Introduction

Two decades after the Supreme Court's decision in *Brown* v. *Board of Education*,[1] the late Civil Rights attorney and Harvard law professor, Derrick Bell Jr., published a widely cited article, "Serving Two Masters" (Bell 1976). Bell worried that dissent was growing between civil rights lawyers and African American communities on the strategy of seeking equality through school integration. As he wrote in the introduction to his article:

> Having achieved so much by courageous persistence, they [e.g., civil rights lawyers] have not wavered in their determination to implement *Brown* using racial balance measures developed in the hard-fought legal battles of the last two decades. This stance involves great risk for clients whose educational interests may no longer accord with the integration ideals of their attorneys . . . .there is tardy concern that racial balance may not be the relief actually desired by the victims of segregated schools.

"It is difficult," Bell warned, "to provide standards for the attorney and protection for the client where the source of the conflict is the attorney's ideals" (471–2). Quoting the Book of Luke, he concluded; "*No servant can serve two masters:* for either he will hate the one and love the other; or else he will hold to one, and despise the other" (Luke 16: 18, King James).

"In acknowledging the influence of class interest and donor pressure on lawyer goals and tactics," writes Doug NeJaime (2012: 666), "Bell was the first to expose the tensions inherent in cause lawyers' representation of large, diverse groups." But Bell never specified the role of the *social movement* of which the Legal Defense Fund was a part and which developed in the context of the structural changes brought on by the war and depression.[2] Nor did he explicate the interactions among the lawyers who pled their cases, the constituents they represented, the broader movement of which both were a part, and the institutions before which they made their claims. It is these multiple interactions – and the mechanisms that drive them – that form the core of this Element. In what follows, we advance an interactive approach to this problem and sketch four mechanisms that seem to us promising in effecting a true fusion: *legal mobilization, legal-political opportunity structure, social construction,* and *movement-countermovement interaction.*

[1] 347 US 483 (1954).

[2] See the definition of movements in Tarrow (2022: 11) as "collective challenges based on common purposes and social solidarities, in sustained interaction with elites, opponents, and authorities." On the impact of the depression and the Second World War on African Americans, see Doug McAdam, *The Political Process and the Development of Black Insurgency, 1930–1970* (1982 [1999]).

In the decades after Bell published his critique, social movements were increasingly recognized by legal scholars as intervening actors in the relations between courts and claimants. As Jack Balkin and Reva Siegel noted in a 2006 essay, "Social Movements continuously integrate law and the institutions of civil society" (946). But for a long time, legal scholars failed to develop much expertise what was happening in social movement scholarship that might have helped them to integrate the two fields of study. For example, in their essay, Balkin and Siegel did not cite any social movement theorists, despite the considerable overlaps between their theory and the advances in social movement research in the decades when they were writing.

Conversely, few movement scholars paid sufficient attention to the interactions between movements and the law, even though they were aware that many movements' claims ended up in the courts. Even after they began to do so, they tended to posit a one-way causal relationship between law and movements, eliding the interactions among the courts, movements, and the constituencies they worked to represent. Apart from a few exceptions (Handler 1978; Klare 1978; Barkan 1980, 1985; Zemans 1983), there were few examples of "crossover work" that could foster a junction between these two flourishing fields.

In this Element, we follow the progress of the crossover work that developed within both specialties on both sides of the turn of the century before presenting our own theory, in which we investigate the interactions among lawyers, movement organizations, key constituencies, and institutions. We present a detailed – though not comprehensive – survey of social movement scholarship and legal scholarship, as well as this crossover work. In the process, we attempt to draw on a wide range of scholars, who focus on different issue areas and different areas of the world. For scholars who are conversant in both this historical development and recent works in these traditions, the first few parts of this Element will be largely familiar. In the latter parts of the Element, we present a new approach to best effect the fusion of law and social movement scholarship – these sections will be novel, even to those most up-to-date on these literatures. We offer both this detailed survey and our new approach with the hope that this Element will be useful to future generations of scholars, as well as those already steeped in the fields of law and social movements.

This Element proceeds as follows: In Section 1, we show why social movement scholars have been slow to integrate the law into their empirical approaches. In Section 2, we focus on three streams of legal scholarship: first, on "rights-based" analyses and on the critique of rights that followed in what came to be called "critical legal studies"; second, the literature on "cause lawyering"; and, third, the strand of scholarship that we summarize with the term "popular constitutionalism."

Section 3 turns to the growing "crossover" tradition, across both issue areas and different areas of the world. Beginning from the debate between Gerald Rosenberg (1991) and McCann (1994), we will show that a broader conception of the law – one that reaches well beyond the courts – has helped to make movements more accessible to legal scholars, but has been less satisfactory in specifying the mechanisms through which lawyers and movements intersect.

