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Social Movement Casework and the Law and Organizing Ideal

Toward a modified law and organizing model

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Social Movement Casework and the Law and Organizing Ideal: Toward a Modified Law and Organizing Model

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Résumé

En Amérique du Nord, les militants et les juristes ont longtemps cru que les avocats progressistes pourraient offrir des avantages tactiques importants aux mouvements sociaux. Cette perspective optimiste a cédé la place pendant les années 1970 à une attitude critique à l'égard des avocats et des litiges. Les chercheurs se sont interrogés sur l'efficacité d'assimiler les revendications politiques à des atteintes aux droits individuels, pour être ensuite présentées devant les tribunaux. Le litige était perçu comme source d'une influence négative qui favorise l'isolement et l'individualisme. De plus, les chercheurs ont remarqué qu'il y avait le potentiel pour les avocats militants – bien qu'ils soient bien intentionnés – d'exercer leur profession d'une manière qui pourrait donner un sentiment d'impuissance aux autres participants du mouvement social. Les premières versions de cette critique vont souvent assimiler la « stratégie juridique » avec le litige présenté devant les tribunaux judiciaires et géré par les avocats.

Une réponse inspirante à cette critique a développée au début des années 2000, avec l'émergence d'un modèle de pratique que les chercheurs aux États-Unis ont nommé *« law and organizing »*. Des études normatives sur ce modèle offrent des arguments nuancés en faveur d'une pratique militante interdisciplinaire, partagée entre les avocats et les organisateurs. Ces études continuent à attribuer les risques d'individualisation et d'impuissance aux

avocats et aux litiges. Selon ce modèle, au lieu de diriger la stratégie, les avocats travaillent en collaboration avec les travailleurs sociaux, les organisateurs et les citoyens pour planifier la stratégie du mouvement social, tout en favorisant l'autonomisation et la mobilisation de la collectivité.

La présente thèse offre un examen critique de ce modèle, à travers l'une de ses tactiques bien connues: le traitement des problèmes juridiques individuels[1] par les organisations militantes. La thèse examine les hypothèses fondatrices du modèle *« law and organizing »*, en réinterprétant les problèmes d'individualisation et d'impuissance comme étant des enjeux reconnus dans de multiples disciplines, partout où les acteurs font de l'intervention sur une base individuelle afin de provoquer un changement systémique. La thèse soutient qu'un modèle de la pratique engagée du droit qui associe l'individualisation et l'impuissance exclusivement à la profession d'avocat risque de répondre de façon inadéquate aux deux problèmes. La recherche propose un modèle modifié qui met l'accent sur les options juridiques accessibles aux militants, tout en reconnaissant que la mobilisation et l'autonomisation sont des priorités qui sont partagées entre plusieurs disciplines, même si elles peuvent être traitées de façon particulière à l'intérieur de la profession juridique.

Mots-clés : « accès à la justice », « mouvement social », militance, « travail social », « *cause lawyering* », professions

[1] Cette phrase est traduite par le mot *casework* en anglais.

Abstract

In North America, activists and legal scholars long believed progressive lawyers could offer important tactical advantages to social movement organizations. This hopeful attitude changed in the 1970s as a critical stance toward lawyers and litigation emerged. Scholars questioned the efficacy of rights claims over mobilization in promoting systemic change. They argued that litigation was individualizing, and that well-meaning movement lawyers might use their expertise and status in disempowering ways. Early versions of this critique frequently equate legal strategy with courts and lawyers.

An inspiring response to the critique developed in the early 2000s with the emergence of the law and organizing model. Prescriptive law and organizing studies offer nuanced arguments in favour of interdisciplinary practice as a defence against individualization and disempowerment, while continuing to attribute both problems to lawyers and litigation. On this model, instead of directing strategy, lawyers cooperate with social workers, organizers, lay practitioners and community members on equal terms to plan movement strategy, fostering empowerment and mobilization in the process.

The present thesis critically examines the law and organizing model through one of its prominent tactics: casework in activist organizations. Focusing on social movement casework practice, the thesis considers the

founding assumptions of the law and organizing model, recasting individualization and disempowerment as problems recognized by multiple disciplines engaged in casework for systemic change. The thesis argues that a law and organizing model which associates individualization and disempowerment exclusively with the legal profession may inadequately address both issues. The research proposes a modified law and organizing model which emphasizes the legal options available to activists, while contemplating mobilization and empowerment as priorities which cut across disciplines even as they may be dealt with in ways unique to the legal profession.

Keywords : “law and organizing”, “cause lawyering”, “social movement”, activism, “structural social work”, empowerment, professionalism, “empowerment lawyering”

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For Camille, Venus and Maude

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Introduction

"*Who among you wants to join the social justice revolution?*"[1] With this question, Eric Mann introduces his guide to progressive organizing. The question is, in his words, "an evangelical call."[2] A great number of legal professionals in North America have answered this call in the affirmative. The histories of movements for civil rights, gender justice, free migration, collective bargaining, anti-poverty and other causes include lawyers who have tried to employ their expert knowledge in support of the movement. Progressive jurists (lawyers and legal workers) have created their own associations in various jurisdictions across the continent for mutual support, advocacy and continuing education.[3]

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[1] Eric Mann, *Playbook for Progressives: 16 Qualities of the Successful Organizer* (Boston: Beacon Press, 2011) at xx (emphasis in original).

[2] *Ibid.* at ix.

[3] These include, among others, the Law Union in Ontario, the National Lawyers Guild (NLG) in the United States, and the *Association des juristes progressistes* in Quebec (AJP). The Law Union describes itself as "a coalition of over 200 progressive lawyers, law students and legal workers." Its home page includes the slogan "Agitate & Litigate." Law Union of Ontario website. Online: http://www.lawunion.ca/. Accessed January 19 2014. The NLG states that it is open to lawyers, law students, legal workers and jailhouse lawyers: National Lawyers Guild, "Members." Online: http://www.nlg.org/member. Accessed January 19 2014. The AJP also includes progressive lawyers, law students and lay practitioners dedicated to social justice under the slogan "*Le juridique au service de la justice sociale*." AJP website. Online: http://ajpquebec.org/. Accessed January 19 2014. The researcher is a former board member of the AJP. The views expressed in the thesis are those of the researcher alone and do not

In the late 1990s, Austin Sarat and Stuart Scheingold coined the phrase "cause lawyering" to describe lawyers who depart from the traditional model of legal practice by working on single cases with a broader political aim in mind.[4] The classic image of the cause lawyer, familiar to legal scholars, is the litigator who takes on the opponents of the movement in court, wielding evidence and principles of constitutional law, so that a judge might agree with the movement group and grant a just decision with far-reaching systemic benefits.[5]

However, such a strategy is not without its perils.[6] Beginning in the 1970s, a critical stance developed toward the idea of using legal strategy (mainly litigation) and lawyers in social movements.[7] The lawyer's traditional faith in litigation as the primary movement tactic was challenged by those

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necessarily reflect those of the AJP or any other organization with which the researcher is affiliated.

[4] See Austin Sarat and Stuart Scheingold, eds, *Cause Lawyering: Political Commitments and Professional Responsibilities* (Cambridge: Oxford University Press, 1998); Liora Israël, *"Quelques éclaircissements sur l'invention du* cause lawyering" (interview with Austin Sarat and Stuart Scheingold) (2003) 62:16 *Politix* 31; Liora Israël, *L'arme du droit* (Paris: Presses Sciences Po., 2009) at 61 n. 20.

[5] For a critical account of the assumptions behind this image, see Gerald Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (Chicago: University of Chicago Press, 1991).

[6] Byron Sheldrick, *Perils and Possibilities: Social Activism and the Law* (Halifax: Fernwood Press, 2004).

[7] Scott Cummings and Ingrid Eagly, "A Critical Reflection on Law and Organizing" (2001) 48 *UCLA Law Review* 443 at 445 (Cummings and Eagly "Critical").

who considered this faith to be naïve.[8] Lawyers, and the activists who worked with them, were presumed to have bought into the "myth of rights" – an ideology which reinforces the status quo by devaluing popular mobilization for systemic change, preferring instead the highly-structured, professionalized and seemingly orderly process of the courts.[9] This critique became so widespread that by the late 1990s, it had become the conventional understanding of the dangers law and lawyers posed for social movement organizations and their participants.[10] Michael McCann and Helena Silverstein summarize the standard view:

> "Lawyers, it is suggested, push social movements in narrow directions that are, at best, ineffective and, at worst, harmful. Lawyers, caught up in the myth of rights and in their own career and personal goals, tend to infuse movements with the misleading and mythical promise of legal justice. Even when lawyers sincerely identify with movement aims, therefore, their own biases and beliefs can crowd out alternative substantive agendas, organizational approaches, and tactical actions. Legal activists, along with their perspectives and methods, contribute to illusions of change without advancing real reform. In so doing,

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[8] Rosenberg, *supra* note 5.

[9] Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy and Political Change* (New Haven: Yale University Press, 1974); Michael McCann and Helena Silverstein, "Rethinking Law's 'Allurements': A Relational Analysis of Social Movement Lawyers in the United States," in Austin Sarat and Stuart A. Scheingold (eds.) *Cause Lawyering : political commitments and professional responsibilities*, (New York: Oxford University Press, 1998) 261at 262.

[10] McCann and Silverstein, *ibid.* at 263. Scott Cummings has written that litigation is "the bogeyman of social movements." See Scott L. Cummings, "Commentary: A Pragmatic Approach to Law and Organizing: A Comment on 'The Story of South Ardmore'" (2008-2009) 42 *J. Marshall L. Rev.* 631 at 635.

> cause lawyers tend to reaffirm more than resist and challenge status quo hierarchies."[11]

As a challenge to this view, McCann and Silverstein present their own empirical research on lawyers involved in two social movements. Their conclusion, after speaking with lawyers involved in political work, is that legal professionals are actually quite sensitive to the dangers listed above, and work hard to avoid them.[12] A study by Corey Shdaimah, published a decade later, comes to a similar conclusion about how lawyers try to avoid taking over decision-making authority, and their efforts to empower, rather than bully, vulnerable clients.[13] Nevertheless, skepticism toward the involvement of lawyers in social movements and the use of legal strategy for systemic change has continued to be influential in the literature.[14]

In the early 2000s, a "politically revitalized approach to progressive legal practice"[15] emerged as a response to the standard critique. Dubbed *law and organizing*, this model of practice suggests that the problems raised by the

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[11] *Ibid.* at 263-264.

[12] See also Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994); Helena Silverstein, *Unleashing Rights: Law, Meaning, and the Animal Rights Movement* (Ann Arbor: University of Michigan Press, 1996); Israël, *supra* note 4 at 36.

[13] Corey Shdaimah, *Negotiating Justice: Progressive lawyering, low-income clients and the quest for social change* (New York: New York University Press, 2009).

[14] McCann and Silverstein note that they have been influenced in their own work by the standard critique, and that their aim is not to dismiss it "outright": *supra* note 8 at 261-262.

[15] Cummings and Eagly "Critical" *supra* note 7 at 447.

standard critique could be largely avoided if lawyers could successfully integrate legal strategies with organizing in grassroots movements.

> "In general, this new framework offers a vision of social change directed by community based organizations in which lawyers are ancillary to the definition and implementation of a transformative agenda. Accounts of law and organizing suggest that progressive lawyers should de-emphasize conventional legal practice and instead focus their efforts on facilitating community mobilization."[16]

For all its focus on community organizing, however, the law and organizing model remains focused on lawyers, associating the problems of individualization and disempowerment raised by the conventional view almost exclusively with the presence of legal professionals. Law and organizing studies privilege the decision-making capacity of community members and organizers, but place the task of supporting that decision-making in the hands of lawyers. Moreover, lawyers are still presumed to be the central players in the creation and management of legal tactics during a campaign, even when the legal tasks do not always require the activist to be a member of the bar. For example:

> "Specifically, lawyers seeking to improve the conditions of poor clients are encouraged to supplement conventional litigation strategies with community education programs, link the provision of legal services with membership in organizing groups, and become directly involved in organizing campaigns."[17]

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[16] *Ibid*.

[17] *Ibid.* at 447-448. Of course, Stephen Wexler introduced a similar outline of 'best practices' decades earlier. Wexler argued that organizing should be central to poverty law practice: "Practicing Law for Poor People" (1970) 79 *Yale L. J.* 1049 at 1053-1054 and following.

The present research is a critique of the law and organizing model, and a proposal for its modification. The assumptions about the origins of disempowerment and individualization which underpin the current model of law and organizing stem from the model's situation as a response to the standard critique.[18] The model seeks to answer the critique of the "myth of rights" by emphasizing a new role for lawyers and legal strategy in an interdisciplinary social movement practice. As scholars have noted, the model puts forward an alternate myth, one which places faith in the virtues of organizing above faith in the virtues of law.[19] However, it is argued that although law and organizing activists engage in interdisciplinary work in *practice*,[20] the *theoretical model* remains as unidisciplinary in focus as the standard critique on which it is based.[21] Recent examples of the law and

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[18] This is in spite of the empirically-based challenge by McCann and Silverstein, above. This observation is inspired by arguments presented in: Orly Lobel, "The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics" (2007) 120 *Harvard Law Review* 937; Cummings and Eagly, "Critical" *supra* note 7.

[19] *Ibid.*

[20] Scott Cummings raises the distinction between law and organizing in practice versus law and organizing in the academy in his reply to Lobel *ibid.* See Scott L. Cummings, "Critical Legal Consciousness in Action" (2007) 120 *Harvard Law Review Forum* 62. Online: http://ssrn.com/abstract=998040. Accessed January 15 2014.

[21] The reader may understandably ask how the researcher could call the early critique of movement lawyers and legal strategy "unidisciplinary" when it was the product of a nascent *law and society* movement in the academy - itself a path-breaking interdisciplinary approach to the study of law and social change (see Israël, *supra* note 4 at 11 and following; Claude Thomasset and René Lapierre, "L'interdisciplinarité dans l'Eldorado des sciences juridiques à l'Université du Québec à Montréal (UQÀM)" Chapter 15 in Violaine Lemay and Frédéric Darbellay, eds, *L'interdisciplinarité comme interculturalité: Voyages au coeur de la*

organizing model in legal scholarship still assume that the "law" portion of law and organizing requires lawyers, and that the central problems of disempowerment and individualization raised by the standard critique can be dealt with effectively through vigilance toward those lawyers and the strategies they suggest. While these may sometimes be correct assumptions, it is argued that this is not always the case.

In contrast, the thesis argues an alternative perspective on law and organizing which is grounded in the interdisciplinary practice of Canadian social movement organizations. In Chapter 1, the research problem is outlined in greater detail. Chapter 2 offers an overview of how one tactic in the law and organizing model is used in Canadian organizations. This tactic is social movement casework, which involves offering legal services on a case-by-case basis to the public as part of a broader movement strategy. Chapter 3 explains how it is possible for nonlawyers to engage in social movement casework without running afoul of the local bar association. A survey of the positive law governing unauthorized practice of law is presented, with a note on the interpretation of "legal advice" versus "legal information", particularly in

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mondalisation scientifique (Montréal: Presses de l'Université de Montréal, 2013)). The reason for this assessment is that the critique focuses almost exclusively on lawyers and assumes that "legal strategy" generally means litigation. In this way the critique is not only unidisciplinary (in the sense that it focuses on a single profession), but also legally positivist in outlook. On this last point, see Lemay, Violaine and Alexandra Juliane Law, "Multiples vertus d'une ouverture pluraliste en théorie interdisciplinaire du droit: l'exemple de l'analyse du phénomène *de cause lawyering"* (2011), 26 *Revue canadienne de Droit et Société* 35.

Québec. Chapter 4 revisits the standard critique, this time from an interdisciplinary perspective. Incorporating observations from the social work field, the problems of individualization and disempowerment raised by the standard critique are recast as issues which cut across professional disciplines involving case-based individual help. Chapters 3 and 4 supply the basic assumptions for a case study of social movement casework in Canada, which is presented in Chapter 5. The Special Diet Campaign is studied as an example of law and organizing built on a legal strategy which did not need the participation of lawyers.[22] Chapter 6 then examines social movement casework as a law and organizing tactic, from the perspective of caseworkers themselves. The results of interviews with lawyer and nonlawyer caseworkers are presented and analyzed, demonstrating overlapping understandings of power relations and strategic issues between lawyers and lay practitioners.

The thesis concludes by suggesting a change to the law and organizing model, taking into account the presence of empowerment and mobilization concerns outside the legal profession. The proposed model understands disempowerment as a potential problem in situations where a person with few alternative resources seeks the help of a person with expertise. It is suggested

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[22] Of course, lawyers *could* participate in the campaign. However, as discussed in Chapter 5, the legal tactics employed (rights information, distribution and submission of applications, "direct action casework") did not require actors to be members of the bar.

that social movement caseworkers could hold normative authority[23] with respect to justice seekers, based on their legal expertise even if they are not members of the bar. Furthermore, the power imbalance inherent in the justice-seeker/caseworker relationship may be enhanced when there are few (or no) affordable alternatives to the legal services provided by the movement organization. Individualization is understood not only as a product of individualizing rights discourse and the necessities of courts, but also as a consequence of the relational challenge of recruiting participants from among justice seekers who are often in crisis and have few service alternatives. The thesis does *not* ignore the professional expertise and training of lawyers, nor does it suggest eliminating lawyers from social movement organizations. The goal is a law and organizing model which more closely reflects current practice, and which may be better equipped to deal with the problems it purports to solve. The suggested change, understood as a model of best practices in movement advocacy, encourages caseworkers of all backgrounds to remain alive to the perils of disempowerment and individualization, but also to the possibilities of creative legal mobilization.[24]

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[23] …in the sense discussed in Violaine Lemay, *L'autorité contractuelle : mouvance internationale et interdisciplinaire : Théorie et sociologie d'une intervention publique québécoise de protection de la jeunesse par l'enchâssement législatif d'un outil de travail social* (Sarrebruck, Germany: Éditions universitaires européennes, 2011).

[24] The phrase "perils and possibilities" is borrowed from Sheldrick *supra* note 6.

Chapter 1: Research Problem, Theory and Methods

Introduction

The present chapter begins with a brief outline of what has become a standard critique of the role of legal strategy and lawyers in social movement organizations. The law and organizing model of activism is then described as a response to this critique. Social movement casework is situated as a prominent tactic within the law and organizing model. The relationship between the *myth* of rights, which is at the heart of the standard critique, and the *model* of law and organizing, which responds to the critique, is clarified in order to set up the core problem of the thesis: the law and organizing model's strong association of demobilization and disempowerment with legal strategy and lawyers. The main argument of the thesis is briefly presented, followed by an outline of the research methodology. Following the work of Orly Lobel, and of Scott Cummings and Ingrid Eagly, the thesis argues that while law and organizing may offer a new model for social movement legal practice, it also introduces a new myth.[1] This new myth, it will be argued, impedes the ability of the model to take account of sources of disempowerment and individualization beyond the legal profession. The resulting incomplete model may be inadequate to respond to both concerns.

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[1] Orly Lobel, "The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics" (2007) 120 *Harvard Law Review* 937 at 974; Scott L. Cummings and Ingrid Eagly "After Public Interest Law" (Book review) (2006) 100 *Northwestern*

The "Myth of Rights" and the Standard Critique

Among legal scholars on the political left,[2] the critique of law and lawyers' role in social movement organizations can be understood as a critique of three main elements: 1) the perceived inefficacy of rights discourse and rights-based strategies; 2) the inability of courts to act as catalysts for broad social change; and 3) the potential for lawyer domination of social movements and vulnerable clients.[3] All three elements are captured by the critique of the "myth of rights", a phrase attributed to Stuart Scheingold, who first used it to describe the ideology which formed the subject of his 1974 book on the role of rights-based strategies in social movements.[4] The phrase

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University Law Review 1251. Online: http://ssrn.com/abstract=834784. Accessed January 15, 2014, at 1275.

[2] Scott Cummings, "Critical Legal Consciousness in Action" (2007) 120 *Harvard Law Review Forum* 62. Online: http://ssrn.com/abstract=998040. Accessed January 15 2014, at 65 (Cummings, "Action"). This article is a reply to Orly Lobel, *supra* note 1.

[3] For a summary of the critique presented here and in the body text below, see e.g. Michael McCann and Helena Silverstein, "Rethinking Law's 'Allurements': A Relational Analysis of Social Movement Lawyers in the United States," in Austin Sarat and Stuart A. Scheingold (eds.) *Cause Lawyering : political commitments and professional responsibilities*, (New York: Oxford University Press, 1998) 261 at 263; Scott L. Cummings and Ingrid Eagly "After Public Interest Law" (Book review) (2006) 100 *Northwestern University Law Review* 1251 Online: http://ssrn.com/abstract=834784. Accessed January 15 2014, at 1254-1255, citing Stuart Scheingold at note 29 (Cummings and Eagly, "After"); Lobel, *supra* note 1.

[4] Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy and Political Change* (New Haven: Yale University Press, 1974). See also Michael McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994) at 3 (McCann, *Rights at Work*), attributing the invention of the phrase "myth of rights" to Scheingold.

has become a blanket designation for a variety of problems associated with the reliance of activist groups on strategies based on litigation, State law and rights claims.[5] The myth of rights holds that political action is best undertaken following legal proceedings, using an articulation of individual rights, and with an *a priori* focus on litigation as the most effective way to solve systemic problems.[6] This perspective is an essential starting point for any theoretical discussion of critical approaches to progressive social movement casework.

The myth of rights translates into a model for social movement activism in which activists identify their cause with a specific individual rights violation, file a suit with the court, litigate and obtain a helpful judgment which, it is assumed, will change the law such that the systemic changes desired by the movement become reality.

In this context, lawyers play a central role. Because of its reliance on courts and litigation, the model of activism promoted through the myth of rights encourages activists to seek help from legal professionals. According to critics of the myth of rights, lawyers then use the confidence gained from their relatively privileged socioeconomic and professional status and elite education to push movement strategy into their own comfort zone, the courtroom, more often than is necessary or desirable from the perspective of the movement as a whole. The resulting loss of control over strategic decision-making –

[5] See e.g. Lobel, *supra* note 1.

according to the critique – leaves movement participants feeling sidelined from the process. Over time, people may feel it is sufficient to let the lawyers manage their campaigns, and erstwhile mobilized justice seekers adopt a passive role. When combined with the already individualizing effects of court cases and rights claims, the critique argues that this "legalization of politics"[7] leads to a demobilization of the social movement and to the disempowerment of its members, including the people most directly affected by the problems the movement seeks to resolve.

Individualization and Disempowerment: Central Concerns of the Critique

The above critique raises two central problems which are dealt with in the present thesis. First, an uncritical belief in the myth of rights can lead to **individualization**, as participants are encouraged to see systemic problems from a perpetrator-victim perspective better suited to court litigation.[8] Systemic problems are thereby recast as individual problems, which can lead to depoliticisation and demobilization. Second, an emphasis on the efficacy of

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[6] Scheingold, *supra* note 4 at 13 and following.

[7] The phrase "legalization of politics" in Canada is closely associated with Michael Mandel, *The Legalization of Politics in Canada* (Toronto: Thompson Educational Publishing, 1994).

[8] On the distinction between the perpetrator-victim perspective and systemic approaches to social problems, see Dean Spade, "What's Wrong with Rights?" in *Normal Life: Administrative Violence, Critical Trans Politics and the Limits of Law* (Brooklyn, NY: South End Press, 2011).

courts and lawyers may lead movement actors to relinquish their collective power to legal professionals who are more knowledgeable about civil and criminal procedure, but whose interests may diverge from those of the broader movement. Lawyers may coerce individuals to tell their stories in ways which conform to the requirements of courts, but which conflict with their own personal understanding.[9] These factors can lead to **disempowerment** of movement organizations, and of individual participants.

The risks of demobilization and disempowerment are closely associated with the often fraught relationship between lawyers and social movement groups depicted in the literature. The following description is typical of the genre:

> "In traditional law practice, lawyers tend to dominate, regulate, and manage their clients within the structure of the attorney-client relationship. Lawyers may function as oppressors, who, in effect, subjugate their already disenfranchised clients through controlling litigation strategies, discounting client's narratives and aspirations, and

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[9] The classic example of this problem is Lucie White, "Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G." (1990) 38 *Buffalo L. R.* 1 (Hein Online). See also "The Plaintiff as Person : Cause Lawyering, Human Subject Research, and the Secret Agent Problem", Note, (2006) 119:5 *Harvard Law Review* 1510 at 1517 (on "narrative surrender" in the context of cause lawyering):

> "While the risks of narrative surrender attend any litigation, their *likelihood* increases in the context of cause lawyering. First, the cause lawyer must translate the plaintiff's story not only into a claim that the law recognizes, but also into one that, if successful, would advance the lawyer's cause. Second, the fact that cause lawyering typically involves multiple plaintiffs further complicates matters by requiring that all the plaintiffs' narratives be translated into the *same* legal theory. Third, the legal claim into which cause plaintiffs' narratives are forced is often some form of discrimination. The experience of being legally wronged can be traumatic enough; being publicly depicted as a victim of discrimination when this does not fit one's experience constitutes a double injury." (Note omitted).

> fostering a relationship of dependence upon the lawyer's professional expertise."[10]

In sum, a belief in the myth of rights leads to a model of social movement advocacy which privileges individual remedies over collective mobilization, and which places lawyers at the centre of strategic decision-making. According to the standard critique described above, the problems of individualization and disempowerment stem from an emphasis on case litigation and over-reliance on the help of lawyers. The law and organizing model, described below, arose as an attempt to deal with the issues raised by the standard critique.

An Answer: Law and Organizing

Recent scholarship has proposed the coordinated and explicit use of legal strategy with community organizing as a model for social movement activism which could attenuate the negative aspects of legal strategy and lawyer involvement raised by the earlier critique. By employing a *law and organizing* model, groups can avoid the problems of "*unaccountable*

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[10] Reyna Ramolete Hayashi (2012) "Empowering Domestic Workers Through Law and Organizing Initiatives," *Seattle Journal for Social Justice*: Vol. 9: Iss. 1, Article 16. Online: http://digitalcommons.law.seattleu.edu/sjsj/vol9/iss1/16. Accessed January 18, at p. 504. Note that some scholars have challenged this view of lawyers, offering empirical evidence in favour of a more nuanced perspective in which lawyers are actually sensitive to the needs of movement organizations and do their best to adapt. See Introduction to the thesis and Chapter 4.

lawyering and *unenforced law*"[11] by building egalitarian and collaborative relationships between social movement organizations and their lawyers, and by finding new and creative ways to combine legal strategy and other tactics in campaigns. In this case, the assumption remains that the lawyer bears the responsibility to promote cooperation, as argued below.

An important element of this approach is the elimination of the perceived hierarchy between legal and other strategies, and between lawyers and non-lawyer activists. Under the law and organizing model, political strategy comes ahead of court cases, and movement lawyers do not make strategic decisions on their own. Goals of the movement organization change under a law and organizing model, coming into closer alignment with community organizing ambitions than with the traditional aims of the lawyer-client relationship.[12] A victory for the movement can include a favourable court judgment, but also a sense of empowerment among affected individuals and communities – even if they *lose* in court.[13] This is also referred to as "empowerment lawyering".[14] The success of a court case is measured by the

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[11] Scott Cummings, "Commentary: A Pragmatic Approach to Law and Organizing: A Comment on 'The Story of South Ardmore'" (2008-2009) 42 *J. Marshall L. Rev.* 631 at p. 633 ("Pragmatic").

[12] Lobel, *supra* note 1.

[13] See Cummings, "Action", *supra* note 2; McCann, *Rights at Work*, *supra* note 4.

[14] William P. Quigley, "Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations", 21 *Ohio N.U. L. Rev.* 455 1994-1995 (Hein Online). See also Victor Narro, "Finding the Synergy Between Law and Organizing: Experiences from the Streets of Los Angeles" (2007) 35 *Fordham Urban Law Journal* 2 at 339, at 341.

judge's decision, but also by the degree to which activists manage to connect the case to broader social struggles in the public eye.[15] "Therefore, lawyering involves not advocacy for individual interests, but advocacy with a group of people organized to reclaim what is rightfully theirs, their own power. That is empowerment."[16]

As traditional litigation is used in connection with other possible movement strategies, individual cases become only one part of a broader plan, and may be only incidental to the core organizing work. An example of this approach is the Workplace Project, the organization founded by lawyer Jennifer Gordon in the United States, and discussed in detail elsewhere in the thesis.[17] The Workplace Project began as a community legal clinic, where a lawyer would help workers with their personal legal problems. However, over time the clinic moved to a law and organizing model where, in order to receive assistance, each justice seeker had to commit to attending a course on workplace rights and activism, at the end of which they were invited to participate in the activities of the group. In this way, instead of placing legal

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[15] Cummings writes: "In general, we would predict that legal action would be more likely to "make sense" where the risks of unaccountable lawyering were low or the costs associated with it were relatively small. Similarly, we would expect that legal action would be more compelling in situations where legal enforcement either was likely to occur or was not critical to the success of the campaign." Cummings, "Pragmatic" at 633.

[16] Quigley, *supra* note 14 at 472.

[17] Jennifer Gordon, *Suburban Sweatshops: The Fight for Immigrant Rights* (Cambridge, Mass.: Belknap Press of the Harvard University Press) (Gordon, *Suburban Sweatshops*); Cummings and Eagly, "After", *supra* note 3.

services at the centre of the movement organization, casework was used as a way to encourage justice seekers to support other strategies. The prospect of legal help acted as an incentive to convince people to attend demonstrations and other events, regardless of whether each individual case was a success.

On Myths and Models

The academic literature often refers to law and organizing as a "model", without necessarily explaining what is meant by this designation.[18] This is unfortunate because the meanings and intentions of scholars who use and describe models can vary widely.[19] For present purposes, the law and organizing "model" designates a group of best practices, drawn from law and

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[18] Studies which refer to law and organizing as a "model" include: Hayashi *supra* note 10 at 498; Lobel, *supra* note 1at 960-961; Scott Cummings and Ingrid Eagly, "A Critical Reflection on Law and Organizing" (2001) 48 *UCLA Law Review* 443 at 447 (Cummings and Eagly, "Critical"); Betty Hung, *Essay-Law and Organizing from the Perspective of Organizers: Finding a Shared Theory of Social Change*, Symposium Immigrants' Rights: From Global to Local, 10 (2008); David R. Rice, "The Bus Rider's Union: The Success of the Law and Organizing Model in the Context of an Environmental Justice Struggle" (Spring 2003) 26:2 *Environs* 187; Narro, *supra* note 14.

[19] See Finn Makela, "Explaining Legal Norm Transmission Using an Epidemiological Model: The Case of Employment Drug Testing" (Doctoral Thesis, Faculté de droit, Université de Montréal, 2010). Online: https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/4793/Makela_Finn_2010_these.pdf;jsessionid=A2F1E6122A0F6C3A76D5CFCAEE0E15A9?sequence=2. Accessed January 13 2014, at 132 and following; Eliot Friedson, "Professionalism as Model and Ideology" in Robert L. Nelson, David M. Trubek and Rayman L. Solomon, eds, *Lawyers' Ideals, Lawyers'Practices: Transformations in the American Legal Profession* (Ithaca, New York: Cornell University Press, 1992) 215 at 217.

community organizing, used in combination by lawyer and/or nonlawyer activists as they work together on an equal basis for mobilization, empowerment and systemic change.

To call law and organizing a *model* of social movement advocacy does not mean that it presents a step-by-step sequence of actions which we predict will result in success.[20] Instead, the goal is to recognize a common set of practices which are present across a great diversity of causes and campaigns, but which are employed with shared goals of mobilization and empowerment.

> "An important but often overlooked characteristic of analytic models in the social sciences is that although they can be used in a purely neutral fashion, they can also be used prescriptively to represent what should exist and to guide practical efforts to realize them. They can also serve as ideologies to focus and organize political activity. Indeed, the most effective ideologies are those based on models sufficiently abstract to be applicable to a wide range of issues and circumstances. Those models can thus explain systematically what is wrong with the world and stand as guidelines by which wrong can be righted."[21]

Following Eliot Friedson's description, law and organizing offers both a description of progressive social movement work and a set of best practices. It is in this sense that law and organizing can be understood as a "model".

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[20] An empirical evaluation of the effectiveness of the law and organizing model as tool for systemic change is beyond the scope of the present thesis. For comments on the possible strengths and weaknesses of the law and organizing model at promoting systemic change, see e.g. Cummings and Eagly, "Critical" *supra* note 18; Lobel, *supra* note 1.

[21] Friedson, *ibid.* Friedson examines two such alternative models to professionalism: the free market and the bureaucracy based on the work of Adam Smith and of Max Weber, respectively.

It is important to be clear about the relationship between the *model* of law and organizing and the *myth* of rights. As a response to the critique of the myth of rights, the law and organizing model has an ideological and prescriptive aspect. Again, to quote Friedson:

> "The most persuasive attacks on professions come from people who themselves, explicitly or implicitly, are advancing an ideology based on an analytic model. They attack the professions not merely for deficiencies in performance but because their existence stands in the way of realizing another, more desirable model."[22]

This thesis argues that movement activists have responded to the much maligned *myth* of rights on an ideological level along the lines described by Friedson, above, by creating a *model* of movement advocacy – but without necessarily examining the new myths which may underpin this new model. In separate works and in dialogue, Orly Lobel, and Scott Cummings and Ingrid Eagly have suggested that the law and organizing model rests on a substitute myth.[23] It is this myth which the present study of social movement casework seeks to critically examine.

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[22] Friedson, *ibid.*

[23] Cummings and Eagly, "After" *supra* note 3 at 1275.

Examples of the Model in Action

As explained in Chapter 1, law and organizing translates into many different combinations of social movement tactics; the Workplace Project offers but one example.[24] However, regardless of which specific tactics are employed and how they are combined, the law and organizing model responds to the standard critique by creating an ideal image of its own: the lawyer-as-organizer.[25] Reminiscent of politically-engaged lawyers envisioned by Peter Gabel and Paul Harris in the 1980s,[26] or Gerald Lopez in the 1990s,[27] the lawyer-organizer works in a non-hierarchical fashion with other activists.[28]

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[24] Other case studies include Hayashi *supra* note 18; Scott Cummings, "Law in the Labor Movement's Challenge to Wal-Mart: A case study of the Inglewood site fight" (2007) 95 *California Law Review* 5 at 1927 (Cummings, "Wal-Mart"); Scott Cummings, "Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement" (2009) 30 *Berkeley Journal of Employment and Labor Law* 1 at 101; Rice, *supra* note 18; McCann, *Rights at Work*, *supra* note 4; and see the case study of the Special Diet Campaign related in Chapter 5, below.

[25] On alternative myths to the "myth of rights" see: Cummings and Eagly, "After" *supra* note 3 at 1275 (the "myth of organizing"); Orly Lobel, *supra* note 1 at 974 (the "myth of activism"; the "myth of exit"). See also below in the present chapter.

[26] Gabel, Peter and Paul Harris, "Building Power and Breaking Images: Critical Legal Theory and the Practice of Law" (1982-1983) *N. Y. U. Rev. L. and Soc. Change* 369.

[27] Gerald P. López, One Chicano's Vision of Progressive Law Practice (New Perspectives on Law, Culture, and Society) (Westview Press, 1992); Gerald P. López, "The Rebellious Idea of Lawyering against Subordination" in Susan D. Carle (ed.) *Lawyers' Ethics and the Pursuit of Social Justice: A Critical Reader* (New York: New York University Press, 2005) 187.

[28] See e.g.: Cummings and Eagly, "Critical" *supra* note 18.; Hayashi, *supra* note 18; Rice, *supra* note 18; Quigley, *supra* note 14; Hung, *supra* note 18; Bezdek, Barbara L., "Alinksy's Prescription: Democracy Alongside Law" (2009). *John Marshall Law Review*, Vol. 42, 2009; U of Maryland Legal Studies Research Paper No. 2009-42. Available at SSRN:

This person aspires to be a community builder as well as an effective attorney. Lawyer-organizers are expected to blend in with their fellow activists, so that the knowledge and the experience of *all* participants are valued on an equal footing. In contrast to the pessimistic view of lawyers in earlier critical scholarship, descriptions of the law and organizing model in action are inspiring, in part because they highlight the creative potential of progressive law students, recent graduates and current lawyers.

In a case study of the Bus Riders' Union in Los Angeles, California, David Rice situates law and organizing as a response to earlier critiques of lawyers in social movements.[29] He explains how a law and organizing approach is helpful *to lawyers*:

> "By integrating elements of grassroots organizing into their practice, and by explicitly coordinating their efforts with organizations rooted in the community, lawyers could address the two major criticisms of traditional progressive law. First, by working either as organizers or with existing community groups, lawyers could engage the community with more sensitivity. Not only would lawyers gain a greater understanding of the community's needs, they would also be perceived with less animosity or contempt as outsiders. Second, lawyers could coordinate more closely with their client communities, as well as employ effective tactics such as political protests and letter-writing campaigns, to augment legal strategies. This would make their work more effective."[30]

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http://ssrn.com/abstract=1495021. Accessed January 18 2014. Scott Cummings, "Pragmatic" *supra* note 11.

[29] Rice, *supra* note 18 at 188. This organization is also discussed in Eric Mann, *Playbook for Progressives: 16 Qualities of the Successful Organizer* (Boston: Beacon Press, 2011) at xv.

[30] Rice, *supra* note 18 at 191.

The case study itself chronicles the efforts of a grassroots community organization to oppose an increase in bus fares by combining litigation with traditional organizing. The group filed a motion for a temporary restraining order asking that the fares not be increased. They based their arguments on the grounds that the increase was racist and constituted a civil rights violation against low-income people.[31] During the lawsuit, the Bus Riders Union, as one of the plaintiffs, maintained control of the process, assisting the lawyers in drafting the arguments required.[32] During the ensuing lawsuit, the Bus Riders Union continued to recruit new members and attended board meetings of the municipal transit authority.[33] From this experience, Rice draws several "Lessons for Lawyers".[34] Lawyers are asked to "Know your role" and "Be realistic about your commitment". Organizations are also offered important lessons, one of which is to keep control over legal decisions:

> "There may be a tendency to defer decisions to an attorney, especially if the attorney professes superior knowledge of the law. However, as the BRU case illustrates, there are many opportunities for non-lawyers to directly supervise legal decisions. Organizations should not shy away from demanding this level of control as it is in their best interest. Furthermore, allowing general members a role in the lawsuit creates a sense of ownership consistent with the spirit of grassroots organizing."[35]

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[31] *Ibid.* at 195.

[32] *Ibid.*

[33] *Ibid.* at 196

[34] *Ibid.* at 197 and following.

[35] *Ibid*. at 199.

In the above study, the combination of law with organizing strategy involves a clear mixing of member recruitment, attendance at events such as the board meetings, and organizational participation in the lawsuit. Here, the "law" part of "law and organizing" is a traditional court case. However, that is not always so.

Scott Cummings' case study of opposition to Wal-Mart is an example of what he has referred to as "tactical pluralism",[36] which is when lawyers use skills such as drafting legislation and court litigation, as well as public relations. In this case, lawyers worked with a union and grassroots organizations in a coordinated effort to prevent Wal-Mart from opening a store at a site near Los Angeles.[37] Here, the legal strategy centred on land use approval processes, court litigation against a ballot measure initiated by Wal-Mart, and the municipal electoral process.[38] The lawyers were called upon to work closely with union activists and community organizations to put these strategies into action in a way that would effectively defeat Wal-Mart's plans. Cummings writes that the legal strategy differed from traditional legal practice because it was "problem-solving rather than litigation-focused."[39] During the campaign, "the Inglewood lawyers used traditional litigation strategies in an

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[36] Cummings, "Wal-Mart", *supra* note 24 at 1932.

[37] Cummings notes that Inglewood is "a separately incorporated city within Los Angeles" and that the choice of this site allowed Wal-Mart to avoid its obligation to consult the city of L.A. prior to development. *Ibid.* at 1955.

[38] *Ibid.* at 1964 and following.

[39] *Ibid.* at 1985.

attempt to gain concrete 'wins' and to spur ongoing mobilization, while also readily incorporating non-traditional techniques to advance policy goals."[40]

Commenting on a group of law and organizing case studies, Jennifer Gordon writes that stories about legal strategies used by social movements "have a sameness to them"[41] in that they tend to place the lawyer at the centre and recount the heroic efforts of the attorney in litigation. She remarks that the law and organizing studies which are the subject of her own comments are different because within this model, lawyers do not adopt the central role: organizations do.[42] Studies such as Cummings' case study of the anti-Wal-Mart campaign or David Rice's account of the Bus Riders' Union are examples of this genre. Under a law and organizing model, lawyers are asked to adopt subordinate or equal roles with organizers, instead of taking up the spotlight. The model presumes that this allows lawyers to be more responsive to the needs of movements in which they work, thereby avoiding the problems of individualization and disempowerment.

