical mass of victories at the state level, was, for the most part, carried out in state courts. From Hawaii to Massachusetts and Vermont, the marriage-equality advocates, fearing resistance at the Supreme Court and the fact that the federal judiciary might not be ready to rule in their favor, filed lawsuits based mostly on state constitutional grounds.²⁹⁶ Thus, these advocates were not insensitive to the trends in the courts and wider society and crafted strategies that were mindful of those trends when they decided the legal steps to advance the cause of marriage equality.²⁹⁷

The legal advocacy directed at social change described here seems to indicate that these highlighted efforts shared several common themes. These efforts were often incremental in nature. They required creativity in terms of the ways in which the advocates viewed the law. They often involved interdisciplinary approaches. The advocates sought out opportunities to build coalitions through finding common ground—referred to here as interest convergence—with likely and unlikely partners. And they viewed their work in the context of what was happening in the world outside of their

293. *Lawrence v. Texas*, 539 U.S. 558 (2003).

294. *United States v. Windsor*, 570 U.S. 744 (2013).

295. *Obergefell v. Hodges*, 135 S. Ct 2584 (2015).

296. John F. Kowal, *The Improbable Victory of Marriage Equality*, Brennan Center for Justice (Sept. 29, 2015), <https://www.brennancenter.org/analysis/improbable-victory-marriage-equality> [https://perma.cc/4K37-FA7Z].

297. See FRANK, *supra* note 49, at 70 (describing LGBTQ rights advocacy in state courts).

advocacy, assessing their work in light of the broader social context and making tactical decisions based on that context. The previous Part identified the challenges that lawyers working for social change face and the extent to which those challenges require creativity. The next and concluding Part attempts to assess the extent to which these components of the three efforts to bring about social change highlighted above might offer ways for social-change lawyers to overcome these challenges through creativity.

IV. Creativity and the Social-Change Lawyer

Part II set forth some of the challenges that lawyers must face when they try to bring about social change. We hope that these lawyers seek to make the lives of their clients—however they identify their clients—better through efforts to create lasting social change that is meaningful to those clients. Social-change work is challenging, however, precisely because it involves change: change to power relations, change to the status quo, and change in the policies that impact clients. Those challenges include that, first, they must alter the existing laws and policies—they cannot simply work within existing legal frameworks using tried-and-true, formulaic, and time-tested solutions to straightforward problems.

Second, they must involve their clients and the communities they serve in the critical strategic decisions that the lawyers make as they chart a course for the advocacy out of fear that the legal strategy and the process by which it is developed may further marginalize the clients. There is always a risk that lawyer-centric strategies may weaken and distract from community efforts to achieve self-determination and a more democratic society. Relying on elites like members of the legal profession to engage in social engineering that is not grounded in the lives and lived experiences of the clients that those lawyers ostensibly serve might actually perpetuate misunderstanding and marginalization. Moreover it would offer those communities victories that they have not sought and changes that are not necessarily beneficial to them, further solidifying their outsider status. Lawyers for social change must also strive to avoid a backlash

against their clients and the communities they represent, ensuring the ultimate goals of the representation are not undermined by short-term victories. Third, they must navigate between clients' demands and donors' preferences and desires, finding ways to fit their work within the constraints of existing funding sources or locate new financial support for work not supported by existing funding streams. Fourth, social-change lawyers must balance the need to meet ongoing and direct needs of individual clients against the long-term law-reform efforts—those that build the political power that is likely to bring about a reordering of social relations that are more just. Fifth—and related to the fourth challenge—social-change lawyers must pursue complex goals and must do so on behalf of clients that are not always easily identified. Sixth, the social-change lawyer might have to choose among a wider array of tactics than the traditional lawyer simply because she may be foreclosed from using tactics commonly used in most lawyering work. This limitation on tactics means that the lawyer must look for other means of achieving client goals.