In Section 4, we lay out our own theory for integrating social movement theory and socio-legal studies. We build on four mechanisms that we hope will advance the fusion between these two traditions:

- *First, legal mobilization*: the efforts of social movements to use and expand the law to advance their claims;
- *Second, the social construction of the law* which has enabled movement activists to advance their claims;
- *Third, political and legal opportunity structure*, concepts that surround and constrain efforts at legal mobilization;
- *Fourth,* the process of *movement-countermovement interaction,* both in and outside the courts, which produces outcomes of legal mobilization that are often quite different than what movements intend.

In Section 5, drawing on our own research, we integrate these traditions: first, in the conflict over same sex marriage in the United States; and then on the impact of social constitutionalism in South Africa. The Element concludes with a series of questions that we hope will mark the next generation of legal/social movement scholarship.

Why Do We Care?

Why does it seem important to advance this scholarly integration? In crafting this essay, we have had three motivations:

First, more knowledge is always better than less; we think exposing the work of scholars in each of the traditions to scholars in other is itself a worthy aim;[3]

Second, the "fields" in which movements and the law come together are of particular importance for public policy and constitutional development, especially in this era of rising inequality and polarization. We hope our efforts will make contributions to both of these areas;

[3] Once again, we do not claim to be alone. In 2006, Michael McCann put together an exhaustive reader called *Law and Social Movements.* More recently, in 2023, Steven Boutcher, Corey Shdaimah, and Michael Yarbrough have put together a mammoth *Handbook on Law, Movements, and Social Change*, which includes a great deal of work coming from outside the United States.

Finally, we hope that the interactive theory that we put forward in Section 4 and illustrate in Section 5 of this Element will serve as a model for the efforts of other scholars working to fuse social movement and legal perspectives in these areas of research and practice.

1 How Movement Scholars Turned to the Law

In this section, we briefly show how and why social movement scholars since the 1960s turned toward the law but why empirical, theoretical, and methodological elements in the budding social movement field left a void between this field of scholarship and parallel advances in socio-legal studies until quite recently.

1.1 The Sources of the Turn in Social Movement-Scholarship

The modern field of social movement studies grew out of three main roots, which came together in the early 1960s: *collective behavior, structural Marxism, and historical sociology.*[4] While these sources differed in many ways, what they had in common was seeing social movements as only one of a number of forms of collective action. Movements were variously seen as parts of unorganized collective action (the collective behavior approach); the development of conflicts triggered by modern capitalism (structural Marxism); and conflicts accompanying the rise of the modern state (historical sociology).

Influenced by the horrifying outcome of Europe's interwar movements and the horrors to which they led, early postwar movement scholars argued that mass demonstrations undermine the rule of law and threaten democracy. The civil rights and student movements showed that movement activists were just as intelligent, well schooled, psychologically normal, and instrumental as other people (Keniston 1960). In the words of former activists and distinguished movement scholars Frances Piven and Richard Cloward (1992), this move served to "normalize" protest. The crystallization of a distinct field of social movement studies attached to politics helped scholars to better understand the extraordinary surge of contentious collective action over the last half-century, with tools that were based on the assumption that movements were "normal" and constituted noninstitutional forms of participation in more-or-less structured relations to institutional politics (McAdam 1982; Meyer and Staggenborg 1996, 2022; Tarrow 2012). These scholars came to define social movements as "collective challenges, based on common purposes and social solidarities, in

[4] For a telescopic outline of these classical sources and their role in social movement studies, see McAdam and Tarrow (2019).

sustained interaction with elites, opponents, and authorities" (Tarrow 2011: 9), a definition that we adopt throughout this Element.

1.2 The Effects of Normalization

The normalization of movements had both a negative and a positive aspect: on the negative side, it led many scholars to dismiss traditional movements, like the labor movement, as "old" social movements (Offe 1985)[5]; on the positive side, it led scholars to pay more attention to the connections between the law and social movements. In the forefront of this move were young scholars like Steven Boutcher – both writing on his own (2010) and with collaborators (Boutcher and Stobaugh 2013; Boutcher and McCammon 2019), Epp (1998), Gianluca de Fazio (2012), Hilson (2002), McCammon (2012), McCann (1994), Polletta (2000), Gerald Rosenberg (1991), and Vanhala (2010).

There were aspects of the new social movement scholarship that continued to retard its fusion with legal scholarship, however: the advent of widespread – and almost obsessive – employment of survey methods; a preoccupation with movement organizations; and the development of movement scholars' most original contribution to the social sciences: protest event analysis. Although all three were major innovations, they dovetailed imperfectly with the methods and the objectives of legal scholarship.

1.2.1 Surveying Social Movements

When legal scholars analyze reform-minded legal cases, they turn naturally to the case method, because the law proceeds through cases, especially in common law systems like the American one. But as social movement scholars struggled for recognition in the social sciences, they adopted methodologies that would legitimate movements as a valid field of political participation, and these were mainly quantitative, and not case-oriented.