Like Gordon, Rice and Cummings, Betty Hung also frames law and organizing as a model through which lawyers can find a new and friendlier

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[40] *Ibid.*

[41] Jennifer Gordon, "The Lawyer is not the Protagonist: Community Campaigns, Law, and Social Change" 95 *Cal. L. Rev.* 2133 (2007).
Online: http://scholarship.law.berkeley.edu/californialawreview/vol95/iss5/7.
Accessed January 15 2014, at 2133. (Gordon, "Protagonist").

[42] *Ibid.* at 2135.

role in social movement organizations. She notes that the standard critique remains relevant to activists today. However, she expresses hope that law and organizing can inspire a better set of alternatives, provided that lawyers and organizers learn to work together effectively and create shared goals. She cautions, however, that even within a law and organizing model, conflict can arise between organizers and legal professionals:

> "Rather than building the power of marginalized communities, lawyers tend to create dependency on lawyers and legal strategies without altering structural inequalities and the status quo. Notably, in my experience, community organizers believe that these criticisms are applicable even to lawyers and lawyering within the 'law and organizing' model. The reality of these on-the-ground conflicts between organizers and lawyers must be addressed if 'law and organizing' is to be effective and sustainable as a model for bringing movement players together to achieve systemic change."[43]

As the preceding examples indicate, law and organizing scholarship can inspire best practices in progressive legal work, but it can also be read as an attempt to 'rehabilitate' cause lawyers after years of mistrust on the part of academics and activists. Law and organizing studies may thus serve an ideological function: to reclaim respect for the image of the legal professional in social movements.

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[43] Hung, *supra* note 18 at 6.

Defining the Argument

Lawyers Still at the Centre

Law and organizing studies often easily move from a stated concern with *processes* (combining legal strategy with other organizing tactics) to an analysis of *roles* or *identities* (lawyers working with organizers) – as if the use of legal strategy always implies the participation of lawyers. Lawyer participation in legal strategy is assumed in the case studies mentioned above. In yet another study of law and organizing, Victor Narro presents two inspiring and detailed cases of how legal and other organizing strategies were combined in labour organizing in Los Angeles, as well as the lessons for organizers and lawyers which can be drawn from them.[44] The stated goal of the study is "finding the synergy between law and organizing."[45] Narro begins by noting the abundant scholarship currently available, particularly in the United States, on law and organizing approaches. The move from "law and organizing" to "lawyers and organizing" then happens almost instantly, as does the move from "law" to "courts":

> "The topic of law and organizing has generated much scholarly debate over the past twenty years. There exists a wide array of articles written by legal scholars and other academics on the relationship between

[44] Narro, *supra* note 14.

[45] *Ibid.* at 343.

> public interest lawyers and organizers during the process of legal representation and litigation."[46]

The search for synergy between law and organizing soon becomes the search for "effective ways to foster positive synergy between lawyers and organizers"[47] – as if the two searches were equivalent. One reason for this may be the fact that in one of the campaigns examined by Narro, the legal strategy consisted of suing (and being sued) in court. As discussed in detail later in the dissertation, the line between the role of a lawyer and the roles of non-lawyer activists is often most rigidly drawn in the context of court litigation, where only a lawyer is permitted to represent other people. However, the second case studied by Narro deals with lawyers who successfully created a movement for protective legislation for car wash workers – a task which requires legal training, but for which one does not need to be a member of the bar. Narro's acknowledgement at the beginning of the article, that law and organizing literature is largely about lawyers and their relationship to social movements, is telling. Not all legal strategies necessarily require lawyers. However, even when the tasks involved can be completed by non-lawyers, the focus on legal professionals in the literature remains.

In another study, this time of domestic worker organizing in the United States, Reyna Ramolete Hayashi sets out a detailed summary of the standard critique and explains what a law and organizing perspective offers to the

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[46] *Ibid.*, at 339-340.

movement against domestic worker abuse.[48] She writes that legal reform is usually conceived as a "top-down" exercise, and that "Accordingly, the domestic worker labor movement and the lawyers supporting it should adopt a bottom-up, progressive law and organizing model to empower domestic workers to best address the intersections and conditions that cause domestic servitude."[49] Hayashi divides her summary of the standard critique of legal strategy into a critique of "the Law"[50], of "Litigation"[51] and of "Lawyers". However, concern over the role of the legal professional runs through all three sections. The critique of the Law focuses on the contrast between formal equality under American law and the conservative nature of legal institutions. The fact that court cases often demand that one phrase a complex situation in terms of clear, concise 'rights language' is an important factor, as is the reliance on the "perpetrator perspective" adopted by courts, which ignores systemic issues in favour of individual blame.[52] Here, the emphasis is not on lawyers, yet the critique of "the Law" does focus on courts as the main forum for dispute resolution. Given that courts are the almost exclusive domain of legal professionals (including judges mostly drawn from the ranks of former

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[47] *Ibid.* at 343.

[48] Hayashi, *supra* note 18.

[49] *Ibid.* at 500.

[50] *Ibid*.

[51] *Ibid.* at 503.

[52] *Ibid.* at 501. For a critical discussion of the perpetrator perspective, see Spade *supra* note 8.

lawyers), the equation of legal strategy with courtrooms once again implies the participation of lawyers.[53]

The lawyer becomes an even more central player in the final two critiques. Understandably criticizing litigation for its individualizing aspect, Hayashi notes that "[…] prioritizing impact litigation is dangerous, because in the case selection process, attorneys look for cases that fit a particular legally recognizable claim and prefer those clients who precisely fit each of a claim's statutory elements in order to best posture the case for success."[54] She is clear that it is the litigation process which requires this selection, and that it is not necessarily the lawyer's chosen tactic, but the lawyer remains the exclusive conduit for this demand.[55] Finally, in her critique of Lawyers, Hayashi explains the tendency of lawyers to dominate movements and clients, promoting a sense of dependency instead of empowerment along lines similar to the standard critique outlined above.[56]

Like other scholars, Hayashi situates law and organizing as a response to the standard critique of legal strategy in social movements: "The law and

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[53] The division between lawyers' and other advocates' tasks according to the positive law is discussed in detail in Chapter 3. For now, it is important to note that only a lawyer may represent another person before most courts in Canada (in contrast to administrative tribunals, where 'lay-advocates' may sometimes practice).

[54] Hayashi *supra* note 18 at 503.

[55] For a similar account of a lawyer caught between the demands of the legal system and the requirements of an empowering progressive legal practice, see White *supra* note 9.

[56] Hayashi *supra* note 18 at 504.

organizing movement emerged to address the numerous critiques **of the law** as an imperfect vehicle to generate social change by fusing legal advocacy with community organizing."[57] In explaining how this fusion might be accomplished in a law and organizing model, Hayashi emphasizes the role that lawyers have to play. The explanation is cited at length and with emphasis added in order to demonstrate the almost automatic overlap between legal strategy and the legal profession:

> "Thus, this model requires **de-centering the law, litigation, and lawyers**, in addition to prioritizing community organizing, political mobilization, and community empowerment. **Specifically, lawyers should provide** community education programs, link the provision of legal services with participation in organizing, and take direction from community-organizing campaigns. **It is only through law and organizing projects that lawyers can assist** communities in challenging the underlying structural causes of poverty and oppression and advance a progressive vision of social justice."[58]

The explanation of the benefits of law and organizing moves swiftly from the goal of de-centering law, litigation and lawyers – to examining what lawyers can do to help. Hayashi does acknowledge the importance of lay advocates, calling on organizers to prioritize the work of lay advocates when possible.[59] In a brief case study, she describes how an activist group developed an organizing strategy for dealing with wage theft without needing the intervention of lawyers. The strategy is to combine a demand letter with

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[57] *Ibid.*, p. 505. Emphasis added.

[58] *Ibid.* at 505. Note omitted and emphasis added.

[59] *Ibid.* at 519-520.

direct action (demonstrations) to pressure employers.[60] In addition, tasks which are recommended by Hayashi for lawyers interested in law and organizing include: community legal education, legal advice on picketing, teaching lay-lawyering, negotiation, research and reports on industry conditions, traditional litigation and legislative drafting.[61] Note that many of these tasks can be performed by any person with the proper training, regardless of whether they are a member of the bar, and without running afoul of rules against the unauthorized practice of law.

However, when the article reaches general conclusions about law and organizing, Hayashi returns the lawyer to centre stage. The article concludes by setting out a general program of law and organizing approaches for domestic worker organizing in the US. A pattern emerges here, which is repeated elsewhere in the law and organizing literature. The overarching goal of the law and organizing model is to relativize the use of legal strategy with respect to other organizing strategies. However, in the final analysis, it is the *lawyer's* job to adapt and decide how this will be done. Again, the article is cited at length to clarify the underlying assumption: that a lawyer remains both responsible for changes to the way legal strategy fits with organizing, and *in charge* of how those changes will play out in practice.

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[60] *Ibid.* at 519.

> "In conclusion, in order to address the conditions of abuse and oppression that plague the field of domestic work, **poverty lawyers** need to begin deconstructing their traditional roles by de-centering law and litigation. Moreover, **lawyers should reconceptualize their role** within the framework of the law and organizing model by prioritizing community-based and organizing initiatives that empower domestic workers and produce social change. […]
>
> By promoting and facilitating innovative law and organizing initiatives, such as worker centers, worker-owned cooperatives, and unionization, **lawyers can empower domestic workers** to advocate on behalf of themselves and exercise self-determination by collectively taking control over the very working conditions they seek to change."[62]

Other examples of the focus on lawyers in the law and organizing literature are cited notably in an annotated bibliography created by Loretta Prince and Melinda Davis.[63] In their introduction, the authors make the same direct move from writing about law and organizing to writing about lawyers:

> "That law and organizing are related is self-evident in some ways. Social movements and grassroots organizations can hardly exist without interaction to a significant degree with law, lawyers, and the legal system. How that interaction occurs, however, and what roles lawyers play in structuring and planning it, can vary dramatically."[64]

Describing their audience, the authors write that they hope to assist "lawyers, legal educators, and law students who want to understand – and perhaps help to construct – the relationship between law and effective

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[61] *Ibid*. at 515-516.

[62] *Ibid.*, p. 528. Emphasis added.

[63] Loretta Price and Melinda Davis, "Seeds of Change: A Bibliographic Introduction to Law and Organizing" (2000-2001) 26:4 *Review of Law & Social Change* 615.

[64] *Ibid*. at 616.

organizing for social change."[65] From the beginning, this is a text aimed at legal professionals or future legal professionals despite its great potential usefulness for activists outside the legal profession. In aiming it exclusively at the profession, Price and Davis imply that, while organizers can learn about law from lawyers, they generally do not "do" the legal side of law and organizing by themselves. This is supported by a glance at the texts cited as examples of the law and organizing literature, as well as the stated goals of each study.[66] The bibliography has several sections, but the section devoted to literature solely from the law and organizing field includes twenty-one texts, of which sixteen specifically highlight the role of lawyers and how they can integrate themselves into organizing work.

The purpose of the above discussion has been to point out a particular current in the literature in law and organizing, the assumption of a special role lawyers play in movement organizations, and the possible rehabilitation of the image of the cause lawyer. This is by no means intended to downplay the importance of the careful and respectful integration of lawyers into movement organizations. As a lawyer committed to organizing, the researcher has found inspiration, valuable practical guidelines and even a certain emotional comfort from reading this literature. The law and organizing model offers interesting possibilities for the practice of social movement law, and this is - to repeat -

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[65] *Ibid.* at 617.

[66] *Ibid.* at 620 and following.

inspiring to legal professionals. Nevertheless, by focusing on the lawyer-organizer, even from a critical perspective, law and organizing scholarship continues to place the emphasis in discussions of law and social movements *on lawyers*, thus reinforcing the implied division in roles which is emphasized in the standard critique, as well as the notion that only lawyers can mobilize legal strategy. The conflation of legal and organizing *processes* with lawyers' and organizers' *roles* in activist groups may reinforce the divide criticized in earlier literature between those who can "do law" and those who cannot – leaving the lawyer as "protagonist"[67] even as she seeks to take on a supporting role.

The conflation gains significance when we consider that activists who eventually become lawyers may do so after a great deal of soul-searching. Elements of the standard critique, as well as the law and organizing literature, may influence that decision-making process. Law professor and activist Dean Spade explains the dilemma of prospective lawyer/activists who ask him for advice as follows:

> "I end up talking on the phone or in person to many of these people and saying a lot of the same things to them so I thought it might be useful to write them down. In general, these conversations are focused on helping them get past the national narratives we have all been fed that tell us that legal cases are the most effective way to dismantle systems of oppression and changing people's lives. If we compare that idea to what is really happening in the world and what social movements are strategizing about, we find a more complicated

[67] Gordon, "Protagonist" *supra* note 41.

> relationship between law and social movements that raises questions about whether becoming a lawyer is a good way to participate in transformative change, and if so, how."[68]

In the above quote, the reader can clearly see the distinction made in the critique of the 'myth of rights' between the ideals expressed in this myth and the lived reality of people who attempt to mobilize law in favour of social movement goals. There is a connection here between the critique of the myth of rights on the one hand, and the strategic decision of what official role to adopt in a social movement on the other. This, among other reasons, makes an examination of possible challenges to the lawyer-organizer ideal in social movements, as it is portrayed in the current law and organizing literature, a potentially helpful project.

Instead of focusing exclusively on lawyers and their own dilemmas as they strive to become good organizers, the thesis examines the process of activist casework as a legal strategy. It is suggested that the casework process might influence the way that activist roles are shaped over the course of a campaign, and that in doing so it poses a challenge to the assumption that lawyers have a *de facto* special role to play in organizing efforts. A working hypothesis is that social movement casework is a practice which has the potential to blur or at least complicate the presumed distinction in roles, and

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[68] Dean Spade, "For Those Considering Law School", (2010) 6 *Unbound: Harvard Journal of the Legal Left* 111. Online: http://www.legalleft.org/wp-content/uploads/2011/02/3-for_those_considering_law_school.pdf. Accessed January 18 2014, at p. 111.

that this has implications for our present-day understanding of the "standard critique" and its continued relevance.

Individualization and Disempowerment Concerns Remain

The continued emphasis of the role of lawyers in law and organizing studies is accompanied by another assumption which can perhaps be attributed to the model's origins as a response to the critique of the myth of rights. The law and organizing model assumes that the problems of individualization and disempowerment raised by this critique can be remedied by adopting a critical stance toward legal strategy and lawyers, ensuring that both adopt supporting roles in the movement rather than directing decision-making. However, this assumption has been challenged by more recent scholarship. Orly Lobel has written of the substitution affected by the law and organizing model, of a "myth of exit" or a "myth of activism" in place of the myth of rights.[69] Lobel writes that law and organizing scholars have adopted a romantic view of organizing which presumes that by exiting the legal sphere (which in this case means litigation and dominant lawyers), activists can avoid the problems raised in the standard critique, which Lobel groups under the label of "cooptation".[70] She writes that this can have negative consequences. For example, the growth of civil society organizations offering legal services can

[69] Lobel, *supra* note 1 at 974.

[70] *Ibid.*

serve as a justification for the State abandoning areas of service gradually.[71] Local organizations offering these services are often dependent on project funding which may dictate the terms of their work.[72] Moreover, community organizing and development programs meant to empower people locally may actually have exclusionary effects on the most vulnerable – and these exclusions are not addressed by the law and organizing model.[73]

Cummings and Eagly express similar concern, citing a "myth of organizing" created in the law and organizing literature.[74] Activists who too easily dismiss legal strategy and lawyers may overestimate the value of organizing strategies within a movement. In their review of Gordon's published account of the Workplace Project, they note that as a lawyer, Gordon works hard to diminish her own status as a professional in the organization.[75] However, they question why lawyers in particular should be the focus of concern, noting that doctors and other professionals may act in similarly disempowering ways. "A focus on cabining lawyer expertise also may obscure the way that other "expertises" are deployed at the community

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[71] *Ibid.* at 972.

[72] *Ibid.* at 981.

[73] *Ibid.* at 977, citing Cummings and Eagly "Critical" *supra* note 18.

[74] Cummings and Eagly, "After" *supra* note 3 at 1275-1276.

[75] *Ibid.* at 1279.

level."[76] They include social workers and organizers among those who might bring their expertise to bear on a movement in a manner similar to lawyers.

The researcher will engage with these suggestions in the present thesis. It will be argued that, by focusing on disempowerment and individualization *as understood through a legal disciplinary lens*, the law and organizing model may fail to adequately respond to these issues. Lobel argues as follows:

> "It is not the particularities of lawyers as a professional group that create dependency. Rather, it is the dynamics between skilled, networked, and resourced components and those who need them that may submerge goals and create reliance. It is not the particularities of the structural limitations of the judiciary that threaten to limit the progressive vision of social movements. Rather, it is the essential difficulties of implementing theory into practice. Life is simply messier than abstract ideals."[77]

The purpose of this thesis is to demonstrate that the above contention is plausible. As long as the law and organizing model emphasizes lawyers' roles (even when the legal strategy does not require a professional), and assumes that disempowerment and individualization are exclusively "legal" problems, it may remain unequal to the task scholars have set for it.

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[76] *Ibid.* In a separate article, Cummings makes the observation that a charismatic organizer can potentially dominate movements in much the same way as lawyers are accused of doing. However, organizers are given the benefit of the doubt. "Nonetheless, we tend to equate organizing with the promise of direct democracy." Cummings "Pragmatic" *supra* note 11 at 632.

[77] *Ibid.* at 977.

Core Concepts: Social Movement Casework and Legal Strategy

Two core concepts are significant for understanding the argument.

Social movement casework is defined in the thesis as a tactic within the law and organizing model. It is the process of assisting an individual person to overcome circumstances which are causing distress, in the context of a movement for systemic change aimed at problematic circumstances similar to those of the individual person, undertaken by professional or non-professional advocates, regardless of whether the case is dealt with through formal adjudication. Key to social movement casework is the process of linking individual cases to broader systemic goals.

Legal strategy is defined inclusively. In line with a legal pluralist approach which recognises that law can be created and interpreted in multiple sites, and that competing normative orders may coexist in a single territory, legal strategy is understood as the mobilization of rules-based processes and normative claims, including advocacy before institutional actors in charge of administering such processes or claims, as well as the negotiation of disputes before they can become the object of adjudication.[78] It follows that when an

[78] On formal and informal/explicit and implied legal norms from a legal pluralist perspective, see Roderick A. Macdonald, "Les Vieilles Gardes. Hypothèses sur l'émergence des normes, l'internormativité et le désordre à travers une typologie des institutions normatives" in Jean-

activist group considers whether it should adopt a legal strategy, the scope of possible strategic choices which fall into the 'legal' category is broad.[79] Legal strategy may require going to court in search of a judicial decision, but may also encompass administrative processes such as the Special Diet policy form in Ontario, meetings of Boards of Directors or shareholders, the federal Employment Insurance application process, or an appeal to an ombudsperson working in a private company or organization. Above all, the researcher recognizes that the definition of "legal strategy" in practice depends on the interpretation of social movement participants themselves:

> *« Le droit n'est pas autant un fait social qu'une construction sociale. Le droit n'existe comme phénomène normatif que dans la mesure où il est reconnu à ce titre par les citoyens. »*[80]

Guy Belley ed., *Le droit soluble : Contributions québécoises à l'étude l'internormativité* (Paris: Librairie générale de droit et de jurisprudence, 1996) 233. For a discussion of legal pluralism in the context of cause lawyering, see Violaine Lemay and Alexandra Juliane Law, "Multiples vertus d'une ouverture pluraliste en théorie interdisciplinaire du droit: l'exemple de l'analyse du phénomène *de cause lawyering"* (2011), 26 *Revue canadienne de Droit et Société* at 353; Lobel *supra* note 1 at 966 and following.

[79] Alex Law and Jared Will, "Some Comments on Law and Organizing" in Jill Hanley & Eric Schragge Aziz Choudry ed., *Organize! Building from the Local for Global Justice* (Oakland: PM Press, 2012).

[80] Roderick A. Macdonald, "L'hypothèse du pluralisme juridique dans les sociétés démocratiques avancées", (2002-2003) 33 *R.D.U.S.* 134 at p. 135 (Macdonald, "Pluralisme").

Thesis Methodology

The thesis presents the above argument beginning with an overview of social movement casework. Because so much of the law and organizing literature originates in the United States, a series of Canadian examples are offered. Second, the thesis examines State law governing the line between lawyers' and nonlawyers' tasks. Canadian provincial legislation prohibiting the unauthorized practice of law is surveyed, contrasting the seemingly unproblematic definition of the tasks of the lawyer from the perspective of the positive law, with the way that this definition becomes complicated when put into action. Chapter 4 presents an interdisciplinary re-reading of the standard critique. By combining observations from the field of social work with the existing critical literature on the myth of rights, the concerns of critical legal scholars are exposed as a set of shared issues held by actors working across disciplines. Applying the observations gained from interdisciplinary study of the critique, coupled with an understanding of the positive law governing lawyer/non-lawyer tasks, the thesis then turns to a case study of social movement casework in a Canadian organization. The Special Diet Campaign, spearheaded by the Ontario Coalition Against Poverty (OCAP) from 2005 onward, is an example of a casework-based campaign which used legal strategy and the help of professionals, but in which lawyers and courts only appeared very late in the chronology. The campaign is notable for the involvement of a *medical* professional, Dr. Roland Wong, who was subjected

to a disciplinary hearing as a result of his participation in the movement. Finally, social movement casework is examined from the perspective of caseworkers themselves. A series of in-depth, semi-structured interviews was conducted with eight caseworkers engaged in a variety of causes, four of whom are lawyers, and four of whom are not.

Overview of Social Movement Casework in Canada

This chapter recalls the definition of casework described above, and presents a more detailed examination of the motivations behind the choice of this particular tactic among available options. The various uses of social movement casework are described using Canadian examples and with reference to examples already present in the literature. Some of the challenges inherent in adopting the casework tactic are also addressed.

State Law Governing Unauthorized Practice of Law

The thesis moves on to a study of the positive law governing lawyers' exclusive tasks. However, in doing so, the dissertation takes into account the fact that law creation is not exclusive to the State. The empirical bases for a broad definition of social movement legal strategy, which contests the centrist, monist and positivist image of law, are plenty. Scott Cummings has written of how activists have used a blend of strategies to prevent a big-box store from opening in their neighbourhood, and to support anti-sweatshop work in the US

and abroad – everything from drafting legislation to protesting, to addressing city council and so on.[81] Internationally, we can consider the use that activists have made of supra-national institutions such as the United Nations, or attempts to bring transnational corporations to justice through cross-national lawsuits.[82] When we consider the documented evidence of social movement strategies and the injustices they seek to remedy, it is no longer sufficient to consider legal strategy to include only advocacy before courts and state legislators. The empirical reality of activist organizations simply does not conform to a state-centred, positivist and monist view of legal activism.[83]

At the same time, it is important for legal scholars to differentiate between a theoretical commitment to a pluralist understanding of law, and the refusal to acknowledge the importance of state law in people's daily lives. There are many ways in which the law of the state influences the work of activist groups. One need only consider the coercive influence of police discretion to declare protests illegal, to arrest and detain activists, to conduct surveillance of activist movement organizations, and influence the laying of charges against movement participants. Moreover, even activists who have a serious political commitment to abolishing the State altogether may, in the short term at least, address demands to the state for policy and legislative

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[81] Cummings, "Wal-Mart" *supra* note 24.

[82] See e.g. Austin Sarat and Stuart Scheingold (eds), *Cause Lawyering and the State in a Global Era* (New York: Oxford University Press, 2001).

[83] …if it ever did. See historical overview in Chapter 4.

changes in favour of affected communities, or they may go to court for strategic purposes.

There are thus many reasons for a legal scholar interested in social movements to pay attention to the positive law of the State. In this case, State law offers a seemingly clear means of governing the distinction between lawyer and non-lawyer roles. The determination of who is a lawyer depends in large part on legislation enacted by the provinces and enforced by provincial bar associations. A person cannot hold themselves out to be a lawyer unless they satisfy the requirements of the local bar. For this reason, the thesis engages with the distinction between lawyer and non-lawyer activist roles at the level of the positive law of the State, through an examination of legislation against the unauthorized practice of law in Canadian provincial jurisdictions. The text of the legislation is examined, as well as the manner in which certain of these articles are interpreted and enforced – particularly in Ontario and Quebec. It is suggested that, even from the perspective of the positive law, the division between potential roles for lawyers versus nonlawyers social movement casework may be difficult to determine clearly.

Interdisciplinary Reading of the Standard Critique

The thesis first reviews the standard critique in detail, but this time through an interdisciplinary lens. This review is undertaken with caution, bearing in mind the importance of maintaining distinctions between the

technical terms and acknowledging the different historical backgrounds of each discipline. Given its origins in the legal academy, and the preoccupation of most law professors with training new generations of lawyers, it may be unsurprising that the standard critique assumes that lawyers play a unique role in social movements, and that lawyers must deal with problems (demobilization, disempowerment) presumed to be unique to legal practice in this context.[84] However, this core assumption – the unique nature of the lawyer's role – can be nuanced through insights from other disciplines.

The critical tradition in social work is an important source of new perspective on the standard critique in the legal academy. "Radical" or "structural" social work scholars and practitioners offer a critique of traditional modes of social work practice which closely parallels that presented by Scheingold and other legal scholars in terms of the myth of rights. In line with critics of the 'myth of rights', structural social workers decry the individualizing and disempowering aspects of traditional social work practice, especially in the context of community organizing. The legal and social work professions have divergent histories and theoretical preoccupations, as discussed in this chapter of the thesis. However, the study of casework critiques from both disciplines reveals that disempowerment by professionals, individualization through an emphasis on cases, and the

[84] This has been a concern of law professors as early as the 1970s when Stephen Wexler wrote his influential article on "Practicing Law for Poor People" (1970) 79 *Yale L. J.* 1049. See also

consequent demobilization of movements are concerns which belong to activists both in and outside the legal profession.

Case Study of Law and Organizing in Action

Building on the interdisciplinary study of social movement casework introduced in the first section, and on the knowledge of state law and legal pluralist assumptions outlined in the second, the third section of the study examines social movement casework in action. The purpose of this section is to examine what a law and organizing approach which focuses on legal and organizing *processes* instead of lawyer and non-lawyer *roles* looks like. To this end, the thesis presents a case study of a movement campaign in which casework was the main tactic of choice, but where the professional services of lawyers were not required in order for the majority of the legal work to take place.

Briefly, the Special Diet Campaign was one phase in an ongoing effort among Ontario anti-poverty advocates to convince the provincial government to raise social assistance rates. A little-known regulation which provided extra funds to recipients for medically necessary dietary needs was publicized by groups such as OCAP. Activists conducted widespread public legal education campaigns, informing recipients of the regulation, the application process, and where to go to apply for the monthly income supplement, which could amount

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Gabel and Harris, *supra* note 26.

to $250 per person. Refusal of application forms was answered with a variety of tactics, including enlisting the help of medical professionals to garner broad public support, as well as direct action in support of the individual casework (occupying welfare offices and staging raucous protests). The Special Diet Campaign worked on multiple levels, including mass media representations, provincial legislation, public legal education and individual service provision. The case study of the campaign highlights the intersections between different tactics, professional disciplines and legal systems, examining an approach to law and organizing in which a unique role for lawyers is not clearly identifiable.

This case study is presented in the context of ongoing debates on sociolegal research methods and epistemology, as well as the appropriate use of a diversity of movement tactics in organizing work. These are discussed in greater detail in the chapter devoted to the case study, however, a brief explanation will help guide the reader. The study presents the Special Diet campaign based on publicly-available documents, media reports and quotes from activists cited in both. It is based on an interpretivist approach to sociolegal research, which focuses on social reality as it is shaped by the understandings of participants. Within this approach, the constitutive role which media representations play in the creation of law is acknowledged, as is the importance of 'framing processes' as a critical battleground in legal

activism.[85] While lawyers did offer support near the end of the most active phase of the Special Diet Campaign, their participation was not instrumental to the legal mobilization efforts of anti-poverty groups. At the height of the campaign, where the legal battle was occurring at the level of media representations of welfare recipients, and in the processes related to special diet applications, it would have been difficult to pick out a significant role assigned exclusively to lawyers. And yet, there *was* an important role for legal strategy.

Caseworker Interviews

The final element in the four-part study presented in this dissertation is an examination of the law and organizing model from the perspective of caseworkers themselves. Following an interpretivist approach to social scientific research, the interviews here are aimed at understanding how caseworkers understand their own work.[86] This is in line with the underlying assumptions of the methodology adopted by Michael McCann for his study of the pay equity movement in the United States.[87] McCann's study employs

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[85] Michael McCann and William Haltom "Framing the Food Fights: How Mass Media Construct and Constrict Public Interest Litigation" (2004) UC Berkeley: Center for the Study of Law and Society Jurisprudence and Social Policy Program. Online: http://www.escholarship.org/uc/item/2rc29425. Accessed January 15 2014.

[86] This approach is discussed in detail in Michael McCann, "Causal versus Constitutive Explanations (or, On the Difficulty of Being so Positive...)" (1996) 21 *Law and Social Inquiry* 457 (McCann "Causal").

[87] McCann *Rights at Work, supra* note 4.

qualitative interviews with activists. He relies on the understandings of his research participants to construct a study which closely aligns with activists' own impressions of what they are doing when they employ a rights-based, largely State legal campaign for pay equity. Instead of taking a birds-eye view and evaluating the cause and effect relationship between legal strategic choices and the success of the movement, *Rights at Work* focuses on activists as creators of knowledge and gives them credit for being capable of strategic decision making.[88]

The knowledge of activist caseworkers whether they are lawyers or not, is thus considered a valuable contribution to our understanding of how the roles of activists are defined and negotiated in the course of a campaign. Study participants were asked to describe their casework and movement activities in detail, and to explain what, if any, link they found between individual casework and the long-term goals of their organizations. The responses of caseworkers are analysed for common themes and divergences, both in the substantive answers and in the way caseworkers phrase their responses. An important focus of this study is on comparing the responses between lawyers and non-lawyers, particularly on the way they describe their own combination

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[88] This issue of methodology formed part of a cordial debate between McCann and Gerald Rosenberg. See: McCann, "Causal" *supra* note 86; Gerald Rosenberg, "Positivism, Interpretivism, and the Study of Law, review of *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* by Michael W. McCann" (1996) 21 *Law and Social Inquiry* 435. See also Liora Israël *L'arme du droit* (Paris: Presses Sciences Po. 2009) at 34-35.

of individual legal service provision and broader organizing strategies, and how they see themselves in that context.

Interview Methodology

Participant Selection

Ethical approval for the research project was obtained from the Comité plurifacultaire d'éthique de la recherche (CPÉR) of the Université de Montréal prior to beginning selection and recruitment.[89] Interview participants were selected based on their role as caseworkers, their status as lawyers or non-lawyers and the tactics of their organizations. Participants are all involved in organizations which offer casework services to the public for free or at low cost, as part of a broader campaign for systemic change. Examples include anti-poverty groups, immigrant support organizations, access to justice organizations, and disability rights groups. The main selection criterion was each group's combination of casework with organizing tactics as part of a social movement campaign. In other words, participant selection emphasized caseworkers from groups whose tactical choices reflect a law and organizing approach – even if they do not explicitly refer to the model in their work.

An earlier chapter outlined the multiple potential uses of casework in the context of a social movement organization. These may include research,

mobilization, member recruitment and other uses. The interview participants' organizations use casework in different ways and for different reasons. Nevertheless, they share a casework practice which is explicitly and tactically linked to a long-term mission of systemic change.

The law and organizing literature is based almost overwhelmingly on the experience of movement participants in the United States.[90] The reader will note that the majority of the academic literature cited for the present thesis draws on cases and commentary by US authors and advocates. While this literature is clearly relevant for scholars internationally, one goal of the present study is to offer an examination of law and organizing from within Canada. The selection process was focused on participants working with Canadian organizations on campaigns for systemic change domestically.

This thesis deals with social movement casework as a process within the law and organizing model. In order to prevent the study from becoming focused on a single campaign or cause, participants representing different issues were selected. Of course, any organization offering free and low-cost services will likely attract justice seekers who cannot afford the services of a professional in private practice. On the whole, the clientele of the selected organizations is not drawn from the upper-middle or wealthy classes and this is reflected in the broad political orientations of the groups: progressive,

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[89] See Ethics Certificate, Appendix I.

focused on social justice and belonging to the left of the political spectrum.[91] At the same time, the selected organizations cover a variety of legal fields, causes and ideological commitments – from the liberal democratic to the explicitly anti-state, anti-colonial and anti-capitalist.

To facilitate comparisons between responses of legal professionals and lay advocates, an equal number of lawyer and non-lawyer caseworkers were recruited. Some selected organizations only use lay advocates, while others use a combination of lay advocates, in-house lawyers or outside counsel. An attempt was also made to recruit two or more caseworkers who were currently, or had been, involved with the same organization. This was done in order to provide material for comparisons between professionals and non-professionals working in the same organization. The results of this effort are described in the participant profiles, below. All participants were involved in a social movement group at the time of the interview, but discussions were not restricted to the current organization. Thus, in some cases it was possible to hear participants' views on casework as they experienced it in different organizations, past and present.

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[90] Israël, *supra* note 88 at 11.

[91] This is in line with Cummings' observation, above, that the standard critique and the law and organizing response belong mainly to the left legal academy. Cummings "Action" *supra* note 2.

Participant Recruitment

Each participant was recruited through a formal letter introducing the study and emphasizing the importance of the recipient's potential contribution as an interview participant. An initial mailing of 30 solicitation letters was directed to individual caseworkers at various organizations across Canada. This initial mailing resulted in a single positive response from a caseworker who agreed to be interviewed for the study. Other letters went unanswered.

There are several possible reasons for the lack of response to the original solicitation. One possibility is a simple lack of interest or time on the part of recipients. Another is that regardless of the detailed explanation in the letter, activist caseworkers may have been understandably suspicious of the motives behind the present study. They may have decided that it was not in the best interest of their organization to allow an academic and legal professional access to their experiential knowledge.[92]

In order to increase the rate of response and interest in the study, the contact method was refined to focus on a few potential interview participants at a time, through a combination of a solicitation letter and a follow-up telephone call. The recruitment process was also changed to offer financial compensation to participants in the amount of $20 per interview. This yielded

[92] This possibility is discussed further below under the heading *Ethics and Politics of Research Involving Activist Groups*.

better results, as did the addition of a final question to the interview guide, asking each participant to recommend a potential new participant.

In total, eight participants were recruited for the present study, four of whom are lawyers, one of whom is now a licenced immigration consultant but not a lawyer, and three of whom are not members of any professional association.

Mitigation of Risks to Participants

The caseworkers in this study spend most of their time protecting vulnerable people. However, in designing the study, the potential vulnerability of caseworkers to reprisals (from other movement participants, state authorities, employers and others) was also important to take into account. The participants come from organizations which are relatively small in size and activist networks in which many people are on a first-name basis with their counterparts in other organizations and causes. Some of the issues discussed during the interviews may be politically volatile either in terms of their broad social significance or their impact on the internal dynamics of the organization and its members. It is necessary to protect the anonymity of caseworkers interviewed for the study – not only out of the above concerns, but also so that they feel at ease speaking in depth about their work and its challenges.

To that end, several measures have been taken:

- Each caseworker has been assigned a pseudonym by alphabetical order according to the timing of the interview (i.e. ‘Aaron’ and ‘Anne’ were interviewed early in the process, while ‘Evelyn’ and ‘Eric’ were interviewed later).

- Names and identifying information of people and organizations were left out of interview transcripts.

- As part of the consent process, interview participants were told verbally that even if they consented to recording the interview, the recording could be paused or stopped entirely at their request.

- Occasionally participants mentioned information to the researcher, but then asked that it be ‘off the record’. These requests were respected, and no such information appears in the present thesis.

- Organizations are not named in the thesis.

- Caseworkers were recruited from causes for which it is possible to find many Canadian activist groups campaigning.[93] Organizations and caseworkers are "camouflaged" within a larger population.

- The city where each participant is based is not mentioned in the thesis.

- Participants were informed verbally and in writing that they could withdraw from the study at any time.

- Although some participants gave their answers in French, all quotes from interviews have been carefully translated into English to make it more difficult to identify caseworkers by linguistic identity.

- The gender of some participants has been changed.

In addition to the vulnerabilities of caseworker participants, it was necessary to consider the risks to justice seekers themselves. The researcher is responsible for minimizing risks associated with the study. However, sometimes this can best be done through a collaborative process. During the interviews, caseworkers were asked not to give any information which could identify their clients. This included names and particular case details. No identifying information about justice seekers appears in the thesis.

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[93] For example, the PovNet online community includes over one hundred different anti-poverty advocacy groups across Canadian provinces and territories: http://www.povnet.org/find-an-advocate.

Ethics and Politics of Research Involving Activist Groups

Beyond the risks traditionally associated with participation in a research study, there is an ethical issue not explicitly covered in the ethical approval process, but which is increasingly relevant for researchers interested in doing empirical work with social movement groups. This is the question of how to conduct law and society research in a non-hierarchical manner, which both validates and draws on the knowledge of activists and their organizations in a non-exploitative way.

It can be understandably difficult to gain the trust of potential research participants working in activist groups. As indicated in several of the interviews for this study, movement actors are often critical of state legal systems and their agents – including lawyers and academics. Indeed, this may have been a factor in the initial lack of responses to the present study.

In addition, there is an important distinction between the knowledge creation process which leads to a doctoral thesis and the knowledge creation which takes place when people come together to advocate for social change.[94] It is understandable that a caseworker might wonder what benefit to a

pragmatic social movement could possibly result from participating in research where the final product is a doctoral thesis. The benefit to the researcher is clear, while the advantage for the movement group is less so.

The casework practices described in the present thesis are largely undertaken by groups acting in defense of marginalized people. When compared with the traditional lawyer-client relationship, social movement casework is a marginalized form of legal practice in its own right. Moreover, caseworkers may have experienced the same difficulties as the people they now assist.[95] Writing about accounts of marginalization in the academic social sciences, Alan Bourke et al. warn that even well-meaning scholars can unintentionally depict people and their struggles in a demeaning way:

> "At best, such accounts help to create significant and much needed awareness and identification of neglected social issues. At worst, they indulge a deeply problematic cultural predilection in bearing witness to what has become journalistically known as 'poverty porn'. This fuels […] the distrust among activists of university-based researchers seeking to 'satisfy a voyeuristic urge to participate in the "real world".' Consequently, raising awareness can lead to the reification or even aestheticization of conditions of marginality. From the perspective of activist-scholarship, the critical litmus test of such accounts is whether they are useful for action and mobilization of, for, among, or with, the marginalized rather than encouraging mere spectactularization in the act of representation."[96]

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[94] Aziz Choudry, "On Knowledge Production, Learning and Research in Struggle" in Carlo Fanelli and Patricia Lefebvre, *Uniting Struggles: Critical Social Research in Critical Times* (Ottawa, 2011: Red Quill Books) 175.

[95] This is the case for some of the participants in the present study.

[96] Bourke et al., *infra* at 23 (quoting Richard J. F. Day, *Gramsci is Dead: Anarchist Currents in the Newest Social Movements* (Toronto: Between the Lines, 2005) at 12).

Recognizing the unequal privilege inherent in much community-involved university research – where scholars obtain degrees, scholarships and career advancement by interviewing people who either volunteer or are precariously employed at a low wage, it should come as no surprise that some caseworker activists would demand to negotiate the terms of their own participation.[97] Early in the recruitment process, one of the participants told the researcher that the interview would not happen unless the organizational membership first discussed the project and decided there was a benefit to the group as a whole. The participant explained this requirement to me during our subsequent interview:

> "[I]t's just that we spend a lot of time doing these interviews and then people publish things that may have useful feedback for us that we never see, and it's like, not, so we've started being like "we need to see it at the end" if it's going to have things that are going to be useful for us to reflect on how we do things we want."[98]

Activists are increasingly aware of the value of their knowledge to members of social and economic elites – including even the most progressive of university researchers. Members of social movement organizations might

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[97] Alan Bourke, Tia Dafnos and Markus Kip, "Lumpen-City: Discourses of Marginality| Marginalizing Discourses" Chapter 1 in Bourke et al. (eds), *Lumpencity: Discourses of Marginality|Marginalizing Discourses* (Ottawa: Red Quill Books, 2011) at 9 and following.