The main point of this Article is that these challenges that the lawyer faces when trying to serve her clients in advancing social change create complexities for the lawyer that go beyond those that the traditional lawyer faces when serving her client. These complexities require creativity to address them and to serve the client with zeal to achieve the social change that will benefit that client. To what extent do the common features of the examples of successful social-change lawyering that I have provided here help chart a course for the social-change lawyer? Do the common characteristics of these examples of social-change lawyering offer techniques and tactics for bringing creativity to this work?

Although iterative, incremental approaches help advocates hone better ideas, they also advance the cause of social change in a more just and democratic way by incorporating clients in the problem-solving effort. Incremental approaches can help to satisfy them, at least partially, on the way toward bringing about the larger strategic measures that might ultimately lead to the broader social change that the lawyer seeks. Of course, some clients might express frustration

for the conservative nature of an incremental approach, but incrementalism might turn out to serve the long-term goals of the client and the client's community better. Moreover, incremental, iterative approaches should include clients in the inspiration and experimentation phases by consulting with them as the lawyers and clients together determine the proper course of action. The lawyer should engage those clients in developing the experimental arguments that the lawyer may use, helping to "crowdsource" the ideas that the lawyer will promote—likely leading to better ideas—but also investing the clients in the process itself, giving them confidence that the lawyer is taking the client's problem seriously.²⁹⁸ In addition, the lawyer can balance the need for broader change with addressing the client's immediate needs through incremental measures that are designed to test ideas that can build toward more wide-ranging impacts in a way that helps alleviate the direct and immediate legal needs of the client. In this way, the lawyer can use incrementalism as a way to thread the needle between broader social change and the urgent needs of the client while she is waiting for that broader change to transpire.

The "test case" model is a perfect example of this. A lawyer has a client with facts that serve to exemplify the broader problem other clients and communities face, but the lawyer files a narrow case on that client's behalf in the hope of testing out her arguments on the courts, hopefully finding ones that will address the client's immediate needs while also garnering feedback about what arguments may resonate with the courts should a larger, more wide-ranging action follow.²⁹⁹

Incrementalism might also serve as an effective antidote to potential backlash—the reversal of victories or an erosion of

298. On the value of crowdsourcing, see generally, JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2005). As Tom Tyler's research shows, engagement with a legal process helps people feel more connected to it and more trusting of the outcomes that come as a result. Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 *INT'L J. PSYCHOL.* 117, 121 (2000).

299. Matthew Diller, *Poverty Lawyering in the Golden Age*, 93 *MICH. L. REV.* 1401, 1406 (1995) (describing and evaluating the test-case model of progressive lawyering).

rights—which might come as opponents are energized by their own losses to harness their own collective energy and will take action to counteract the strides made by the forces of social change. Taking small steps allows the community to begin to see what social change might look like, experience it, realize that the change is itself not all that different from the status quo, and come to accept that change a small amount at a time. As more people begin to accept the change—even if at a slow pace—it gives opponents a smaller base of support when they begin to mount their challenges to the change.

Another aspect of the creative social-change lawyering described in Part II is that each of the lawyers engaged in an exercise so critical to lawyering generally and social-change lawyering in particular: they used their interpretive powers to reframe issues, often seizing on the weaknesses of their opponents' positions and exploiting them. For the social-change lawyer, her primary role in the context of efforts to bring about change is to serve as the translator of legal concepts in ways that can support the social change that she and her clients seek. What makes this aspect of social-change lawyering so creative is that the lawyer often must fit together received wisdom and the controlling legal narratives of dominant interpretations of the law that help to maintain and preserve the status quo.³⁰⁰ Dominant interpretations often leave little room for outsider perspectives on the law to convince decision makers of the interpretation that the social-change lawyer seeks. This is precisely why social-change lawyers often must attempt a reassessment of the legal, sociological, ethical, moral, and factual bases and underpinnings of their opponents' arguments. When faced with little room to maneuver and few options to make the affirmative case on their clients' behalf, the creative lawyer can seek to encourage a reassessment of the support of the opponents' position. And to carry out this reassessment, the lawyer

300. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2438 (1989) (citation omitted).

deploys the tools of creativity described earlier, particularly reframing.³⁰¹

But does this type of reframing and reimagining help to overcome some of the challenges that the social-change lawyer must overcome in pursuing change? One of the main uses of this type of reframing is that it can often reaffirm the dignity of the community on whose behalf the lawyer is advocating. In the marriage-equality litigation, reframing the issues helped to promote the interests of the LGBTQ community by undermining the arguments of the marriage-equality opponents.³⁰² In so doing, advocates destroyed the factual justifications for opposing marriage equality and helped fight the stigma that those justifications created. When marriage-equality opponents said that heterosexual marriage needed the endorsement of the state to ensure procreation, marriage-equality advocates argued that there were plenty of heterosexual couples who could not procreate—should the state not recognize their marriages then?³⁰³ When opponents argued that children needed heterosexual couples to raise them, marriage-equality advocates presented overwhelming support for the proposition that children raised in same-sex households fared the same as those in households headed by heterosexual couples.³⁰⁴ Instead of further marginalizing and oppressing their client communities, the reframing of the issues helped reaffirm the dignity of their LGBTQ clients and their families. Through creative reframing, the lawyers were able to overcome

301. Reframing should not be confused with “framing,” which in social science literature describes a process by which an individual or community may see the world to make sense of it. See ERVING GOFFMAN, *FRAME ANALYSIS* 21 (1974). For one example of the role of political framing itself in progressive lawyering, see Amy Kapczynski, *Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 *YALE L. J.* 804, 804 (2008).

302. Andrea Anastasi, *Reframing the Fight for LGBT Equality as a First Amendment Issue*, *WHYY* (May 5, 2015), <https://whyy.org/articles/reframing-the-fight-for-lgbt-equality-as-a-first-amendment-issue> [<https://perma.cc/MF9J-TCZF>].

303. FRANK, *supra* note 49, at 56–57.

304. *What does the Scholarly Research say About the Well-Being of Children with Gay or Lesbian Parents?*, *WHAT WE KNOW* (Dec. 2017) <https://whatwewknow.inequality.cornell.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-the-wellbeing-of-children-with-gay-or-lesbian-parents> [<https://perma.cc/C9EE-TG8E>].

obstacles to the social change they sought while also avoiding some of the deeper pitfalls of social-change lawyering.

Admittedly, this is not always the case. Indeed, the reframing carried out by Benjamin Butler when he called escaped slaves contraband did not sit well with abolitionists who thought Butler was accepting the South's view of slaves as property too readily, and this reframing undermined the efforts to recognize the humanity and dignity of the slaves themselves—the very individuals Butler was trying to protect and save.³⁰⁵ There is thus sometimes a risk that accepting the opponents' position in an effort to undermine it can have the effect of further marginalizing and demeaning the very clients that the lawyer seeks to serve. I do not know if anyone ever asked the escaped slaves who presented themselves on Fort Monroe in the early days of the war whether or not they approved of Butler's tactics. My guess is they preferred freedom, but that is not to say that every interpretive act carried out by the social-change lawyer will always advance the client's interests while also reaffirming the client's basic dignity and humanity.³⁰⁶ Thus, although reframing can offer social-change lawyers an opportunity to advance their legal position, the process of identifying which arguments to make, how and when to make them, and to what ends are issues that should always be addressed in collaboration with the client and the community that the lawyer serves. That brings us back to the design-thinking, or incremental, approach described above. To the extent that the interpretive strategies deployed by the lawyer are carried out in collaboration with the client, it is likely to yield better results that are reaffirming of the client and effective in the course of the representation.

Similarly, by expanding the tools that the lawyer uses to carry out these interpretive functions, the lawyer can create more creative strategies by developing an appreciation for the ways in which the

305. *Supra* Lawyers and the Abolition of Slavery in the United States.