The first adaptation was the use of survey research. In their book *Political Action: Mass Participation in Five Western Democracies*, Samuel Barnes and Max Kaase (1979) employed surveys with citizens to find out what forms of political participation they reported having employed. As expected, there were many more respondents who claimed to have voted or supported candidates than those who engaged in "unconventional political activities" (58). The latter category included everything from writing to a newspaper to damaging property to the use of guns or explosives, passing through signing petitions, occupying

[5] Except for isolated research by scholars like Klare (1978–9) in the 1970s, organized labor was largely left out of social movement scholarship after its Cold War-induced de-radicalization.

buildings, and boycotting goods (66). Not surprisingly, the more "unconventional" the form, the less frequent was its reported use.

In an important innovation building on survey research, social movement scholars have recently begun employing surveys to dig more deeply into movement activism. In Europe, Bert Klandermans and Nonna Mayer (2006) employed surveys to analyze activists in far-right movements. In the United States, Christopher Parker and Matt Barreto (2013) used similar methods to understand activism in the Tea Party. Fisher (2019) employed surveys of participants during protest events.

Although these methodological innovations are ingenious and fruitful, their practitioners struggled to gain access into the internal lives of movements or how movement activism intersects with the law (Andretta and della Porta 2014). Survey research can produce pictures of the attitudes of citizens toward political activity in general, but it is difficult to connect these attitudes to on-the-ground or real-world behavior. The problem with using survey methods alone to measure legal consciousness is that closed-ended questions provide little insight into how "people think about and use the law," in part because the nature of the questions, where respondents select from a predetermined list of answers, and in part because surveys capture only a snapshot moment rather than dynamic processes (Merry 1990).

1.2.2 Organizational Analysis

At the same time as survey research was growing as a tool of social scientific analysis, a group of sociologists around Mayer Zald at the University of Michigan began to apply insights from organization theory to the study of movements. Their first move was distinguishing between movements and movement organizations.[6] In contrast to Mancur Olson's microeconomic account, which focused on the problems of effecting collective action (1965), McCarthy and Zald were struck by the great increase in the organization of collective action in America in the 1960s (1973). From this, they derived a theory of what they called "resource mobilization" (1977), which became the basis for a broad rethinking of social movement theory (Davis et al. 2005). The resource mobilization approach considers "resources that must be mobilized," as well as "the linkages of social movements to other groups, the dependence of movements upon external support for success, and the tactics used by authorities to control or incorporate movements," rather than focusing

[6] Many of the products of the "resource mobilization" school will be found in Zald and McCarthy (1987).

on levels of deprivation or the beliefs that mobilized actors hold (McCarthy and Zald 1977: 1213).

But to our knowledge, few scholarly efforts were made to connect movement *organizations* to the law: Handler's 1978 book *Social Movements and the Legal System* explicitly drew of resource mobilization theory. Barkan's 1984 article on "Political Trials and Resource Mobilization" stood out as a rare application of McCarthy and Zald's theory to the legal system. And the essay "Law, Organizations, and Social Movements" (2010) by Lauren Edelman, Gwendolyn Leachman, and Doug McAdam is the only effort we have found to employ organization theory in a systematic way to examine the relations between law and movements.

1.2.3 Protest Event Analysis

The most original methodological innovation in social movement scholarship is the systematic study of aggregates of protest events.[7] From the 1970s on, movement scholars began to collect, enumerate and analyze protest event data. In Great Britain (Tilly 1995), Germany (Rucht 1998), Italy (Tarrow 1989), the United States (Jenkins and Perrow 1977; McAdam 1982), and in a range of European countries (Kriesi et al. 1995). Suspicious of the accuracy and the objectivity of official data, they began to systematically mine newspapers and other sources to track the rise and fall of cycles of contention and the forms of protest employed by protesters.

Protest event data added consistency and historicity to the study of how citizens use public forms of collective action. But the quantitative logic of protest event analysis dovetailed poorly with the case-based nature of most legal research. Part of the problem came from the fact that newspaper accounts of protest focused inordinately on the more dramatic or more violent forms of contentious action (McCarthy 1996). But a deeper problem was its focus on participation in public space. Only in 2015, in a landmark article on the relations between movements, high profile rape trials, and policy advocacy did Kristine Coulter and David S. Meyer combine protest event analysis with detailed examination of legal cases.

In summary, by the 1980s, a flourishing field of social movement studies began to detach itself from earlier and less precise notions of collective behavior, structural Marxism, and historical sociology. At its boundary, a few scholars began to reach out to the field of legal studies, but the methodologies of survey research, protest event analysis, and organizational analysis fit in poorly with

[7] For a primer on this method, see Hutter (2014).

the case-based approaches of legal scholars, who – in the meantime – were struggling to reach out to social movement studies, as we will see in Section 2.