[98] Interview with anonymous participant. The caseworker chose to reveal participation in the study to the activist group. This participant's pseudonym is not used in this section in order to protect the anonymity of the participant's other responses shared later in this chapter.

not consider university-based research to be worth their time unless it offers a concrete benefit to the movement.[99] They are also aware that university researchers may often receive scarce grant funding if they are able to gain the trust and cooperation of community organizations.[100] Summarizing his interviews with researchers engaged in community-based research (CBR), Alan Bourke concludes as follows:

> "What these quotes suggest is that university researchers gain funding legitimacy for their CBR projects when community organizations are listed as co-participants. In a political climate in which all post-secondary sectors are being cautioned to exercise budgetary restraint and demonstrate 'value for money', universities are thus being encouraged to capitalize on their links with extra-academic organizations. [… One interview participant says…] 'my experience of going and seeking community partners was that almost any community organization that I approached had already been approached by someone else that was interested in community-university partnerships.' This view was mirrored in discussions I had with individuals working in community agencies who commented upon the frequency with which they are approached by academics seeking to partner."[101]

If in the past the stated goal of the progressive academic to 'speak truth to power' might have been enough to convince activists to participate in university research, that time may now be over. The earlier participant's comment about 'these interviews' highlights the frequency with which social

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[99] On the line between research and activism, see Bourke et al *supra* note 93; Choudry *supra* note 91 at 181.

[100] Alan Bourke, "Participatory Practices: Contesting Accountability in Academic-Community Research Collaborations" Chapter 10 in Bourke et al., op. cit., 291 at 309 and following.

[101] *Ibid.* at 312.

movement groups are approached by researchers eager to study their work, their organizers or their members. While participation in an interview may offer benefits to the participant (this part *is* mentioned in ethics board materials), the real value of these benefits can also be judged by the organization membership, based on movement goals.

Consequently, and following reflection on the researcher's own current role in a social movement organization, several factors have been considered in designing the present project, which may respond to the above issues. First, the time commitment required for individual participation in the interview is not onerous: an interview of between 50 minutes and 2 hours, in a location chosen by the participant, to be begun and ended at the participant's discretion. Most interviews were interrupted at one point or another to allow the caseworker to carry on regular business while participating in the interview (answering a cell phone, for example). Recordings were stopped at these moments to protect confidentiality of justice seekers' cases. The fact that participants were selected from multiple organizations, beyond its advantage for comparisons, also made it possible to spread time demands among several groups, rather than burdening a single organization.

In terms of benefits to the group, participants were informed that they would receive the full text of the thesis once it was finished, and they are free to share this with their organizations if they wish. A more easily digestible 'executive summary' will also be created and made available to interested

participants. The value of the research, viewed as a final product, naturally depends on the judgment of participants and their organizations.

It is worth recalling at this point that the researcher benefitted from a scholarship from the Social Sciences and Humanities Research Council of Canada. This is a tremendous privilege, not only because it allowed her to work full-time on the thesis for a total of three years, but also because the terms of the doctoral award allowed for research free from many of the constraints of current grant programs, including the need for community partners to sign onto the project and contribute scarce time and resources to it.[102] At the same time, the researcher has been volunteering with an organization, the Immigrant Workers Centre in Montreal, for over nine years. She also briefly volunteered with an anti-poverty group, the Ticket Defence Program in Ottawa. These experiences, mentioned at the outset of the thesis, motivate the researcher's interest in social movement casework, particularly as it is conducted by trained, experienced, non-lawyer caseworkers. Direct involvement with activist groups has helped to shape the research orientation of the present thesis, as well as the researcher's own political orientation with respect to activist work and community-involved scholarship. One element in this orientation is a belief that it can be difficult to obtain the necessary critical distance to study casework and caseworkers' roles from within one's own

[102] For a critique of this requirement and its unintended negative effects, see Bourke, *ibid*., at 313 and following.

organization. For this reason, in her original grant proposal to SSHRC the researcher made a written commitment *not* to study the two organizations with which she has been directly involved. This means that no interview participants were recruited from these groups.

The resulting research design is *not* an example of participatory action research, or community-based research. The researcher has not been embedded in any of the organizations whose caseworkers generously provided their insights. The contact between the researcher and interview participants is generally limited to the recruitment process, the interview, and the eventual transmission of the final thesis and executive summary. Nevertheless, while this appears to be a rather conventional research methodology, it is chosen in light of the concerns expressed above, in the belief that the research can be rigorous, accurate, and relevant, without requiring a creative process which would unduly tax movement organizations or caseworkers.

Interview Process

Before each interview, the participant and researcher would read through the consent form and recruitment letter, and the researcher would ask if there were any questions. Participants were asked if they consented to the interview being recorded and transcribed in full. A single interview, with 'Anne', was conducted over the telephone and not recorded. Instead, the researcher took detailed notes, incorporating direct quotes from Anne's

description of her experience. All other interviews were conducted in person, recorded and transcribed.

The interview began with questions about the functioning of the organization, its structure, and how casework interventions began and progressed.[103] Participants were asked to talk about the mission of their organization, the role of casework in the group, and what, if any connection they understood between casework and the long-term goals of their movements. While the Interview Guide lists question topics in a direct

fashion, during the interview, questions were phrased in an open-ended way, i.e.: "Could you tell me a bit about…?" Often, participants would cover topics listed in the Interview Guide without being asked. Interview participants were given information about the general topic of the study (the process of casework as it occurs in social movement groups) however the specific research question and academic literature were not discussed.

Process of Analysis

While interviews were ongoing, the researcher read through completed transcripts for accuracy and out of interest. However, purposeful analysis did not begin until after all eight interviews had been completed. Transcripts were printed out. First, all transcripts were read and 'interesting' quotes

[103] See Interview Guide, Appendix II.

highlighted. A second read-through was then conducted, this time identifying different themes discussed in each interview. The identification of themes was an intuitive process based in part on terms used in the Interview Guide, but mainly on words and phrases used by interview participants. Themes were labeled in the margins of the paper copy each time they were mentioned. The researcher then listed all of the themes appearing in each interview under each participant's pseudonym. Any theme discussed in common among two or more participants was identified (Figure 1). A separate list of 'outlier' themes, mentioned only by one participant, was also compiled (Figure 2). The researcher then identified the most and least commonly-discussed themes in the interviews, compiling a list of themes mentioned by at least four different participants (Figure 3). It is important to note that this identification of common themes is not an attempt to turn a qualitative research project into a quantitative study. Eight participants is not a statistically representative sample, and any statistical information about rates at which themes were mentioned would be meaningless. Instead, common themes are identified for the purpose of comparing the ways that lawyers and nonlawyers talk about similar themes. This is explained in greater detail in Chapter 6.

Participants

Eight caseworkers, four of them lawyers and four of them non-lawyers, participated in a semi-structured interview of between one and two hours about their work. Each caseworker is either a volunteer or employee of a social movement group which engages in individual casework as part of its organizing. The interview participants represent several different causes and organizations. Using pseudonyms, and grouped according to the causes which are most prominent in their activism, the participants work in the following movements:

- Access to legal services and equality rights: Christopher, Anne
- Migrant and immigrant advocacy: Evelyn, Dana, Aaron
- Anti-poverty struggles: Eric, Charles, Beatrice

Evelyn and Dana work for the same organization. Aaron is a former member of Charles' organization, but his comments deal mainly with migration work he has done with another group. Likewise, Christopher has worked with Beatrice's organization before, but the main focus of his interview responses was his present place of employment. In total, the interview participants represent seven different organizations, grouped under the three general cause categories above. There is some overlap between causes, as is made evident in the interview data discussed later in the thesis.

For example, Aaron's focus is primarily on anti-poverty work, but this often intersects with immigration and refugee issues. Evelyn and Dana both focus on migration, but often feel called upon to help with poverty-related problems of migrating people. Anne practices mainly in disability rights law, but also must confront issues related to poverty to better serve her clients and the long-term goals of her organization.

The *lawyers* in the selected group are Christopher, Anne, Beatrice, and Evelyn.

The *nonlawyers* are Dana, Aaron, Eric and Charles.

The goal of the present study is to examine social movement casework at an abstract level, rather than to focus on a single organization, political orientation or cause. The purpose of the present interview selection is to ensure a cross-section of lawyers and non-lawyers, as well as representation from several different movements and political perspectives. This should allow for observation of any similar responses and representations which might occur across causes and professional boundaries, without becoming immediately fixated on the idiosyncrasies of a particular organization or cause.

Conclusion to Chapter 1

The present dissertation approaches the law and organizing model from four different directions: a critical examination of the positive law, an interdisciplinary re-reading of the standard critique, a detailed case study, and in-depth interviews with caseworkers. The study adopts a legal pluralist understanding of law, and an interpretivist approach to law and society research in its attempt to demonstrate the inability of the current law and organizing model to respond fully to the concerns of individualization and disempowerment in movement activism. Disempowerment and demobilization are potential problems for every activist group, regardless of the professional identities of the people involved. The dissertation will suggest that once we move beyond a rigid approach to dividing activist roles along lawyer/nonlawyer lines, we can more directly address the real "perils" of law and organizing which remain.[104]

[104] Byron Sheldrick, *Perils and Possibilities: Social Activism and the Law* (Halifax: Fernwood Press 2004).

Chapter 2: Social Movement Casework in Canada

Introduction

In reading the academic literature on social movement lawyering with its emphasis on the dangers of allowing lawyers to take over social movements or coerce participants, the reader may develop the notion that lawyer and non-lawyer caseworkers are two groups of homogeneous actors with completely opposed approaches to their work. However, casework may capture activities which are understood as 'legal advocacy' by movement actors, but which lie beyond the sphere of exclusivity assigned to lawyers by the positive law of the State.[1] To give an idea of the great diversity of movements and casework tasks which might be captured by the casework definition used in the present dissertation, this chapter offers a description of several movements in Canada which incorporate casework. While based on the law and organizing model, these examples are not restricted to the work of lawyers. Rather than artificially separating Canadian activist lawyers and "lay-advocates" into discrete categories, this chapter presents social movement casework as it is conducted in Canada today – a practice which may challenge the sharp distinction between lawyer and non-lawyer movement advocates

[1] See e.g. Scott Cummings, "Law in the Labor Movement's Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight" (2007) *California Law Review* 95:5 at 1927 (Cummings, "Wal-Mart"). In this detailed case study, Cummings discusses a variety of tactics combined during a campaign against the large retail company.

which is implied in early versions of the standard critique, as well as some later studies.

Definitions

Social Movement Casework

Social movement casework is defined for the purpose of the thesis as *the process of assisting an individual person to overcome circumstances which are causing distress, in the context of a movement for systemic change aimed at problematic circumstances similar to those of the individual person, undertaken by professional or non-professional advocates, regardless of whether the case is dealt with through formal adjudication.*

This definition captures the practice of casework as it occurs under a law and organizing model. It is broad enough to capture legal work outside the courtroom, recognizing the diverse contexts in which social movement law is practiced in the present day.[2] Examples of social movement casework discussed below all conform to this definition.

[2] Scott Cummings uses the term "tactical pluralism" to describe lawyers' pragmatic use of a variety of legal strategies apart from litigation during the campaign against Wal-Mart. These tactics included drafting legislation, public relations, organizing and lobbying. See

Social Movement

A social movement is defined as an ensemble of people and organizations acting in concert to provoke a systemic change. This broad definition predicts the inclusion of advocacy groups aimed at a variety of collectively-held goals. Instead of focusing on one particular cause, the present thesis examines casework in several different movements in the hope of transcending specific political orientations or missions. A word is necessary at this point on political orientations. Cause lawyering and social movement work, including law and organizing campaigns and studies, are often oriented toward the left of the political spectrum.[3] Social movements are often assumed to be progressive, working toward goals such as alleviating poverty, reducing the power of private for-profit corporations, strengthening worker-controlled organizations, organizing labour unions, and fighting identity-based discrimination. Indeed, the majority of the cause lawyering and law and organizing literature focuses on the use of legal strategy in socially progressive movements. At the same time, although this literature comes out of a left political tradition, for present purposes the definition of 'social movement' need not be restricted to a leftist political orientation. Recent

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Cummings, "Wal-Mart", *supra* note 1 at 1932 ("tactical pluralism"); and at 1984 and following (discussion of specific tactics).

[3] Scott Cummings, "Critical Legal Consciousness in Action" (2007) 120 *Harvard Law Review Forum* 62. Online: http://ssrn.com/abstract=998040. Accessed January 15 2014, at 65 (Cummings, "Action").

scholarship on social movement legal strategies has highlighted the practice of public interest law by politically-motivated lawyers devoted to conservative causes, particularly in the United States.[4] Movement organizations which might be labelled as anti-feminist, anti-labour or pro-capitalist by the political left are still potentially relevant to the study, as long as they engage in some form of individual casework advocacy as part of their activities. Recall that the focus of the present dissertation is on social movement casework as a tactic within law and organizing, rather than on the specific goals of organizations.

Using Casework as a Social Movement Strategy

Why Casework?

It is unclear how social movement organizations first decide to 'do casework', though certainly many groups do. There are several possible reasons for offering advocacy services to the public as part of a social movement strategy. Jennifer Gordon, an attorney in the United States, writes about her experience organizing a workers centre – a place for immigrant workers to go for information about their rights, as well as a space for organizing campaigns around issues relevant to them. Gordon began *The*

[4] Ann Southworth, "Conservative Lawyers and the Contest Over the Meaning of 'Public Interest Law'" (2005) 52 *UCLA L. R.* 1223; Orly Lobel, "The Paradox of Extralegal Activism:

Workplace Project in 1992 when she was a recent law school graduate. She acted as director of the project for six years, during which she and the workers involved in the project organized people in favour of better working conditions and respect for labour standards in Long Island, New York.[5]

> "Through a resourceful combination of collective action and legal advocacy, the Workplace Project has won noteworthy victories, including the most far-reaching state wage-enforcement legislation in the country. It has also created and maintained a stable membership organization run in large part by immigrants. In the process, its members have transformed themselves from outcasts in exile to active and effective political participants."[6]

This image of the success of the Workplace Project incorporates elements which activist caseworkers from a variety of causes would recognize. The project acts through both advocacy on an individual level and group organizing strategies. It attracts members who, according to Gordon, remain with the organization even after their own cases are resolved. Originally founded by an American citizen and legal professional, the organization is now managed by members themselves, most (if not all) of whom are non-professionals and many of whom are non-citizens or recent immigrants. In Gordon's vision, people who enter the organization seeking assistance are not passive recipients of help. Instead, they are encouraged to

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Critical Legal Consciousness and Transformative Politics" (2007) 120 *Harvard Law Review* 937.

[5] Jennifer Gordon, *Suburban Sweatshops: The Fight for Immigrant Rights* (Cambridge, Mass.: Belknap Press of the Harvard University Press) (Gordon, *Suburban Sweatshops*) at 3.

[6] *Ibid.*

become participants in a broader social movement. When one asks why social movement organizations engage in casework, these are the benefits activists often cite in favour of the practice.[7]

One significant advantage to casework cited by Gordon in her description is the use of legal services as a means of attracting participants for other organizing work.[8] In the early development of the Workplace Project, legal information and casework services were offered to workers seeking assistance, and this encouraged many people to visit the organization for the first time. Workers often did not see the need for the Workplace Project until the moment when they required assistance with a personal problem.[9] Over the course of the organization's development, in an effort to move beyond individual service provision toward a more coherent organizing plan, the Workplace Project developed what Gordon calls "paths to participation,"[10] processes designed to lead individual workers to join the organization and contribute to its work. The organization set up a nine-week course on labour standards and immigration law which workers were expected to complete in

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[7] See also Scott Cummings and Ingrid Eagly, "A Critical Reflection on Law and Organizing" (2001) 48 *UCLA Law Review* 443 (Cummings and Eagly, "Critical"); Scott Cummings and Ingrid Eagly, "After Public Interest Law" (2006) 100 *Northwestern University Law Review* 1251. Online: http://ssrn.com/abstract=834784. Accessed January 15 2014 (Reviewing Jennifer Gordon's *Suburban Sweatshops*) (Cummings and Eagly "After").

[8] Cummings and Eagly "Critical" *supra* 7 at 467. See also Gordon *supra* note 5 at 115.

[9] Gordon *ibid.* at 121.

[10] *Ibid.* at 112 and following.

order to obtain casework assistance from the group's legal clinic.[11] The course focused on workers' own experiences and common problems, as well as labour history and legal rights. Dubbed the "Workers Course,"[12] its curriculum was designed in such a way that by the end, participants would recognize their own individual cases belonging to a larger set of systemic issues.[13] They would then be encouraged to become active members of the Workplace Project and take part in organizing in the long term. Gordon notes that in many instances this did not happen, however several workers stayed on, some of whom eventually came to govern the organization as administrators.[14] Over time, the Workers Course requirement changed to give potential members the choice between the original course and a single weekend seminar, plus attendance at eight committee meetings.[15]

The choice to expect course or committee meeting attendance, or some other form of participation in return for legal services is typical of descriptions of how the law and organizing model works in action.[16] Gordon writes that the Workplace Project considered operating according to a standard membership

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[11] *Ibid.* at 116.

[12] *Ibid.*

[13] *Ibid.*

[14] *Ibid*.

[15] *Ibid.* at 117-118. Gordon explains that the Workers Course was the product of experimentation and change over time, and thus should not be viewed as a static model for encouraging active membership.

[16] See Cummings and Eagly, "Critical" *supra* note 7; Cummings and Eagly, "After" *supra* note 7; Lobel, *supra* note 4.

model, offering legal services to any members who signed up and paid their dues. However, they soon decided that this would not be the most effective way of encouraging long-term participation in the organization:

> "Members who had signed up simply to receive services, they reasoned, would be unlikely to participate in campaigns, attend membership meetings, walk picket lines, run for office on committees or the board, all important aspects of active Project membership. They achieved this by postponing the membership decision until after the Workers Course, when participants were both well informed about the meaning of membership and excited about the possibilities of group action."[17]

An important reason to offer casework services is so that individuals directly affected by the issues raised by the social movement organization will participate in other aspects of the work of the group, and in the movement as a whole. Other projects which follow a law and organizing model, including workers centres such as the Immigrant Workers Centre (IWC) in Montreal, Quebec and the Miami Workers Centre (MWC) in Miami, Florida, also encourage active participation through service provision, though they may not include a course such as that designed by Gordon's organization.[18] Activist lawyer Dean Spade remarks on the difficulty that some activists sometimes

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[17] Gordon, *supra* note 5 at 123.

[18] On the Immigrant Workers Centre see Aziz Choudry, J. Hanley, S. Jordan, et al, eds, *Fight Back: Workplace justice for immigrants* (Halifax: Fernwood Press, 2009); Eric Shragge, *Activism and Social Change: Lessons for community organizing*, 2nd ed (Toronto: University of Toronto Press, 2013) at 135 and following. On the Miami Workers Centre, see Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics and the Limits of Law* (Brooklyn, NY: South End Press, 2011) at 180 and following.

have in understanding the connection between services such as casework, and the building of power within a movement organization.[19] In terms similar to Gordon, Spade argues for an empowerment-based approach to service provision within social movement organizations.[20] He cites the example of the MWC, noting that the organization encourages justice-seekers to work on their own cases, moving gradually from being passive clients to becoming active members of the group.[21] The MWC holds that service provision is one of four Pillars of social movement activism identified by the group, and is closely linked to the relative power of organizations.[22] This is because people are often treated in a demeaning way when they must ask for help from social service agencies run by the State and even by some non-profit organizations. Spade argues that a membership-based (as opposed to charity or client-based) model of service, offered within a social movement group with the goal of empowering community members, may help to counteract these negative experiences.

> "Service work that operates to support the Pillar of Power understands services as immediately urgent but also as only one part of a much

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[19] Spade, *ibid.* at 181.

[20] *Ibid.* at 182.

[21] *Ibid.*

[22] "This model is helpful for understanding how multiple strategies can fit together to build participatory, mass-based movements. […] The Four Pillars that MWC describe are the Pillar of Policy, the Pillar of Consciousness, the Piller of Service, and the Pillar of Power." *Ibid.* at 180.

> larger strategy to address the underlying and root causes that produce such need."[23]

In addition to attracting and empowering movement participants, casework advocacy has the potential to provide tangible results, often within a relatively short time frame, which can be an important spur to long-term organizing. In Ontario, the Ontario Coalition Against Poverty (OCAP) has a history of doing casework advocacy along a direct action model which focuses on winning tangible benefits through a combination of organizing and legal argument. The Workplace Project combines traditional legal work with picketing of employers' establishments, and OCAP has operated using similar tactics: organizing sit-ins and other direct action at the offices of the Toronto social assistance administration.[24] The organization offers a casework manual online to anyone interested in learning about its early casework practices.[25] Like Gordon's Workplace Project and the MWC discussed by Spade, OCAP links individual casework advocacy with broader political objectives. Unlike the Workplace Project, OCAP does not require people to participate in a course in order to receive assistance. It does, however, encourage active membership and offer the opportunity for individual gains as a result of participating in a broader movement.

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[23] *Ibid.*

[24] OCAP, "A Short History of OCAP" Online: http://ocap.ca/files/history%20of%20ocap.pdf. Accessed January 12 2014.

[25] Tim Groves, "Direct Action Casework Manual" (Toronto: OCAP, 2003) Online: http://update.ocap.ca/node/322. Accessed January 16 2014.

A similar promise is expressed by the Workers Action Centre, also based in Ontario. This organization seeks to effect systemic changes to employment standards in the province in favour of working people, with a focus on precarious work and migrant/immigrant workers. Their strategies include providing casework services and organizing mass mobilisations. The group advertises services to working people as follows:

> "Protecting Workers' Rights
>
> WAC staff, members and volunteers support workers who are experiencing a problem at work. Workers call our **Workers' Rights Info Line** to get information about their rights and help with strategies to resolve the problem. Workers can also attend one of our **Support Clinics** to get more information and one-on-one support with their workplace problem."[26]

The promise of potential success is phrased in a manner reminiscent of Jennifer Gordon's Workplace Project approach: "Our members come together to **fight for better wages and working conditions** for all workers in our province. Our victories prove that this way of making change works."[27] The site also includes a page devoted to the systemic victories of the organization,

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[26] Workers Action Centre, "How We Work" (Toronto: Workers Action Centre, 2009-2013) Online: http://www.workersactioncentre.org/about-us/how-we-work/. Accessed January 10, 2014. Emphasis in original.

[27] *Ibid.* Emphasis in original.

including labour standards legislation for nannies and funding for employment standards enforcement.[28]

Like the approach described above by the Workers Action Centre, the direct action casework model used by OCAP (discussed later) requires mass participation in order to be successful. In this way, the provision of individual services is combined with political other actions. While participation by justice-seekers in a course may not be required as in Gordon's organization, the OCAP manual of suggested casework techniques does emphasise the participation of individuals in their own cases. Addressed to caseworkers, the manual advises as follows:

> "Empower those you are working with rather than just provide a service for them. It is important that they come to actions and that you explain the process you are using to them. This is so that they can see the power that even a small group of people can have and take that boldness with them into all their dealings with those who regulate their lives." [29]

According to this approach, which again echoes the work of Gordon, social movement casework can encourage people to join the organization, but also be used as an empowerment tool. A person seeking assistance may arrive as a passive individual expecting a service, but he or she may complete the experience as an active participant in a movement which goes beyond the

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[28] Workers Action Centre, "Victories" (Toronto: Workers Action Centre, 2009-2013) Online: http://www.workersactioncentre.org/category/victories/. Accessed January 10, 2014.

[29] Groves *supra* note 25.

individual case. This idealized version of the process can be contrasted with the traditional commercial relationship between lawyer and client. The balancing of service provision with active participation of justice seekers is present from the beginning of the advocacy process, whereas in the traditional lawyer-client model the provision of services with no strings attached (beyond payment of fees) is presumed.[30]

Other reasons for providing casework services include the possibility of precedent-setting work in court, or the simple fact that there is a great need for casework advocacy among a certain group of people. In the latter scenario, it is possible for casework itself to become the primary activist tactic, even if it is practiced with a systemic goal in mind.[31]Casework can also be understood as a form of research. For every case that an organization takes on, a wealth of information about legal systems, administrative practices and the positive law may be gained. Over time, this can allow the organization to become a "repeat player" to use Marc Galanter's famous phrase,[32] and more likely to succeed in future cases because of the strength of past experience. In addition, a strong history of casework practice makes it possible for organizations to speak

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[30] On the contrast between traditional legal service provision and empowerment of justice-seekers through collaborative lawyering, see Corey Shdaimah, *Negotiating Justice: Progressive lawyering, low-income clients and the quest for social change* (New York: New York University Press, 2009).

[31] Shdaimah, *ibid.*

credibly in public about the issues. There is a vast difference between writing an opinion piece in the newspaper based on research gained from secondary sources, and writing from direct experience speaking with people who are living through the problems the organization wishes to make public. Casework can thus make an organization both knowledgeable and credible. It is no surprise then that university researchers increasingly seek to partner with community organizations, thereby increasing the applicability and the credibility of their own academic work from the perspective of people directly affected by the issues.[33]

Casework Challenges

At the same time, casework can be difficult and requires a great deal of time and other resources including money. These may be in short supply, particularly in volunteer-based organizations which receive little or no core funding. When an organization takes on cases for individual justice seekers in need, it takes on the responsibility for following up on those cases from

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[32] Marc Galanter, "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 *Law and Society Review* 1, Reprinted (with corrections) in R. Cotterrell (Ed.) *Law and Society* (Aldershot: Dartmouth, 1994) at 165.

[33] The ethical and political implications of this are discussed in Chapter 1 under "Interview Methodology". For a first-hand account of a fruitful research partnership between university and social movement actors, see Kezia Spiers, "Research Partnerships and Local Community Organizing: Reflections from Evelyn Calugay" in Aziz Choudry, Eric Shragge and Jill Hanley, eds, *Organize! Building from the Local for Global Justice* (Oakland: PM Press, 2012) at 36.

beginning to end. This can remove resources from other, less immediately urgent aspects of the social movement work.[34] In a context where so many people find themselves without access to adequate legal advocacy services at affordable rates, any organization which agrees to do casework risks becoming overwhelmed by requests from individual justice seekers. This is an important part of the decision-making process for any organization considering whether casework would be an effective strategy in the long run. One participant interviewed for the present dissertation, "Aaron" said the following about his experience of activist casework:

> *"There are just not enough legal supports for people especially without money, there are not enough groups out there that know or are savvy how to do the media, there are very, very very few sympathetic politicians, so you can easily become overwhelmed. Like I've seen groups organize around casework and just that, they end up doing it 24-7. And it doesn't move anything forward. It…you can win the cases, but unless you have an actual strategy behind it, the casework doesn't win anything, move anything forward."*[35]

This critique of an exclusively casework-based strategy echoes concerns expressed in the legal academy with respect to the effectiveness of the law and organizing as a tactical choice.[36] A focus on aggregate, case-based activism may not only overwhelm groups with work, but also train advocates to limit their ambitions to small-scale or symbolic victories in individual

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[34] See Lobel, *supra* note 4.

[35] "Aaron" interview 2011-06-26.

[36] Lobel, *supra* note 4 at 983-984.

cases.[37] Orly Lobel likens casework in the law and organizing model to a set of "micro-resistances", the aggregate effect of which, activists assume, will be social change in the long term – although this success is by no means guaranteed.[38] Along with casework victories also come losses, and dealing with the consequences of those losses can be difficult. In Gordon's case, the Workplace Project was founded and initially was run by a professional, who worked from a position of privilege relative to the justice-seekers who came to the organization for help. In this sense, the advocate at the head of the organization did not have to deal with the same issues as the workers she was assisting. This is one of the complications which may arise when considering whether to do casework in the service of social movements, and it is a source of concern for activists wishing to avoid strategies which privilege the involvement of professionals. While casework services can be necessary and beneficial, advocates are often keenly aware that they are not the ones who must deal with the consequences of strategic choices made when working on a case. Another issue is the ethics of using casework as a means of attracting people to the organization and encouraging them to participate. There is no question that a wealthy business executive would not be expected to sit through a course on rights and obligations in order to obtain legal assistance, nor would she be required to help with other executives' legal troubles in

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[37] *Ibid.* See also Cummings and Eagly, "Critical" *supra* note 7.

[38] Lobel, *supra* note 4 at 985. See also Cummings and Eagly, "After" *supra* note 7 at 1275 and following.

order to have a lawyer work on her case. In their critique of the law and organizing field in legal scholarship, Scott Cummings and Ingrid Eagly raise the ethical issues inherent in using law "as a draw", as so many social movement organizations do.[39] They ask whether it is ethical to use free advocacy services offered to people in situations of vulnerability in order to grow a movement organization. This is complicated by the fact that social movement organizations devoted to public-interest law are in the present day a source of job opportunities for idealistic lawyers who might otherwise have to do the same work for free while seeking paid employment elsewhere.[40] While there are compelling reasons why organizations may incorporate casework into their social movement activism, it should be noted that this work raises important ethical considerations particularly with respect to recruitment practices. These are discussed throughout the dissertation. Interview participants spontaneously raised this and other issues in the course of the research, as described later. These observations on the potential disadvantages of casework are not intended as a discouragement to organizations wishing to take on these important tasks. Rather, it is to give the reader a clearer idea of the potential difficulties which movement organizations may encounter when offering services to the public. After considering some of the pressures which come with doing casework, it is expected that the reader will be better equipped to understand the

[39] Cummings and Eagly, "Critical" *supra* note 7; Cummings and Eagly "After" *supra* note 7.

[40] Cummings and Eagly, "After" *supra* note 7; Spade, *supra* note 18.

representation of the link between the individual case and the broader social movement, as it is expressed by advocates in their own words.

Four Examples

While much of the cause lawyering and law and organizing literature available comes from the United States, Canada is home to many social movement organizations which incorporate casework advocacy into their activism. A number of different organizations either use casework as a way to attract new members or encourage public legal education, or offer casework as a way of gaining information about the issues which are their focus. In addition, in Canada, activist organizations which offer casework advocacy may provide a stop-gap service for people who would otherwise have no access to information about their rights and obligations beyond what they could find through their own research. The inadequacy of legal aid systems is an important part of social movement casework in Canada, as discussed later in the thesis. In the following section, examples of social movement organizations which offer casework are offered in order to give the reader an idea of the breadth and variety of movement groups engaging in this work. Each example is presented under a heading which highlights a particular casework ideal or practice. However, the reader should note that all organizations combine elements of using "law as a draw", casework-as-research, and other approaches to casework. This categorisation is meant only to bring a variety of aspects of casework in Canada to the attention of the

reader, and not by any means to pigeonhole individual organizations into rigid descriptions of their work.

Finally, a note on the choice of organizations for this overview is necessary. A later chapter in this thesis analyzes the results of eight in-depth and anonymous interviews with activist caseworkers working in a variety of organizations and movements. For ethical reasons, and in order to ensure the greatest degree of sincerity and spontaneity in interview responses, the researcher has agreed to protect the anonymity of interview participants in this study. One of the ways that this is done is to conceal both the name of each interview participant (by using a pseudonym), as well as the name of the organization where the participant is active. There are many organizations across Canada where casework services are offered in the context of a broader social movement. The four Canadian organizations which are named in this chapter (one of which is the focus of the case study in Chapter 5) are chosen for two reasons: 1) each exemplifies a different way of using casework as a social movement tactic and 2) each has a significant web presence: they post many of their own publications and updates on their websites, and on a regular basis. Their web presence allows for a more detailed description of the activities of the organization. The fact that a specific organization has been described below has **no relationship** to the selection of interview participants whose words appear elsewhere.

Legal Services as an Incentive to Participation

In Quebec, the Mouvement Action Chômage offers assistance to individuals on a case by case basis. Operating in Montreal, with service in nearby suburbs, MAC is dedicated to rights education and advocacy among people who are unemployed and claiming employment insurance. The Montreal branch of MAC publishes a low-cost guide to the system which explains the *Employment Insurance Act*[41] in plain language and presents the history of the employment insurance system in Canada from the political perspective of the organization.[42] MAC Montreal uses a similar membership system to the one described by Gordon at the Workplace Project, in that the organization assists people wishing to request a review of a decision in their file, contest a penalty, or prepare for a hearing. In order to receive these services, a justice seeker must take a single information class on the employment insurance legislative framework, the history of the program in Canada, and MAC's political positions on developments in employment insurance since the 1990s.[43] The organization website is clear about the mandatory nature of this seminar and the reasons why it conducts its casework intake process in that manner:

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[41] S.C. 1996, c. 23.

[42] Le Mouvement Action-Chômage de Montréal, *Conseils Pratiques aux Chômeurs et Chômeuses 2011-2012* (Montreal: MAC 2011).

[43] Le Mouvement Action-Chômage de Montréal, "Le MAC, comment ça fonctionne?" Online: http://www.macmtl.qc.ca/Accueil.htm#Information. Accessed January 12, 2014.

> *"Le Mouvement Action-Chômage (MAC) de Montréal est un* ***groupe communautaire d'éducation populaire****. Son premier mandat est* ***d'INFORMER*** *les citoyen(ne)s sur la Loi d'assurance-chômage. C'est un objectif auquel nous croyons fermement. En conséquence, les séances d'information sont* ***OBLIGATOIRES. Aucun renseignements*** [sic] ***ne sera fourni, aucune démarche ne sera entreprise sans avoir préalablement assisté à une rencontre collective.*** *À la suite de la séance, toute personne ayant des questions supplémentaires ou un problème qui nécessite notre intervention pourra rencontrer un(e) intervenant(e)."*[44]

According to the MAC website, a person cannot meet with a caseworker without first attending a group class. In addition to the advantages of this recruitment method cited by Jennifer Gordon above, the mandatory information session ensures that everyone entering a casework meeting has a basic understanding of how the complex employment insurance administration works. This can save time for caseworkers, who would otherwise have to explain basic elements of the program repeatedly to new members. The organization also publishes a newsletter, revises and publishes the above-mentioned guide to employment insurance on a yearly basis, and provides information to unions and other community groups seeking specialized knowledge of the employment insurance system.[45] MAC Montreal has also begun construction of a database of employment insurance review decisions. Following a major reform of the employment insurance system in

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[44] *Ibid.* Emphasis in original.

[45] Mouvement Action Chômage, "Activités". Online: http://www.macmtl.qc.ca/Accueil.htm#Activ. Accessed January 12 2014.

2013, a new Social Security Tribunal was created to replace the previous forum for review. Unlike the earlier forum, the new tribunal has not yet begun to publish its decisions – creating difficulties for advocates wishing to rely on precedents from the new tribunal. MAC responded by launching an appeal through its networks, asking other progressive advocates to transmit decisions received in their casework for inclusion in the database, to be made available free to users.[46] This demonstrates how an organization which offers casework in one way can also branch out into other tactical areas over time.

Casework as Research

The Workers' Action Centre in Toronto is an organization where working people can call for information on their rights in the workplace, and meet to organize. It is similar in mission to the Workplace Project discussed above. WAC operates a labour rights information line which provides information on a case-by-case basis. Part of its core mission is the education of workers about their rights and the provision of labour rights workshops in the city.[47]

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[46] Mouvement Action Chômage, "Appel à tous concernant le tribunal de la sécurité sociale (TSS)". Online: http://www.macmtl.qc.ca/pdf/Appel%20a%20tous_juris_TSS.pdf. Accessed January 12 2014.

[47] Workers' Action Centre, "How We Work". Online: http://www.workersactioncentre.org/about-us/how-we-work/. Accessed January 16 2014.

One of the major campaigns of WAC is to raise awareness of, and obtain redress for, wage theft, i.e. the nonpayment of wages owed for work already performed. The WAC campaign against wage theft involves public service messages on its website and on YouTube, lobbying the provincial government through postcard campaigns and other mobilisations, and research on the impact of wage theft on workers in Toronto. In 2011, WAC produced a report based on worker testimonials.[48] In an example of cooperation between legal professionals and activist organizations, the research was largely conducted by volunteers and staff at WAC, and the final report was drafted by a legal worker with Parkdale Legal Services. The survey methodology illustrates how building contacts through casework can be an effective research strategy and lead to broader movement activity. During a five-month period from 2010 to 2011, the organization contacted workers involved in low-wage and precarious work, many of whom were recent immigrants to Canada. WAC notes that justice seekers in these sectors are "typically hard to find in traditional surveys."[49] It was only through contacts already established through frontline service provision at WAC and other agencies, as well as WAC members' own social circles, that the organization was able to obtain

[48] Workers Action Centre, "Unpaid Wages, Unprotected Workers: A Survey of Employment Standards Violations" (Toronto: Workers Action Centre, 2011). Online: http://www.workersactioncentre.org/press-room/policy-papers/. Accessed January 16 2014. (WAC, "Unprotected Workers").

[49] *Ibid.* at 16.

the survey results.[50] Without building prior contacts in the communities affected by wage theft, the researchers could not have completed surveys of 520 people in the short period of time during which the study was conducted. According to the survey document, individual casework is one way that WAC has learned about the extent and nature of wage theft, and this knowledge has translated into research on the issue which can in turn help to shape public debates.

In addition, the WAC wage theft report highlights the connection between the need for legal information provided by activist groups and the inadequacy of existing legal aid and other professional legal services. The report explains that in Ontario little in the way of legal support is available for justice seekers claiming unpaid wages under the *Employment Standards Act*.[51] Moreover, the legal aid system does not appear to have filled this gap in service provision:

> "An overwhelmed community legal clinic system provides little support for workers requiring assistance with ESA issues. There are no legal aid certificates for ESA matters. The $10,000 limit on amount of unpaid wages recoverable under the ESA means that few private bar lawyers would represent workers on ESA matters."[52]

This means that by offering information on how the ESA claim system works, organizations such as WAC provide a valuable service to individuals who

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[50] *Ibid*.

[51] S.O. 2000, Ch. 41 ("ESA").

might otherwise be unable to exercise their rights effectively. Casework thus offers at least two advantages in the case of WAC: to provide immediate assistance to people with few other options, and to enhance the ability of the organization to do credible and detailed research in communities which may often be invisible to government or university researchers.

Casework and the Courts

The Centre for Research-Action on Race Relations (CRARR) is an anti-racist non-profit organization which was established in Montreal in 1983. The organization offers individual assistance with human rights claims and police ethics complaints, among other subjects. CRARR combines this individual casework with participation in litigation, by supporting litigants or through interventions in court. Its rationale for participating in litigation in the courts is explained on the organization website:

> "CRARR also seeks, through its assistance service for victims of discrimination and legal interventions, to expand civil rights jurisprudence and incorporate innovative social science data on race and other discrimination in court decisions, especially in areas such as systemic discrimination, hate crime, school sanctions and biased policing. These are issues which many institutions have avoided to address for different reasons."[53]

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[52] WAC "Unprotected Workers" at 14.

[53] Centre for Research-Action on Race Relations, "CRARR Civil Rights Cases before the Courts". Online: http://www.crarr.org/?q=node/110. Accessed January 12, 2014.

CRARR participates in litigation not only for the purpose of creating a helpful precedent, or aiding an individual justice seeker. Part of the advantage of litigation for this organization is that it provides an entry point into the judicial system for introducing new information on issues relevant to the promotion of civil rights and equality. The information comes from the social sciences, as outlined above. In this way, CRARR encourages an interdisciplinary approach to legal cases involving discrimination claims. CRARR's casework operates beyond the sphere of the courts as well, by incorporating media strategies to make public the case information which it learns from its work. The court cases where CRARR intervenes or supports individual justice seekers are often of interest to journalists, and this allows the organization to express its views in a public forum which in turn may influence the development of legal change.[54] CRARR offers a description of its litigation work which exemplifies what Michael McCann has observed about the role of courts in social movements – that a court case can also be used for educational and mobilization purposes, and not simply for the sake of a single victory or precedent.[55]

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[54] For a discussion of the role of mass media in law creation and social change, see Michael McCann and William Haltom, "Framing the Food Fights: How Mass Media Construct and Constrict Public Interest Litigation" (2004) UC Berkeley: Center for the Study of Law and Society Jurisprudence and Social Policy Program. Online: http://www.escholarship.org/uc/item/2rc29425. Accessed January 12 2014; see also Spade, *supra* note 18.

