

## Bringing Cultural Analysis to the Study of Cause Lawyers: An Introduction

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### I. Introduction

This book seeks to illuminate what we call the cultural lives of cause lawyers by examining their representation in various popular media (including film, fiction, mass-marketed nonfiction, television, and journalism), the work they do as creators of cultural products, and the way those representations and products are received and consumed by various audiences. Attending to media representations and the culture work done by cause lawyers, we can see what material is available for citizens and others to use in fashioning understandings of those lawyers. It also provides a vehicle for determining whether, how, and to what extent cause lawyering is embedded in the discourses and symbolic practices around which ordinary citizens organize their understanding of social, political, and legal life.

This fifth edited volume of the Cause Lawyering Project adds an important new dimension to the body of research that has been growing steadily in the decade since the publication in 1998 of our first volume, *Cause Lawyering: Political Commitments and Professional Responsibilities*. As we detail below, all of the previous volumes have, in one way or another, focused on the place of cause lawyering in the legal profession and on its political aspirations, activities, and achievements. In contrast to the actions and institutions that were the subject of that research, here we turn to the broader context of cultural “sensibilities” and “mentalities.” This book is but a first step into an area of research rather than the culmination of a research enterprise. It offers glimpses of cause lawyers in a few political and legal contexts in the United States, United Kingdom, and Latin America rather than a systematic survey. It is the start of an effort to make sense

of the resonance of, and receptivity to, cause lawyering in different time periods in the United States and elsewhere.

The importance of beginning to try to understand that resonance and receptivity stems directly from the guiding premise of our previous inquiries into cause lawyering. From the start, we have argued that cause lawyers serve both to subvert and legitimate mainstream conceptions of the legal profession. As a consequence legal professions everywhere are both threatened by, and yet need, cause lawyering.

Cause lawyering, we have argued, is everywhere a deviant strain within the legal profession.<sup>1</sup> The cause lawyer is a “moral activist . . . [who] shares and aims to share with her client responsibility for the ends she is promoting in her representation.”<sup>2</sup> In so doing, cause lawyers threaten the profession by destabilizing the dominant understanding of lawyering as properly wedded to moral neutrality and technical competence. In rejecting nonaccountability, cause lawyers establish a point from which to criticize the dominant understanding from within the profession. They also denaturalize and politicize that understanding.<sup>3</sup> As a consequence, cause lawyers challenge ongoing professional projects and put at risk the political immunity of the legal profession and the legal process.

However, that same moral activism also serves the legal profession. Because cause lawyers commit themselves and their legal skills to furthering a vision of the good society, they provide an appealing alternative to the value-neutral, “hired gun” imagery that often dogs the legal profession. In thus enhancing the civic stature of the bar, cause lawyering makes a significant contribution to a profession that is frequently on the defensive. It is in this sense that cause lawyers are needed, by the legal profession.

Cause lawyering will, however, be deemed a need, not just a threat, only so long as its activities are viewed as consonant with, not in conflict with or subversive of, prevailing political and social values. Whether cause lawyers are viewed in this way will be substantially dependent on how their

<sup>1</sup> Madelaine Petrara, “Dangerous Identifications: Confusing Lawyers with Their Clients,” 19 *Journal of the Legal Profession* (1994), 179.

<sup>2</sup> David Luban, *Lawyers and Justice: An Ethical Study* (Princeton: Princeton University Press, 1988), xxii.

<sup>3</sup> See William Simon, “Visions of Practice in Legal Thought,” 36 *Stanford Law Review* (1984) 469.

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activities are represented to, and received by, multiple audiences: peers, participants in the movements they serve, and the broader populace. In addition, previous research has established that, to achieve their objectives, cause lawyers often combine political with legal mobilization, and the success of these mobilizing strategies depends in a large part on how cause lawyers are perceived by relevant publics. Whereas the views of peers and activists may be shaped by direct contact with cause lawyers, the general public is dependent on mediated images and cultural products, though the ways those images and products are consumed are highly contingent and deeply contextual.