2 Legal Scholars Turn to Movements

From the 1960s on, legal and socio-legal scholars began to study popular efforts to influence the law, especially in the US context (e.g., Scheingold 1974; Galanter 1974; Handler 1978; Zemans 1983; Olson 1984). The study of "cause lawyers," the kinds of cases they bring to the courts, and the consequences of the turn to law for social change came to preoccupy socio-legal scholars, while scholars working in the legal academy engaged in efforts to forward popular constitutionalism as a normative and empirical theory of law and movement studies. Both sets of scholars owed a debt to studies of "the politics of rights" and to the challenge to the civil rights movement by Derrick Bell and the critical legal studies that followed. But both were hamstrung by the fact that most legal scholars came from the legal academy in which the major question put to students was how to construct a winning case in court. Only around the turn of the century did legal scholars begin to place the relations between law and movements within a broader framework of multidimensional advocacy in which winning a case was only one possible outcome of the interaction of law and movements, picking up on insights developed by earlier socio-legal scholars (NeJaime 2011, 2012). We will turn to these broader outcomes in Section 3, where we begin to show how legal and social movement scholarship began to merge.

2.1 Rights and the Critique of Rights

In his notable book, *The Politics of Rights,* political scientist Scheingold (1974) zeroed in on the overwhelming emphasis on rights that marked the two decades of progressive legal scholarship after *Brown*. In their pure form, as he saw it, rights are a myth. "The myth of rights," Scheingold declared, "rests on a faith in the political efficacy and ethical sufficiency of law as a principle of government. "The myth of rights," he specified, ". . . assures us that the path of the law is consistent with our fundamental political ideals as they are enshrined in various provisions of the Constitution and the Bill of Rights" (17).

Like many who followed in his footsteps, Scheingold saw rights as an *ideology* – a particularly powerful one in the American political tradition, but one that was less a description of reality than a wish for their fulfilment. Rights, he concluded, are *resources,* and are therefore dependent on the power of those who wield them. "The myth of rights," he wrote, "may work on behalf of change, but its dominant tendency is surely to reinforce the status quo" (91). Recalling Bell, he reasoned that "There is no need to look any further than school desegregation

problems to realize that the declaration of rights does not purge political conflict of its power dimensions" (85). Going beyond Bell, he concluded pessimistically that "litigation emerges as a strategy of desperation rather than hope" (95).

Scheingold turned to a variable that was absent from Bell's critique – *mobilization* – which gestured toward the social movement field.[8] He described a dual process of *activating* a quiescent citizenry and *organizing* groups into effective political units. Political mobilization can in this fashion build support for interests that have been excluded from existing allocations of values and thus promote a *realignment* of political forces (131). But although his concept of mobilization was remarkably close to the work that Charles Tilly (1979) and other movement scholars were doing at the time, he did not access that tradition or try to build on it. Nor did his concept of mobilization lead him beyond the role of law and courts. On the contrary, he explained, "Insofar as court decisions can legitimate claims and cue expectations, litigation can contribute to both activation and organization; to the building of new coalitions; and, in the long run, to a realignment of forces within the political arena" (Scheingold 1974: 132). Scheingold ended his analysis on a cautious note. "The evidence," he warned, "suggests that litigation may be useful for providing remedies for individuals but . . . its impact on social policy is open to question" (148).

2.2 Critical Legal Studies

About the same time as Scheingold was underscoring "the political of rights," a new strand of theorizing – critical legal studies (CLS) – emerged in the legal academy.[9] Building a critique of the emphasis on rights that had come out of the civil rights movement and of the artificial distinction between law and politics, CLS scholars began to question the role of courts and lawyers as a contributing factor in liberalism's decline. As Scott Cummings (2017b: 1587) put it in a thorough analysis:

> As the legal liberal vision of social change appeared to reach its limit – erupting in bitter fights over abortion, busing, and affirmative action – optimism began to fade. Rather than "balancing the scales of justice," legal liberalism came to

[8] It is important that the premier journal of social movement studies in the United States is called *Mobilization,* which was founded in the 1980s.

[9] We cannot hope to summarize the various strands of theories and counter-theories that were part of the Critical Legal Studies movement. A critical perspective is offered by Laura Kalman in her *The Strange Career of Legal Liberalism* (1998). More sympathetic accounts were offered by Morton Horwitz, in *The Transformation of American Law* (1992), by Karl Klare in "Law-Making as Praxis" (1979), by Mark Tushnet in his "Critical Legal Studies: A Political History" (1991), and by Roberto Unger, in *The Critical Legal Studies Movement* (1983). After-the-fact reflections were offered by Duncan Kennedy in his *The Rise and Fall of Classical Legal Thought* (2006), and by Orly Lobel in his "The Paradox of Extralegal Activism" (2007).