Direct Action for Immediate Gain and Radical Change

The Ontario Coalition Against Poverty (OCAP) is an anti-poverty organization which focuses on direct action as its main advocacy tactic. Like several other organizations engaged in casework in Canada, OCAP identifies itself as anti-capitalist, and adopts a radical political analysis of the state of social assistance and the broader causes of poverty in Ontario. OCAP uses disruptive activity to support individual casework and to promote broader changes to social assistance, housing and other regulations and administrative practices. The organization has developed a model of direct-action casework which has been adopted in various guises by other organizations. As mentioned earlier, the organization publishes a free online manual for casework of this nature. The rationale behind direct action casework is discussed in detail in the case study of the Special Diet Campaign later in the present dissertation. However, a sense of the political flavour of this tactic can be gained from "A Short History of OCAP" – an online historical document published by the organization. The document carefully distinguishes between tactics which aim to make concrete gains on the spot (direct action) versus

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[55] Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994) (McCann *Rights at Work*); Michael W. McCann, "Reform Litigation on Trial", Book Review of *The Hollow Hope: Can Courts Bring About Social Change?* by Gerald N. Rosenberg (1992) 17:4 *Law and Social Inquiry* 715 (JSTOR) at 738 (McCann "Reform Litigation on Trial"). See also Liora Israël, *L'arme du droit* (Paris: Presses de Sciences Po., 2009) at 34 and following.

forms of political expression designed to send a message to the powerful in the hope that they will respond favourably to the group's request:

> "The unemployed in the 30's and the workers who won the right to organize did not want to make a moral case to those in power. They fought for their rights and OCAP stands for just such course of action."[56]

Direct action casework, a tactic used by OCAP and discussed in detail in Chapter 5, is one "course of action" recommended by the organization. This tactic involves basing demands of the group upon an alleged violation of State law in the case of an individual justice seeker. If the demands are not met, the justice seeker and supporters protest disruptively at the office of the agency which is presumed to have broken the rule. Direct action casework, as explained in detail later in the thesis, requires a combination of legal knowledge and organizing expertise. OCAP and other organizations with similar tactics show that it is possible to incorporate a radical political analysis and direct action with public service provision, both opposing the State and engaging with its support institutions to obtain benefits with justice-seekers.

Conclusion to Chapter 2

The present chapter has presented a brief overview of social movement casework. Casework was defined as *the process of assisting an individual*

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[56] OCAP, "A Short History of OCAP" Online: http://ocap.ca/files/history%20of%20ocap.pdf. Accessed January 12 2014.

person to overcome circumstances which are causing distress, in the context of a movement for systemic change aimed at problematic circumstances similar to those of the individual person, undertaken by professional or non-professional advocates, regardless of whether the case is dealt with through formal adjudication. Some of the reasons why a social movement organization would commit to casework were explained, followed by a brief discussion of some of the challenges faced by movement groups when they decide to provide casework services as a tactic. Four examples of social movement casework currently in progress in Canada were outlined. The organizations named as examples are meant to be a sampling of the diverse approaches to casework presently available. While specific aspects of their casework have been highlighted (casework as an incentive to participation, as research, as a chance to litigate, as an occasion for direct action), each organization may use casework in a variety of ways which change over time. These organizations are four among many (over one hundred) currently at work in Canada. It was noted above that the mention of these organizations in the present chapter has no relationship to the identity of the anonymous caseworkers who participated in the in-depth interviews analysed and presented later in the thesis. Having described the main object of analysis of the thesis – social movement casework – and having offered the reader some examples of organizations which use casework as a tactic, the thesis now turns to the discussion of the research problem. The following chapter presents the problem, research methods and theoretical framework.

Chapter 3: Avoiding Unauthorized Practice of Law

Introduction

For the purposes of the dissertation, a caseworker may be, but is not necessarily, a lawyer. The decision to include nonlawyers in the caseworker category is significant for the study of law and organizing, a field in which scholars often equate legal strategy with the participation of lawyers in the social movement. Later, in Chapter 4, it will be argued that law and organizing studies often focus on strategies for encouraging fruitful cooperation between lawyers and other movement actors. Although this is an important aspect of the model, to restrict the caseworker role to lawyers would be an inaccurate reflection of social movement casework as it takes place in Canada today. Of the eight caseworkers who shared their experiences for Chapter 6 of the present thesis, four are not lawyers. This situation is not unique. Scholar, lawyer and activist Dean Spade advises activists considering whether they should to law school:

> "**Lots of legal work that needs to be done to help poor people can be done without a law degree.** For those of us who want to directly help people in our communities struggling in horrible legal systems, we can do a lot of that without going to law school! Legal advocacy can be done by non-lawyers—non-lawyers can even represent people in lots of hearings related to public benefits, immigration, and other urgent issues."[1]

At the same time, the reader may understandably wonder how nonlawyers could do casework on legal issues without giving rise to accusations of unauthorized practice of law from the local bar association. The activities of non-professional social movement advocates take place in the context of provincial legislation governing the activities reserved to legal professionals. While there are limits on what acts can be done by nonlawyer activists, organizations are able to provide a host of important services which are not exclusive to the legal profession.

This chapter examines legislation governing what activities nonlawyer caseworkers in Canada may undertake, and which tasks are strictly reserved to lawyers. The thesis is written from a perspective which recognizes the possibility of multiple legal orders and forms of expression of law.[2] However, this does not preclude the study of State law where it is relevant. In the present day, when virtually every geographical territory on the planet is claimed by one State government or another, it is impossible to avoid dealing with State law.[3] This is all the more significant when we consider the focus on actors and institutions of the State in many social movement campaigns. Restrictions and

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[1] Dean Spade, "For Those Considering Law School", (2010) 6 *Unbound: Journal of the Legal Left* 111 at p. 111. (Spade, "Law School").

[2] See e.g. Martha-Marie Kleinhans and Roderick Macdonald, "What is a *Critical* Legal Pluralism?" 12 *Can. J.L. & Soc.* 25 1997.

[3] See Andrée Lajoie, "Contributions à une théorie de l'émergence du droit 1. Le droit, l'État, la société civile, le public, le privé : de quelques définitions interreliées" (1991) 25 *Revue juridique Thémis* 103 at 110.

penalties for the unauthorized practice of law figure in the concerns of law and organizing scholars in the United States as well.[4]

Unlike the traditional image of the lawyer as a courtroom advocate, social movement caseworkers practice a form of advocacy which often includes tasks related to cases at the bottom of the pyramid of the legal order,[5] seldom reaching the inside of a courtroom. There are thus many contexts where caseworkers do not need to be members of the provincial bar in order to assist justice seekers. In some cases, it can be difficult in practice to trace a clear line between tasks reserved to lawyers and tasks which are open to all. This can be true of legal advice versus legal information, as discussed later in the present chapter.[6] It is suggested below that while there are restrictions on the tasks that nonlawyers can perform, many important legal casework services remain which do not require bar association membership. Part of the nonlawyer caseworker's task is to negotiate the line between the tasks which are permissible and those which form part of the lawyers' monopoly.

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[4] Scott L. Cummings and Ingrid Eagly, "A Critical Reflection on Law and Organizing" (2001) 48 *UCLA Law Review* 443 at 513 and following (Cummings and Eagly "Critical"). See also below in the present chapter.

[5] Henry M. Hart & Albert M. Sacks, "Prefatory Note: The Great Pyramid of the Legal Order" in Williman N. Eskridge & Philip P. Frickey, eds., *The Legal Process: Basic Problems in the Making and Application of Law* (Westbury, NY 1994: Foundation Press) 286. This is discussed further in Chapter 4.

[6] In some jurisdictions, legal professionals other than lawyers are permitted to give legal advice to clients. The reader should assume that the discussion of legal advice below includes

A final note: though the present chapter highlights possibilities for legal service provision by nonlawyers, the intent here is not to discount the importance of lawyers' and notaries' specialized expertise. It is simply to justify the statement that some law and organizing strategies do not require lawyers, and to provide the groundwork for arguing that the law and organizing model should take this fact into account.

Legislation Prohibiting Unauthorized Practice of Law

The role of a provincial bar association has two general aspects: the protection of the public, including professional inspections, complaint resolution and malpractice insurance, and the promotion of its members' interests, including their professional education and protection through insurance. Part of this dual role requires bar associations to police the boundary between the practice of law, reserved to lawyers, and other activities which can be accomplished by nonlawyers. Bar associations in Canada are thus responsible for governing their members, but also for ensuring the exclusivity of tasks reserved to those members and the protection of the market for their services.[7]

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any legal professionals (lawyers, notaries…) who are permitted to advise clients under provincial legislation.

[7] Claude Thomasset and René Laperrière, "Facultés sous influence: ou quand la formation universitaire en droit est soumise aux ordres (des) professionnels" *Université* March, 1999, 11 Online:https://www.usherbrooke.ca/droit/fileadmin/sites/droit/documents/recherche/activites/groupe_de_lecture/Thomasset-Laperriere.pdf. Accessed January 21 2014 (Thomasset and

The regulation of the legal profession is a provincial responsibility under Canadian law. Each province has its own legislation governing access to the profession and the activities reserved to lawyers. In Quebec, section 128 of the *Act respecting the Barreau du Québec* sets out a list of tasks which are "the exclusive prerogative of the practising advocate or solicitor."[8] These include (when performed for another person) drawing up legal proceedings for use before the courts, pleading before a tribunal – with certain exceptions, drawing up a will, and writing a demand letter, among other tasks.[9] In addition, only a lawyer or notary may "give legal advice and consultations on legal matters"[10] in Quebec.

Laperrière "Influence") at 12: The authors note that in Quebec, the legislation establishes a *de jure* restriction of certain tasks to lawyers and notaries, while a *de facto* restriction exists in the granting of legal jobs only to members of the professions. However, they remind the reader that these restrictions have not always been in place and are subject to change over time. They articulate the relationship between the restrictions on tasks and the affordability of services as follows: "*La nature du monopole consiste à restreindre l'offre de services dans le but d'en maximiser le prix"* (at 12). On the changing scope of the lawyer monopoly on legal services in the United States, see Derek A. Denckla, "Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters" (1999) 67:5 *Ford. L Rev.* 2581 at 2583; Deborah L. Rhode, "The Delivery of Legal Services by Non-lawyers" 4 *Geo. J. Legal Ethics* 209 1990-1991.

[8] S. 128(1) *Act respecting the Barreau du Québec*, R.S.Q. ch. B-1 ("Quebec Act").

[9] In order of mention in the text: ss. 128 (1)b); (2)a); (2)b); (2)e), Quebec Act.

[10] S. 128 (1) a) Quebec Act restricts legal advice to lawyers, while s. 129 e) of the Quebec Act preserves the right of practicing notaries to offer legal advice.

Other jurisdictions have similar exclusive areas of practice laid out in provincial law. In New Brunswick, the *Law Society Act*[11] defines the practice of law to be "applying legal principles and procedures for the benefit of or at the request of another person."[12] This definition is followed by a list of activities included in the practice of law, such as:

> "(a) acting as counsel or advocate,
>
> (b) providing legal services,
>
> (c) issuing an originating notice of action,
>
> notice of application, notice of motion, petition or
>
> similar document in any legal proceeding
>
> according to the provisions of any statute,
>
> (…)
>
> (e) giving legal advice,
>
> (f) negotiating and settling claims in a legal
>
> proceeding; (…)"[13]

Section 33(1) of the New Brunswick Act prohibits the practice of law along the above lines except for practitioners authorized by the bar association. At the same time, section 33(2) of the same Act protects the continued right of an individual to act on his or her own behalf in legal matters, as well as other activities such as "providing mediation and arbitration services or providing

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[11] S.N.B. 1996, chapter 89, as amended by S.N.B. 2009, chapter 25 ("New Brunswick Act").

[12] S. 2 New Brunswick Act.

legal advice as a corollary to such services,"[14] or practicing another profession which is regulated by the province.[15] Finally, it is illegal for a person to falsely hold oneself out to be a member of the legal profession.[16]

Similar provisions exist in Ontario. The *Law Society Act*[17] defines the provision of legal services as follows:

> "a person provides legal services if the person engages in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objectives of a person."[18]

Like the New Brunswick legislation, the Ontario Act includes a provision outlining in detail (without limiting the generality of the above definition) which tasks are the exclusive domain of legal professionals. These include giving "advice with respect to the legal interests, rights or responsibilities" of a person;[19] selecting, drafting, completing or revising a variety of legal documents on behalf of another person;[20] "(representing) a person in a proceeding before an adjudicative body;"[21] and "(negotiating) the legal

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[13] S. 2 a) to c), e) and f), New Brunswick Act.

[14] S. 33(2)h), New Brunswick Act.

[15] S. 33(2)i), New Brunswick Act.

[16] S. 35, New Brunswick Act.

[17] R.S.O. 1990, ch. L.8 ("Ontario Act).

[18] S. 1(5), Ontario Act.

[19] S. 1(6)1), Ontario Act.

[20] S. 1(6)2), Ontario Act.

[21] S. 1(6)3), Ontario Act.

interests, rights or responsibilities of a person."[22] The Ontario legislation further defines representation in a proceeding, including tasks such as selection of documents to serve or file, examination for discovery, and "engaging in any other conduct necessary to the conduct of the proceeding."[23] However, the legislation also makes exceptions for people acting on their own behalf, officers of corporations working in proceedings where the corporation is a party, and trade union representatives, among others.[24] The prohibitions on the practice of law by non-licenced people and falsely holding out oneself as an attorney are found at s. 26.1 of the Ontario Act.

The Alberta legislation also restricts the ability of a person to act as a barrister or solicitor. The prohibition on unauthorized practice of law reads as follows:

> "Practice of law
>
> 106(1) No person shall, unless the person is an active member of the Society,
>
> (a) practise as a barrister or as a solicitor,
>
> (b) act as a barrister or as a solicitor in any court of civil or criminal jurisdiction,
>
> (c) commence, carry on or defend any action or proceeding before a court or judge on behalf of any other person, or

[22] S. 1(6)4), Ontario Act.

[23] S. 1(7), Ontario Act.

(d) settle or negotiate in any way for the settlement of any claim for loss or damage founded in tort."[25]

As in the previously-cited jurisdictions, in Alberta the legislation makes exceptions for people who represent themselves, corporate officers, agents authorized to appear in provincial court, and other examples.[26] There is also a prohibition on falsely holding oneself out to be an attorney, and sanctions are provided in case of violations.[27]

The above are just some examples of legislation which prohibits unauthorized practice of law in Canadian provinces. The legislation provides a general prohibition on identifying oneself as an attorney, while listing certain specific tasks which only members of the bar may accomplish.

Sanctions for Unauthorized Practice of Law

Unauthorized practice prohibitions may carry the threat of substantial fines. Under s. 26.2 of the Ontario Act, for example, a first offence carries a maximum fine of $25 000 and this maximum penalty doubles for subsequent offences. Penalties for unauthorized practice of law vary from one jurisdiction to another. In Alberta, for example, the maximum fine is lower than in

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[24] S. 1(8), Ontario Act.

[25] S. 106(1), *Legal Profession Act*, R.S.A. 2000 Ch. L-8 ("Alberta Act").

[26] S. 106(2)h); j); l), Alberta Act.

[27] Ss. 107, 109, Alberta Act.

Ontario, at $4000 for a first offence, and a maximum of $8000 for subsequent offences.[28]

Failure to comply with a court order to cease unauthorized practice of law may result in additional sanctions for contempt of court. These may include restrictions on a person's liberty, up to and including a custodial penalty. For example, in a 2007 judgment, the Ontario Superior Court sentenced Maureen Boldt, a paralegal, to four months' house arrest for refusing to respect previous orders of this kind. House arrest was deemed a possibility by the court because Ms. Boldt was well-known in her small community – a factor which would have been less helpful to her if she lived in a large city, according to the judge.[29] She was also ordered to pay costs of $35 000 to the Law Society.[30]

It is significant that in this case, the sentence and costs were the culmination of several years of open defiance of the Ontario legislation and Law Society of Upper Canada. As early as the 1990s, Ms. Boldt had admitted to advertising legal services and representing clients in court, contrary to the legislation.[31] She was charged with 38 counts of unauthorized practice of law, though 37 of the counts were withdrawn in conjunction with a guilty plea on

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[28] S. 109(1), Alberta Act.

[29] *Law Society of Upper Canada* v. *Boldt*, 2007 CanLII 41426 (ON SC), Online: http://canlii.ca/t/1t41k. Accessed on June 1 2012 ("*Boldt*") at par. 31

[30] *Ibid.* at par. 42.

[31] *Ibid.* at par. 4.

one count.[32] This resulted in a fine of $100. A later injunction ordered to prevent Ms. Boldt from giving legal advice and conducting divorce proceedings for her clients was ignored, and this led to the later contempt of court ruling.[33] In 2006 new regulations were introduced in Ontario to cover the activities of paralegals under the *Access to Justice Act*.[34] When Ms. Boldt applied for a paralegal licence, the LSUC, which now governs paralegals, rejected her application on character grounds, citing the above rulings.[35]

It is worth mentioning that the Boldt case dealt with a person offering legal services for a profit. The social movement groups canvassed in the overview earlier serve populations who often lack the means or the desire to hire a professional. Nevertheless, writing from the United States, Scott Cummings and Ingrid Eagly raise the issue of unauthorized practice of law (which they term "UPL") in their critical analysis of law and organizing. They consider unauthorized practice to also be a potential ethical problem for lawyers engaged in social movement activism. Cummings and Eagly suggest that the prohibition on unauthorized practice can create a roadblock to collaborative, interdisciplinary casework involving lawyers and nonlawyers.[36]

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[32] *Maureen Olivia Boldt* v. *Law Society of Upper Canada*, 2012 ONLSAP 13 (CanLII) Online: http://canlii.ca/t/fr2g2. Accessed January 21 2014 ("*Boldt-LSUC*").

[33] *Boldt, supra* note 29 at par. 4.

[34] *An Act to promote access to justice by amending or repealing various Acts and by enacting the Legislation Act* 2006, S.O. Ch. 21.

[35] *Boldt-LSUC*, *supra* note 32.

[36] Cummings and Eagly "Critical" *supra* note 4 at 514-515.

One potential problem area is when lawyers provide training to lay advocates on how to help justice-seekers learn their rights and obligations. They write that the lawyer must take special care to avoid teaching lay advocates how to represent other people in court, which would be a violation of unauthorized practice rules. Another example is where a lawyer works with a nonlawyer who fails to respect ethical requirements such as confidentiality or oversteps his or her permitted domain of work. The lawyer may ultimately be held responsible by the bar association for any problems that occur.[37]

In brief, there are serious risks for any organization which crosses the line into unauthorized practice, and so it is understandable that organizations would seek to avoid violating the law. At the same time, there are situations where legal services can be provided by nonlawyers without violating rules against unauthorized practice. The following section outlines these opportunities, highlighting a particular problem for social movement caseworkers: drawing the line between permissible legal information and prohibited legal advice.

Opportunities for "Nonlawyer" Law and Organizing

Recall that in the Introduction to the thesis, Scott L. Cummings and Ingrid Eagly were quoted as listing several practices which lawyers can adopt

[37] *Ibid.* at 515.

according to the law and organizing model.[38] These practices include public legal education, linking membership to legal services and direct participation in organizing. Public legal education in particular is an area of legal service in which one need not be an attorney to participate. While only a lawyer may give advice on legal matters, trained nonlawyer caseworkers are free to inform justice seekers of their rights and obligations, whether through group workshops or individual meetings. In some cases, a caseworker may decide to have public legal education materials verified by a lawyer. However, if the caseworker has enough experience and training in the area of law, this may not be necessary.

Another service which caseworkers can offer is accompaniment – to court, to negotiation, to mediation or to other appointments. This is distinguished from direct representation by the fact that the caseworker does not speak on behalf of the justice seeker. Instead, caseworkers who provide this service will attend the appointment, sitting with the justice seeker and offering a supportive and trustworthy presence. They may take notes of what is said during the meeting so that the justice seeker can concentrate. Their presence may provide a balance in terms of numbers, should the other party bring a lawyer or other person to the meeting. Prior to the meeting, the caseworker may also meet with the justice seeker to explain how the upcoming process works – pointing out the differences between mediation and

[38] See Introduction to the thesis, above, at note 17.

a traditional court hearing, for example. Thus, accompaniment and public legal education may be used in combination, without going against the legislation on unauthorized practice.

A recently-created student coaching service for unrepresented litigants at the University of Windsor in Ontario offers a list of services which closely parallels those which social movement organizations can offer:

> "Law students will be matched with litigants – one-on-one – to offer coaching. Our law students will not be able to provide legal advice, but they can:
>
> - Help you review your case and identify your needs and priorities
> - Help you to prepare for a mediation session (and possibly accompany you)
> - Work with you to prepare for a case management or settlement conference (and possibly accompany you)
> - Answer questions about procedure (subject to the knowledge of the individual student)
> - Review your forms with you (subject to the knowledge of the individual student)
> - Provide overall support as you work through this often stressful and difficult process on your own."[39]

In some jurisdictions, it may also be possible for nonlawyers to represent justice seekers before certain tribunals. In Quebec, for example, a nonlawyer may represent a person in matters of workers' compensation, union grievance arbitration, and several other matters listed as exempt from the

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[39] Julie Macfarlane, "We're Getting Started. Are You Coming with Us? A First Legal Coaching Experiment" January 21 2014 (blog post) Online: http://drjuliemacfarlane.wordpress.com/?blogsub=confirming#blog_subscription-2. Accessed January 21 2014.

prohibition.[40] While a justice seeker might classify such issues as "legal" in substance, and seek the help of a legal professional in case of trouble, these matters do not fall under the exclusive tasks of lawyers in the Quebec legislation. Nevertheless, lawyers who practice exclusively before these administrative tribunals are *not* relieved of their obligation to pay malpractice insurance, unless they can affirm under oath that *in the course of this representation they do not offer any legal opinion or advice within the meaning of the law*.[41] This is an interpretation by the insurance fund of the Barreau du Québec, and it appears to leave open the question of what, exactly, constitutes legal opinion or advice.[42] The line between legal information and legal advice has been the subject of commentary and case law. Because of its significance for the daily practice of social movement caseworkers, the final section of the chapter focuses on this issue.

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[40] s. 128 2) a) par. 1-7, Quebec Act.

[41] s. 2 par. 8, *Règlement sur la souscription obligatoire au Fonds d'assurance responsabilité professionnelle du Barreau du Québec*, Ch. B-1, r. 20. The web page of the professional liability insurance fund for Barreau du Québec includes an interpretation of this section which states as follows: "*Représentation devant les tribunaux administratifs -- L'exemption peut être recevable s'il s'agit de la seule activité de l'avocat et en autant qu'il puisse affirmer, sous serment, ne rendre aucun avis ou opinion juridique au sens de l'article 128 de la Loi sur le Barreau.*"
Fonds d'assurance responsabilité professionnelle du Barreau du Québec, "Demande d'Exemption" Online: http://www.assurance-barreau.com/fr/police/exemption/. Accessed January 21 2014.

[42] It is difficult to imagine a situation where a lawyer would represent a person before the administrative tribunal without at some point advising the client. Perhaps these fora simply do not count as "legal" for the purposes of the insurance fund.

Advice vs. Information[43]

Based on what the above legislation says on its face, only a lawyer may do the tasks listed within the practice of law in a given jurisdiction. Yet, the dividing line between lawyers' tasks and work which can be done by activist caseworkers is murkier. The definition of the broad term, "practice of law" is subject to multiple understandings.[44]

In Quebec, the giving of advice and consultations on legal matters is specifically reserved to "advocates" who are defined as members of the bar and registered on the professional Roll.[45] Various Canadian prohibitions on non-professional legal advice read as follows:

> "advice with respect to the legal interests, rights or responsibilities of the person or of another person."[46]
>
> ""practice of law" means applying legal principles and procedures for the benefit of or at the request of another person"[47]

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[43] The researcher first engaged with the distinction between information and advice in a term essay during the final year of her undergraduate degree in law. See Alexandra Law, "Formal and Informal Norms at the McGill Legal Information Clinic" (McGill University term essay, unpublished, 2004).

[44] Cummings and Eagly, "Critical" *supra* note 4 at footnote 290. See also Denckla *supra* note 7.

[45] S. 128, Quebec Act.

[46] S. 1(6)1), Ontario Act.

[47] S. 2, New Brunswick Act.

> "to give legal advice and consultations on legal matters;"[48]
>
> "advise, do or perform any work or service for fee or reward, either directly or indirectly, in matters pertaining to the law of Saskatchewan or of any jurisdiction outside Saskatchewan;"[49]
>
> "providing legal advice;"[50]

We can resort to dictionary definitions of "advice" or "to advise" for greater clarification and there are common-sense understandings of the word. There is a clear difference between saying to a person "This is what the labour standards say …" on the one hand, and "If you want your money, you should…" on the other. However, even on this seemingly common-sense level, the information/advice distinction is more complex than it at first appears. Regardless of what definition the advocate adopts, there remains the problem of control over the interpretation of any information given to a justice-seeker. It is possible, through body language, tone of voice or choice of words, to offer information which sounds like advice to the justice seeker. This is an aspect of casework practice which has come up frequently in interviews with advocates working in organizations which describe legal

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[48] S. 128(1)a), Quebec Act.

[49] S. 30(1)b), *Legal Profession Act*, 1990, S.S. ch. L-10.1 ("Saskatchewan Act"). Note that this section mentions a "fee or reward" given in return for advice. S. 30(2)a) of the same Act provides that a person who practices without a licence may not recover any "fee, reward or disbursement" for the services. In addition, s. 30(2)b) provides that the person is deemed in contempt of any court in which he or she has worked on a proceeding for another person.

[50] S. 2(2)f), Newfoundland and Labrador legislation.

information as one of their main mission tasks.[51] There is a potential problem of interpretation and control over meaning, regardless of what definition of advice is favoured by decision-makers.

In the end, from the perspective of bar associations, the determination of what constitutes the practice of law, including the giving of legal opinions or advice, may be a question of law, to be determined only once a person or group is accused of unauthorized practice.[52] What might this interpretation look like? In 2012, the Quebec Court of Appeal was asked to rule on this very question.[53] This was an appeal of a conviction for unauthorized practice of law in the Superior Court. The court of first instance had acquitted the accused, but the Barreau had appealed this decision to Superior Court and prevailed. The appellant was accused of having given legal advice regarding the meeting agenda of a condominium board of directors.[54] The court of first instance interpreted the email exchange to be a simple list of obligations under the Civil Code of Quebec.[55] However, the Superior Court disagreed, holding that the exchange amounted to legal advice.[56]

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[51] See Chapter 6.

[52] See Cummings and Eagly "Critical" *supra* note 4 at note 290.

[53] *Charlebois v. Barreau du Québec*, 2012 QCCA 788 ("*Charlebois*").

[54] *Ibid.* at par. 6. The appellant gave this advice/information while acting as president of an association of condominium boards, whose mission is to offer services to the boards. The Court of Appeal noted at par. 7 that the association had a lawyer to whom legal questions would be referred. It also noted that the accused was friends with the person who had called him for help, and it was this friendship which motivated the person to seek his assistance.

[55] *Ibid.* at par. 8.

The Court of Appeal, in overturning the decision of the Superior Court, pronounced on the interpretation that should be given to the legal opinion versus legal advice provision in the Quebec legislation, first noting that there was no definition of legal opinion in the Act itself.[57] While the Barreau du Québec sought a broad definition of legal opinion, the Court of Appeal disagreed, holding that the proposed interpretation was unreasonable:

> "*L'intimé plaide que l'application de principes de droit à une situation donnée constitue, dans tous les cas, « un avis d'ordre juridique ». Je suis en désaccord avec cette proposition. Cela signifierait que toute référence à une règle de droit par quiconque, en relation avec une situation concrète, constitue une infraction à la Loi sur le Barreau, quelles que soient les circonstances.*"[58]

The Court of Appeal quotes with approval a Texas guide to identifying legal advice, which offers a more narrow interpretation:

> "**What is Legal Advice ?**
>
> Court users are asking for legal advice when they *ask whether or not* they *should* proceed in a certain fashion. ***Telling a member of the public what to do rather than how to do it may be giving legal advice.***
>
> Legal advice is a written or oral statement that :
>
> - Interprets some aspect of the law, court rules, or court procedures;
> - Recommends a specific course of conduct a person should take in an actual or potential legal proceeding; or

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[56] *Ibid.* at par. 11.

[57] *Ibid.* at par. 19.

[58] *Ibid.* at par. 25. The Court of Appeal notes that the broad definition would capture everything from a conversation between neighbours about latent defects in a house, to a friend telling a person to seek child support under divorce legislation (par. 26).

- Applies the law to the individual person's specific factual circumstances."[59]

In the end, the Court of Appeal held that the exchange was not, beyond a reasonable doubt, an example of advice which would go beyond a lay person's understanding of the law, and it therefore constituted legal *information*, permissible under the Act.[60] The appellant was finally acquitted of the offence, but not before having passed through three separate judicial instances, which may have been a significant drain in terms of time, money and stress. It is understandable then, that nonlawyer caseworkers may be wary of crossing the line between providing legal information and providing a legal opinion or advice.

Conclusion to Chapter 3

This chapter has presented examples of Canadian legislation prohibiting the unauthorized practice of law. Sanctions for the offence were discussed with reference to a specific case in Ontario. Finally, opportunities for nonlawyers to offer free or low-cost legal services were discussed, with

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[59] Texas Courts Online, « Legal Information vs. Legal Advice : Guidelines and Instructions for Clerks and Court Personnel Who Work with Self-Represented Litigants in Texas State Courts », June 2010, Online: <http://www.courts.state.tx.us/pubs/LegalInformationVSLegalAdviceGuidelines.pdf/> (site consulté le 5 avril 2012), p. 7, cited in *Charlebois, ibid.* at par. 29.

[60] "L'étude de la situation à laquelle répond l'accusé doit faire appel, selon moi, à une certaine connaissance de notions juridiques qui va au-delà de celle de la personne qui n'est pas formée dans le domaine juridique." *Ibid.* at par. 33, citing Denckla *supra* note 7.

specific reference to the Quebec experience with the information/advice distinction in case law.

The purpose of this chapter has not been to provide an exhaustive list of possible legal services which could be incorporated into a law and organizing campaign, nor has it been to canvass all possible instances of unauthorized practice of law. Instead, the chapter demonstrates that there are legal services which can be provided by social movement caseworkers who are not lawyers, without violating the law. This is not to discount the importance of lawyers' specialized training and expertise, which will often go beyond that of a caseworker, specialized in one procedure or area of law. However, law and organizing accounts which presume that legal strategy *necessarily* requires lawyers may not always reflect current practice or State law.

In the next chapter, the thesis turns from a discussion of the law governing unauthorized practice to a discussion of the theoretical foundations of the current law and organizing model. Below, the standard critique of legal mobilization is re-read through an interdisciplinary lens, taking into account the possibility of advocacy by nonlawyers.

Chapter 4: An Interdisciplinary Reading of the Critique

Introduction

In Chapter 1, the law and organizing model was situated as a response to the critique of the use of legal strategy and lawyers in social movements – a critique of what Stuart Scheingold described as the "myth of rights". It was argued, following Orly Lobel, as well as Scott Cummings and Ingrid Eagly, that the model is based on a myth of its own: the myth of activism or of organizing.[1] One of the reasons that this myth has been able to flourish in the literature, it was argued, is that law and organizing studies largely equate legal strategy with the necessity of lawyer involvement. They also associate the problems of individualization and disempowerment strongly with legal strategy and lawyers. However, as explained earlier in the thesis, it is possible to incorporate a legal strategy into organizing without requiring the participation of a member of the bar. Thus the assumption that legal strategy requires lawyers appears incorrect, at least where Canadian provincial law is concerned. The present chapter examines a second assumption: that individualization and disempowerment are the result of organizations choosing to use legal strategy and involve lawyers in the movement. In Chapter 1, it was briefly argued that these issues are present across different disciplines which engage in casework as part of a campaign for systemic change. Below, this argument is explained in detail, through an

[1] See "Defining the Argument" in Chapter 1, above, and accompanying notes.

interdisciplinary examination of the origins and development of the standard critique of the myth of rights and its consequences for movement activism, this time incorporating insights from the field of social work.

The discussion of legal scholarship begins with a historical introduction based in pre-World War II Canada and the United States. In this idealistic phase, law and legal professionals were perceived as powerful allies of social movements. This discussion is followed by an outline of the later critical phase beginning in the 1970s, in which lawyers and their perceived emphasis on litigation drew suspicion from activists and academics. The critical literature on social work is then canvassed, with an emphasis on casework and its place in community organizing. In this chapter, it is argued that despite many significant differences between the two professions, each offers a critique of social movement casework which focuses on the same core issues: disempowerment and individualization. These two concerns form the basis of an interdisciplinary critique of casework described in the concluding section of the chapter.

Defining Casework in the Context of Social Movements

For the purpose of outlining a critique of casework in social movements, it is necessary to explain what is meant by the term, when used in the context of political activism. Not all social movement organizations engage in casework, nor do all movement organizations define casework in

the same way. It is a form of advocacy which involves solving problems with (or for) individual justice-seekers. The types of assistance which a social movement organization may include under the heading of 'casework' vary. Casework may include assisting a person with a mediation process, negotiating on the person's behalf, going to court to represent the person, helping the person to write a letter, listening attentively to the person's account, accompanying the individual to administrative appointments, and many other tasks. Some of these tasks, the reader will note, may fall under the activities reserved to lawyers under provincial bar acts, while others do not.

Moreover, some casework tasks may be more easily incorporated into movement campaigns than others. For example, attentive listening may form a significant part of casework practice in social movement organizations. When this occurs in confidential settings, the story of a person in difficulty may never become public. Nevertheless, casework is often done as part of a broader commitment to political action. For example, helping a person to win a case against the welfare office is a task which could be accomplished for the sake of that individual alone. However, within an anti-poverty movement organization, casework is done with a view to changing the way that the welfare system operates, the amount of benefit all people receive, the level of courtesy extended to people by social assistance staff, and so on. Casework in this sense is a form of individual assistance, connected to systemic issues,

performed with the aim of helping the individual while promoting systemic change.

The *Direct Action Casework Manual* web publication by the Ontario Coalition Against Poverty (OCAP) is instructive in this regard. The Manual characterises casework as a "model of organizing,"[2] which emphasizes the role of casework as a political tactic. The main principles of operation in this organizing model are the following:

> "1. To combine legal work with disruptive action
> 2. Not to duplicate the work of legal clinics or other agencies
> 3. To forward political goals but never compromise the interests of those you are working with in the process."[3]

As indicated by these principles, casework at OCAP is embedded in other political organizing strategies.[4] In the past, these have included mass demonstrations, rallies, and noisy sit-ins which disrupt the work of social assistance agency staff.[5] Casework is thus part of a full set of possible strategies, and service provision is not the final goal. It follows that, according to the second principle, the movement organization is not a service-oriented

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[2] Tim Groves, "Direct Action Casework Manual" (Toronto: OCAP, 2003) Online: http://update.ocap.ca/node/322. Accessed January 16 2014. On direct action casework, see also Jonathan Green, "Whatever It Takes: Poor People's Organizing, OCAP, and Social Struggle" (2005) 75 *Studies in Political Economy* 5. Online: http://spe.library.utoronto.ca/index.php/spe/article/viewFile/6674/3675. Accessed January 22 2014, at 11 and following.

[3] Groves, *Ibid.*

[4] Although the casework manual does not make direct reference to the law and organizing model and associated literature, the strategy described in the document closely parallels the approaches described in law and organizing studies.

[5] See descriptions of casework tactics in Chapter 5, below.

agency offering assistance on an individual basis. The goal of casework is not to encroach on the territory of existing service providers, which are often funded by the State, as long as these providers are able to satisfy the needs of their client base. At the same time, the second principle implies that there are some services which are not adequately provided by existing legal clinics or agencies – otherwise there would be no demand for casework services from the activist group. Indeed, in the manual, OCAP writes that many of the people who approach them for casework help have no other service options.[6] Finally, the third principle listed in the Manual raises the ethical challenge inherent in all social movement casework: how to create a link between individual cases and systemic issues, without harming the people who put their trust in the organization and its caseworkers. Casework is an individual service, performed in the context of a movement for systemic change, which poses strategic and ethical challenges to organisers, whether they happen to be lawyers, social workers, or non-professional experts.

The above is still, admittedly, a broad description, notably because it includes no mention of what a 'case' is. One assumption of the thesis is that social movement casework can involve multiple disciplines. When engaging in research which crosses disciplines, scholars are reminded to be cautious about terminology and the potential for linguistic confusion between fields of

[6] Groves, *ibid.* at 2.

study.[7] For a litigating lawyer who spends a great deal of time going to court and arguing before a judge, a 'case' is most often a judicial decision - a precedent to be relied upon or distinguished. In common law and mixed jurisdictions, 'case law' is the body of judicial decisions from which legal actors discern the general rules which will influence the outcome of future cases. In addition, a *case* in a lawyer's practice can represent the whole of the evidence and possible arguments in favour of the client's side of a dispute. If this evidence and these arguments are insufficient, the lawyer has a duty to inform the client that she 'has no case' or 'has a bad case'. In the medical profession on the other hand, a doctor may tell a patient that he 'has a bad case' of some virus. In this sense, the case is in fact a state of disease which a patient is thought to possess.[8] In medical circles, the most fortunate patients are those who have no case at all. For a social worker, as will be shown later in this chapter, the definition of the 'case' is not far from that of the doctor. In traditional social work casework, the individual person is treated as if they have a difficult set of circumstances which can be overcome with

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[7] Roderick Macdonald likens translation between disciplines to translation between languages. See: Roderick A. Macdonald, "Transdisciplinarity and Trust" Chapter 2.1 in Margaret A. Somerville and David J. Rapport, eds., *Transdisciplinarity: reCreating Integrated Knowledge*, (Oxford: EOLSS Publishers Co. Ltd., 2000) at 61 and following. On the caution against terminological confusion, see: Pierre Noreau, "Voyage épistémologique et conceptuel dans l'étude interdisciplinaire du droit" in Pierre Noreau (ed.) *Dans le regard de l'autre/In the Eye of the Beholder* (Montreal: Éditions Thémis, 2007) 165 at 175.

[8] Case: "the condition of disease in a person." OED online: http://www.oed.com/view/Entry/28393?rskey=AZLAaN&result=1#eid. Accessed January 17 2014.

psychotherapeutic counselling or other individualised therapy. This view of therapeutic approaches to individual cases has been the subject of criticism from structural or radical social workers. However, the description of the case as a set of circumstances which are a source of distress for an individual has the advantage that it can also be connected to traditional legal advocacy, as the case of the lawyer's client is made up of facts and evidence – problematic circumstances – which motivate the client to seek out help, and which are only later described to a judge.

Another theoretical assumption is that, as mentioned earlier in the thesis, much of the casework employed in social movement organizations occupies the lower levels of what Henry M. Hart, Jr. and Albert M. Sacks describe as the *Great Pyramid of the Legal Order*.[9] The metaphor of the

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[9] Henry M. Hart & Albert M. Sacks, "Prefatory Note: The Great Pyramid of the Legal Order" in Williman N. Eskridge & Philip P. Frickey, eds., *The Legal Process: Basic Problems in the Making and Application of Law* (Westbury, NY 1994: Foundation Press) 286. Marc Galanter contrasts the image of the pyramid, which, he writes, gives the impression of a unified whole, with his own image of the iceberg, in which "the existence of disparate systems of settling disputes is a reflection of cultural and structural discontinuities." Marc Galanter, "Why the Haves Come out Ahead: Speculations on the Limits of Legal Change" (1974) 9 *Law and Society Review* at 1, Reprinted (with corrections) in R. Cotterrell (Ed.) *Law and Society* (Aldershot: Dartmouth, 1994) 165 at footnote 97. In a separate article, Galanter invokes the image of the pyramid in order to analyze it in detail, noting that the sense of stability it gives is belied by the changing nature of the identification of disputes over time. However, for the purposes of the present chapter of the thesis, the image of the pyramid is used only to illustrate the common understanding among legal scholars that most cases are resolved without reaching a courtroom. Marc Galanter, "Reading the Landscape of Disputes: What We

pyramid represents the proportion of cases which are resolved through judicial decisions in first instance or on appeal, relative to the number of cases which either encounter no trouble at all, or are settled privately before ever reaching an adjudicative process. Hart and Sacks describe a seven-layer pyramid. The bottom, largest layer involves "billions upon billions of events and non-events"[10] which never give rise to a problem. The second, slightly smaller layer includes "trouble cases" where a person involved in an event feels that some violation of the established order has occurred. Third is the layer of trouble cases which are settled privately. Fourth are the cases which are submitted for formal adjudication (in court or elsewhere) but settled informally. Fifth are cases which are decided by the adjudicator by default or without contestation. The sixth layer of the pyramid is made up of the cases which are contested at first instance and disposed of by an adjudicator, while the tiny tip of the pyramid includes cases dealt with by an appeal or review process.[11] The purpose of the metaphor is to demonstrate that despite the fact that lawyers spend much of their training reading appellate decisions, the vast majority of cases never reach the appellate court level. One of the assumptions guiding the understanding of casework in the thesis is that casework in social movement organizations involves the base levels of the pyramid most of the time. In this respect, social movement casework is distinguishable from

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Know and Don't Know (and Think We Know) about Our Allegedly Contentious and Litigious Society" (1983) *UCLA Law Review* 4 at 11 and following.