### II. The Cultural Problematic

Invoking the term “culture” at the start of the twenty-first century means venturing into a field where there are almost as many definitions of the term as there are discussions of it, and where inside as well as outside the academy arguments rage. As Renato Rosaldo puts it, “These days questions of culture seem to touch a nerve . . .”<sup>4</sup> Where once the analysis of culture could neatly be assigned to the respective disciplines of anthropology or literature, today the study of culture refuses disciplinary cabinaging, and forges new interdisciplinary connections.

Traditionally the study of culture was the study of “that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society.”<sup>5</sup> This definition, in addition to being hopelessly vague and inclusive, treats culture as a thing existing outside of ongoing local practices and social relations. In addition, by treating culture as “capabilities and habits acquired . . .” culture was made into a set of timeless resources to be internalized in the “civilizing” process through which persons were made social. Finally culture was identified as containing a kind of inclusive integrity, of parts combining into a “whole.” This conception of culture still has its defenders and may even be on the rise as a political knowledge.

<sup>4</sup> Renato Rosaldo, *Culture & Truth: The Remaking of Social Analysis* (Boston: Beacon Press, 1989), ix.

<sup>5</sup> Edward Taylor cited in Stephen Greenblatt, “Culture,” in *Critical Terms for Literary Study*, ed. Frank Lentricchia and Thomas McLaughlin (Chicago: University of Chicago Press, 1990), 225.

Today, however, within the academy critiques of the traditional, unified, reified, civilizing idea of culture abound.<sup>6</sup> As Luhmann observed, the concept of culture is “more unsettled than it has been for forty years.”<sup>7</sup> In this unsettled moment in the life of the concept of culture, efforts are underway to rehabilitate and reform it. In this effort, contemporary cultural studies have played an especially important role. Cultural studies have had a bracing impact in giving new energy and life to the study of culture, freeing it from its homogenizing and reifying tendencies. It has done so by radically extending what counts in the analysis of culture beyond the realm of “high culture,” inviting study of the quotidian world. Film, advertising, pop art, and contemporary music – these and other products of “popular culture” have been legitimized as objects of study.

*The Cultural Lives of Cause Lawyers* takes up that invitation, extending the domain of cultural study to new terrain, namely the work of politically engaged, cause lawyers. The research reported in this book is premised on the growing scholarly recognition that legal meaning is found and invented in the variety of locations and practices that comprise culture and that those locations and practices are themselves encapsulated, though always incompletely, in legal forms, regulations, and legal symbols. Thus the interpretive task for cultural analysts is endlessly challenging as they seek to read everyday cultural forms.

This book brings together research on the legal profession with work that takes up the analysis of popular culture. Our contributors include scholars of popular culture who turn their attention to cause lawyers and experts on cause lawyering who turn their attention to popular culture. This is a joining of perspectives that is both long overdue and fruitful for both kinds of scholarship.

We confront the challenge of this joining of perspectives by analyzing a variety of cultural forms. In so doing we address the following questions:

- First, how does popular culture define and understand cause lawyers? What sense does it make of this category of lawyering? How does it turn an analytic category into a folk concept?

<sup>6</sup> For one example see Robert Brightman, “Forget Culture: Replacement, Transcendence, Reflexification,” 10 *Cultural Anthropology* (1995) 509.

<sup>7</sup> T. M. Luhmann, “Review of Hermes’ Dilemma and Hamlet’s Desire: On the Epistemology of Interpretation,” 95 *American Anthropologist* (1993), 1058.

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- Second, how are relations between lawyers and causes treated in popular culture? And when and how do cause lawyers become active producers of culture?
- Third, what perspectives does popular culture make available from which to criticize and analyze what cause lawyers do, as well as the impact and significance of their work? And how are those perspectives received by various audiences?