306. See White, *supra* note 53, at 28–29 (discussing ways in which a lawyer's interpretation of a client's story can undermine the dignity of the client).

dominant legal interpretation of particular social relations that the lawyer is challenging cannot hold up when assessed under the scrutiny of other disciplines. By leaving the realm of law altogether and seeking out support for one's position from other disciplines, the social-change lawyer is able to overcome the opponents' dominant positions and undermine them by looking at the problem in different ways from different perspectives.³⁰⁷ These different perspectives help to reveal the weaknesses, inconsistencies, and baselessness of the assumptions that often underpin dominant narratives and interpretations of the law and social relations. By incorporating insights from different disciplines in creative ways, the social-change lawyer identifies flaws in the dominant interpretation of the law and the extent to which those flaws often find a basis in unsupportable, stereotypical, and discriminatory animus. By bringing in perspectives from other disciplines, the lawyer can reveal the narrowness of the thinking that supports the opponents' positions and use those perspectives to advance a richer understanding of the human experience and further the social-change goals that she seeks.³⁰⁸

One way to further those goals in creative ways is to help the clients and the communities that the social-change lawyers serve build power. A critical way in which she helps those communities build power is through creative-coalition building. Central to creative-coalition building is the notion that coalitions often form around shared interests—together with shared ways of viewing the world—which is sometimes referred to in the social-science literature as “frame alignment.”³⁰⁹ The ability to identify those shared

307. See Damon Centola, Robb Willer & Michael Macy, *The Emperor's Dilemma: A Computational Model of Self-Enforcing Norms*, 4 AM. J. SOC. 1009, 1010 (2005) (describing power of different perspectives to help diminish the spread of false information).

308. In his study of the effective strategies of farmworker organizers in California in the latter half of the 20th century, Marshall Ganz showed that this type of openness to diverse views can help to improve organizational effectiveness because it creates networks of information and learning that lead to the collection of more salient information, which in turn leads to better, more informed, and more effective tactics and strategies. MARSHALL GANZ, *WHY DAVID SOMETIMES WINS: LEADERSHIP, ORGANIZATION, AND STRATEGY IN THE CALIFORNIA FARM WORKER MOVEMENT 19–20* (2009).

309. David A. Snow, et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464, 464 (1986).

interests—to find opportunities where interests converge and align—requires creativity, an ability to sense opportunities for collaboration, and crafting a campaign’s message in a way that it will attract supporters from as wide of a section of the populace as possible. This message crafting requires creativity and a sense of the needs and interests of different sectors of society. That necessitates a willingness to seek out, stay attuned to, and listen for opportunities where one’s clients’ interests will align with that of other individuals and groups who may serve as potential allies and supporters. In many ways, the pursuit of potential allies requires the tools of creativity as well—specifically, an ability to reframe ideas and see things from different perspectives. In addition, the social-change lawyer can begin to identify potential allies and test out new theories that may bring those allies into the supportive fold by testing out theories through incremental steps. An example of this was the submission of an amicus brief filed on behalf of the United States military’s service academies³¹⁰ in support of the University of Michigan in defense of the use of racial diversity in admissions decisions in *Grutter v. Bollinger*³¹¹ and *Gratz v. Bollinger*.³¹² In these ways, some of the components of the social-change lawyering described here can work together to identify and tap into areas where interests converge.

Finally, when the social-change lawyer takes into account the ways in which trends in the world beyond the law can affect arguments that one makes and the success she may have, she is recognizing that social change is always embedded in a context, and that context often determines the strategies that one can and should use to advance that social change. When doing so, the lawyer is also sensitive to the

310. Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516) (“Amici are former high-ranking officers and civilian leaders of the Army, Navy, Air Force, and Marine Corps, including former military-academy superintendents, Secretaries of Defense, and present and former members of the U.S. Senate Based on decades of experience, amici have concluded that a highly qualified, racially diverse officer corps educated and trained to command our nation’s racially diverse enlisted ranks is essential to the military’s ability to fulfill its principal mission to provide national security.”).

311. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

312. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

ways in which her legal strategies can play out, how receptive potential allies will be to them, and the extent to which they might further—or undermine—efforts to build client power that can ultimately reorder social relations in a more just way. Taking into account the ways in which legal strategies might play out in the community and the broader society also helps the lawyer minimize the risk of backlash where a solution that might advance a client’s cause in one area or on one issue can actually undermine further advances or result in a retrenchment of rights generally, as opposition forces can use their own defeats as accelerants for actions that undermine the long-term interests of the communities that the social-change lawyer serves.³¹³ By incorporating an appreciation for political, socioeconomic, and cultural trends into the tactical decision making that the lawyer undertakes in collaboration with her client, the social-change lawyer can help to advance the interests of the client, ensure that the advocacy helps to increase and enhance the ability of that client to achieve self-determination and social justice, and minimize the risk of backlash against her efforts. Such an appreciation requires creativity and an openness to accept new information and incorporate it into one’s strategic decision-making processes that the social-change lawyer uses in collaboration with the clients that she serves.

Thus, the social-change lawyer faces challenges beyond those that the traditional lawyer faces but has the tools at her disposal to address those challenges with skill and creativity. As the examples of the creative social-change lawyers highlighted here show, these lawyers exhibited common strategies for bringing about social change that revealed the creative ways in which these challenges. By seeking incremental change, reframing critical legal issues in new ways, incorporating interdisciplinary perspectives, seeking out

313. For example, in the wake of the Supreme Court’s decision in *Kelo v. City of New London* a groundswell of community activism opposed to the decision led many state legislatures to take action to limit the eminent domain power of state and local governments. For a review of post-*Kelo* legislation, see Andrew P. Morriss, *Symbol or Substance: An Empirical Assessment of State Responses to Kelo*, 17 SUP. CT. ECON. REV. 237, 237–38 (2009).

opportunities where interests converge, and exhibiting a sensitivity to emerging trends and the wider social and political context in which the lawyer's efforts are taking place, the social-change lawyer can help overcome some of these challenges in creative and effective ways.

CONCLUSION

The history of lawyering for social change is long and storied. However, it is not without its challenges. At the heart of the lawyer's work is problem solving. For the lawyer seeking to bring about social change, the problems that she faces are compounded by the existence of legal doctrine that is not generally consistent with the client's position (hence the need for social change), the risk that advocacy can undermine the client's long-term interest, and the fact that professionally driven and lawyer-centric advocacy can actually perpetuate the status quo and further oppress the clients that the lawyer seeks to serve. This Article has used three examples of lawyers who have advanced social change in an attempt to identify any common characteristics of their advocacy to understand the ways in which advocates have used creativity to achieve their social goals and overcome some of these barriers to problem solving in the social-change context. Those common characteristics appear to be a willingness to pursue incremental change, the deft reframing of the legal issues that can advance or inhibit the lawyer's work for change, the incorporation of interdisciplinary perspectives into the work, the search for opportunities for coalition building through the identification of where diverse interests converge among individuals and communities, and an appreciation for the ways in which political and other trends may impact the lawyer's social-change efforts. Each of these components is a reflection of the ways in which these social-change lawyers incorporated creativity into their work to overcome and offset some of the risks inherent in social-change lawyering. Although all lawyers solve problems, the social-change lawyer faces problems of a different quality and degree because she faces an

additional challenge: she is generally seeking to change the legal infrastructure that affects the lives of her clients rather than simply operating within it. The ability to use creative problem-solving techniques relevant to social-change lawyering is a critical competency of the social-change lawyer. This Article has been an attempt to identify some of those techniques and to recognize their role in social-change lawyering in the past. It is up to the lawyers of today and tomorrow—the lawyers working for social change—to determine the extent to which these techniques may prove useful in the future or whether or not new and different techniques are needed to bring about the social change that is clearly needed to create a more just, fair, and equal society.