[10] Hart and Sacks, *Ibid.*

[11] *Ibid.* at 287.

impact litigation. Rather than seeking to move a 'good case' up through the court hierarchy, casework under a law and organizing model may instead involve finding the best (and often fastest) settlement for the individual justice seeker. Systemic change may happen as the aggregate result of many cases, rather than a few helpful precedents.[12]

For this reason, for the purposes of the thesis, social movement casework was defined in Chapter 1 as *the process of assisting an individual person to overcome circumstances which are causing distress, in the context of a movement for systemic change aimed at problematic circumstances similar to those of the individual person, undertaken by professional or non-professional advocates, regardless of whether the case is dealt with through formal adjudication.*

Before moving on to the next section, an important distinction must be made between casework in the sense described above and the broader use of legal strategy in social movements described in the academic literature outlined below. The literature on law and social movements is vast, and it includes accounts of impact litigation in courts, labour strikes, and other strategies which use law for political purposes. Casework is therefore only one among many tactics which are available to social movement actors, and that many movement organizations carry on their activities without offering

[12] This occurred, for example, during the Special Diet Campaign, studied in Chapter 5.

individual casework services to the public. For this reason, at times it may appear that the literature on law and social movements canvassed in the following section is not directly relevant to the object of study in the dissertation. However, by the end of the present chapter, it will hopefully be clear that this literature is significant for the way that it presents a broad-based critique of the use of State law and the role of legal professionals in social movement organizations. This critique, combined with the work of critical social work scholars and community organizers, has important implications for the thesis because it forms the theoretical basis for the current law and organizing model.

Social Movements and Legal Strategy, Pre-2000

When considering the role of lawyers and legal strategy in social movements, one might assume that the strategic use of law and legal professionals began with the social movements which arose in the context of the political turmoil of the 1960s. The civil rights movement in the United States has been an influential force in social movement strategy building and writing on the political use of legal strategy, both in the US and beyond its borders.[13] Much of the critical scholarship on cause lawyering, law and social movements or law and organizing focuses on this time in the history of the

[13] Liora Israël, *L'arme du droit* (Paris: Presses Sciences Po., 2009) at 12; Liora Israël, *"Quelques éclaircissements sur l'invention du* cause lawyering" (interview with Austin Sarat and Stuart Scheingold) (2003) 62:16 *Politix* 31 (Israël "Interview") at 35.

United States as the moment when legal strategy and progressive lawyers reached the height of their popularity with political activists.[14] Although the present thesis focuses on casework in the Canadian context, so much of the influential academic literature on law and organizing, "cause lawyering" and related topics comes from the United States that it is relevant to discuss this literature and the perspective it can offer on casework practices outside the US.[15] The following section describes several 'movements' in the study of the political use of law and lawyers, mainly in US scholarship. The tone of the discussion of law and lawyers in social movements moves gradually from one of idealism and hope for the potential benefits of litigation, to a more critical - at times even cynical - approach following the social upheavals of the 1960s. Finally, legal scholars have added nuance to the critical approaches, based on empirical evidence of the on-the-ground practice of cause lawyers and other social movement actors. It is in this most recent phase of law and social movement scholarship that the present research project is situated. It will be argued that at all stages of the development of this literature, from pre-World War II to the present day, activists have incorporated legal strategy along with other organizing strategies for social change, often without making clear divisions between State legal tactics and other strategies.

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[14] See discussion of progressive law reform pre-World War II, below.

[15] Israël *supra* note 13 at 11. However, it is notable that Sarat and Scheingold recall having the first academic conference discussions on cause lawyering at Aix-en-Provence: Israël "Interview" *supra* note 13 at 34.

Brief Summary: Pre-World War II to the late 1960s

The Great Depression was a time of political and social upheaval which, while beyond the living memory of many people today, led to the creation of State legal regimes which continue to influence the strategies of social movement actors in the present. In the United States, the Depression forced mass migrations of would-be workers who left their homes, often with families in tow, to search for employment across the country. Even lawyers did not escape the economic insecurity of the Depression. Sole practitioners saw their incomes drop to the point where in California, the majority of law graduates from the classes of 1929-1931 could not feed their families, and in New York City, "nearly half the members of the metropolitan bar earned less than the minimum subsistence level for American families."[16] In the context of widespread threats to food security and the inability of people to work safely and earn enough to feed their families, the State seemed for many to have the capacity to act to improve living and working conditions.[17] In this context, US President Franklin D. Roosevelt established the influential legislative frameworks which would become known as the New Deal.

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[16] Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York: Oxford University Press, 1976) at 159.

[17] Michael McCann and Jeffrey Dudas, "Retrenchment…and Resurgence? Mapping the Changing Context of Movement Lawyering in the United States" in Austin Sarat and Stuart Scheingold (eds.) *Cause Lawyers and Social Movements* (Stanford, 2006: Stanford University Press) 37 at 41. In this context, the State would also have been seen by the employer class as a threat to the existing capitalist order: see Auerbach, *supra* note 16 at 191 and following.

The administration of programs under the New Deal required that the US federal government hire a new and larger cohort of attorneys to work in Washington. Many of these lawyers had been taught to be critical of traditional ideas related to the autonomy of State law and the ability of judges to 'discover' the law through reasoning and precedent.[18] The new critical lawyers saw the need for State law to be responsive to social change.[19] They were aware of mounting public criticism of their professional colleagues, who were seen as servants of business and the financial elite instead of the public interest.[20] In the 1930s, the availability of affordable legal services was considered inadequate according to public opinion.[21] The New Deal framework also created many opportunities for private practitioners to do litigation work in the public interest before the United States Federal Courts. Thus, scholars Michael McCann and Jeffrey Dudas write that "(c)ause lawyers, defined by Scheingold and Sarat as attorneys who dedicate their

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[18] Auerbach, *supra* note 16 at 165.

[19] Israël, *supra* note 15 at 12.

[20] Auerbach, *supra* note 16 at 158 and following. Ann Southworth notes that in the present day, the notion of *public interest law* is contested, with different definitions among lawyers on the right and left of the political spectrum: "Conservative Lawyers and the Contest Over the Meaning of 'Public Interest Law'" (2005) 52 *UCLA Law Review* 1223. See also Ann Southworth, *Lawyers of the Right: Professionalizing the Conservative Coalition* (Chicago, 2008: University of Chicago Press).

[21] Auerbach, *Ibid.* Auerbach also ascribes some of the scarcity in affordable legal services in the US to efforts of the American Bar Association to limit access to the profession by restricting night schools and other legal education sites deemed 'sub-standard', and which, it was feared, would produce a glut of lawyers, thereby creating downward pressure on legal fees. Auerbach, *ibid.* at 102-129.

careers to the pursuit of specific political and/or moral commitments, first emerged in substantial numbers and public identity during the New Deal period."[22]

Although cause lawyers may have grown in number during the New Deal, instances of legal mobilization in Canada and elsewhere can be identified prior to this era.[23] For example, the connection between political activism and legal strategy was clearly understood by social reformers in 19th-

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[22] Michael McCann and Jeffrey Dudas, *supra* note 17 at 49. On the development of cause lawyering during this period and beyond, see also the chapter by Austin Sarat and Stuart Scheingold, which draws on the historical work of Auerbach, *supra* note 19: Sarat and Scheingold, "Cause Lawyering, Civic Professionalism, and the Organized Legal Profession: A Brief History" Chapter 2 in Sarat and Scheingold, *Something To Believe In: Politics, Professionalism, and Cause Lawyering* (Stanford, 2004: Stanford University Press) at 23. The term "cause lawyering" only came into use in the legal academy in the late 1990s, after it was popularized by Stuart Scheingold and Austin Sarat: Israël, *supra* note 13 at 61, footnote 20; Sarat and Scheingold note that the term was at first applied mainly to lawyers of the political left, but later came to include lawyers on the right as well: Israël, "Interview" *supra* note 13 at 33, 34-35.

[23] The social reformers described below probably would not have identified themselves as "activists" in the sense that we would understand the term today. Likewise, they would not have labeled their work as "law and organizing". In the thesis, law and organizing is used as an analytical concept, which can be applied regardless of whether participants speak of their own work this way. This is similar to the use of "cause lawyering" by McCann and Dudas when they describe historical events which predate the invention of the term. See McCann and Dudas, *ibid.* Austin Sarat and Stuart Scheingold (inventors the of "cause lawyering" label) have also stated that theirs is an analytical term and not "indigenous" to social movement participants. See Israël "Interview" *ibid.* at 37. The same is arguably true of law and organizing. On the development of the law and organizing model in the legal academy, see Scott L. Cummings and Ingrid Eagly, "A Critical Reflection on Law and Organizing" (2001) 48 *UCLA Law Review* 443 (Cummings and Eagly "Critical").

century Ontario. Writing on the topic of protective labour legislation, Constance Backhouse chronicles the debates of middle-class Ontario women as they worked to ensure the protection of vulnerable 'shopgirls' in the workplace.[24] These proto-activists in Ontario, who felt that women were too weak to engage in traditional union organizing, operated sewing classes, lunchrooms and lecture evenings for the 'betterment' of working women.[25] They combined these activities with lobbying efforts to pass legislation limiting hours of work, providing for rest periods, and even chairs in the workplace, so that women would not have to stand for hours on end.[26]

The women who did this organizing and legal work were not legal professionals. Although it included lobbying for progressive legislation, the reformers' activist work drew from disciplines other than law for support. In fact, many of the arguments put forward in favour of protective legislation for women at work in Ontario were based not on rights discourse at all, but on medical concerns over reproductive health. In extreme instances, eugenicist

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[24] Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth Century Canada* (Toronto, 1991: Canadian Scholars' Press and Women's Press) at 276 and following.

[25] *Ibid.*

[26] *Ibid.* Backhouse details the many conflicts and contradictions inherent in this early women's movement. The attitudes of the social reformers who combined lobbying with community organizing tactics were reflective of middle-class attitudes also prevalent among early social workers, as explained below. Backhouse explains that while lecture nights were poorly-attended due to fatigue at the end of the day, the lunchroom, which provided free meals and an informal social club, was a great success.

and racist 'evidence' was used to argue that long hours would make the children of the future 'feeble' due to their mothers' overwork. The rights of women as equal citizens under State law took second place to the survival of the (Anglo-Saxon, in Ontario) race, and the protection of women's biological capacity to bear healthy children.[27] Backhouse writes that stories of individual women driven to unseemly behaviour or robbed of their reproductive capacity by long hours of standing work were used as morality tales to spur State legislators to action. While not "casework" in the sense of providing a problem-solving service on an individual basis, this form of activism did focus on publicizing the narratives of individual women as representatives of an affected group in an effort to promote systemic change. The reformers thought themselves to be concerned with the global wellbeing of working women – though in a moralistic sense which would raise eyebrows in the present day. The struggle for legislated workplace protections was combined with social and educational activities which took on a distinctly paternalistic and almost coercive air.[28]

While their participants would not have been familiar with present-day academic currents, the events surrounding the 19th-century Ontario workplace protections can be interpreted as an early example of what Scott Cummings has termed "tactical pluralism" – the use of multiple tactics in social activism,

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[27] *Ibid.* at 276 and following.

[28] *Ibid.*

some dependent on State law, others not.[29] It is no accident that this example comes from the context of workplace struggles. The labour movement has a long history of combining legal tactics with other organizing work.[30] Though not explicitly coordinated under the banners of cause lawyering or law and organizing, this instance of organizing for political change adopted the very kinds of strategic approaches later documented by scholars in these fields. The present dissertation is not a historical study. However, it is helpful to remember that strategic combinations seen as innovative in the present day may have originated in earlier times.

If legal scholars place the origin of the political use of legal strategy at the 1930s, the notion that lawyers and legal strategy could contribute to social movements really gained ground from the late 1950s to the 1970s, during which the civil rights, feminist and other social movements became influential.[31] Like the critical lawyers of the New Deal period, many of the people who came of age as social movement activists in these decades expressed optimism for the possibility of promoting progressive social change through the use of courts and State legislation. During this time, social

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[29] Scott L. Cummings "Law in the Labor Movement's Challenge to Wal-Mart: A case study of the Inglewood site fight" (2007) 95 *California Law Review* 5 at 1927, at 1932 (Cummings "Wal-Mart").

[30] Scott L. Cummings "Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement" (2009) 30 *Berkeley Journal of Employment and Labor Law* 1 (Cummings "Hemmed In").

[31] McCann and Dudas, *supra* note 17 at 38, 49-50, 52.

movement actors brought forward court challenges to racial segregation, one of which resulted in the now famous decision in *Brown v. Board of Education*. The civil rights movement was an inspiration for scholars and other movement actors.[32]

Critique: the Myth of Rights and the Role of Lawyers, 1970s to 1990s

In spite of inspiring victories such as *Brown*, beginning in the 1970s, the optimism and public enthusiasm for activist lawyering in the US began to wane.[33] At this time, legal scholars began to question the value of lawyers and State-based law for social movements. A strong critique of the role of legal professionals in activist work evolved. In the following section, we move from the brief historical discussion, to an account of the development of critical scholarship on law and social movements in the 1970s and beyond. The way in which American legal scholars constructed the roles of the lawyer and of State law in social movements has had an influence on the way that movement participants (including young law students) have perceived these elements and used them in their work.[34]

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[32] Cummings and Eagly, "Critical" *supra* note 23 at 444-445.

[33] McCann and Dudas, *supra* note 17.

[34] For an overview of the historical development of public opinion of the role of lawyers in progressive movements in the United States, see McCann and Dudas, *supra* note 17.

Aware of the importance of avoiding confusion between varieties of technical jargon, professional cultures and histories when constructing an interdisciplinary research project, the main points of criticism in the legal academy are described separately from the social work critique in this chapter. The final section of this chapter then outlines the convergent elements of each body of critical literature to construct an interdisciplinary critique of casework in social movement organizations. It is argued that the current law and organizing model rests on a critique of the political use of legal strategy – and therefore a set of assumptions – which give an incomplete explanation of the potential causes of individualization and disempowerment. This is because the model fails to recognize these issues as manifested, both in clinical practice and in academic debates, in disciplines outside the legal profession.

Individualization

In Chapter 2, a critique of the use of legal strategy in social movements was briefly outlined. This critique of the "myth of rights," a phrase attributed to Stuart Scheingold, designates an ideological perspective on the use of mostly State-based legal tactics in the service of political causes. To recapitulate, the myth of rights encourages movement participants to focus on advancing political causes through the use of rights-based claims, mainly in court. Adherents to this ideology believe that the most effective way to make gains for a social movement is to become adept at court procedure and gain knowledge of legislation and constitutional rights. As described in Chapter 2,

the "myth of rights" is, for Stuart Scheingold, built upon a strong faith in the formal equality provided under the United States Constitution and other US legal documents:

> "The myth of rights, in sum, encourages the view that the United States Constitution is a beneficent document which is in a large measure responsible for both our affluence and our domestic tranquility. Our constitutional order is said to be responsive to reason rather than power, to promote the public interest, and to nurture change within a reassuring framework of continuity."[35]

Here, Scheingold's focus is exclusively on the United States. He writes that one factor in the strength and persistence of the myth of rights as an ideology is the "distinctively American faith in the law."[36] Nevertheless, this faith in the law finds its reflection in Canadian scholarship as well. The potential for the Canadian *Charter* to provoke a "legalization of politics"[37] has been the subject of critique. Scheingold perceives a clear connection between this belief in the power of the Constitution to 'right wrongs' on the one hand, and an erroneous faith that complex political issues can be solved by invoking this and other State legal documents before a tribunal. According to proponents of the myth of rights, the simple application of rights discourse to a social problem is already a step toward resolution. Rights ideology assumes that if a

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[35] Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy and Political Change* (New Haven: Yale University Press, 1974) (Scheingold, *Politics of Rights*) at 37.

[36] *Ibid.* at 21.

[37] Michael Mandel, *The Legalization of Politics in Canada* (Toronto: Thompson Educational Publishing, 1994).

problem can be defined in terms of legal rights and obligations, and appropriately prepared for formal court adjudication, it can be fixed efficiently. The best-known and most powerful interpreters of constitutional law are judges. Thus, there is a strong pull on social movement actors to choose litigation, despite its demonstrated ineffectiveness at correcting power imbalances when used in isolation from other tactics.[38] This leads to an emphasis on litigation as the primary means of dealing with what are actually complex, systemic issues, ill-suited to individualized treatment. Scheingold writes that when applied to social movement activity, the myth of rights may lead activists to favour courts at the expense of other, potentially more effective strategies.

Beyond encouraging the adoption of ineffective tactics, the myth of rights may also pacify activists by imposing procedural formalities on what

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[38] Scheingold, *Politics of Rights, supra* note 35 at 84-85, 95. See also Gerald Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (Chicago: University of Chicago Press, 1991); Joel Handler, *Social Movements and the Legal System: A theory of law reform and social change* (New York, 1978: Academic Press Inc.) at 18 and following. For a summary of the 'standard critique' of social movement lawyers and legal strategy, see Michael McCann and Helena Silverstein, "Rethinking 'Law's Allurements' : A Relational Analysis of Social Movement Lawyers in the United States" in Austin Sarat and Stuart A. Scheingold (eds.) *Cause Lawyering : political commitments and professional responsibilities*, (New York: Oxford University Press, 1998) 261 at 261 and following; Scott Cummings, "Critical Legal Consciousness in Action" (2007) *Harvard Law Review Forum* 62: http://ssrn.com/abstract=998040; Orly Lobel (2007) "The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics" 120 *Harv. L. Rev.* 937, 942-48 (2007).

might otherwise be an unpredictable and militant mass movement.[39] This is reminiscent of course of arguments against legislated collective bargaining in support of industrial peace. Moreover, by positing the institutions of the State as the main – or even the only – forum for resolution of sociopolitical conflicts, the myth may actually strengthen the belief among movement participants that these institutions are legitimate and responsive to social problems. In this framework, injustices are characterised as "aberrations" rather than as problems with the system as a whole. In this way, "(t)he myth of rights may work in behalf of change, but its dominant tendency is surely to reinforce the status quo."[40]

US history provides significant evidence for the above argument against exclusive reliance on litigation. Scheingold uses the example of litigation by civil rights activists in an effort to end segregation. While American courts and organizations such as the NAACP Legal Defence Fund were responsible for landmark decisions such as *Brown v. Board of Education* and its associated cases, the application of judicial decisions on the ground proved difficult, as officials attempted to circumvent the will of the court. Politicians and bureaucrats in the American South refused to accept the legitimacy of the outcome in the *Brown* cases and continued to threaten

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[39] Scheingold, *Politics of Rights, supra* note 35 at 24.

[40] *Ibid.* at 91. On this point, see also Peter Gabel and Paul Harris, "Building Power and Breaking Images: Critical Legal Theory and the Practice of Law" (1982-1983) 11 *N.Y.U. Rev. L. & Soc. Change* 372 at 376.

desegregation proponents with violence – all the while protesting that these decisions were "contrary to the Constitution." Scheingold is not the only scholar to cite the inability of courts to end segregation as evidence for the ineffectiveness of litigation strategy for social movements. Gerald Rosenberg, whose work is discussed later in the dissertation, also uses the desegregation cases as one example of the inability of courts to effect progressive systemic change. Joel Handler has employed the same example to argue for the same point.[41] Nevertheless, Scheingold, Handler and Rosenberg have argued separately that in spite of courts' inability to promote systemic change, activists continue to choose "myth over reality," using litigation as a political tactic in a variety of causes.[42]

The emphasis on individual legal rights as a strategic asset for social movements also implies speaking about political causes using the language of State law. As in Canada, the rights under the United States Constitution are phrased mainly in *individual* terms.[43] Scheingold writes that this is consistent with individualism as a core *American* value,[44] but he might as well have written of individualism as a *North* American value. In the end, there is a danger that social movements which adopt the myth of rights will also choose

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[41] See Rosenberg, *supra* note 38; Handler, *supra* note 38 at 18 and following.

[42] Scheingold, *Politics of Rights, supra* note 35 at 95.

[43] The *Charter of Rights and Freedoms*, The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11 introduces the fundamental freedoms using the word "Everyone," (s. 2), while equality rights begin with "Every individual…" (s. 15).

[44] Scheingold, *Politics of Rights, supra* note 35 at 59-60.

individualising strategies which focus on single court victories or defeats, and which could dissipate the movement over time. This view of litigation is shared by some cause lawyers even today.[45]

In an odd twist, while high-profile, individual court cases are encouraged under the myth of rights, 'ideologists'[46] of this myth may discourage activists from engaging in the kind of small-scale, individual casework service which forms the subject of this dissertation.[47] Among 'ideologists' who heartily accept litigation as an essential movement strategy, there continues to be a perceived dichotomy between *impact litigation* using high-profile court cases, and casework *service provision*, particularly for low-income people.[48] Both approaches may employ rights language and court procedures which emphasise individual remedies. This aspect is of course criticised by Scheingold and others as individualising and isolating. Extrapolating from their argument, rights-based casework service would be problematic because its individualised nature masks the systemic problems at the root of individual rights violations. It is therefore depoliticising. However, for 'ideologists' of the myth of rights, casework service provision is

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[45] Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Brooklyn, 2011: South End Press).

[46] This is the term used by Scheingold to designate those who subscribe uncritically to the myth of rights.

[47] …albeit for different reasons than those expressed by Scheingold and other critics.

considered apolitical because it is generally *incapable of creating powerful precedents in court*. This impression is well-summarized below:

> "Because impact litigation can 'make law,' poverty lawyers and commentators have viewed it as the most rational, efficient way to address inequality. In contrast, commentators have regarded client service as offering little potential for social change and much risk of a lawyer developing a disabling emotional involvement in client problems."[49]

Thus, while Scheingold and other critics of rights-based approaches to activism warn of the depoliticising effects of individualising litigation strategy, lawyers who see impact litigation as the primary movement strategy warn of the depoliticising effect of helping many individual people without focusing on a single, big, representative court case. Scheingold and others argue that the myth of rights is dangerous for social movements because it legitimates State institutions and power, it focuses on expensive and often ineffective litigation as a social change strategy, and it reinforces the very individualism which must often be overcome for mass movements to succeed. However, while it encourages these potentially harmful attitudes, the myth can also lead participants to underestimate the value of service provision as a movement tactic, or to assume that *the only connection between service provision and systemic change is the potential for finding single, high-profile*

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[48] Peter Margulies, "Political Lawyering, One Person at a Time: The Challenge of Legal Work Against Domestic Violence for the Impact Litigation/Client Service Debate" (1995-1996) 3 *Mich. J. Gender & L.* 493.

[49] *Ibid.* at 497.

'good' cases in the mass of everyday files – i.e.: service provision is only helpful insofar as it assists movement advocates (lawyers) in finding the one good case which will help the movement. On this line of thinking, casework may be a very inefficient tactic, indeed. The myth of rights may therefore have a distorting effect on our understanding of the reasons for, effectiveness of, and best practices in social movement casework.

Disempowerment

The myth of rights is also profoundly disempowering. Scheingold explains that by focusing on litigation as the primary tool for social change, the myth of rights takes the power to make strategic decisions away from movement activists and gives it to legal professionals who know how courtroom procedure works. Movement participants may at first perceive this as a convenience because it offers "maximum control with minimum expenditure of participatory energy."[50] However, an emphasis on litigation encourages participants to sit back and allow lawyers to take over movement activities, directing strategy which might otherwise be the choice of non-professional organisers, members and activists.

> "After all, the detailed work of the law must, can, and should be left to others with professional qualifications working under well-established guidelines embodied in the law. Citizens are therefore encouraged to

[50] Scheingold, *Politics of Rights, supra* note 35 at 49.

> believe that they are fully competent to understand and even loosely monitor, but not to participate in acts of governance."[51]

The disempowerment of movements under the myth of rights has an insidious negative effect, not only because it could lead to conflict between activists and lawyers, but because it actually imposes limits on the creative initiative of organisers. If strategy is left to lawyers, the movement may shrink down to a core of professional leaders who may have little in common with the directly affected population they are defending.[52] Joel Handler, in a 1978 study of the role of legal strategy in social movements writes that "lawyers and judges have great faith in the propensity of court orders (…) to change behavior and compliance is usually taken for granted. This is an unfortunate assumption as far as social movement groups are concerned."[53] He attributes this faith in courts among even public interest lawyers to their training in law faculties, where the emphasis is on appellate decisions rather than 'soft skills' like negotiation.[54] This complaint about lawyers' training continues to be relevant today.

Critics of the myth of rights, including Scheingold, are therefore suspicious or even cynical about the potential for litigation strategy to be of assistance to social movements, unless it is informed by a critical stance

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[51] *Ibid.*

[52] Gabel and Harris *supra* note 40. This perspective on lawyers remains influential today. See e.g. Lobel *supra* note 38 at 953; Scott Cummings, "Wal-Mart" *supra* note 29 at 1991.

[53] Handler *supra* note 38 at 24.

toward State law and legal institutions more generally.[55] This suspicion extends to the major players in those institutions, including lawyers – even those who seek to help social movement groups with their expertise. Both Scheingold and Handler express concern that lawyers may take over social movements, with litigation knowledge as their weapon of choice.

Scholars have shown concern for the effect of lawyer domination on the relationship between individual clients and the cause lawyers who represent them, even in cases where social movement organizations are not involved or affected. The class position, training and familiarity lawyers have with formal adjudication and the adversarial court system leaves them open to co-optation by State interests. Beyond endangering the strategic independence of social movement organizations, this co-optation also may lead them to push individuals in situations of vulnerability to accept strategic decisions which are not in their best interest.[56]

The problem of client disempowerment is intimately linked to the problem of depoliticisation in the minds of critics. From the perspective of the myth of rights, depoliticisation actually *results* in disempowerment of clients

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[54] *Ibid.* at 31.

[55] Scheingold advocates in the second half of *The Politics of Rights* for a more politicized understanding of how rights discourse can be used within social movements, beyond its use in accordance with the positive law.

[56] For a detailed summary of the co-optation issue in law and social movement scholarship, see Lobel, *supra* note 38.

and social movements as a whole. In a 1982 paper, Peter Harris and Paul Gabel warn of the potential for lawyers to disempower social movements and clients alike by taking control of court cases and sapping them of their political impact.[57] They write that the lawyer may reinforce the legitimacy of coercive State institutions by forcing clients to adopt a State legal outlook on their cases, and by forcing clients to litigate in the public sphere. They argue that in the mind of the average client, the public sphere occupied by courts is:

> "controlled by government officials endowed with virtually magical authoritarian powers. The maintenance of this imaginary sphere through symbols of psychological terror is the State's principal weapon against the formation of a radical political consciousness, because it has the effect of privatizing people's experience of their own daily lives; it functions to imprison people within isolated worlds and to depoliticize people's understanding of their true social and economic situations."[58]

The result is that the lawyer is viewed by the client as a guardian against the threatening and even terrifying aspects of the system. Gabel and Harris conclude that in situations where lawyers adopt a traditional approach to advocacy and handle the case without input from the client on strategy, the client will generally express gratitude to the lawyer regardless of the outcome of the case, simply "for having championed him in the public arena."[59] The result is the disempowerment of the client, even if the latter feels grateful for the lawyer's services.

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[57] Gabel and Harris *supra* note 40.

[58] *Ibid.* at 410.

[59] *Ibid.* at 410.

In some cases, a client may be able to get through the ordeal without being pushed into a passive role. Where the lawyer works according to the traditional advocacy model, client empowerment may actually involve a struggle against one's own attorney. Lucie White's oft-cited account of her experience as a lawyer representing a single mother on social assistance is instructive here.[60] White tells the story of how she represented a woman who was asked to repay an amount of social assistance which had been allocated to her. She had used some extra money to purchase "Sunday shoes" for her children. In her role as lawyer, White had instructed Mrs. G. (her client) not to sign any papers requested by the welfare office. Nevertheless, Mrs. G. did sign, and thereby admitted that she owed a debt to the government. When she told White about what she had signed, White writes that she understood the nature of the power relationship in which Mrs. G. found herself: "I suddenly saw a woman caught between two bullies, both of us ordering her what to do."[61] White then instructed Mrs. G. to testify to the social assistance tribunal that she had used the money to buy ordinary shoes – a permissible expense. White encouraged her client to adopt the role of the passive, compliant recipient, unable to afford luxuries such as fancy shoes for her family. When Mrs. G. refused to testify as instructed by her lawyer, saying instead that she had bought Sunday shoes, White saw in this apparent act of rebellion an

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[60] White, Lucie, "Subordination, Rhetorical Survival Skills and Sunday Shoes : Notes on the hearing of Mrs. G." (1990) 38 *Buffalo L. R.* 1, p. 1-58 (Hein Online).

[61] *Ibid.* at 23.

attempt on the part of her client to preserve some of her own sense of empowerment, even as she participated in a potentially embarrassing, demeaning process:

> "By talking about Sunday shoes, Mrs. G. claimed, for one fragile moment, what was perhaps her most basic 'life necessity'. She claimed a position of equality in the speech community – and equal power to take part in the *making* of language, the making of shared categories, norms, and institutions – as she spoke through that language about her needs."[62]

By focusing on Mrs. G.'s claim of "equality in the speech community," White demonstrates a different kind of contrast between empowerment and disempowerment from what Gabel and Harris describe. For Gabel and Harris, disempowerment is closely linked to depoliticisation, as mentioned above. The disempowered client is one who is unable to make the connection between his or her own case and a broader critique of its political context. The disempowered client is one who accepts the legitimacy of the court through intimidation by its symbols: the judge's robe, the size of the courtroom, the formalities of the judicial process, and so on.[63] Disempowerment is cast here as a form of false consciousness (unwillingness to recognize the injustice of the situation) and isolation, leading to a passive attitude. The problem with lawyers (including cause lawyers), for Gabel and Harris, is that if they remain locked in the traditional advocacy model they fail to challenge the system as a whole. This omission leaves their clients

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[62] *Ibid.* at 50.

vulnerable to intimidation by State legal symbols. The "psychological terror" Gabel and Harris write about (cited above) comes not from the relationship between client and lawyer, but a relationship to the formalities of the State legal system and the style of argument required in order to win a case on the traditional model of lawyerly advocacy.

In White's account on the other hand, the disempowerment is intimately connected with the lawyer-client dialogue. White recalls feeling as though she was acting as a bully by giving her client strict instructions not to sign a paper admitting to the overpayment. She again attempts to push her client into speaking against her own best judgment before the social assistance tribunal. Once again, the lawyer depicts herself as an agent of client disempowerment, rather than just a conduit for the demands of a system.[64] In Mrs. G's case, the client then becomes empowered, not by overtly politicising the systemic injustice of her situation, but instead by disobeying her attorney.

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[63] See Gabel and Harris *supra* note 40.

[64] To some extent, White also depicts herself as a victim of the State legal system, though admittedly a privileged victim in comparison with her client: "As I contemplated my role as an advocate, I felt again the familiar sense that I had been taken. Here I was, asking Mrs. G. to trust me, talking with her about our conspiring together to beat the system and strategizing together to change it. Here I was, thinking that what I was doing was educative an empowering or at least supportive of those agendas, when all my efforts worked, in the end, only to teach her to submit to the system in all of the complex ways that it demanded." White, *supra* note 60 at 29.

Her resistance takes the form of a refusal to give up her own narrative.[65] At the same time, the direct result of this resistance is that she loses her case.[66] The implication in White's account is that it is possible for a client to feel that there has been a victory in a case, even if this is untrue according to the rules of the system – as long as the client has a sense that he or she has kept some measure of control.

While White encourages respect for client narratives, Gabel and Harris call on lawyers to be agents of politicisation and resistance alongside their clients. They make several suggestions for lawyers seeking to promote client empowerment, distinguishing between a "rights oriented" approach (adhering to the myth of rights) and a "power oriented" approach to advocacy.[67] Although they cite the role of the lawyer-client dialogue as an important part of a power oriented approach, they do not stop there:

> "First, the lawyer should seek to develop a relationship of genuine equality and mutual respect with her client. Second, the lawyer should conduct herself in a way that demystifies the symbolic authority of the State as this authority is embodied in, for example, the flag, the robed judge, and the ritualized professional technicality of the legal

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[65] "Narrative surrender" is a concern among cause lawyers, but also lawyers in more traditional practice. This occurs when the client relinquishes the ability to tell her own story the way that she understands it, instead being forced to use the language of the legal system in which she finds herself. See "The Plaintiff as Person : Cause Lawyering, Human Subject Research, and the Secret Agent Problem", Note, (2006) 119:5 *Harvard Law Review* 1510.

[66] The overpayment decision against Mrs. G. was later reviewed and withdrawn for other reasons. See White *supra* note 60 at 32.

[67] Gabel and Harris, *supra* note 40.

> proceeding. Third, the lawyer should always attempt to reshape the way legal conflicts are represented in the law, revealing the limiting character of legal ideology and bringing out the true socioeconomic and political foundations of legal disputes."[68]

The resistance to disempowerment which is described by Gabel and Harris can be contrasted with the kind of resistance described by White in the case of Mrs. G. While Mrs. G.'s resistance can be characterised as a form of 'everyday' or 'micro' resistance, Gabel and Harris suggest that lawyers should directly challenge the State's authority in a more systemic sense. What is important to retain here for present purposes is that while the period from 1970 to 2000 saw the rise of a new critical consciousness among scholars of law and social movements, this critique was not entirely negative. Scholars such as Scheingold, Gabel and Harris, and White offered suggestions for combating what they saw as an unhealthy domination by lawyers and State legal institutions of movements for social justice. To varying degrees, each saw the connection between empowerment of individual clients, social movement organizations, and the need to overcome the individualising, depoliticising nature of rights-based judicial remedies in the context of their movements.

Conclusion to Legal Critique

The above section of this chapter has presented a brief historical introduction to the political use of law in social movements, including the role

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[68] *Ibid.* at 376 (emphasis added).

of legal professionals. Historical examples were offered to suggest that social movement casework has long been a legally plural, interdisciplinary exercise. In Canada, as in the United States, movement activists have long contested existing social, political and economic arrangements with the help of legal strategy. This included both State and non-State law, and did not depend on lawyers in all cases. The development of a critique of legal strategy by social movements, and of the role of lawyers in social movement organizations from the 1970s to 2000 was then covered. This critique, based largely on Stuart Scheingold's concept of the *myth of rights* holds that State legal strategy can be individualising, systemically ineffective, and may result in further legitimation of the political status quo. The result may be the depoliticisation of the movement issue and the sapping of power from the movement. At the same time, the reliance on litigation which the myth of rights encourages leads to the disempowerment of movement organizations and individual clients, relative to cause lawyers who represent them. Lawyers, because of their specialised training and relative privilege, are susceptible to co-optation by the institutions of the State, and are thus suspect. They may actively seek to dominate movement organizations, or they may, by omission, fail to sufficiently challenge the State legal establishment. Resistance and empowerment may require clients to disobey the instructions of their attorneys, as in the case of Mrs. G., or it may necessitate delegitimising tactics on the part of lawyers, as recommended by Gabel and Harris. The whole of

the above outlook forms what is commonly known as the standard critique of the role of lawyers and legal strategy in social movements.

Before moving on to the most recent developments in the critical legal academic literature, Part B of this chapter outlines a parallel critique present in the literature on *social work* and social movements. As will be shown below, like the critical legal scholars in Part A, 'radical' or 'structural' social workers also contest the depoliticisation and disempowerment which their own professional intervention may inflict on movement organizations and individual justice seekers.

Social Work Critique of Casework, pre-2000

Social work profession: brief history

For a legal professional to understand the critique of clinical social work practice levelled by radical and structural social workers in Canada and abroad, it is necessary to have some insight into the history of the social work profession, including the basic assumptions which distinguish the professional traditions of the social worker from those of the lawyer.

Before it became a recognised profession, social work was a practice of mostly middle-class women engaged in charitable works. In the nineteenth century, the ancestors to today's social workers were members of charitable

organizations who offered assistance to people living in poverty.[69] Recall the ambitions of the Ontario social activists in Part A, which included not only protective legislation for factory workers, but also the moral betterment of these young women. The paternalistic attitude of the activists described by Backhouse was prevalent among many charity volunteers of their time.[70] Part of that attitude was based in a sense of duty among volunteers. Together, in their daily work they were responsible for differentiating between those poor people who were deserving of help and those who were not. The 'deserving poor' were people who were believed to be in poverty through no fault of their own, and who led lives of moral rectitude. They went to church, did not have children out of wedlock, did not drink to excess (or at all), were polite, and expressed gratitude for charity. The 'undeserving poor' were the opposite: believed to be lazy, criminal, and otherwise undesirable. Only the former group qualified for assistance. This moralistic and prejudiced attitude toward people living in poverty was subject to criticism from members of affected communities, even before social work became a profession. Backhouse writes of a working-class woman who responded publicly to the charitable activism of her middle-class 'sisters' as follows:

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[69] Kate Murray and Steven F. Hick, "Structural Social Work: Theory and Process" Ch. 1 in Hick, Steven F., Heather I. Peters, Tammy Corner and Tracy London (eds.) *Structural Social Work in Action: Examples from Practice* (Toronto: Canadian Scholars' Press, 2010) 3 at 4.

[70] This in no way implies that such attitudes have completely disappeared today.

> "Writing in the Palladium of Labor, published in Hamilton in 1885, she had issued an open letter to "working girls." It warned against relying upon "high-born" sisters who were ignorant or forgetful of women workers' conditions and needs. "Sisters, by our dignity, co-operation, and organization, we must protect ourselves," she concluded."[71]

The anonymous letter of this worker contrasts the empowered, self-directed vision of social activism adopted by many anti-poverty organizations today, with the ignorance of self-appointed 'do-gooders' who would tell working-class people how to live. This kind of open resistance to the paternalistic aspects of charity in the 19th century was not possible for everyone. The ability of charity groups to provide or withhold items such as clothing and food from people unable to obtain them otherwise made for a potentially coercive relationship between early social workers and their clients.[72] Looking back on this era from a 21st-century vantage point, critics would later argue that social work began as a coercive practice designed to monitor and control populations of low-income people.[73]

A change to the practice of social work began as early as the 1920s, when the informal charity volunteering of middle-class women gradually was transformed into a recognised profession with formal standards.

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[71] Backhouse, *supra* note 24 at 285.

[72] Iain Ferguson and Rona Woodward, *Radical Social Work in Practice: Making a Difference* (Bristol, 2009: Policy Press) at 18-19. See also Hick et al. (eds.) *Structural Social Work in Action: Examples from Practice* (Toronto: Canadian Scholars' Press, 2010) at 9, describing the process of learning that one is 'undeserving' as a form of internalized oppression.

[73] See Ferguson and Woodward, *Ibid.*

Instead of viewing people subject to interviews and home visits merely as members of a potentially dangerous population, social workers began to encourage their colleagues to see each person as an individual with intrinsic worth.[74] *Individualization* thus became a progressive development in social work practice, and the focus on the well-being of each client became the social worker's mission.[75] With the advent of individualization as a social work ideal came the notion that social workers should help foster their clients' sense of self-determination.[76] Social workers began to work to assist clients to become more autonomous and to make responsible decisions. Though by no means devoid of the moralistic overtones and coercion of earlier social work efforts, the clinical social workers of the early twentieth century began to see people as individuals and not just members of a population.

Individualization and autonomy are prescriptive notions for the social worker because they often work to assist people who are in danger of losing their autonomy.[77] This is in contrast to the traditional image of the lawyer-client relationship, which assumes a certain degree of autonomy on the part of

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[74] Janice Fook, *Radical Casework: A Theory of Practice* (St. Crow's Nest: Allen & Unwin, 1993) at 27.

[75] John S. Bradway, *Law and Social Work: An Introduction to the Study of the Legal-Social Field for Social Workers* (Chicago: University of Chicago Press, 1929) at 25; Fook, *ibid*.

[76] Fook, *ibid.*

[77] Fook, *ibid.* at 27, 61.

the client.[78] While social workers traditionally foster individual autonomy as an ethic of practice, lawyers take autonomy for granted:

> "Lawyers and social workers assume very different things about the world in which they work. Law assumes a level playing field, and as such, lawyers often define justice according to whether a procedure is fair and applied equally. Social workers, on the other hand, come to their profession with an abiding sense that the playing field is not level and that their job is to search for justice as a substantive matter."[79]

In sum, while social workers see autonomy as something to be fostered as part of the client service relationship, for lawyers in traditional practice, client autonomy must first be present for casework to be possible. This leads to two different critiques of individualization and disempowerment.