### III. Relation to Previous Books

In four previous edited collections we have explored the complex relations between cause lawyers and the organized legal profession and the way cause lawyering is shaped by, and shapes, processes of political change associated with globalization and democratization. The first edited volume, *Cause Lawyering: Political Commitments and Professional Responsibilities*, originally asserted and presented evidence in support of, our foundational claim: that legal professions everywhere both need and, at the same time, are threatened by cause lawyering. As we indicated above, by reconnecting lawyering with morality, cause lawyers make tangible the idea that lawyering is a “public profession” and that its contribution to society goes beyond the aggregation, assembling, and deployment of technical skills. On the other hand, in many countries lawyers are, to varying degrees, bound by an ethical code that requires that they vigorously represent their clients “regardless of their own personal beliefs.” Cause lawyering thus threatens the ethical premises of the legal profession by demonstrating that these principles are contingent, and constructed, and, in so doing, raises the political question of whose interests are served by the dominant understanding of legal professionalism.

Our second edited collection, *Cause Lawyering and the State in a Global Era*, spoke to a distinctive gap in the scholarly literature on the legal profession. Rarely had that literature taken the connection of lawyers to the formation and transformation of states as its subject. Although state transformation and globalization clearly influence, and are influenced by, law and lawyers, with a few notable exceptions, available research tends to ignore these interdependencies. Instead, as Terrence Halliday puts it, most research on lawyers focuses “on the internal organization and behavior of legal professions, overwhelmingly attends to single countries and, within

national studies; it is the economic organization and behavior of professions, especially the market for legal services, that has captured most scholarly attention.”<sup>8</sup> Similarly, the literatures on state transformation and globalization, again with a few important exceptions, ignore law and lawyers almost entirely and tend to treat the rule of law as something of a taken-for-granted black box. The result is that not only are lawyers neglected but so too is the wealth of research that decenters law and documents its pervasive presence and constitutive power as social practice throughout civil society, culture, politics, and the economy. *Cause Lawyering and the State in a Global Era* responded to the situation by connecting research on one kind of lawyering, cause lawyering, to the analysis of the state and state transformation in a global era.

Our third book, *The Worlds That Cause Lawyers Make*, turned from the large, macro-sociological questions that we took up in our two previous edited collections to examine what cause lawyers do in regard to social movements, how they make their practices, and what they do in marshaling social capital and making strategic decisions. It examines the dynamic interactions of cause lawyers and the political and professional contexts in which they operate. It does so by taking a constructivist view of cause lawyering. Instead of an essentialist approach to this phenomenon that assigns certain fixed traits to cause lawyers, we examined what cause lawyers do, how they do it, and what difference it makes. We analyzed the way in which cause lawyers “fabricate” (in an Arendtian sense) the political and professional contexts in which they operate. *The Worlds Cause Lawyers Make* documents the various ways in which cause lawyers both innovate within, and are constrained by, those contexts. Another way of making this point is to note that cause lawyering takes place within a framework of opportunities and constraints. The research compiled in this book examines the strategies that cause lawyers use to navigate within this framework.

Our fourth edited book, *Cause Lawyers and Social Movements*, took up one of the themes explored in *The Worlds That Cause Lawyers Make*,

<sup>8</sup> Terrence Halliday, “Lawyers as Institution Builders: Constructing Markets, States, Civil Society, and Community,” in *Crossing Boundaries: Traditions and Transformations in Law and Society Research*, ed. Austin Sarat et al. (Evanston, IL: Northwestern University Press, 1998).

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namely the way cause lawyers work with and for social movements. Doing so allows for a reorientation of previous scholarship, turning the theoretical lens away from studies of the legal profession and toward the scholarly literature on movements. Our analytic interest was the same in this collection as it was for each of the previous books, namely to explore tensions and challenges that cause lawyers confront. Yet here we began with the world of politics, locating tensions between professional identity and political work from the perspective of movements and their agendas.

Can lawyers, we asked, maintain their professional identities and, at the same time, work as movement activists? If they seek to maintain a distance from the movement to protect their professional role, can they effectively serve movements? Does their usual preference for litigation as a tool for advancing movement goals facilitate the achievement of those goals or distort them? Do the social capital and prestige that lawyers bring to social movements lead to lawyer domination and threaten to undermine the internal solidarity necessary to social movement success?