Structural/Radical Social work

In the late 1960s and 1970s, as critical scholars in the legal academy were beginning to question the value of State legal tactics and the role of lawyers in social movements, social workers were also challenging the way that their profession is practiced. As mentioned above, a major progressive innovation in social work in the 20th century was the rise of individualization as a social work ethic and ideal.[80] In the latter half of the

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[78] Corey Shdaimah, *Negotiating Justice: Progressive lawyering, low-income clients and the quest for social change* (New York: New York University Press, 2009) at 64 and following.

[79] Aiken and Wizner, Aiken, Jane H. and Stephen Wizner, "Law as Social Work" (2003) 11 *Wash. U. J.L. & Pol'y* 63 at 79.

[80] Fook *supra* note 74.

century, however, social work professionals began to investigate the perhaps unintended negative consequences of this and other aspects of traditional clinical practice. Like their counterparts in the legal field, these social work scholars were inspired by the civil rights struggles and victories in the United States at that time.[81] Observing events in the US, politicized social workers from the United Kingdom began to see themselves as part of a global movement for social justice (before globalization became a common term, of course).[82] Radical social work, as it is known in the UK, and structural social work, the equivalent term in Canada and Australia,[83] began to grow in prominence among scholars and practitioners.

Individualization

An important element of the radical/structural social work tradition is the critique of individualization as a basic tenet of social work practice.[84] However, before going into detail about this critique, some nuance is required. Not all radical social workers are opposed to the ideal of individualization. Janice Fook writes that this ideal may be helpful when it encourages the social worker to help deal with immediate distress. "Sufferers may only become fully aware of the broader aspects of their condition once the immediate pain

[81] Ferguson and Woodward, *supra* note 72 at 24.

[82] *Ibid*.

[83] *Ibid.* at 30. In the dissertation, the terms are used interchangeably.

[84] Murray and Hick *supra* note 69 at 3.

is allayed."[85] Nevertheless, the radical social work critique of individualization argues that it encourages an almost exclusive reliance on psychotherapeutic approaches to clinical practice, and that these approaches can mask the broader problems which lead to emotional responses in clients. Psychotherapy emphasises the emotional strains and stresses felt by the client, without necessarily addressing the underlying causes of those painful feelings. In some cases, these underlying causes have political implications which are lost on the social worker who is devoted to the traditional clinical model of practice.[86] This phenomenon gave rise to a satirical cartoon often cited among radical social workers, in which the worker asks the hapless client, "But tell me, Mrs. Jones, how do you *feel* about your rats?"[87]

Although they can help to establish emotional balance for clients in the short term, exclusively psychotherapeutic approaches to social work are thought to do little to address the circumstances which give rise to client problems in the first place. For example, a social worker in traditional practice might meet a person who is identified as having anger management problems. The focus of the traditional clinical intervention might be to deal with the feelings of rage, helping the individual to recognise them before she loses control of her behaviour. Once the anger response is dealt with, the traditional clinical social worker might consider the clinical intervention to be finished.

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[85] Fook, *supra* note 74 at 26.

[86] See Ferguson and Woodward, *supra* note 72 at 23.

In contrast, the critical social work academy argues that this approach is insufficient because the root causes of the anger issues have not been addressed. Perhaps the person lives in an area where there is high unemployment and is she or he is engaged in precarious work. The person may have been the target of racial profiling by police or teachers in school. The combined stresses of housing issues, unemployment and police harassment may be at the root of the person's outbursts.[88]

All of these potential causes for anger are considered external to the individual's feelings, which are the real focus of traditional clinical practice. However, these causes for anger on an individual level become political issues when they are considered at a systemic level. Structural social workers argue that the psychotherapeutic approaches which were the hallmark of individualization as the social work ideal can depoliticise cases which have their basis in systemic issues which are better dealt with through political solutions. Critical social workers realized that psychotherapy could be useful, but worried that a focus on individual therapy could draw attention away from the connection to systemic problems.[89] Critics within the social work academy argue that the socioeconomic context is seldom blamed for the individual problems faced by clients, and social workers will often favour a more

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[87] *Case Con* (broadsheet), cited in Ferguson and Woodward, *ibid.* at 23.

[88] For other examples of contrasting case studies in the traditional and radical social work models, see Fook *supra* note 74.

[89] *Ibid.* at 26-27; Murray and Hick, *supra* note 69 at 3-4.

individualistic approach to casework.[90] The danger of focusing on individual cases is a criticism which has been levelled against social workers and legal professionals together:

> "Writing in 1943, the radical American sociologist C. Wright Mills noted:
>
> 'Present institutions train several kinds of person – such as judges and social workers – to think in terms of 'situations'. Their activities and mental outlook are set within the existing norms of society: in their professional work they tend to have occupationally trained incapacity to rise above cases.'"[91]

An additional problem with treating cases in isolation, particularly in the context of social work individualization, is that it is a short leap from thinking of a person as 'having problems' to thinking of that person as inherently *problematic*. A concern for radical social workers is that individualization may lead to blaming the victim for the effects of broader systemic problems which have a negative impact on his or her life.[92] As Fook writes, this is not always the case with individualized approaches. Sometimes it is necessary to focus on a single person and give individual assistance. However, the possibility for blame is an additional concern for radical social workers. Just as an individualized approach may mask what they perceive as structural problems, it may lead to misplaced beliefs in the causes of individual problems. This is especially so, as many of the problems faced by social work clients are already stigmatised. Students entering social work

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[90] Ferguson and Woodward, *supra* note 72 at 133.

[91] Quoted in *ibid.* at 133.

courses may be just as predisposed to judging people in distress as are members of the broader society.

This element of the critique is particularly relevant for any social movement group considering engaging in casework as a movement tactic. If the examples of critical social work and critical legal studies are any indication, it would seem that the very act of assisting with an individual case may have a depoliticizing potential.[93] The question for movement activists is whether, in the specific context of their own movement, the reverse might also be true.[94] Radical social work scholars, for their part, encourage a systemic approach to practice:

> "individually oriented help which focuses on structural causes of personal problems, more specifically on the interaction between the individual and the socio-economic structure which causes problems."[95]

Disempowerment

The radical social work tradition which began to grow in the late 1960s was, like its counterpart in the legal profession, concerned with the often coercive and disempowering aspects of traditional practice. Recall the important distinction between the way a lawyer traditionally sees autonomy

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[92] Murray and Hick, *supra* note 69 at 10.

[93] See Margulies, *supra* note 48.

[94] On the importance of specific context for the empirical study of social movements and legal strategy, see Cummings, "Hemmed In" *supra* note 30; McCann and Silverstein *supra* note 38.

[95] Fook, *supra* note 74 at 41.

and the way this concept fits in with clinical social work practice. Social work clients are assumed to be in some way dependent on the social worker or on the institutions where social workers practice.

Along with the ideal of individualization, social workers are expected to strive for the ideal of client self-determination. However, in doing so, they find themselves in a contradictory and often difficult position. The individual social worker might not exert great power in the workplace – indeed, radical social work scholars are critical of the lack of decision-making power offered to front-line staff.[96] However, in their institutional roles with correctional facilities, schools, child welfare agencies and other (mostly State) organizations, the social worker can wield a great deal of influence on clients. Instead of promoting client autonomy and independent decision-making, the individualised practice of social work can become a normalising process in which the social worker's immediate task is to teach the client to live within the rules of society.[97] "The ideology of self-determination also masks the fact that many social work clients are involuntary."[98] This, coupled with the social

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[96] Ferguson and Woodward *supra* note 72. Roy Bailey and Mike Brake wrote a foundational text on structural social work in Canada in 1975. Writing five years later, they remained critical of the coercion which social workers themselves sometimes feel when working in State institutional settings. See Roy Bailey and Mike Brake, "Contributions to a Radical Practice in Social Work" Chapter 1 in Mike Brake and Roy Bailey (eds.) *Radical Social Work and Practice* (London: Edward Arnold, 1980) 7 at 17 and following.

[97] Nicole Lavanchy and Ariane Nicolet, *Représentation sociale : identité et pratique professionnelles en travail social* (Geneva, 1994: Hospice General) at 9.

[98] Fook, *supra* note 74 at 61.

worker's professional training and lingering aspects of the moralistic charity model, can make for a disempowering experience for social work clients.

It is important to note that social workers' training and code of ethics does not explicitly encourage them to disempower and coerce people. On the contrary, social workers have a basic duty to work for social justice. They are aware from the beginning that 'the playing field is not level,' as stated above and part of their mission is to work for a fairer society. However, if this is the ideal behind social work, the daily interactions between workers and clients do not always bear this out. Working in a government setting can make it difficult for a social worker to approach practice with empowerment and social justice as primary concerns.[99] This is one reason why radical social work is understood among its proponents as a reformist, and not a revolutionary practice.[100] Radical social workers act from within the profession, but applying a critical perspective which constantly puts into question the relations of domination which can arise when a social worker and client interact.

The suggestions of structural social workers for practical improvement to their work should be familiar to cause lawyers and law and social

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[99] Jill Hanley and Eric Shragge, "The Radical Social Work Tradition in Canada: Examining the Quebec Community Movement," Chapter 3 in Michael Lavalette and Iain Ferguson, *International Social Work and the Radical Tradition*(Birmingham, 2007: Venture Press) 51, at 51-52, 55. See also Ferguson and Woodward *supra* note 72 at 73.

[100] Fook, *supra* note 74 at 31.

movement scholars. Bailey and Brake suggest that social workers should 'collectivise' problems, linking individual cases together based on common grievances, while at the same time being mindful of the importance of protecting clients and respecting their wishes.[101] They view the social worker as a community organizer, a role which, under the law and organizer, is also coveted by cause lawyers. At the same time, the social worker is encouraged to become an *advocate*.[102] Ferguson and Woodward define radical social work advocacy in a manner reminiscent of the legal profession:

> "taking action to help people say what they want, secure their rights, represent their interests and obtain services they need. Advocates and advocacy schemes work in partnership with the people they support and take their side."[103]

Conclusion to Social Work Critique

As will become apparent in the final part of the chapter, there is significant overlap between the attitudes and practices demanded of radical social workers, and of cause lawyers in the present day. The final part brings together common elements of the two critical perspectives outlined above, incorporating them into the more recent literature in both fields, to construct an interdisciplinary critique of casework in the service of social movements.

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[101] Bailey and Brake *supra* note 96 at 19 and 23. They suggest "a collective and de-hierarchized practice of teams, and of teams and consumers" while retaining the importance of individual attention (at 19).

[102] Fook, *supra* note 74 at 101; Ferguson and Woodward, *supra* note 72 at 24.

We will see that while lawyers are being encouraged more and more to act as social workers, radical social workers are increasingly expected to take on an advocacy, rather than psychotherapeutic approach to their practice.

Interdisciplinary Critique of Social Movement Casework

Despite their differences, both law and social work fields are critical of casework for two main reasons: the potential for depoliticisation and for disempowerment by legal professionals or social workers. At the same time, as outlined below, new studies in law and social movements suggest that this critique requires nuance, as lawyers are more sensitive than earlier believed to the potential for co-optation and disempowerment in the movements where they work, as well as the necessity of drawing on knowledge from other disciplines.

Interdisciplinarity

In presenting a shared critique of casework in social movement organizations between law and social work, the goal of this chapter is to construct a preliminary image of the lived experience of social movement caseworkers. Whether they are lawyers, social workers, or expert non-

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[103] Ferguson and Woodward, *ibid.* at 24.

professionals, the literature in law and in social work suggests that *all* caseworkers may be required to deal with the issues of disempowerment and depoliticisation in their everyday practice. Interdisciplinarity is a necessity for jurists, even when not engaging in social movement practice. Lawyering increasingly requires a mixture of disciplinary knowledges:

> "(E)veryday legal practice continues to undermine the autonomist vision and, in the course of their day to day work lawyers, notaries, legislators and courts, have been compelled to acknowledge and incorporate insights flowing from research in the social and human sciences – notably from experts in social psychology, sociology, criminology and sometimes even theology."[104]

Lawyers who work with vulnerable clients may also cooperate with social workers.[105] Social workers are encouraged to learn the basic legal principles which apply to their clients' situations, in order to practice their profession effectively.[106] Joint Law/Social Work degrees have also been created in several universities.[107] Moreover, both legal and social work scholars address their research to an audience of practitioners who are often

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[104] Pierre Noreau, "Interdisciplinarity, the gaze of others and new conceptions of contemporary law" in Pierre Noreau, ed., *Dans le regard de l'autre/In the Eye of the Beholder*, (Montreal: Éditions Thémis, 2007) 7 at 7.

[105] Aiken & Wizner, *supra* note 79.

[106] Cheryl Regehr & Karima Kanani, *Essential Law for Social Work Practice in Canada* (Don Mills: Oxford University Press, 2006) at x; Raymond Albert, *Law and Social Work Practice* (2nd edition) (New York: Springer Publishing, 2000) at xviii-xix.

[107] Universities in Canada offering joint degree programs in Law and Social Work include the University of Toronto, McGill University and the University of Windsor.

members of a professional order and governed by a professional code of ethics.[108]

In spite of these common points, recall that interdisciplinary work is not intended to take two disciplines and bring them together into an undifferentiated mass.[109] The critiques of traditional practice outlined above are based on different assumptions, depending on whether each originates in the law or social work field. It is important to keep these differing assumptions in mind when studying casework as a whole.

> *"L'interdisciplinarité n'est donc pas un composite statique où s'agglomèreraient, pêle-mêle, des bouts de savoir d'origine indistincte. Elle n'est pas mélange des genres. Elle est mouvement de va-et-vient entre deux univers scientifiques aux frontières bien définies et aux us méthodologiques clairement distincts."*[110]

It is necessary to maintain the distinction between disciplines because it is all too easy to confuse technical vocabularies when employing terms, which may not have a consistent meaning when applied in more than one discipline.[111] For example, the concept of a *norm* may mean one thing to a

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[108] In Quebec: *Code of ethics of the members of the Ordre professionnel des travailleurs sociaux et des thérapeutes conjugaux et familiaux du Québec*, R.S.Q. c. C-26, r. 286; *Code of ethics of advocates*, R.S.Q. c. B-1, r. 3.

[109] Violaine Lemay, "La propension à se soucier de l'Autre : Promouvoir l'interdisciplinarité comme identité savante nouvelle, complémentaire et utile" in Frédéric Darbellay & Theres Paulsen, eds. *Au Miroir des Disciplines : Réflexions sur les pratiques d'enseignement et de recherche inter- et transdisciplinaires* (Berne: Peter Lang, 2011) 25

[110] *Ibid.* at 29.

[111] Noreau, *supra* note 104 at 175.

jurist, and something quite different to a sociologist.[112] The word *advocacy* also holds different meanings for different disciplines.[113] This is the reason why a definition of *casework*, for the purposes of the dissertation, is set out at the beginning of the present chapter.

In this final part of the chapter, more recent developments in scholarship on law and social movements are incorporated into an interdisciplinary, critical image of social movement casework in activist the law and organizing model, which draws from insights in both the social work and legal academic literature.

Adding Nuance to Earlier Critiques of Social Movement Lawyering

The turn of the 21st century marked an important change in the way that critical scholars began writing about the political use of legal strategy and the relationship between lawyers and social movement organizations. Above, the critique of scholars such as Stuart Scheingold and others opposed to the 'myth of rights' was outlined. This critique began in the mid-to late 1970s, and continued into the mid-1990s. However, around the time that the critique of the myth of rights had become the standard critique of law and social

[112] *Ibid.* at 176-177.

movements generally,[114] scholars began to establish a more nuanced picture of the legal strategies used by activists, and the lawyers who assisted their movements.

One of the most prominent legal scholars to engage in this new critique of earlier scholarship (including his own early published work) is Michael W. McCann.[115] In 1994, McCann published a wide-ranging empirical study of the role of legal strategy in the movement for pay equity in the United States.[116] In *Rights at Work*, McCann includes the results of interviews with hundreds of activists involved in the pay equity movement, including rank-and-file workers, lawyers, and union leaders. This study is a departure from the standard critique in several ways. First, McCann sets up his research question differently from earlier critics. Instead of asking whether a rights-based strategy was 'good' or 'bad' for social movement organizations, or whether

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[113] Compare, for example the definition of "advocate" in the *Act respecting the Barreau du Québec*, R.S.Q. c. B-1, art. 1(e), with the discussion of social work advocacy in Fook, *supra* note 74 at 101-102. See also Regher & Kanani, *supra* note 106 at x.

[114] Michael McCann and Helena Silverstein refer to a "standard critique" *supra* note 38.

[115] Michael McCann, *Taking Reform Seriously: Perspectives on Public Interest Liberalism* (Ithaca: Cornell University Press, 1986) (McCann, "Taking"). McCann expresses views on legal mobilisation in this work which are similar to the standard critique of law and social movements (the 'myth of rights'). He later revised this assessment following empirical research.

[116] Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994) ("*Rights at Work*").

lawyers were a help or a hindrance, McCann simply asked 'how do rights work?' in the context of the pay equity struggles.[117]

Already aware of the more strident forms of the standard critique, McCann set up his study in a comparatively even-handed fashion. He sought to observe and document - relying on the knowledge of activists themselves in an interpretive social scientific approach - rather than to judge.[118] While *Rights at Work* does address the results of the pay equity movement's strategic choices, this is not the focus of the study. Instead, McCann relies on data obtained through in-depth interviews to re-evaluate earlier claims that legal strategies are necessarily harmful.

Research participants offer McCann a new and interesting picture of their work. They explain that while court victories would not necessarily result in dramatic change on the ground, litigation can be useful for other reasons. These are not the naïve activists depicted by Gerald Rosenberg in *The Hollow Hope* or the ideologists of the myth of rights discussed by Scheingold in *The Politics of Rights*. The activists McCann speaks with have a clear idea of what using courts can do for their movement – and it has little to do with the decision of the judge. One participant in particular tells McCann that court

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[117] McCann, *Rights at Work, ibid.* at 12: "In sum, it is worth reiterating that the legal mobilization framework envisions law as essentially neither just a resource nor just a constraint for defiant political action. Rather, the approach encourages us to focus on how, when, and to what degree legal practices tend to be both at the same time."

[118] See Israël *supra* note 13 at 34-35.

cases are often used to 'hotwire' movement activity.[119] By this she means that the litigation is a catalyst for greater mobilisation of activists and that it is a draw for media outlets, who may then give the movement more attention. In fact, McCann argues that the *indirect* effects of the litigation are of much higher value from the perspective of movement activists than the judge's ruling.[120] This more nuanced understanding of law and social movements is developed in a later, co-authored chapter with Helena Silverstein.[121] Like McCann, Silverstein conducted qualitative research into the attitudes of social movement lawyers, this time in the movement for animal rights. McCann and Silverstein used their data, drawn from two entirely different causes, to argue that today's legal professionals are actually highly sensitive to the dangers of co-optation, the importance of giving voice to the vulnerable, and the need to avoid taking over social movement strategy. The lawyers interviewed were also very skeptical of the potential benefits of litigation. McCann and Silverstein conclude that, while elements of the standard critique remain

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[119] Michael W. McCann, "Reform Litigation on Trial", Book Review of *The Hollow Hope: Can Courts Bring About Social Change?* by Gerald N. Rosenberg (1992) 17:4 *Law and Social Inquiry* 715 (JSTOR) at 738 ("Reform Litigation on Trial").

[120] McCann, *Rights at Work, supra* note 116. McCann's study is also significant for its methodological and epistemological orientations. See discussion of interview methodology in Chapter 1. See also Michael McCann, "Causal versus Constitutive Explanations (or, On the Difficulty of Being so Positive...)" (1996) 21 *Law and Social Inquiry* 457; McCann, "Reform Litigation on Trial" *supra* note 119; Gerald Rosenberg, "Positivism, Interpretivism, and the Study of Law, review of *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* by Michael W.McCann" (1996) 21 *Law and Social Inquiry* 435; Israël *supra* note 13 at 34-35.

[121] McCann and Silverstein *supra* note 38.

important, a more nuanced picture of social movement law is required which takes into account the understandings of practitioners on the ground.

While demonstrating the importance of qualitative research for an understanding of social movement activism, McCann's work also offers a different understanding of what law *is* from that assumed in earlier critical work. McCann writes that law is not simply a creation of the State, and that at the level of discourse, law is something we all participate in:

> "First, it is important to emphasize that legal practices and rights discourses are not limited to formal state forums. After all, citizens routinely mobilize legal strategies for negotiating exchanges and resolving disputes in many social settings without relying on direct official intervention."[122]

In a 2004 article, McCann incorporates an even more de-centred view of law into a research question on the role of media in litigation against obesity in the United States:

> "The key question in this study concerns how the mass media, in constructing the terms of legal disputes, become a contributing player in the mass politics of legal knowledge production, issue agenda setting, and lawmaking."[123]

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[122] McCann, *Rights at Work, supra* note 116 at 7-8.

[123] Michael McCann and William Haltom, "Framing the Food Fights: How Mass Media Construct and Constrict Public Interest Litigation" (2004) UC Berkeley: Center for the Study of Law and Society Jurisprudence and Social Policy Program. Online: http://www.escholarship.org/uc/item/2rc29425. Accessed January 15 2014.

Again, while the context of the study is courtroom litigation, the focus is on the role of non-State institutions such as mass media in creating or influencing interpretations of law. Based on the influence of media accounts of the lawyers and other actors involved in anti-obesity litigation, McCann and Haltom write "the mass media play a fundamental role in the production and reproduction of law itself."[124] They point out that beyond the courtroom, law can be understood culturally, "as a body of knowledge, a complex tradition of discourses, symbols, logics, and modes of reasoning"[125] and:

> "Regardless of the institutional site where legal practice is studied, we miss a great deal if we ignore the degree to which mass produced knowledge of and about law is present and powerful, contributing to the ongoing constitution of legality."[126]

The understanding of legal influences external to the court also becomes prominent among other scholars interested in the political use of legal strategies. Dean Spade, in a 2011 book on the role of administrative law and the transgender rights movement, writes that rights-based strategies fall short of addressing the role of mass media in shaping the norms by which people live.[127] Spade remarks that much of the power which we might attribute to State-sponsored rights legislation (such as hate crime laws) is small compared to the disciplinary power of informal or non-State norms. He

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[124] *Ibid.* at 21.

[125] McCann and Haltom *supra* note 123.

[126] *Ibid.*

[127] Spade *supra* note 45.

writes that in addition to rights-based strategies, social movement organizations may need to engage directly with disciplinary power, for example to "cultivate critiques of media representations of their communities as lazy, criminal, or mentally ill (…)".[128] In this way, newer scholarship on the political use of legal strategy sees litigation and rights-based strategies more generally as part of a much broader field of potential movement activity, all of which has a legal dimension, even if not explicitly based on litigation. At the same time, this work is not necessarily legal pluralist, in that it still most often associates 'law' with the State, and does not necessarily assign the label of law to institutional rules in schools, voluntary associations and so on. This aspect is discussed further in a later chapter.[129]

Another significant addition to the literature has been the rise of terms such as 'tactical pluralism'[130] and 'law and organizing'[131] as labels for strategies and perspectives on law and social movements which combine community organizing, lobbying and other traditional mobilizing tactics with

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[128] *Ibid.* at 108.

[129] But for now, consider Spade's discussion of what he calls the "Population-Management Power" with which social movement groups must engage: "This decentralized view of law suggests that laws are merely tactics, rather than that law is the most important form of power. It suggests that power is not primarily operating through prohibition or permission but rather through the arrangement and distribution of security and insecurity." Spade, *ibid.* at 110. The assumption in this quote is that "laws" (plural) are discrete pieces of State legislation, as opposed to power which is *not* law, and operates outside the State.

[130] Cummings "Wal-Mart" *supra* note 29.

[131] Cummings and Eagly "Critical" *supra* note 23.

court litigation and creation of new legislation. Here again, rather than being prone to cooptation and the desire to force litigation strategy on social movement members, social movement lawyers are expected to be able to blend State legal tactics almost seamlessly into other movement strategies.[132] In a case study of the movement to block a Wal-Mart store from being opened for example, Scott Cummings describes the different tactics the activist group employed. "*Tactical pluralism*" occurred, he writes, when "lawyers helped to advance a coordinated labor campaign using traditional litigation alongside nontraditional skills such as drafting legislation and conducting public relations."[133]

The idea of law and organizing is most pertinent to the present discussion. This is the term Scott Cummings and Ingrid Eagly (among others) use to describe what they understand to be a new paradigm in the practice of law in social movements.[134] Cummings and Eagly characterize law and organizing "as a form of poverty law practice,"[135] situating it within a

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[132] *Ibid.*; See also McCann and Silverstein, *supra* note 38.

[133] Cummings, Wal-Mart, *supra* note 29 at 1932.

[134] Cummings and Eagly, *supra* note 23. Although they describe it as new, Cummings and Eagly describe the historical development of law and organizing beginning with Saul Alinsky's early approach to community organizing in the 1930s and following, at 461-462.

[135] *Ibid.* at 517.

tradition of poverty law in the United States which includes the creation of community legal clinics.[136]

As critics expressed skepticism about the potential for law reform campaigns and litigation to promote systemic changes, movement activists and progressive lawyers began to place greater emphasis on direct action and mass mobilisation – at the expense of traditional State-based litigation strategy.[137] This led to the emergence of a perspective on social movement law which saw empowerment as a necessary goal in the context of social movement activism.[138] This approach moved away from impact litigation as a primary tactic and toward a more community-oriented practice of law and activism. Law and organizing experts see individualization as a problem which can be solved, often through the collectivisation of individual cases at the community level. Rather than seeking a good court judgment which would set a precedent, law and organizing practitioners may focus on the aggregate

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[136] *Ibid.* at 447-450; 468. However, as will be argued in the dissertation, law and organizing as a vision of social movement casework is not confined to anti-poverty movements. In the Canadian context, where even middle-class people may find themselves unable to afford a lawyer, yet ineligible for legal aid, social movement caseworkers may fill an important need. Aside from its historical origins in poor people's movements, there is no reason to assume that the law and organizing paradigm would only work in a left-leaning organization devoted to social justice and anti-poverty work. On the use of public interest law/cause lawyering on the right of the political spectrum, see e.g. Southworth *supra* note 20.

[137] Cummings and Eagly "Critical" *supra* note 23 at 453.

[138] *Ibid.* at 455-456.

effect of legal service provision and of incidents of small-scale resistance, such as that of Mrs. G.[139]

Law and organizing incorporates several different fields of law, from anti-poverty law, labour and environmental law, to other legal areas. Regardless of the cause, law and organizing combines individual service provision at the community level with advocacy for systemic change, based on a belief that local, individually-empowering, community focused casework strategy can promote change in a more progressive way than earlier strategies which would have focused on State-based litigation and the work of lawyers.

Conclusion to Chapter 4

The thesis examines social movement casework which is both local in practice and systemic in its ambitions for promoting change. The literature suggests that lawyers draw from the experience of other disciplines – most notably social work – to become more effective allies of social movements. Lawyers can gain a greater understanding of social justice by studying the ethical codes and professional training of social workers. At the same time, scholars are aware of the perceived hierarchy in status between these two professions. One law teacher remarks that her students looked at the anti-poverty work which they were asked to do and remarked "This isn't law. This

[139] White *supra* note 60.

is social work."[140] At the same time, as indicated earlier, under the radical or structural social work perspective which challenges traditional social work practice, social workers are encouraged to become more effective community organizers by adopting the role of advocate, instead of using exclusively psychotherapeutic practices to assist individual clients.[141] Just as social movement lawyers are encouraged to adopt the habits of social workers, social workers are asked to take on the role of advocate for their clients.

This connection in practice extends to common threads in academic critiques of casework in each discipline. Recall that in both law and social work, scholars are critical of the potential for disempowerment and individualization in casework. Lawyers and social workers receive different training and learn different assumptions about their clients' needs, the proper way to interact with clients, and the appropriate response of the professional to an individual case which may be connected to systemic issues. While the social worker expects to meet clients in danger of losing their autonomy, and who may be unable or unwilling to make independent decisions, the lawyer in traditional practice serves a client who is presumed to be an autonomous and self-serving individual. However, despite the differences in initial perspective and assumptions between the disciplines, both law and social work academies

[140] Aiken and Wizner, *supra* note 79 at 63.

[141] See Fook, *supra* note 74.

produce a remarkably similar critique of the use of casework in the service of social movements.

In interdisciplinary work, one must maintain clear divisions between disciplines, even as one seeks out common ground. The present chapter has raised two themes held in common between the disciplines of law and social work. Viewed from an interdisciplinary perspective, the standard critique of legal strategy and lawyers in social movements, to which the law and organizing model responds, has significant overlap with a critique present in the social work academy. The foundation of the law and organizing model, which focuses on lawyers and legal strategy thus is based on critical concerns which do not belong to the legal academy alone. Lawyers and legal strategy do not pose the only risks for disempowerment and individualization in a movement organization.

Chapter 5: Case Study of the Special Diet Campaign

Introduction

Above, it has been argued that the law and organizing model does not address the potential for disempowerment and individualization in legal mobilization situations where no lawyer is present. Moreover, the notion that legal mobilization naturally implies lawyer participation is pervasive in this literature, to the point where, even if they know that one can offer some legal services without being a lawyer,[1] readers may understandably wonder what legal mobilization without lawyers looks like. It can therefore be helpful to offer an illustration. The present chapter presents a case study of a social movement campaign which did *not* depend on lawyers to plan the initial part of its casework-based mobilization. There was litigation connected to the Special Diet Campaign, notably the human rights case of *Ball v. Ontario (Community and Social Services)*.[2] However, the present case study focuses on the phase in the social movement campaign which preceded this case. As noted earlier in the thesis, lawyers could, and did, get involved in the Campaign. However, the core tactics of legal education, filling out application forms, and "direct action casework" did not require participants to be members of the bar. This study is thus an illustration of what social movement casework can look like in the absence of legal professionals in primary organizing roles. At the same time, the campaign studied here *did* involve

[1] See Chapter 3.

[2] 2010 HRTO 360 (CanLII) ("*Ball*").

professionals working in concert with other movement actors. In this case, the professionals were involved in health care fields. The Special Diet Campaign offers an example of how assumptions about the necessary connection between legal mobilization and lawyers can be challenged when one considers social movement casework practice.

On The Use of Case Studies in Research

The Special Diet Campaign is remarkable for many reasons, including its success in material terms, its emphasis on administrative justice rather than on courtroom victories, and its effective use of direct-action casework as a tactic early in the mobilizing process. A campaign such as this does not come along every day. The Special Diet Campaign combined years of hard work and prior struggle, an almost serendipitous discovery of little-known rules, and a confluence of political factors which contributed to its success. This campaign story may not be representative of every other casework-based social movement experience. However, it is an example of what social movements can accomplish using casework-based campaigns, with or without the participation of legal professionals.

In the case study, the past tense is used to describe the events of the Special Diet Campaign from 2005 to 2011. However, elements of the

campaign were still ongoing at the time the present thesis was filed. This case study should thus be understood as a snapshot of the campaign at a specific point in time, and not as a complete story of its creation, development and final outcome. This account is incomplete in an additional way: the researcher was not personally involved in the campaign. The story of the Special Diet Campaign as it is told here is based on written sources produced by movement actors themselves, or by media outlets which reported on campaign developments. The case study is one version of the campaign history, constructed for the purpose of illustrating an aspect of the present doctoral research.

When caveats such as the above are taken into account, case studies can be an important source of information on movement tactics as they play out on the ground. Several examples of this use of case studies can be found in the literature on law and social movements. Michael McCann's study of the pay equity movement in the United States is one of these. In an attempt to evaluate "the significance of legal norms, tactics, and institutional processes in the campaign,"[3] and to discover "how rights themselves 'work' as cultural conventions in social practice,"[4] McCann embarked on a detailed and wide ranging examination of case studies of the pay equity movement in the United States. In *Rights at Work*, McCann focuses on the use of litigation to "to

[3] McCann, Michael, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994) at 3.

publicize the equity issue, to nurture a growing 'rights consciousness' among many working women, and to organize them in defiant action for change."[5] While litigation was an important element in the pay equity campaigns, McCann adopts a nuanced understanding of the role of legal strategy in social movements, acknowledging that the courts and State law are not the only legal factors in this context.

> "This is the primary thrust of the decentred view of law advanced here: not only that law is pluralistic and relatively independent of the State, but that its role in sustaining traditional hierarchies, and hence in structuring potential strategies of resistance, varies significantly among different terrains of social struggle."[6]

A similar understanding of law and legal strategy is expressed in the present thesis. While more restrictive definitions of legal strategy may limit it to courtroom disputes and changes to State legislation, pluralist understandings of law acknowledge the great variety of potential legal fora and tactics available to movement participants. These include administrative processes such as that which provided the core tactical opportunity in the Special Diet Campaign.

Case studies can also assist in theory building. Constance Backhouse, introducing her volume on the legal history of racism in Canada, writes:

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[4] *Ibid.* at 5.
[5] *Ibid.* at 13.
[6] *Ibid.* at 9-10.

> "I believe that the 'case study' method is particularly well suited to explaining the intricate and fascinating legal record of the past. The opportunity to excise one particular legal dispute from the larger framework lends itself to a detailed and multifaceted probing of the role of law. The 'case study' permits the pinpointing of the concrete impact of legal rules upon real people at specific times. The thick description of a microscopic event allows a fuller dissection of how the law interacts with the wider social, political, economic, and cultural surroundings."[7]

Backhouse argues that a detailed description of a single event can offer helpful insight on the broader context of the event, and later connected developments. Scott Cummings makes a similar point in his study of legal mobilization in the anti-sweatshop movement in Los Angeles.[8] Cummings writes that detailed case studies are helpful for evaluating the factors which contribute to the success or failure of law and organizing campaigns because of the "highly context-specific"[9] nature of social movement work. He explains that qualitative case studies are necessary to discover empirical evidence linked to the effectiveness of newer models of public interest lawyering which often are grouped under the law and organizing model.[10] Thus, despite the specificity of individual campaigns, case studies can provide researchers with a broader understanding of law and organizing, grounded in real movement

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[7] Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: Osgoode Society for Canadian Legal History, 2001) at 15-16.
[8] Scott Cummings, "Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement" (2009) *Berkeley Journal of Employment and Labor Law*, Vol. 30, 2009 101 (Cummints, "Hemmed").
[9] *Ibid.* at 106.
[10] *Ibid.*

strategies. Done with care, it may be possible to transfer lessons learned from one case study to other contexts.[11]

Unlike the case studies by Cummings and by McCann, the present thesis does not evaluate the success and identify the strategies of a single movement. Instead, the thesis critically examines the law and organizing model and its fundamental assumptions. This case study is a detailed account of a real-life instance where casework advocacy was employed in the service of a broad-based anti-poverty movement. It is an example of a casework-based movement campaign which involved legal mobilization but did not rely on lawyer-organizers.

[11] "Probably the most common understanding of generalizability in qualitative research is to think in terms of the reader or user of the study. Reader or user generalizability involves leaving the extent to which a study's findings apply to other situations up to the people in those situations. The person who reads the study decides whether the findings can apply to his or her particular situation. This is a common practice in law and medicine, where the applicability of one case to another is determined by the practitioner. Nevertheless, the researcher has an obligation to provide enough detailed description of the study's context to enable readers to compare the 'fit' with their situations." Sharan B. Merriam, *Qualitative Research: A Guide to Design and Implementation* (2nd ed.) (San Francisco, 2009: Jossey Bass) at p. 226.

The Special Diet Campaign in Ontario, 2005-2011

The literature on law and social movements is preoccupied by a set of questions surrounding the tactical use of State legal strategies, including casework, to support campaigns for law reform and political change. These questions include the place of lawyers in social movement organizations, how (and whether) legal professionals can create non-hierarchical relationships with individual clients, and what to do about the potential for domination of movements by State legal proceedings and the language of individual rights. At the same time, an alternative[12] approach in the literature looks beyond the immediate results normally associated with going to court, and considers the potential for *indirect* uses of legal strategy when combined with other forms of political organizing.[13] State and other legal tactics are part of a full "menu" of options available to social movement activists, on the same plane as other organizing strategies.[14]

The Special Diet Campaign in Ontario is, in the above sense, one case in which a social movement successfully combined a State-based legal strategy with other mobilizing tactics. However, it is significant for other

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[12] Michael McCann, "Reform Litigation on Trial", Book Review of *The Hollow Hope: Can Courts Bring About Social Change?* By Gerald N. Rosenberg, (1992) 17 *Law & Social Inquiry* 715 at 731 (McCann "Reform").

[13] See for example: Michael McCann and Helena Silverstein, "Rethinking Law's 'Allurements': A Relational Analysis of Social Movement Lawyers in the United States" in Austin Sarat and Stuart Scheingold, *Cause Lawyering: Political Commitments and Professional Responsibilities* [ebook] (Oxford University Press, USA) 261 at 267.

[14] *Ibid.*

reasons, including the fact that the campaign produced immediate, concrete results for participants, which can be calculated in dollars. It differs in form and strategy from the standard picture of a social movement campaign which incorporates legal mobilization, in that it did not employ courtroom litigation until very late in the game, and, arguably, only when circumstances forced this strategy onto some individuals. Unlike the pay equity activists interviewed by McCann, Special Diet activists did not start out by using the court – not even as an indirect mobilizing tool.

The Special Diet campaign was centred on an administrative process and not a judicial one. The campaign focused on helping people apply for and receive a Special Diet Allowance (SDA) from the Ontario social assistance system. On its own, filling out an application form may lack the drama of testifying and arguing in court, but in this case, the application was a significant administrative process for movement participants. The Special Diet Campaign built successful mass actions around individual people's applications, refusals and appeals for the SDA. Although an individualized State legal process formed the strategic core of the campaign, activists ensured that the broader political issue remained at the forefront. By registering thousands of people for the SDA, the Special Diet Campaign provoked a public debate on the norms governing social assistance and the justice of a system in which many people feel obliged to choose between paying the rent

and feeding the kids.[15] The Special Diet Campaign spans several years and is ongoing. A cooperative effort, the campaign was endorsed by a variety of anti-poverty organizations.

To help orient the reader, major developments in the campaign are presented below in chronological order. Following this overview, the present case study analyzes the campaign in an interdisciplinary way which relativizes the role of legal professionals. It is argued that the SDA campaign departs from an ideal of law and organizing represented in the academic literature which maintains a privileged role for lawyer-organizers. By focusing on individual applications as well as broader welfare policy, the SDA campaign managed to obtain gains for individual social assistance recipients, while having an effect at the systemic level. The aggregate effect of entire populations signing up for the SDA at the same time is what provoked such a strong public reaction in this case. Following the work of Dean Spade, it is suggested that an interdisciplinary, institutionally-focused approach to legal mobilization strategy offers an alternative to law and organizing accounts which may unintentionally continue to emphasize lawyers' participation while making unrealistic assumptions about the potential for the ideologically-based mobilization of affected community members.

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[15] The phrase "pay the rent or feed the kids" is borrowed from Mel Hurtig, *Pay the Rent or Feed the Kids: The Tragedy and Disgrace of Poverty in Canada* (Toronto, 1999: McClelland and Stewart) and from Jeff Shantz, "Pay the Rent and Feed the Kids?: Health, Poverty and the Campaign for the Special Diet Allowance" in Jeff Shantz, *Fight to Win: Poor People's Unions and Class Struggle in Canada* (Free Press, 2006). Online: < http://jeffshantz.ca/node/4

Chronology of the SDA Campaign

Although the Special Diet Campaign officially started in 2005, its roots lie in a broader struggle to raise social assistance rates which began in the early 1990s. This long-term struggle has spanned more than twenty years, as movement activists have engaged with governments from all three major Ontario political parties. Early on, activists lobbied the New Democratic Party (NDP) provincial government to raise welfare rates, with only limited success. This was disappointing to movement actors, in light of the expectations they placed on the left-leaning party.[16] Nevertheless, the movement continued into the late 1990's, when a Conservative government introduced significant changes to the provincial social assistance regime.

The *Social Assistance Reform Act* of 1997[17] created the Ontario Works (OW) program to cover social assistance recipients who were deemed able to work. Like others of its kind, this program was dubbed 'workfare' in the popular discourse because people receiving OW assistance had to participate in employment readiness activities in return for benefits. The 1997 legislation

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>, at p. 33. However, this phrase has also been widely employed as a campaign slogan by anti-poverty groups.

[16] Ontario Coalition Against Poverty, "A Short History of OCAP" in Various Authors. *Voices of the New Radical Activism* (London, ON, Canada: Socialist Renewal Publishing Project, 2009) at p. 4: "The backsliding of the Rae Government away from its promises to raise welfare rates above the poverty line and 'end the need for food banks' created a lot of confusion and demoralization. For quite some time, people were unclear on how to confront a Government that they had expected and hoped would offer them more than the Liberals and Tories."

[17] O.R. 226/98, revoked March 31, 2001 (1997, c. 25, Sched. D, s. 10 (3)), elaws: http://www.e-laws.gov.on.ca/html/revokedregs/english/elaws_rev_regs_980226_e.htm

also created the Ontario Disability Support Program (ODSP), which offered benefits to people deemed unable to hold employment due to a disability. People receiving social assistance under the previous regime were automatically transferred into the new programs when each came into force in 1998.[18]

These reforms were passed in a punitive political context which, as Joe Hermer and Janet Mosher have argued, saw the "construction of social assistance as crime," through the use of criminalizing language to describe social assistance recipients.[19] One of the insidious aspects of the reform was the introduction of a basic social assistance rate, plus various allowances which could be applied for separately. The burden of discovering and applying for every possible allowance was placed on recipients themselves. A government agent had no obligation to volunteer information on all the distinct allowances for which a recipient might be eligible. Anti-poverty groups have since suggested that access to supplemental allowances (including the SDA) was limited by deliberately burying the information in regulations where it would be inaccessible to the general public, thus creating a "bureaucratic trap" for recipients.[20] These changes to social assistance delivery coincided with a significant reduction in monthly benefits, with

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[18]See: Jeff Shantz, "Poverty, social movements and community health: the campaign for the Special Diet Allowance in Ontario" (2011) 19 *Journal of Poverty and Social Justice* 145 at 148 (Shantz "Poverty").

[19] Janet Mosher, Janet and Joe Hermer, "Welfare Fraud: The Constitution of Social Assistance as Crime" in Janet Mosher and Joan Brockman, eds, *Constructing crime : contemporary processes of criminalization* (Vancouver: UBC Press, 2010) 17

important effects on household incomes. The social assistance reforms of 1997-98 came into force in a political climate which encouraged a restrictive and punitive approach to social assistance delivery and other measures related to poverty.[21] Under a political platform entitled the "Common Sense Revolution,"[22] the provincial government introduced legislation to issue tickets and fine individuals for panhandling or squeegeeing windshields for spare change.[23] At the same time, the provincial minimum wage remained unchanged at $6.85 per hour from 1995 to 2003, inclusively.[24] This approach to social policy was met with vocal criticism from advocacy groups, and the anti-poverty group OCAP gained notoriety during this time.[25]

While the Special Diet Campaign began under a Liberal provincial government, it is of note that advocacy groups had lobbied two other governing parties before that time. This is a testament to the lack of political interest in raising the incomes of welfare recipients who, in spite of their diversity, are targeted as a group and stigmatized for receiving assistance.[26]

Before the start of the campaign, the Special Diet Allowance (SDA) was a little-known part of the social assistance regime. It came to light

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[20] Shantz, "Poverty" *supra* note 18.
[21] *Ibid.*
[22] The Economist, "Harris in the Rough" (October 9, 1997). Online: http://www.economist.com. Accessed January 18 2014.
[23] *Safe Streets Act*, S.O. 1999, c. 8 Online: < http://www.e-laws.gov.on.ca>.
[24] Human Resources and Skills Development Canada, "Hourly Minimum Wages in Canada for Adult Workers since 1965" online: Minimum Wage Database <labour.gc.ca>. See also: Ontario Ministry of Labour, "A Consultation Paper on Ontario's Minimum Wage" (July 17, 2013). Online: <labour.gov.on.ca> at p. 4.
[25] Ontario Coalition Against Poverty, *supra* note 16.

through the efforts of a university student working at a community health centre in Toronto.[27] The SDA was an allowance of up to $250 per month for people receiving social assistance (OW or ODSP) who required the extra money in order to purchase food for a medically-prescribed special diet. In order to obtain the SDA, a recipient needed a form signed by a medical professional, who would prescribe the diet following an examination. Early on, medical professionals had the discretion to prescribe specific diets not mentioned in the policy.[28] In addition, individual listed diets were not linked to a specific medical condition. As such, medical professionals had wide discretion to sign or refuse special diet forms based on their professional judgment of the needs of the patient. When the student found this policy, he told OCAP, they contacted other groups, and collectively, the Special Diet Campaign began. Rather than continuing to lobby the provincial government in the hope of obtaining an incremental increase in benefit rates, advocates began using the SDA as a means to increase individual welfare incomes directly.

Anti-poverty groups began a vast popular education effort. Many different organizations provided information on how to apply for the SDA and what to do in case of refusal by the social assistance office. Advocates enlisted the help of sympathetic medical professionals. More than fifty medical

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[26] Mosher and Hermer *supra* note 19; Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics and the Limits of Law* (Brooklyn, NY: South End Press, 2011).

professionals declared their support for the campaign on the grounds that the standard welfare income was insufficient to provide a nutritionally complete diet to *anyone* – regardless of medical condition, and that the SDA should be made available to all.[29] Once the SDA policy became well-known, and with the help of these sympathetic professionals, organizations such as OCAP created "clinics" where social assistance recipients could meet with medical professionals and have their needs evaluated:

> "(OCAP) began holding clinics, where providers diagnosed Special Diet items to thousands of people. Attempts by welfare offices to deny the benefit were confronted with hard hitting mobilizations. News of the Supplement spread throughout Ontario."[30]

These clinics served both an individual medical/legal, and a broader political purpose. At one Hunger Clinic, held on the front lawn of the Ontario Legislature, more than one thousand patients were seen by medical professionals in a single day.[31] It was at once an open-air medical clinic, an application centre and a political demonstration. When social assistance offices attempted to reject SDA applications, organizations such as OCAP engaged in "direct action casework" in support of applicants.[32]

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[27] Carol Goar, "Pushing back against the bullies" *Toronto Star*, July 9, 2008 at A6 (online: Factiva).
[28] For more information, see *Ball supra* note 2.
[29]Shantz, "Poverty" *supra* note 18 at 150.
[30] Ontario Coalition Against Poverty, *supra* note 16 at 6.
[31] Mike Smith, "Serving Up a Rebellion" *Now Magazine*, 25:6 (October 6-13, 2005). Online: http://www.nowtoronto.com. Accessed September 28, 2013; Ontario Coalition Against Poverty, "$3 Million to Go into Poor Communities in Single Day" Press Release (September 30, 2005). Online: <http://www.ocap.ca/node/384 >. Accessed September 28, 2013.
[32] This tactic is described further below.

The immediate results of the campaign were dramatic, both in terms of increased welfare incomes and in terms of increased costs to the provincial government. An individual receiving social assistance plus the SDA could see an increase of up to $250 in his or her monthly income, compared with social assistance alone. Considering the income figures cited above, this additional money made a great difference in the lives of individual people. On the provincial scale, the aggregate result of these individual increases was staggering. According to figures published by OCAP, Ontario had to increase spending on the SDA program from $2 million annually before the campaign, to $30 million in 2007.[33] The 2009 report of the Auditor General of Ontario cites different figures, but with the same effect:

> "Province-wide, the total spent on special dietary allowances has increased substantially since the time of our last audit. In the 2002/03 fiscal year, annual special dietary payments totalled $5 million; in the 2008/09 fiscal year, the amount exceeded $67 million, a more than 12-fold increase."[34]

The Auditor General recommended that the Ministry review the SDA to determine if abuse of the program was occurring.[35] The report of the Auditor General attributed the dramatic increase in costs directly to the anti-poverty organizations who had led the casework effort:

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[33] Ontario Coalition Against Poverty, *supra* note 16 at 6.
[34] Office of the Auditor General of Ontario, *Report of the Auditor General of Ontario, 2009* (Toronto, 2009: Queen's Printer for Ontario).
Online: <http://www.auditor.on.ca/en/reports_2009_en.htm >. Accessed September 28, 2013, at 264.
[35] *Ibid*.

> "A significant part of this increase may be due to a campaign by advocacy groups critical of Ontario Works allowance amounts. At least one such organization has organized clinics where health-care professionals have immediately completed special diet allowance applications that entitled each attendee to the maximum $250 monthly supplement."[36]

By the time the Auditor General's 2009 report was released, the Ontario government had already made significant changes to the eligibility requirements for the SDA. The distinctions between the new program and the previous one are outlined in a decision of the Ontario Human Rights Tribunal:

> "The previous special diet schedule was different in three principal ways. First, it was set out in a policy, not a regulation. Second, it was not based primarily upon medical conditions. The schedule identified various diets or nutritional products that the approved health practitioner could indicate were required as a result of a medical condition, with a set amount for each. Some diets were based on medical conditions, such as the diabetic diet and cystic fibrosis diet. Other categories reflected specific needs, such as a high fluid diet, vitamins/minerals and herbal supplements, and cranberry juice. The medical practitioner signed the form indicating that the diet was required as a result of a medical condition. Third, there was a discretionary category for "special diet other than or in addition to a diet set out above", which had certain exceptions. The approved practitioner was required to provide details of the special diet required, and such diets were reviewed every 12 months."[37]

As noted in the decision, above, this modified SDA program limited the discretion of medical professionals to diagnosing medical conditions *only*. The diet required for each patient's medical condition was "prescribed" in the

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[36] *Ibid.*
[37] *Ball supra* note 2 at paragraph 21.

new regulation without regard to the individual decisions of doctors and patients. This restricted the ability of physicians to exercise discretion in making the SDA available.

At this time, one of the most vocal and devoted supporters of the campaign was a physician, Dr. Roland Wong. A community medical practitioner in Toronto, Dr. Wong filled out thousands of special diet forms for patients while the Special Diet Campaign was under way.[38] According to OCAP, in 2009 the Toronto social assistance office refused to accept any more SDA forms signed by Dr. Wong, having noticed the large volume of forms issued by this single physician. Social assistance authorities denied this allegation;[39] however, OCAP occupied the social assistance office at Metro Hall in protest. SDA applicants and their allies chanted "We won't be quiet until we get the special diet!" The police were called and the protestors left under threat of arrest.[40]

Having learned of Dr. Wong's role in obtaining the SDA for thousands of patients, Robert Ford, then a city councillor and later elected mayor of

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[38] Between April 2006 and September 2009, Dr. Wong was found to have completed 34,360 SDA forms for patients, which is equal to 13% of the total number of forms submitted during this period: *Wong. R. (Re)* (2012) Discipline Committee of the College of Physicians and Surgeons of Ontario, at p. 8 ("*Wong*").

[39] Social assistance authorities denied the allegation at the time, stating that each form was examined on its own merits: Anna Mehler Paperny, "Nearly 50 MDs back doctor alleged to have abused welfare food forms" *Globe and Mail*, December 18, 2009. Online: <www.globeandmail.com>.

[40] Ontario Coalition Against Poverty, "Powerful Demonstration at Metro Hall: More than 250 People Occupy Municipal Welfare Office" (Web Page, September 12, 2009) Online: http://ocap.ca/node/827.

Toronto, filed a complaint against Dr. Wong with the Ontario College of Physicians and Surgeons in 2010.[41] Ford was quoted at the time:

> "A doctor is there to be a doctor, not to advocate for the poor, or to be the official opposition in government through taxpayer's money."[42]

For his part, Dr. Wong commented on his perception of the politicization of the complaint process in his case:

> "I don't think it's come up too often when a complaint was not made by a patient, but by a politician."[43]

The Ministry of Community and Social Services, Ontario Works Branch filed an additional complaint following an audit of Dr. Wong's SDA applications.[44] In 2012, the College of Physicians and Surgeons of Ontario found Dr. Wong guilty of professional misconduct, stating that he "failed to maintain the standard of practice of the profession," and that "he engaged in conduct relevant to the practice of medicine that, having regard to the circumstances, would reasonably be regarded by members as unprofessional."[45] The details of the decision are related below in the present chapter.

Following the implementation of new restrictions to the SDA program, a group of over seventy SDA recipients filed complaints with the Ontario

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[41] Laura Eggerston, "Mayoral candidate assails activist doctors" *CMAJ*, June 15, 2010 (Online version April 30, 2010). Online: <www.cmaj.ca>
[42] *Ibid.*
[43] *Ibid.*
[44] *Wong*, *supra* note 38 at 7
[45] *Ibid.* See also Eggerston, *supra* note 41.

Human Rights Commission, alleging discrimination on the basis of disability when they lost their initial eligibility for the SDA under new rules. Of these complaints, three "lead cases" were referred to the Ontario Human Rights Tribunal.[46] The Tribunal found that the changes to the SDA discriminated against the complainants.

The above has been a brief chronology of the Special Diet Campaign, from its origins in an advocacy campaign to raise welfare rates in the 1990s, to the present day, when the public is aware of the SDA but the program is subject to new eligibility restrictions. Activists have continued to demand that the Ontario government restore the SDA under its original conditions of admissibility. We turn now to a more detailed examination of the legal strategy employed by campaign actors.

Tactics

In an earlier chapter, the thesis sets out one prevailing understanding of social movement legal strategy in the academic literature on cause lawyering during the 1960s and beyond. This view, captured in Stuart Scheingold's powerful critique of the myth of rights, holds that the most direct way to incorporate legal strategy into a social movement is to find and bring forward a sympathetic "test case" to court, or to lobby the State government for a new and better piece of legislation.

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[46] *Ball*, *supra* note 2.

Of course, in order to create the best possible chance for success before a judge, the individual test case must be based on an advantageous factual and evidentiary situation. If successful, the judgment in a test case could have both a symbolic and concrete value. At the same time, critics in the legal academy have pointed out the individualizing effect of basing social movement strategy on single cases.[47] Movement participants may become demobilized, either because the individual plaintiff wins (the struggle is assumed to be won – and finished) or loses (the struggle is assumed to be lost – and finished). In addition, the individualizing language of rights may encourage observers to view the case as a simple dispute between two individuals, rather than as the immediate manifestation of a social problem requiring a system-wide response.[48]

Legislation presents its own challenges as a tool of legal mobilization. A campaign based on lobbying for new legislation may put disproportionate decision-making power in the hands of lawyers, who have technical training in legislative drafting. Moreover, in some cases, simply passing a new law may not have the desired systemic effect. The legislative process and the factors influencing the effectiveness of an eventual statute are complex. Sébastien Lebel-Grenier illustrates the limitations of a social movement approach focused on creating new State laws with the example of a Quebec

[47] See Chapter 4.
[48] Spade *supra* note 26; Alex Law and Jared Will, "Some Comments on Law and Organizing" in *Organize! Building from the Local for Global Justice* (Oakland: PM Press, 2012).

anti-poverty group called the "*Collectif pour une loi sur l'élimination de la pauvreté*." Wishing to combat poverty on a systemic level, the group chose to focus their efforts on pushing for a statute which would "outlaw" poverty. Lebel-Grenier remarks that in spite of its potential symbolic importance, the potential concrete effects of such a law in the lives of people living in poverty are unclear.[49]

In a critical examination of Lesbian, Gay, Bisexual and Transgender (LGBT) movements in the United States, Dean Spade points out similar shortcomings of activism based on individual test cases and new legislation.[50] He argues that when activists focus on a test case or a new law as their movement goal, they face pressure to confine their test case advocacy to plaintiffs who most closely fit the patriarchal, classist, racialized and heteronormative images which are most likely to produce success in the courts and the State political sphere.[51] "'Perfect plaintiffs' for these cases are white people with high-level jobs and lawful immigration status."[52] Moreover, Spade argues that legislation such as hate crime laws can reinforce the same institutional powers which are the source of much of the violence already affecting those the movement wants to support.[53] "Since the criminal punishment system itself is a significant source of racialized-gendered

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[49] Sébastien Lebel-Grenier, *Pour un pluralisme juridique radical* (Montreal: Faculty of Law, McGill University, 2002) (Doctoral thesis) at 89.
[50] Spade *supra* note 26 at 86-87.
[51] *Ibid.* at 86-87.
[52] *Ibid.* at 87.
[53] *Ibid.*

violence, increasing its resources and punishment capacity will not reduce violent crime against trans people."[54]

Given the above critiques of legal mobilization tactics and goals, one might ask what place there is for individual casework in a social movement seeking to remedy a systemic issue. As it turns out, the possibilities for effective individual advocacy are not limited to judicial precedents, and individual casework need not be isolating. The Special Diet Campaign is an example of the tactical advantage a group may gain through individual advocacy – even when the group does not select charismatic plaintiffs. Casework can present an opportunity for building relationships, conducting research, raising funds, attracting media attention and other activities not always directly linked to legislative or judicial processes.[55]

The legal mobilization of the early Special Diet Campaign was not based on a small number of specially-chosen cases (or people) which could be brought to court. Instead, the campaign centred on an administrative process which would seldom result in a courtroom hearing. The legal campaign did not result in widespread fame for individual parties. Instead, thousands of cases (SDA applications) supporting the campaign were brought by individuals whose names history will probably forget. OCAP and other anti-poverty groups did not carefully select which social assistance recipients had

[54] *Ibid.* at 90.

the best chance of receiving the SDA, or who would make the best impression with the agent of the social assistance office. The effectiveness of the campaign in bringing the issue of welfare reform to the public and in influencing systemic change did not come from one victorious representative case. Instead, the campaign gained strength from the aggregate effect of thousands of applications filed under the same administrative process. This *collective* use of an *individual* legal process worked alongside more traditional political mobilizations as part of an organized effort to provoke systemic change. The campaign itself was viewed by activists as just one aspect of a broader movement:

> "The special diet has never been anything more than an available tactic. (…) The issue as far as we're concerned is to raise the rates."[56]

In contrast to the traditional tactic of "speaking truth to power" and hoping that the State responds (either with a good law or a good judgment), the campaign created a complex interaction between multiple administrative and legislative processes in an effort to make direct gains for individuals who were part of the affected group. In this instance, the direct gain came in the form of additional funds added to social assistance incomes through successful applications for the SDA. The legal processes employed by anti-poverty groups included:

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[55] For an examination of these indirect benefits as they appear in court litigation, see: McCann, *Rights at Work*, *supra* note 3.

- The Special Diet Allowance application mandated by the provincial government

- Public legal education on the right to the SDA and how to obtain it;

- Hunger Clinics created and administered by caseworkers who assisted people in filling out SDA applications;

- Direct action casework conducted by advocates and people living on assistance

- Communication of alternative legal interpretations via the news media.

The Special Diet Campaign was able to operate using a variety of tactics. These included the practice of individual casework, as well as the effective communication of case information and campaign demands through news media. Both of these tactics are familiar to law and organizing scholars, but the degree to which lawyers' participation was absent in the early days of the Special Diet Campaign may be surprising. Below, the tactics of anti-poverty groups are examined in more detail, with an emphasis on direct action casework and media communication.

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[56] John Clarke, an organizer with OCAP. Quoted in Sue-Ann Levy, "Fighting for their meal ticket: Welfare recipients with sympathetic doctors have abused special diet allowances for years." *Toronto Sun*, December 10, 2009. Online: www.torontosun.com.

Direct Action Casework

The process of direct action casework is of particular interest as a legal strategy employed during the campaign. Direct action casework is a form of advocacy which combines knowledge of State law, individual casework and disruptive confrontation in support of the interpretation of the law held by the activist group – all in the service of individual people and the broader political goals of the organization. A member of OCAP offers the following general description of direct action casework:

> "In these situations OCAP brings large numbers of members and allies directly to the offending agency, landlord or workplace and insists on staying until we get what we came for. If no settlement is forthcoming we raise the costs of offending agencies to the point where it is no longer worthwhile for them to act in an oppressive way."[57]

The 2009 OCAP occupation of Metro Hall, mentioned earlier in the present chapter, is an example of direct action casework. The City of Toronto is responsible for administering part of the provincial social assistance scheme in Ontario. By 2009, people receiving social assistance had been applying in ever greater numbers for the SDA. Recall that this was the year when the Auditor General of Ontario recommended an investigation of possible abuse of the program by recipients. OCAP members alleged that the Toronto social assistance office was systematically refusing any SDA application signed by Dr. Roland Wong. The response from OCAP was quick and disruptive. Their

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[57] Shantz *supra,* note 15 at 14-15.

occupation of the social assistance office was organized in support of the campaign, but also for individual applicants who had been denied the SDA. OCAP has published the following account of the process:

> "Despite intimidation, the group refused to leave and instead demanded the right to have their Special Diet forms properly processed. The group was loud and determined - chanting "We won't be quiet 'till we get the special diet!". Social Services responded by vaguely telling the group that they are waiting on 'clarification' from the Province on policy around the Special Diet. They then issued an ultimatum and sent in a large team of police, including ETF, who were preparing to mass arrest and physically remove people from the building. After almost 4 hours, the group was forced to exit the building. But this fight is not over - the group from today has vowed to return with an even larger number of supporters."[58]

Direct action casework thus involves a disruptive activity done for both a broad political purpose and in order to obtain a concrete result for an individual justice seeker who has brought the case to the organization. As might be expected, the direct action casework approach - which is not exclusive to OCAP - provokes praise from some quarters and condemnation from others. A columnist for the *Globe and Mail* writes:

> "The involvement of OCAP alone should raise flags. This is a radical fringe group with a long history of clashes with police. On its website, the group promises 'direct-action advocacy' against welfare and public housing authorities who 'deny poor people what they are entitled to.'

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[58] Ontario Coalition Against Poverty, "Powerful Demonstration at Metro Hall: More than 250 people occupy municipal welfare office" (December 12, 2009) online: <http://www.ocap.ca/node/827>. "ETF" refers to the police Emergency Task Force, referred to colloquially as the "riot squad". Interesting historical note: "The Emergency Task Force was created in 1965. Officers worked out of a downtown station and their primary function was to deal with strike situations. Over the years the unit has expanded to 70 members who work from a large modern and central facility." Toronto Police Service, "Emergency Task Force" online: < http://www.torontopolice.on.ca/etf/ > (emphasis added).

> On Tuesday the group occupied welfare offices in Metro Hall. Welfare recipients demanded to have their special diet forms processed, chanting 'We won't be quiet till we get the special diet.' OCAP organizer John Clarke told me yesterday that welfare authorities 'playing doctor' will use any 'shabby pretext' to deny dietary benefits to welfare recipients. He denied that Dr. Wong had rubberstamped diet forms for anyone, but conceded 'that in any situation where we can help people access funds we will do it. The special diet is one way. Anybody who is on welfare fully deserves the amount specified in the special diet.'"[59]

Phrasing his own critique in much stronger language, in 2011, Toronto Mayor Robert Ford was quoted as telling OCAP activists to "get a job" and it was alleged that he called them "anarchists, thugs, bullies and animals."[60] Clearly for some, "direct action casework" is little more than a euphemism for an illegitimate and even illegal activity. For others, direct action casework may hold greater legitimacy than the State-mandated process for appealing social assistance decisions. It is interesting to compare Rob Ford's description of OCAP in the context of the Special Diet Campaign with E. P. Thompson's study of 'food riots' in eighteenth-century England. In his introduction, Thompson describes the prevailing view of English historians of the reasons behind the riots, before offering his own counter-explanation:

> "According to (the prevailing) view the common people can scarcely be taken as historical agents before the French Revolution. Before this period they intrude occasionally and spasmodically upon the historical canvas, in periods of sudden social disturbance. *These intrusions are*

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[59] Marcus Gee, "The moral end-run that undermines the welfare system" *Globe and Mail*, December 11, 2009. Online: <http://www.globeandmail.com>.
[60] Kevin Connor, "OCAP not looking forward to Ford years" *Toronto Sun*, Thursday February 24, 2011. Online: <http://www.torontosun.com>.

> *compulsive, rather than self-conscious or self-activating: they are simple responses to economic stimuli*."[61]

Like Ford's description of the anti-poverty activists as "animals", the prevailing view of historians described by Thompson depicts people engaged in 18th century food riots as unable to control their impulses and incapable of planning or reflexivity. The historical account paints the food riot as an action done without reference to any norm. Taking a contrary position, Thompson argues that the food riot was instead a much more complex event motivated by the defence of customary justice as understood by the participants.[62] What appears to those outside the 18th century English village to be disruptive illegality is viewed from the inside as a legal process, justified with reference to legitimate and widely-understood norms. In a similar vein, the disruptive actions of OCAP can be understood as part of an organized legal mobilization strategy mounted in favour of a social movement, which assists individual justice seekers with their legal problems. This in turn offers the possibility of a more subtle discussion of the legitimacy and ethics of direct action casework.

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[61] E. P. Thompson, "The Moral Economy of the English Crowd in the Eighteenth Century" (1971) 50 *Past and Present* 76 (JSTOR) at 76 (emphasis added).

[62] "It is possible to detect in almost every eighteenth-century crowd action some legitimizing notion. By the notion of legitimation I mean that the men and women in the crowd were informed by the belief that they were defending traditional rights or customs; and, in general, that they were supported by the wider consensus of the community. On occasion this popular consensus was endorsed by some measure of licence afforded by the authorities. More commonly, the consensus was so strong that it overrode motives of fear or deference." Thompson, *ibid.* at p. 78. See also pp. 107-108.

The great historical detail offered by Thompson to support his argument is not repeated here. The purpose of the example is simply to suggest that what appears to be a disorderly, even chaotic "mob" may in fact be a coordinated group acting in a concerted way to attain specific goals, and that the legitimacy of tactics such as direct action casework is a matter of controversy.

To assist individuals denied the Special Diet Allowance, OCAP organizers opted for direct action over the standard appeals process. This tactical choice is perceived as illegitimate by State actors and other observers. While OCAP's own account of the December 2009 occupation emphasizes a description of the ETF police intervention against people living in poverty, in the Globe and Mail piece, the focus is instead on the activist organization: a "radical fringe group with a long history of clashes with police".[63] After reading the quote from organizer John Clarke, above, one might conclude that OCAP is remarkably unconcerned with the potential reaction of the news media, police and politicians to their choice of tactic. However, direct action casework is based on an explicitly articulated rationale, linked to the desire for a successful and rapid outcome in individual cases.[64]

Instead of trying to convey a message to those in power as with a traditional public protest, direct action casework aims to obtain concrete gains on the spot, albeit with varying success. One of the reasons advocates give for using this tactic is the slowness and inaccessibility of the social assistance appeals process, exacerbated by the obscurity of much social assistance law.

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[63] Gee, *supra* note 59.

[64] "The official channels of appeal that are available are often lengthy, costly and ineffective. Direct action casework is designed to cut though this to get people what they deserve." Tim Groves, "Direct Action Casework Manual" (Toronto: OCAP, 2003) Online: http://update.ocap.ca/node/322. Accessed January 16 2014 at 1 ("Casework Manual"). Jonathan Green cites Tim Groves as the author of this document, although his name does not appear on the web version of the publication. See Jonathan Green, "Whatever It Takes: Poor People's Organizing, OCAP, and Social Struggle" (2005) 75 *Studies in Political Economy* 5. Online: http://spe.library.utoronto.ca/index.php/spe/article/viewFile/6674/3675. Accessed January 22 2014.

This answer is compatible with the suspicion of recipients that the social assistance regime, which has such control over their lives, is deliberately designed to be inaccessible, slow and incomprehensible. The OCAP manual on direct action casework explains the problem from the perspective of advocates:

> "A legal clinic can make an appeal if some one is unfairly turned down, but they do so completely by the book, and the process takes weeks to months and no money is necessarily available to the family during that time. The appeal process concentrates power in the hands of bureaucracies. It is a biased process that can't be counted on. The process is designed to discourage people from pursuing what they are due."[65]

The group bases its critical assessment of the appeals process on the concrete effects it has on justice seekers hoping for a favourable decision. This document makes an allegation of systemic bias without setting out detailed, empirical evidence. At the same time, it is certainly plausible that people receiving social assistance are harmed by long wait times for appeals and the inability of legal clinics to solve the problem of delay. The obscurity of allowances such as the SDA and the absence of any obligation of government workers to disclose the availability of funds to recipients appear to support the claim that the process is "designed to discourage people".[66]

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[65] Casework Manual *supra* note 64.

[66] Of course, inaccessibility and incomprehensibility are not characteristics limited to social assistance law. "Even statutes ostensibly directed to the public at large-marriage, divorce, and family legislation; home warranty acts; occupier's liability laws; landlord and tenant enactments-are beyond the ken of most citizens. (…) The contemporary statute, far from being the key by which citizens are enfranchised to know, to interpret, and to criticize law, has become the means by which they are excluded from debates about normative meaning in

The norms governing direct action casework within OCAP and other organizations are explained in a manual which is made publicly available on the OCAP website. The general principles behind direct action casework are:

> "1. To combine legal work with disruptive action
>
> 2. Not to duplicate the work of legal clinics or other agencies
>
> 3. To forward political goals but never compromise the interests of those you are working with in the process"[67]

The manual anticipates that advocates need not be legal professionals in order to have knowledge and put it to use. OCAP argues for the use of direct action in combination with legal education in a detailed explanation of the first principle noted above. The manual states that while powerful interests are able to "break the rules all the time,"[68] the legal channels open to poor people are "lengthy, costly and ineffective."[69] Direct action casework is thus posited as a way to "cut through this to get people what they deserve."[70] The tactic is also framed as a matter of bargaining power. While members of labour unions gain power by striking, people living in poverty do not gain power by refusing to participate in welfare schemes. Though direct action may include acts which are illegal according to State law (trespassing, for example), the casework manual bases the legitimacy of claims made by people living in poverty on that same State law: "Our success comes from demanding people receive what

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society." Roderick Macdonald, "The Fridge Door Statute" (2001) 47 *McGill Law Journal* 11 at 15.

[67] Casework Manual *supra* note 64.

[68] *Ibid*.

[69] *Ibid*.

they legitimately deserve under the law and backing it up with disruptive action."[71]

However, disruptive action is not the start point in most instances of direct action casework. Readers of the manual are encouraged to introduce justice seekers' demands first through a letter addressed to the offending institution. Meticulous record-keeping, including sending correspondence by fax in order to have proof of sending, is also emphasized.[72] Over time, as OCAP has gained experience in social assistance casework, the mere possibility of a direct action follow-up has become an incentive for some agencies to respond positively and quickly to demands. OCAP notes that since they first began direct-action casework in Toronto, welfare offices have made it a policy to take their demands seriously, and in actual fact direct action is no longer required in most social assistance cases.[73] In addition, the manual advises aspiring caseworkers to keep an open mind when dealing with police when in engaging in disruptive action. Although the police are often called upon to remove caseworkers and justice seekers from government offices in direct action situations, the manual reminds readers that police officers are also trained to "de-escalate situations."[74] OCAP writes that they have participated in some direct action casework events where police actually

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[70] *Ibid*.
[71] *Ibid*.
[72] *Ibid*.
[73] *Ibid*.
[74] *Ibid*.

assisted them in convincing decision-makers to negotiate in good faith, rather than prolonging the conflict.[75]

Needless to say, it would be risky, on a professional level, for a member of the bar to conduct casework along these lines. While the initial demand letter is standard practice in legal professional settings, the disruptive follow-up – perhaps in the form of a raucous government office shutdown – is certainly *not*. Any lawyer engaging in, or advising, such action would risk the possibility of sanction by the bar association, even if the end result was a win for the client. The comment in the manual by OCAP, to the effect that legal clinics do things "by the book" is understandable from this perspective. The direct action casework model is largely open to non-lawyers, or lawyers who are not dissuaded by the possibility of a professional sanction.[76] The casework manual mentions lawyers only once, and only as a possible resource in addition to the essential tools:

> "To do case work you need a phone line, access to a fax machine, and organizers who have a lot of time to put into cases with some availability during the daytime, since that's when the offices you will be dealing with are open. Organizers also need a very basic legal

[75] *Ibid*.
[76] Scott Cummings and Ingrid Eagly note that lawyers open themselves up to the possibility of sanction by the bar association when they collaborate with organizers on legal strategies which run counter to the lawyer's ethical standards. Cummings, Scott L. and Ingrid Eagly, "A Critical Reflection on Law and Organizing" (2001) 48 *UCLA Law Review* 443 (Cummings and Eagly "Critical") at 515-516.

knowledge, and access to lawyers or other people who can give you the more specific legal information you might need."[77]

Note the emphasis in the manual on organizers as caseworkers. Here, individual casework is conceived from the beginning as part of an overall organizing strategy. In this context, lawyers are almost an afterthought, one option among the "other people" who might assist organizers. Viewed in this way, lawyers in the context of direct action casework exist on the periphery, providing services at times, when called upon by the primary caseworker. For the purpose of the thesis, direct action casework is an example of case-based activism which has concrete legal effects for individual justice seekers, but which is conducted largely in the absence of legal professionals.

At the same time, it is important not to overstate the case for non-lawyer casework. The OCAP casework manual includes several *caveats* about the use of case-based organizing and the types of legal cases which are most amenable to resolution through application of a direct action model. It is conceivable that certain cases cannot be resolved through direct action and may require the services of a legal professional instead. OCAP suggests that organizers think carefully about what kinds of situations can best be dealt with through the use of this tactic. The manual places particular emphasis on the complexity of immigration-related casework, noting that this variety of casework can involve a long-term commitment of several years. Thus, while OCAP emphasizes the effectiveness of direct action casework as a movement

[77] Casework Manual *supra* note 64 (Emphasis added).

tactic, this is just one choice from among others which are available. Direct action casework has been examined above as an example of legal casework which can be conducted in the absence of the lawyer-organizer, but it is important to remember the specialized skills which a lawyer may bring to other complex cases.

Media Communication

The direct action casework tactic was accompanied by coverage in the Toronto news media of the evolving campaign. At times, stories of the campaign and its results emphasized the reaction of the provincial government, while at other moments the justifications for the mass hunger clinics were highlighted. Although it was based on thousands of individual files considered confidential by government agencies, the Special Diet Campaign was fought publicly in the news media. The first purpose of the Special Diet Campaign was arguably to get money into the hands of social assistance recipients on an individual basis. However, the aggregate effect of so many applications was bound to provoke a response from the province. Through an analysis of coverage of this issue by the *Toronto Star,* a major Canadian daily newspaper, it is possible to identify two competing frames through which legal mobilization worked during the Special Diet Campaign.

Following Michael McCann and William Haltom,[78] who argue that mass media reports can be constitutive of law, this section identifies and explains two collective action frames through which anti-poverty groups and the provincial government competed for legitimacy during the campaign.

Frame Analysis and Legal Mobilization

The concept of frame analysis was first introduced by Erving Goffman in the 1970s.[79] It has since become significant for social movement theorists interested in the processes by which movements are born, grow and succeed (or fail) in changing the way that the broader population thinks about an issue. It grew in popularity among academics in the early 2000s, as the significance of "discursive processes" for social movements became more widely recognized.[80] The basic idea behind frame analysis is that providing a framework for understanding the facts surrounding a particular cause or issue is a task of social movement groups. A collective action frame is a perspective from which to understand the events that take place during the mobilizing process. "(…) collective action frames are action-oriented sets of beliefs and

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[78] Michael McCann and William Haltom "Framing the Food Fights: How Mass Media Construct and Constrict Public Interest Litigation" (2004) UC Berkeley: Center for the Study of Law and Society Jurisprudence and Social Policy Program. Online: http://www.escholarship.org/uc/item/2rc29425. Accessed January 15 2014.

[79] Robert D. Benford and David A. Snow (2000) "Framing Processes and Social Movements: An Overview and Assessment", *Annual Review of Sociology* 26, 611-639.
[80] *Ibid.*

meanings that inspire and legitimate the activities and campaigns of a social movement organization (SMO)."[81]

Benford and Snow list three main "core framing tasks" identified in the literature on social movements: 'diagnostic framing' (the identification of a problem), 'prognostic framing' (the identification of one or more solutions to the problem) and 'motivational framing' (the incitement of people to action).[82] Benford and Snow point out that framing is a contested process, in which conflicts can arise within a social movement over how to attribute blame for a social problem, and what solutions should be considered acceptable. They write that framing "takes place within a multi-organizational field (…) consisting of various SMOs constituting a movement industry, their opponents, targets of influence, media, and bystanders."[83] This increases the potential for conflict between potential diagnostic and prognostic frames.

The use of framing to shape public opinion is not limited to social movement organizations. State governments, corporations and other institutions often work to shape public opinion through the framing of issues in the mass media.[84] Frame analysis is important to the study of law creation and interpretation. In their study of anti-obesity litigation against the food industry in the United States, McCann and Halton use frame analysis to

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[81] Benford and Snow, *supra* note 79 at 614.
[82] *Ibid.* at 615.
[83] *Ibid.* at 617 (notes omitted).
[84] *Ibid.* at 613.

examine the role of the mass media in creating law.[85] Their explanation of the importance of mass media for law creation emphasizes the possibility of non-State sources of new law and legal interpretation:

> "To put it most plainly, newspapers, magazines, TV shows, and other organs of the mass media are every bit as much institutions of legal construction as are judicial trials, administrative rulemaking processes, and police decisions in the street. Indeed, citizens act on mass produced images, understandings, and expectations identified with law as they assume roles as legal actors, infusing official legal processes with constructions of the "outside" mass culture, verifying a continuous circulation of knowledge that we identify as law, as legal 'reality," across the many domains of modern life."[86]

For McCann and Halton, the analysis of identifiable frames in the mass media provides an account of one way in which legal knowledge is created by a non-State institution with considerable power over the public imagination.[87] In the process, they note that elements such as tight deadlines and funding limitations can lead news outlets to emphasize what McCann and Haltom refer to as "scripts" – familiar ways of describing a set of events in the world. "These scripts often reproduce dominant cultural narratives and values (…)"[88] In this way, for McCann and Haltom, legal knowledge is constructed in part through the circulation of these scripts – and challenges to them – in mass media. Processes of legal mobilization therefore may involve the construction of competing frames in an effort to win public support for a particular legal interpretation.

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[85] McCann and Haltom *supra* note 78.
[86] *Ibid.* at 22.

Dean Spade makes a similar point, this time focusing specifically on law and social movements related to poverty and social exclusion. Applying Michel Foucault's work on disciplinary power, Spade argues that media representations of people in poverty reinforce norms about what it means to be a good and deserving person.[89] He notes that media representations are a tool often used by State actors to gain support for policies such as punitive welfare schemes.[90] According to Spade, State-run programs such as social assistance operate on the basis of management of populations and not by focusing on individual needs.[91] Decisions made regarding programs such as social assistance depend on support garnered through the use of "images that construct ideas of 'us' and 'them' – a national population that needs protection and constitutive others who are cast as threats and drains to that population."[92] Focusing on the Canadian experience, specifically in Ontario, Janet Mosher and Joe Hermer have written of the criminalization of the act of receiving social assistance:

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[87] *Ibid.* at 12.
[88] *Ibid.* at 12.
[89] Spade, *supra* note 26 at 104 and following.
[90] "A memorable example is the way the depiction of 'welfare queens' – portrayed as Black single mothers 'cheating' the welfare system – was used to support the elimination of certain public assistance programs in the 1990s. Ronald Reagan famously invoked this mythic image to justify his attacks on welfare programs, relying on falsified and exaggerated anecdotes about women defrauding welfare systems." Spade, *supra* note 26 at 112 (notes omitted). See also Mosher and Hermer *supra* note 19.
[91] Spade, *ibid.* at 113.
[92] *Ibid.* at 112-113.

> "The language of 'fraud' has been widely invoked in political discourse, together with such terms as 'cheats,' 'liars,' and 'criminals,' to describe social assistance recipients, and accompanied by promises to 'crack down' and 'get tough.' The message that criminal misconduct is widespread within the social assistance system has certainly not been ambivalent."[93]

Their assessment is clearly reflected in the frames which were identified in the present case study, below, although the frames were identified by the researcher prior to reading Mosher and Hermer's work.

On the other hand, "(w)hen social movements cultivate critiques of media representations of their communities as lazy, criminal, or mentally ill, they are engaging with disciplinary power."[94] Spade argues that legal mobilization on the level of representations – for example in the mass media – is important because strategies which focus on disciplinary power can succeed where legal tactics focused on individual rights claims may fail.[95] As will be shown below, the Special Diet Campaign is one example of a social movement campaign which challenged a population-based State policy, in part by offering the news media an alternative to the framing of social assistance recipients offered by the Ontario government.

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[93] Mosher and Hermer *supra* note 19 at 18.

[94] Spade, *supra* note 26 at 108.

[95] *Ibid.* at 109.

Data Collection and Analysis

The present section presents two frames of the SDA as they are expressed in media articles collected through a Factiva database search of articles, letters and editorials appearing in the *Toronto Star* between January 1st 2004 and July 28th 2011. The *Toronto Star* was chosen because it is a major daily paper with Ontario-wide circulation,[96] its archives are available on databases accessible through the library, and because the paper has covered the Special Diet campaign and issues related to poverty extensively. This coverage allowed for a useful sample size of 53 articles, letters or editorials, or roughly half the sample size used in the 2004 study by McCann and Haltom on obesity litigation.