By examining cause lawyers as both producers of culture and cause lawyering as represented in popular culture, *The Cultural Lives of Cause Lawyers* takes us closer than previous volumes to the core premise that cause lawyering both contributes to and threatens the legitimacy of the organized legal profession. Because legitimacy is dependent on public perceptions and understanding, it is necessary, in other words, to learn about the images of cause lawyering that are disseminated and made available to the public. Each of the chapters in this book is based on original research and written expressly for this volume by specialists in the fields of law and/or popular culture. Taken together, their work suggests that the representations of cause lawyers in popular culture are often hard to distinguish from representations of mainstream lawyers, that where those representations are distinctive they sometimes provoke and at other times allay anxiety about the political movements cause lawyers serve, and that the cultural lives of cause lawyers are politicized in ways that constitute cause lawyers as pushing the boundaries between law and politics.

The first section of this book – **The Cultural Work of Cause Lawyers** – contains three essays that examine cause lawyers' production and defense of cultural products. Although for some cause lawyers this activity is not integral to their work, it nonetheless helps associate them with causes they

might wish to disclaim. For others cultural production is a self-conscious extension of cause lawyering work.

We begin with William MacNeil's subtle exploration of the ways lawyers live inside and outside cultural texts and how the content of those texts bleed outward, shaping the identities of lawyers. At the same, this essay raises questions about the ways we identify lawyers and their causes.

In MacNeil's study of a classic of American popular culture – Margaret Mitchell's *Gone With the Wind* and King Vidor's film version of that same text – he notes the distinct *absence* of cause lawyers in both the novel and the film, and the *overabundance* of lawyering committed to guarding the sanctity of the text itself. As MacNeil puts it, "*Gone With the Wind* is one of the most law-*full* – meaning lawyer regulated – fictions in history, a barristerial barricade having sprung up around it, like those around Atlanta in the last days of Sherman's final assault." He describes one aspect of the cultural work of cause lawyers, namely their work in policing cultural representation, and he asks whether any lawyer can avoid associating him- or herself with the substantive commitments the work seeks to advance. In so doing MacNeil problematizes the boundary between cause and conventional lawyering.

The absence of lawyers in *Gone With the Wind* stands in sharp contrast to the intense effort of lawyers to police its cultural standing. Since its publication the heirs of its author, trustees of her estate, and litigators have fought to protect it, even as they professed their indifference to the "cause" the novel ensconced, namely what MacNeil designates the "Cause of the Confederacy." Is it possible, MacNeil asks, to represent the text as cultural product without taking on the baggage of representing that cause? He suggests that at least in this case the answer is no.

The Stephens Mitchell Trust (which owns publishing rights to the book) for a long time has been represented by the Madison Avenue law firm, Frankfurt, Kurnit, Klein & Selz, whose lawyers hardly fit the usual profile of cause lawyers. Because of their professed indifference to the substance of the novel they sought to protect, MacNeil dubs them "causeless cause lawyers."

In 2001, Houghton Mifflin published a book, *The Wind Done Gone*, by African American writer Alice Randall. That novel is set in the same place and period as *Gone With the Wind*, and the protagonist in both novels is an attractive, independent young woman. The crucial difference is that



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*The Wind Done Gone*'s protagonist is a mulatto slave girl named Cynara. Though the story-line is actually quite different from *Gone With the Wind*, it is obvious to all who read it that *The Wind Done Gone* is "thoroughly embedded in the diegesis" of the other novel.

In a copyright infringement suit, Tom Selz, counsel for the Mitchell Trust, denounced the publication of *The Wind Done Gone* as "wholesale theft." And the U.S. District Court for Northern Georgia agreed, ruling that it qualified as a sequel to *Gone With the Wind* and thus was subject to the Mitchell Trust's copyright. In the court's view, Randall was free to write about the history of the South and its 'ideas' about civil war, slavery, etc., but the fiction that someone creates, a.k.a. their "expression," is legally protected under copyright law.

"But what if," MacNeil asks, "that 'fictional world,' in all of its imaginative expression – characters, plot, scenes – comes to stand for, perhaps even instantiate a place, and its past? Here, copyright's idea/expression dichotomy . . . begins to break down; the boundary between the two becoming blurred, their shared border crossed, their integrity violated – much like a war, and its skirmishes between two contiguous, inextricably linked (federated?) jurisdictions." Randall chooses to parody Mitchell's "expression" because *Gone With the Wind*'s Scarlett O'Hara has come to represent the South by synecdoche and because the novel is so "thoroughly saturated by, so completely imbued with an 'idea' of history."

*The Wind Done Gone* serves as both an historical record and as a means of giving voice to those who are voiceless in the history of the South, including those who were voiceless in *Gone With the Wind*: mulattos. Thus MacNeil contends that the work of the Mitchell Trust lawyers is political, in its meaning if not its inspiration, and the lawyers who do that work serve as lawyers for a cause. In this case they are still attempting to keep mulattos out of the *Gone With the Wind* world by banning any mention of miscegenation in authorized sequels. As MacNeil says, "Scarlett anticipated [the lawyers] textually, carving out a place for them in the narrative by instantiating their very values; and Frankfurt, Kurnit, in turn, not only defend Scarlett and her story, they enact it, becoming an avatar of Scarlett in their aggressive prosecution on behalf of the Mitchell Trust, going to any and all lengths for their client." In this way, MacNeil argues, "the law firm becomes a Scarlett-like paradox, embodying the persona of both Yankee mercenaries and Confederate racists." Their lawyering, he believes, stands in for the

cause and, in so doing, becomes a kind of cause lawyering. Here the cultural representation generates and transforms the lawyering that seeks to protect it.

The next chapter, Kevin den Dulk's study of evangelical cause lawyers, describes the identities of cause lawyers and the work they do as generators of cultural products as more explicit and self-conscious than that of the lawyers at Frankfurt, Kurnit. Drawing on the work of Murray Edelman on symbolic construction, den Dulk investigates how a cultural symbol, the idea of "culture war," plays out in the work of evangelical lawyers. For them, "culture war" suggests that two worldviews, progressive (urban dwellers, usually secular, generally open to alternative understandings of morality) and orthodox (suburban or rural dwellers, overwhelmingly religious, support tradition views of morality), are locked in conflict. "Many evangelical cause lawyers use the culture war trope," he notes, "as both a marker of their own identity and a rallying cry for legal mobilization."

Den Dulk's "goal is to examine the *symbolic* role the notion of a culture war plays in the mobilization of a small subset of often self-described 'warriors' in battle, namely evangelical cause lawyers" and how they have appropriated certain modes of cultural expression – from authoring non-fiction novels to producing radio programming and video documentaries – to define their place in the culture war. Through their work evangelical lawyers seek to control cultural consciousness, not merely influence certain areas of legal rights. As den Dulk writes, "The nature of evangelical subculture, with its arrays of media outlets, enables this kind of cultural engagement. In fact, in some instances the relationships across professions within the tradition have provided opportunities."

Evangelical law firms have become aware of the strength and popularity of cultural analysis, and some have started using that popularity to their advantage by creating what den Dulk calls "advocacy conglomerates." Each constituent of these conglomerates focuses on distinct portions of the public and benefits from each other's resources. Thus, legal, media, educational, and political evangelical groups can work together and provide the means for lawyers to participate on the broader plane of cultural criticism. Through this work, evangelical lawyers, like the lawyers for Mitchell's *Gone With the Wind*, found themselves taking on a paradoxical mix of elements and a distinctive, heroic role within the evangelical movement.

Tim Howard's chapter on the campaign against "Big Tobacco" in Florida provides another example of the cultural work of cause lawyers, an example