It should be noted that the *Toronto Star* is one of several major dailies available in the Toronto area, and the paper is known for favouring the left of the political spectrum. Indeed, this is a media outlet which has explicit norms governing the tone of its coverage – norms which it makes public on its website. The *Toronto Star* includes a list of its founder's principles on its website:

> "While Atkinson's beliefs were never codified in any set form, the central Principles can be summarized as follows:
> • A strong, united and independent Canada
> • Social justice
> • Individual and civil liberties

[96] The *Toronto Star* claims that it has the largest readership in Canada: < http://www.thestar.com/aboutus >.

• Community and civic engagement
• The rights of working people
• The necessary role of government"[97]

While this statement might lead the reader to assume that coverage of anti-poverty campaigns such as the Special Diet Campaign would be uniformly in favour of activists, this was not the case. As shown below, the Toronto Star articles covering the campaign include two main competing frames, one of which favours the Ontario government position on the issue.

The database search covered any texts which included the exact phrase "special diet allowance". This phrase was chosen as a neutral term which is precise and widely-used. The choice of this term allows for the inclusion of articles which give contextual information on the SDA without necessarily making reference to the campaign or advocacy tactics. Although this broadens the query beyond the strict confines of the Special Diet Campaign, the majority of articles make reference to the increase in applications for the SDA which occurred at the time. This search methodology parallels that used by McCann and Haltom (2004), in which they conducted a LexisNexis search of articles with key terms from the food industry litigation (in their case study: "obesity" "fat" "litigation" "lawsuit"). They characterize this methodology as "relatively orthodox".[98]

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[97] Toronto Star, "The Atkinson Principles" online:
< http://www.thestar.com/about/atkinson.html>. Accessed October 12, 2013.
[98] McCann and Haltom *supra* note 78 at 11.

The *Toronto Star* articles were analyzed by theme, or "coded" using QDAMiner, which is qualitative research software licenced by the Université de Montréal. This software allows for the efficient analysis of multiple documents, and creates tables based on the co-occurrences, sequences and frequency of appearance of themes in the text. Coding was done entirely by the researcher. Codes were created after the researcher had read all of the articles and had had an opportunity to study the OCAP casework manual, as well as several articles from the *Toronto Sun* (a competing and more 'right wing' daily newspaper). The codes and definitions appear in Appendix VI. The articles were analyzed for the frequency with which the coded themes were mentioned, co-occurrences between themes, and themes which appeared in sequence. It is from this analysis, coupled with careful reading of the articles, that the two main sets of competing frames were identified.

Competing Frames in the *Toronto Star*, 2004 – 2011

In their review of the literature on framing and social movements, Benford and Snow identify a connection often made in studies of framing processes, between the choice of diagnostic and prognostic frames. Some social movement scholars have found that the choice of diagnostic frame (identification of the problem) may constrain the solutions considered acceptable for the problem, thereby influencing the choice of prognostic

frame.[99] The analysis of the Toronto Star articles appears to lend support to this understanding. During analysis, the researcher identified two main sets of diagnostic and prognostic frames.

The first set of diagnostic and prognostic frames, here labelled the *Justification/State Action* set, emphasizes the justification of the campaign based on the provincial government's decision to keep welfare rates below what is necessary to feed a family. The diagnostic frame in this case emphasizes the importance of good food for health, and is characterized by mentions of the connection between poverty and malnutrition. The problem identified here is one of lack of access to healthy food for people living on social assistance. The preferred solution – applications for the SDA as a necessary health measure for all recipients – seems to flow naturally from this initial identification of the problem. The prognostic frame thus justifies the increase in applications to the SDA by using the logic employed by the anti-poverty advocates:

> "Ontario's welfare payments are so low - $536 per month for an individual, $967 for a single parent with two children - that many recipients can't afford to eat properly. So they apply for nutritional assistance." (2008-07-09 TO Star)

Individual cases were used as "human interest stories" and as evidence in support of the claim of advocates that welfare rates are too low, while demonstrating the benefits of access to the SDA:

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[99] Benford and Snow, *supra* note 79 at 616.

> "For Dennis Black, who has lived at 220 Oak St. since 2003, the $250 was a revelation. Until two months ago, the 41-year-old community worker was living on a $400 government cheque each month. Now he gets about $650 and has graduated from canned beans to organic greens." (2005-07-20 TO Star)

The Justification/State Action frame set received important support from a group of medical professionals, who emphasized the implications of SDA access for human health. Once the problem is identified as one of risk to health through malnutrition, the solution appears clear, as in the following letter from health professionals involved in the campaign:

> "According to a 2001 British Medical Journal study, if you are a child living in poverty you will carry with you, for the rest of your life, an increased risk of heart disease, even if you manage to raise your socio-economic status. Because we understand this, we have been participating in "hunger clinics," set up to help low-income people receive the special diet allowance." (2005-11-25 TO Star)

In total, 71 instances were coded between 2005 and 2011 where the justification for the campaign was phrased in terms of the inadequacy of welfare rates.[100]

The second frame set identified in the articles is labelled the *Cost/Cheating* frame. The code "cheating" appears frequently in the articles. In 38 instances, the *Toronto Star* included a reference to social assistance recipients cheating or defrauding the government by applying for the SDA and/or taking part in the Special Diet Campaign. Many of these instances were

direct quotes taken from government officials responding to the campaign. For example:

> "We have increased social assistance by 11 per cent since we came into power ... we don't support abuse. We don't support fraud." (2009-12-10 TO Star)

> “"Any abuse of this special support will not be tolerated," said a spokesman for the province.” (2005-07-26 TO Star)

Others referred to the SDA as a “loophole” or other indirect means of violating social assistance law:

> “It was not meant to be a back-door route to a social assistance rate increase.” (2006-03-16 TO Star - Letter to Editor)

> “Duncan's budget next week is also expected to close a loophole and curb abuse of a social assistance program that has ballooned to $200 million a year.” (2010-03-17 TO Star)

Again, the diagnostic frame appears to have a strong relationship to the prognostic frame favoured by the provincial government representatives quoted in the articles. The problem, as understood by opponents of the Special Diet campaign, is that the SDA program costs have “ballooned” beyond an acceptable level. At the same time, recipients are abusing the program. The implied solution is to be found not in individual legal actions against recipients, but instead in modifications to the SDA. These modifications are rolled into the provincial budgeting process, as indicated in the quote directly

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[100] The coding frequency of this justification outnumbers the total articles studied, as codes could occur more than once in a single article.

above. Interestingly, none of the articles from the studied period cite a specific case where a recipient was denied the SDA after the application had been proven to be fraudulent. There is the account of the demonstration in 2009, above, where the social assistance office had allegedly refused to take in forms signed by Dr. Roland Wong. However, individual accusations or proven cases of abuse by recipients do not appear in the sample of articles taken from the Toronto Star.[101]

What does emerge in the analyzed results is the frequent proximity between the "cheating" theme and the "cost of program" theme. When the increase in cost of the SDA to the government is mentioned, discussion of abuse or fraud in the program often follows. The two strongest co-occurrences between two terms were the *cheating – cost of program* combination and the *state action – justification for SDA* combination. The Justification/State Action frame explains the anti-poverty advocates' actions with reference to the State decision to keep welfare rates low and the impact of this decision on individual recipients' health. In contrast, under the Cost/Cheating frame, the

increased aggregate cost of the program to the province is frequently used as implied evidence of wrongdoing by individual recipients. From an

[101] Interestingly, the researcher identified the cost/cheating frame and completed the case study several months before reading Mosher and Hermer's argument about the construction of social assistance as crime through the discourse of fraud (see *supra* note 19). While their study does not analyze coverage of the Special Diet Campaign, the present case study appears to support their general conclusion about this era in social assistance law in Ontario.

administrative law perspective, which includes a commitment to procedural fairness, one cannot deduce cheating in individual cases from the fact that aggregate costs have increased. Normally, to conclude that recipients are cheating, it would be necessary to show that each "cheater" obtained the SDA without being eligible. However, articles frequently explained the "cheating" conclusion with reference to budgetary concerns. For example, the following two quotes appear in sequence in a March 2010 Toronto Star article about the Ontario government budget:

> "Confirming advocates' pre-budget fears, the government cited last fall's provincial auditor's report, which found evidence of abuse in the welfare-based program." (Coded as "cheating")

> "The allowance program provides up to $250 per month and helps about 162,000 people, or about one in five on social assistance. But the program ballooned from $6 million in 2003 to more than $200 million in 2008 and "is not sustainable and is not achieving the intended results," budget documents say." (Coded as "cost of program") (2010-03-26 TO Star)

The Auditor General's report refers to an unspecified number of cases in which entire large families received the maximum SDA amount. It also refers to an unnamed medical doctor suspected of filling out forms without diagnosing patients properly.[102] However, the general attribution of the cost increase to fraud does not take into account other possible factors, including

[102] This may be Dr. Wong, though he is not named by the Auditor General in this account. See Report of the Auditor General of Ontario, *supra* note 34 at 264.

public legal education and the resulting increased awareness of the program, which may also have influenced application levels.

We have then two competing frames through which one can understand the events surrounding the Special Diet Campaign. On the one hand, people are applying for the SDA in record numbers after discovering this previously hidden program, and often based on the conviction that social assistance does not provide enough money for *anyone* to afford adequate food and housing at the same time. Thus, the campaign is about making healthy food available to people who need it, in opposition to a government which would deny them this healthy food. On the other hand, people who apply for the SDA are portrayed as cheats who are defrauding the welfare system, not because of individual evidence of fraud, but because of the aggregate effect of their applications. Taken individually, each successful SDA application means increased household income for individual recipients. Each application is a potentially successful individual case for anti-poverty groups. However, when taken together, the SDA applications present a significant budgetary challenge for the government of Ontario. The presence of this challenge is interpreted by the province as evidence that something illegitimate or even illegal *must* be occurring. The competing frames in the *Toronto Star* articles form the hub of a conflict over whose understanding of social assistance law is legitimate: the State in denying people adequate food/trying to prevent abuse of the social

assistance system – or the activists in trying to feed the hungry/aiding and abetting welfare fraud.

The frame offered by the Ontario government may not make sense from the perspective of administrative law and individual rights, according to which a finding of fraud or abuse would need to be proven based on evidence before a neutral decision maker (administrative judge or other). However, Dean Spade's account of population-based State assistance programs helps to put this finding into perspective. Recall that from Spade's perspective, systems such as welfare administration are seen as population-based schemes which manage the "distribution of life chances" among members of a society rather than focusing on the needs and life circumstances of individuals in all their complexity.[103] Spade posits this understanding of government programs as one premise in his argument for why social movement organizations should avoid focusing on impact litigation and anti-discrimination law. For Spade, the traditional victim/perpetrator model favoured by anti-discrimination law fails to capture race- or gender-based injustices which are created when entire systems have disproportionate effects on identifiable groups. When it is a system at "fault," often no single perpetrator can be found, and courts will declare that no individual discrimination or other justiciable harm has taken place. Meanwhile, "(t)he impact of population-level operations of power, in

[103] Spade, *supra* note 26 at 109 and following.

fact, may be much more significant than the impact of individual discrimination."[104]

Suppose one turns Spade's analysis on its head, and considers the State's response to groups who resist the harmful aspects of population-based programs such as social assistance. In the case of the Special Diet Campaign, the resistance itself is population-based. There is no single test case, no famous face representing all possible plaintiffs involved in the movement. Instead, there are thousands of administrative processes undertaken in a relatively short time, each of which results in an increase in income for an individual person or a family, and the aggregate effect of which is a remarkable increase in government spending. As noted above, no individual cases of welfare fraud proven before the courts are reported in the newspaper articles analyzed for this study. From the coverage offered in the *Toronto Star* between 2005 and 2011, it would appear that the Ontario government did not respond to the Special Diet Campaign by prosecuting thousands of individual social assistance recipients. Instead, it responded by publicly alleging that there was widespread fraud committed against the whole SDA system. As explained below, the government answered this population-based campaign with a population-focused policy change: new restrictions on who could qualify for a Special Diet Allowance, and new procedures for applying for the funds.

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[104] Spade, *supra* note 26 at 114.

Aftermath: "Cause Medicine" vs. Medical Professionalism

For scholars interested in the interaction between law and social movements, the Special Diet Campaign is notable for the *absence* of lawyers guiding its strategic decisions, even as organizers adopted tactics compatible with a law and organizing ethos. However, in spite of the absence of lawyers in leadership positions, there was still a high degree of professional involvement in the campaign. This was made necessary by a choice of the Ontario government. The SDA application form was designed to require the signature of a health professional. In this way, the provincial government gave medical professionals a gatekeeping function in the administrative process. As a result, the Special Diet Campaign *had to* rely heavily on professional engagement, without which the organizing work could not have taken place. In this instance, the professionals were not cause lawyers. They were health professionals: nurses, doctors, and other practitioners who were authorized by virtue of their professional status to sign special diet forms for patients.

The rationale behind professional enthusiasm for the campaign in its early stages was expressed clearly in a letter quoted earlier in the present chapter. Kathy Hardill, Debra Phelps and Mimi Divinsky (two nurses and one doctor) wrote to the editor of the Toronto Star in their roles as members of Health Providers Against Poverty – a group which supported the Special Diet

Campaign. The group wrote to express their concern over comments made by the Minister of Community and Social Services, who had referred to health professionals sympathetic to the Special Diet Campaign as "rogue advocates".[105] Recall that Robert Ford, then a mayoral candidate in Toronto, also criticized the idea of political advocacy by medical professionals when explaining his reasons for filing the complaint against Dr. Roland Wong with the College of Physicians and Surgeons of Ontario ("CPSO"). "A doctor is there to be a doctor, not to advocate for the poor, or to be the official opposition in government through taxpayer's money," Ford continues: "That's frightening, when I think about it. You can't have people in the medical field doing that."[106] Following this logic, it would appear that for a health professional, to be an advocate is already to become a "rogue" in the eyes of political opponents. At the very least, advocacy may mean practicing one's profession in a non-traditional manner – with all of the risks which this implies.

In their critical survey of law and organizing in the United States, Scott Cummings and Ingrid Eagly explain that lawyers who take on roles as organizers in social movements also take on risks in relation to their professional licence. Cummings and Eagly explain that when lawyers decide to collaborate with social movement organizers, it can lead to ethical

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[105] Kathy Hardill, Debra Phelps and Mimi Divinsky, "'Rogue advocates' for GTA's poor speak out" *Toronto Star*, November 25, 2011. Online: www.thestar.com.
[106] Eggertson, *supra* note 41.

dilemmas common across jurisdictions, including confidentiality, conflict of interest, and the unauthorized practice of law.[107] In addition to these issues, lawyers are prohibited from counselling their clients to do things which the lawyers' ethical code prohibits them from doing, or things which are illegal in general. The direct action casework outlined earlier in this chapter is one example of a law and organizing tactic which would be risky for a lawyer to suggest. The risks and worry that social movement work entails for lawyers should not be minimized or ignored. However, the case of Roland Wong suggests that it is a mistake to equate the possibility of professional sanction with social movement *lawyers* only. The risk of getting into trouble with the professional regulatory body does not make lawyers special – or at least it does not make lawyers *more* special than any other professional with a political cause. Like the issues of disempowerment and individualization which form the backbone of the standard critique of the myth of rights, professional sanctions in the context of social movement work are not unique to the legal profession.

Throughout the campaign, one medical professional remained highly visible to the public and to social assistance authorities. Doctor Roland Wong participated enthusiastically in hunger clinics and eventually created his own specialist clinic devoted to filling out SDA forms.[108] In 2009, following the Auditor's report which had highlighted the skyrocketing costs of the SDA

[107] Cummings and Eagly, *supra* note 76 at 506 and following.

program, the Ontario government ministry in charge of the SDA began investigating forms signed by Dr. Wong. He was found to have signed a significant proportion of the SDA forms completed in the province.[109] The Ministry of Community and Social Services investigation concluded that Dr. Wong had completed thirteen percent of *all* SDA forms submitted to the government between 2006 and 2011 – the highest proportion held by a single physician – and fifty percent of all "high value applications (from $200 to $250)"[110] for the SDA.

During the complaint process, the CPSO considered three main allegations: failure to maintain the standard of the profession when examining patients asking for SDA forms, disgraceful, dishonourable or unprofessional conduct, and incompetence.[111] Dr. Wong denied all allegations made against him, and continued to advocate in the news media even while under investigation. He published a website where he posted the text of speeches he gave about the need to raise welfare rates and the role of the Special Diet Campaign in bringing needed money into the households of welfare recipients.[112] Framing his work in terms compatible with a conscientious and compassionate practice of traditional medicine, Dr. Wong writes:

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[108] *Wong*, *supra* note 38.
[109] Rob Ferguson, "MD's welfare prescription probed; Doctor in hot water for okaying $250-a-month food bonuses without checking patient restrictions" *Toronto Star*, December 10, 2009. Online: Factiva.
[110] *Wong*, *supra*, note 38 at 8.
[111] *Ibid.*
[112] Roland Wong, www.specialdiet.ca.

> "Compassion and altruism forms the foundation of Practice of Medicine; my action in filling the Special Diet form fulfills those fundamental requirements of being a good physician. Thousands upon thousands saw positive changes in their health and in their lives. Yet I am being punished by being called before the Disciplinary Panel of the College of Physician and Surgeon [sic].
>
> […]
>
> "I filled a lot of forms because I believed I was fulfilling my function as a physician. I must have made many bureaucrats and [Premier] McGuinty's Minister of Social Services very angry at me. I am now called an activist." [113]

Note that the word "activist" appears here as an epithet. The website also served an organizing purpose by encouraging sympathizers to attend the disciplinary hearings. One such announcement reads:

> "***PLEASE NOTE THE **LAST DATE** FOR THE DISCIPLINE COMMITTEE HEARING IS **APRIL 4, 2012** at 9AM at 80 COLLEGE STREET (APRIL 3rd IS CANCELLED) click here for schedule ***"[114]

Asked about the complaint against him by the *Globe and Mail* newspaper, Dr. Wong stated that many doctors did not want to fill out the SDA forms and turned patients away.[115] He, on the other hand, worked in community medicine, thus it was natural that he should receive more requests for SDA forms.[116] Dr. Wong and his lawyer would later make the same argument before the CPSO during his hearing, emphasizing that the nature of

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[113] *Ibid.*
[114] *Ibid.*
[115] Globe and Mail, "Transcript of Interview with Dr. Roland Wong" December 9, 2009. Online: www.globeandmail.com
[116] *Ibid.*

his practice put him into contact with more people living in poverty than the average medical professional.[117] He offered expert evidence in support of the analogy between his SDA clinic and other specialized clinics which do not offer ongoing physician care: vaccination drives, for example.[118]

This is an interesting argument for its implicit acceptance of traditional notions of professionalism in medicine. The argument goes as follows: yes, there is a standard way to practice medicine, but because this group of patients is marginalized and has circumstances different from the standard patient, Dr. Wong must operate his clinic in a non-standard way. One can think of similar hypothetical arguments in defence of cause lawyering tactics. A lawyer serving clients who mainly live on the street and have difficulty affording public transportation might agree to meet them in a non-traditional location, for example, such as a coffee shop or a park (and not the traditional private lawyer's office). While in most circumstances this would seem unprofessional or even create a potential breach of the duty of confidentiality, one could imagine the lawyer making the same argument about non-standard forms of practice for non-standard practice situations. Stephen Wexler implied a similar argument in his advice to progressive law students and anti-poverty lawyers in the 1970s.[119]

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[117] *Wong*, *supra* note 38 at 10.
[118] *Ibid.* at 18-19.
[119] Wexler, Stephen, "Practicing Law for Poor People" (1970) 79 *Yale L. J.* 1049.

In addition to the sheer number of SDA forms signed by the single physician (itself a source of suspicion of course), the CPSO Disciplinary Committee notes in its decision that Dr. Wong's method of collecting information for the SDA form departed from standard medical practice. Dr. Wong developed a form for patients to fill out as part of his specialist SDA clinic. Patients could check off a series of boxes indicating their own medical conditions. The investigators into this practice randomly selected a number of patient files from Dr. Wong's office, all of which consisted almost entirely of the patient self-assessment form, at times with a few notes added by the physician.[120] This was, again, explained by Dr. Wong's expert witness as a non-traditional form of medical practice which nevertheless conformed to the standard of practice demanded by the profession:

> "It was Dr. H's opinion that, given the inadequacy of welfare funding and the fact that the outcome was highly beneficial to the patients, Dr. Wong's approach did not fall below the standard of practice. Dr. H concluded that Dr. Wong should be commended in meeting the needs of a particularly vulnerable population."[121]

The disciplinary decision in Dr. Wong's case includes several glimpses of alternative views of medical practice like the above. The other expert witness offered by Dr. Wong likened his SDA clinic to other specialized clinics such as those dealing with the H1N1 outbreak, and which were allowed to rely on patient self-reporting for diagnoses.[122] In support of Dr.

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[120] *Wong*, *supra* note 38.
[121] *Ibid.* at 19.
[122] *Ibid.*

Wong's efforts to gain the SDA for every patient possible, the expert witnesses cited evidence that doctors in the United States routinely helped patients to "game the system" in similar ways.[123] One expert went so far as to state that professional integrity for a doctor demanded

> "(…) maximum advocacy for the patient, provided that he does so without lying or engaging in deception; and that this advocacy requirement outranks any gatekeeping responsibility the physician might owe government."[124]

Thus, the main line of defence presented by Dr. Wong and his lawyer was that Dr. Wong's patients fell outside the traditional image of the patient imagined by the medical profession. A cause lawyer would instantly recognize that these patients also depart from the traditional image of the autonomous, middle- to upper-class client of the legal profession.

In the end, the Disciplinary Committee found that Dr. Wong had failed to meet the standard of practice in filling out SDA forms because he had not obtained adequate information from his patients. While his conduct was not considered disgraceful, the Committee did find it unprofessional. On this point, the Committee comments as follows:

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[123] *Ibid.* at 20.
[124] *Ibid.*

> "The temptation to exaggerate in order to maximize financial benefit for a patient is entirely understandable. The suggestion was made that Dr. Wong's endorsement of these claims represented advocacy for his patients. Advocacy for a patient, however, should not trump one's professional integrity. While it may well be true that additional financial assistance would provide increased health benefits to many underprivileged individuals, this does not justify failing to maintain the standard of practice, including the endorsement of a misrepresentation in order to obtain financial gain for a patient. The experts who testified for both sides (but particularly Drs. H and J) were able to demonstrate activities in their professional and personal lives that constituted advocacy for vulnerable patients that remained well within the bounds of professional integrity."[125]

In addition, for every SDA form he completed, Dr. Wong billed the government health insurance plan for filling out the form ($20), but in some cases he also added a billing code for a "partial assessment" of the patient, worth an additional $30.60.[126] The Committee held that Dr. Wong failed to meet the standard of practice for billing for the "standard assessment" of the patient. This final aspect of the decision is significant for any discussion of the power dynamics inherent in professional involvement in social movements. Regardless of one's enthusiasm for the goal of raising welfare rates to a level that would allow people to eat nutritious food *and* pay rent, and even if one sees Dr. Wong as a courageous and charismatic hero, it is undeniable that the doctor made a significant income from his work as an SDA activist. The Committee estimated that Dr. Wong made between $418 925 and $718 026 per year from 2007 to 2009 based on his OHIP billings for the SDA forms and

[125] *Ibid.* at 34.
[126] *Ibid.* at 9.

the partial assessments.[127] Responding to public criticisms of this aspect of his work, Dr. Wong published on his website an argument which compared his income with that of a baseball or hockey player:

> "What they deserve depends on a set of conditions before they are paid. Each of them must have the necessary training and qualifications and each of them must complete the work that they set out to do. I did my job of seeing the Special Diet applicants, took a history and did the required examination. Money in the form of taxes pay the salaries of Social Services and Health officials, the money helps to pay for food and opportunities for the poor and money allows me the time and expenses to defend myself before the Disciplinary Panel."[128]

He ends this text with an appeal to readers to "stay with us through my struggle."[129]

Without wishing to judge Dr. Wong's actions in billing the province for the work he did, it is instructive for present purposes to briefly examine this situation from the perspective of critics of the participation of legal professionals in social movements. One of the reasons why lawyers (and social workers, and doctors) are so well-placed to disempower the vulnerable and lead movements astray is that they have a social prestige and an economic security vastly beyond those of their clients. Even if they lose the case, if the movement fails and justice seekers are left in the same position as when they began, the lawyer is still better off than the vulnerable groups he or she represents. This fundamental difference in socioeconomic class lies at the

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[127] *Ibid.* at 9.
[128] Roland Wong, www.specialdiet.ca.

heart of concerns of law and organizing scholars and activists. By participating in the Special Diet Campaign, Dr. Wong placed himself in the same paradoxical position as cause lawyers sometimes do: on the one hand, he is taking an enormous risk, inviting sanctions by a professional body which has the power to take away his licence, suspend him, and impose fines.[130] On the other, he is better off than the people he is helping. No matter how sincerely he expresses solidarity with people on social assistance, no matter how genuine his outrage at a government which neglects its people's basic survival needs, Dr. Wong is nevertheless a highly-educated man who earned money through his activism. He is, in this respect, a beneficiary of class and education privilege similar to that of activist lawyers and law students. In short, Dr. Wong's example shows that the potential wealth, status and power differentials in professional social movement work are not unique to lawyers.

Again, this is not meant as a personal criticism against Dr. Wong's integrity. Rather, it is important for activist movements and legal scholars to recognize that class privilege and professional privilege cut across disciplines. They have the potential to bleed into new emerging professions as well. Dean Spade notes that in contrast to mass social movements of the 1960s and 1970s which were based in affected communities, present-day movements are

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[129] *Ibid.*
[130] The penalty for Dr. Wong's case has yet to be announced at the time of printing the present study.

"professionalized, funded, non-profit formations"[131] which "are dominated by norms typical of other professions, including unequal pay scales, poor working conditions for people without race, class, and education privilege, and hierarchical decision-making structures."[132] Spade writes that a consequence of this professionalization of social movement organizations is an increased reliance on project-based funding and the abandonment of radical work, for example against wealth inequality, in favour of issues which are more attractive to potential funders.[133] Hence, the importance of recognizing that the legitimate concerns of law and organizing scholars are not the sole property of lawyers, but are in fact part of an interdisciplinary phenomenon which may have an important influence on social movement work.

Conclusion to Chapter 5

The two contrasting frames described earlier in this chapter have important implications for our understanding of law and organizing. The SDA is a policy introduced by the Ontario government to provide a food supplement to welfare recipients who have a medical need. While originally the policy was relatively unknown, anti-poverty advocates have made a point of publicizing it to affected communities. In the case of groups such as OCAP,

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[131] Spade, *supra* note 26 at 40.
[132] *Ibid.*
[133] While beyond the scope of the thesis, the influence of project-based funding on the priorities and tactics of organizations is significant for activist work. For a discussion of this issue, see: INCITE! Women of Color Against Violence, eds, *The Revolution Will Not Be Funded: Beyond the Non-Profit Industrial Complex* (Brooklyn: South End Press, 2007).

this work has gone beyond public legal education, to the use of "direct action casework" in support of recipients whose SDA application forms have been refused. Recall that the primary legal strategy employed in the Special Diet Campaign – facilitating SDA applications on a massive scale – is not based solely on elaborating a principle of justice. The campaign began as part of a broader campaign to increase social assistance rates across the board. The SDA is a source of additional money, and in applying for it, social assistance recipients are making a concrete gain which has immediate impact on their household incomes.

It is important to keep this concrete, direct action aspect of the campaign in mind when considering the role of law in social movements as it is described by scholars such as Michael McCann and Gerald N. Rosenberg. In *The Hollow Hope*, Rosenberg expresses scepticism of the use of litigation strategy by social movements.[134] Equating 'legal strategy' with courtroom advocacy, Rosenberg writes that while judges may write favourable decisions based on principles of social justice, court judgments do little to actually change society or fix social problems. Engaging directly with Rosenberg's work, McCann argues that instead one should consider legal (again, read "courtroom") strategy as useful for its indirect benefits.[135] McCann offers

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[134] Rosenberg, Gerald, *The Hollow Hope: Can Courts Bring about Social Change?* (Chicago: University of Chicago Press, 1991).

[135] McCann "Reform" *supra* note 12; see also Liora Israël, *L'arme du droit* (Paris: Presses Sciences Po., 2009) at 34-35, as well as footnote 120 in Chapter 4.

empirical evidence in favour of this suggestion in his study of the pay equity movement in the United States.[136] While Rosenberg limits the effectiveness of legal strategy to symbolic victories, McCann stresses the important effects that symbols can actually have. This emphasis on symbolic and cultural aspects of law also leads McCann and Haltom to identify mass media outlets as law-creating institutions.[137]

The Special Diet Campaign presents a different perspective on the law and organizing model. In this case, the anti-poverty advocates are engaging with State law, but outside the courtroom. In reading accounts of the campaign in the news media, and in press releases from organizations such as OCAP, it becomes clear that the campaign is not using State law in the manner anticipated by *either* Rosenberg in *The Hollow Hope* or McCann in *Rights at Work*. The goal of the SDA 'Hunger Clinic' is not to obtain a friendly judgment, or even to publicize a particular principle of justice, though as will be made clear, these are products of that action. The first goal of the Clinics created during the campaign has been to obtain more money for people living on social assistance. The success of the campaign can arguably be attributed to the immediate concrete effect of its legal strategy, rather than any creation of public sympathy for welfare recipients who must apply for the SDA – even if part of the conflict played out in competing frames in the news

[136] McCann *supra* note 3.

[137] McCann and Haltom *supra* note 78.

media. Frustrated with seeking policy change through traditional lobbying and waiting for results from the government, advocates finally decided to take what was they felt was needed. This is State legal strategy as direct action.

Chapter 6: Social Movement Caseworkers in Their Own Words

Introduction

The previous chapters of the thesis have examined a challenge to the assumption inherent in the law and organizing model, that legal strategy requires lawyers and that disempowerment and individualization concerns can be adequately addressed through vigilance over lawyers and legal work. Through an interdisciplinary re-reading of the critique of the myth of rights, it was suggested that the preoccupations behind this critique – to which law and organizing appears as a progressive response – are actually shared in disciplines outside the legal academy. While the histories of the legal and social work professions are divergent in many ways, the concerns about individualization, disempowerment and consequent demobilization are common to both. This is significant because of the role the 'standard critique' in the legal academy played in the development of the law and organizing perspective today. The third chapter examined lawyer and nonlawyer role distinction from the perspective of the positive law. Opportunities for nonlawyers to work on legal strategy without committing "unauthorized practice of law" were outlined. It was argued that even the positive law of the State, which would seem to have the final word on the line between lawyers' and nonlawyers' exclusive tasks, fails to delineate effectively between them in the context of social movement casework. The example of the information/advice distinction was considered, with a focus on the Quebec Court of Appeal's recent decision. Finally, the fifth chapter presented a case

study of what a casework-based campaign, conducted largely without lawyers, looks like: the Special Diet Campaign. Through this case study, it was argued that a law and organizing approach to social movement activism need not reserve a special role for lawyers – even in cases where legal strategy forms the backbone of the campaign. Nevertheless, even where lawyers are not present, issues related to professionalism, such as non-traditional approaches to practice, professional sanctions and the socioeconomic distance between professionals and justice seekers may remain. The case of Doctor Roland Wong was highlighted in support of this argument.

The previous chapters, whether by reviewing the academic literature, studying the positive law, or examining a case in detail, all support a nuanced view of the role of lawyers in social movement organizations. In the final chapter of the thesis, we turn to an examination of social movement casework as it is understood by caseworkers themselves.

Following the methodology described in Chapter 1, this chapter introduces the participants, along with a general description of each participant's organization(s). The chapter then presents an overview of the major themes they discussed. As will be shown below, there is a significant overlap in concerns and priorities between lawyer and nonlawyer caseworkers. Common themes and themes which were unique to a single participant appear in the three Figures which are at the end of the present chapter.

Participants and their Organizations

Below is a brief description of the participants and their organizations. The participants have been assigned pseudonyms and the organizations have been assigned numbers. Recall that for the purpose of protecting the anonymity of participants, the gender of some participants may have been changed, and participants' responses are all related in English even if they spoke in French during the interview. The researcher did not recruit any participants from organizations with which she has volunteered or worked.

Aaron

Aaron meets with me at a table in an empty corridor of a university, close to a public transit station in a downtown area. It is summer when we meet, and he seems relaxed about the interview. Aaron has volunteered with two Canadian movement groups – one an anti-poverty organization and the other focused on migrant rights. Aaron is now a licenced immigration consultant, having gained an interest in being a consultant through earlier casework. Aaron continues to do migrant rights casework with Organization 2 on a volunteer basis, though no longer involved in Organization 1.

Aaron's organizations both have an explicitly anti-capitalist political orientation. The anti-poverty group, 'Organization 1' engages in a combination of letter-writing, accompaniment and demonstrations in the

defence of people living in poverty. The group's long-term goals include the elimination of poverty entirely, but in the medium term Organization 1 focuses on access to affordable housing and social assistance. It is a membership-based organization with a stable workspace and occasional staff. Decisions on casework priorities are taken by the members as a group. 'Organization 2' supports migrating people seeking to stay in Canada. In structure, they are 'looser' than Organization 1, in that they do not have an office and may meet on an as-needed basis. They work with non-status individuals on immigration cases, and campaign for regularization of immigration status and an end to deportations from Canada.

Anne

Anne speaks with me over the telephone. She is the first participant to respond to my interview request. My conversation with her is not recorded, but I take detailed notes of what we discuss, with direct quotes when possible. Anne is a lawyer working for a disability rights organization. She accepts legal aid mandates for individual clients, and is also involved in broader community advocacy. Although her work mainly centres on disability issues, Anne also does anti-poverty work, depending on the needs of her clients.

Anne's organization ('Organization 3') is a hybrid between a legal aid office and a social movement organization. They combine legal aid work on individual cases with summary advice, public legal education and collaboration on campaigns for systemic change with other disability advocacy groups. Anne tells me that Organization 3 has a board of directors mainly composed of individuals from the disability community in her city.

Beatrice

Beatrice chooses to meet me in her office. She is a busy lawyer working with 'Organization 4' which, like Anne's group, is a hybrid between a legal aid office and an activist group. She agrees that I can record our conversation and appears pleased to be able to talk about not only her current work, but the history of struggles that led to the organization's creation. Beatrice is one of the longest-serving lawyers at Organization 4, and she has a leadership role. The office is large enough for a desk, a file cabinet and a few shelves, as well as a chair for visitors. Beatrice's time is obviously in great demand, and we are interrupted at moments during the interview by a knock at the door so that she can attend to urgent cases.

Organization 4 mainly deals with anti-poverty, family and access to justice issues. These include access to social assistance and increasing the maximum allowable income for legal aid eligibility. The group works in concert with other movement organizations on affordable housing and access

to justice campaigns. They are currently in a period of transition as some staff members contemplate retirement, while new staff must learn the informal rules governing client contact and other aspects of casework. Organization 4 is governed by a board of directors drawn from the surrounding neighbourhood, including representatives of community organizations and concerned individuals from the area.

Christopher

As he has requested, I meet Christopher at his office in a large city in Canada. He has just finished work. At the time that I arrive, Christopher is the only person there and everyone else has left for the day. Christopher is a lawyer, but he explains to me that he seldom does tasks restricted to lawyers under the provincial bar legislation. Instead, he is employed as a coordinator of Organization 5, an access to justice organization which helps justice seekers who are often 'too rich' to qualify for legal aid, but cannot afford a lawyer.

Christopher and I speak in a conference room normally used by justice seekers to do their own research. There are informational pamphlets on the shelves. The reception area is fairly small, with a desk, chair and no visible files. People can speak with the organization's coordinators confidentially in an office with a door that closes.

Organization 5 is open to the public and deals with access to justice issues mainly in relation to civil liability and administrative law. Its mission is to inform and educate self-represented individuals about the law related to their cases, and to refer people to other organizations when more hands-on help is required. Empowerment of individual justice seekers is an important part of Organization 5's work.

Christopher also once worked at Organization 4, where he did a combination of anti-poverty casework, access to civil justice campaigning and community organizing.

Charles

A long-time activist with Organization 1 (Aaron's group), Charles has done casework on anti-poverty issues including affordable housing and social assistance, as well as training of new caseworkers. Over several years as an activist and lay practitioner, Charles has had a chance to observe how casework methods have changed at Organization 1, and how the connection between casework and other organizing tactics has been altered by economic and other factors.

The interview is relaxed; we are seated in Charles' kitchen. Charles is one of two lay practitioners interviewed for this study who began their activist

casework as justice seekers requiring assistance from their organizations. To the best of the researcher's knowledge, Aaron and Charles are not aware of eachother's participation in the study.

Dana and Evelyn

I meet Dana at her office, and she suggests that we go to the cafe downstairs, since it is usually almost empty at this time. It isn't busy and she chooses a table far enough from any people that we can talk confidentially. Dana is a staff coordinator with 'Organization 6', which is based in a large city. She is not a member of a professional association or order, but she has some formal social work training.

Organization 6 focuses on migration issues, working with non-status individuals and lobbying for access to education and health care for refugee claimants and people without immigration status, as well as their children. Dana is one of two advocates I interview on the same day from this organization. Her colleague is Evelyn, a lawyer who also coordinates work at Organization 6. Both caseworkers are involved in organizing, campaigning and individual case tasks, though in different proportions, as explained later in this chapter.

Early in the recruitment process, Dana and Evelyn spoke together about the study without my intervention and in my absence, so each is aware

that the other is speaking with me, although we talk separately. At Evelyn's request, my interview with her takes place at her desk in the large Organization 6 office. Dana leaves to go home before Evelyn and I start talking. During their separate interviews, Dana and Evelyn often refer to each other, at times even suggesting questions that I should ask or information I could confirm with each colleague. They have a friendly rapport and both express respect for the quality of each other's work and the commitment they show to the mission of the organization.

Eric

Eric meets with me in a private home where we are the only people present. Eric works with 'Organization 7', an anti-poverty and access to justice organization. Like Charles, Eric came to his own casework practice through personal experience with the issues that are at the heart of his present-day campaigns. Eric is a long-serving member of Organization 7, first doing activist organizing as a volunteer, and later becoming the group's only staff member. He does a combination of casework and other organizing work on a full-time basis. As soon as I begin recording, Eric talks freely about his experiences. In transcribing the interview later, I am struck by how little I spoke during this conversation, and how much Eric had to say. Of the eight interviews, Eric's conversation involved the fewest questions posed by me.

Like Beatrice and Charles, Eric has spent enough time working with his organization (over twenty years) that he can speak in detail about the changes that have taken place in the composition of membership, campaign priorities and approaches to individual casework over the history of the group. Organization 7 is a membership-based group, in which decisions are made at meetings. Members come together for a combination of political actions (demonstrations, public legal education) and social events (coffee afternoons and dinners). Eric describes the roles of different volunteers in the organization in such a way that it becomes clear that cooking a dinner is just as vital as painting a banner or getting someone their social assistance payment. A major theme which runs through my interview with Eric is the challenge of getting people to participate in organizing at difficult points in their lives.

Social Movement Casework

Interview participants speak as caseworkers who combine individual service provision with other movement tactics in favour of systemic change. This means that the casework services which they provide are offered in large part for political reasons. Charles states that justice seekers who mistakenly believe they have entered a customer-service relationship with a caseworker are soon corrected: "*Like, everyone deserves to get their money from welfare, but we're doing this for political reasons and we're doing it with you*." Although social movement casework represents an important service to

individual justice seekers, caseworkers offer their help for reasons other than the resolution of individual cases. The relationship between long-term strategic goals and the immediate demands of individual cases was discussed by all interview participants. The few who did not raise the issue spontaneously were asked a general question along the lines of, "What would you say is the relationship between individual casework and your organization's other work or goals?"

Anne refers to the process of reconciling these aspects of her work as "*a bit of a juggling act*". Each caseworker approaches this juggling act in their own way, but as will become clear, the caseworkers interviewed for this study share elements across professional and organizational boundaries. The constant balancing of individual service provision with broader political work is a theme running throughout the interviews and in the discussion which follows below.

We might first ask why a justice seeker would seek help from a social movement organization, especially if, as Charles implies, the caseworker may evaluate the case instrumentally in terms of social movement goals. One factor influencing the decision of justice seekers to seek help from movement groups may simply be the lack of other available options. In their article examining law and organizing in the United States, Scott Cummings and Ingrid Eagly discuss the lack of service options for people who must 'become organized' as a condition of receiving casework assistance: "Are these clients

really interested in being organized, or are they agreeing to do so only because they have no other means of obtaining needed legal services?"[1] We might also ask: If justice seekers *have no other means*, why is this so?

One possible influence is the lack of affordable legal service for members of the public who are ineligible for legal aid but still cannot afford professional help.[2] Several participants have strong words for the current state of legal aid and the private legal services market in Canada. Because of its importance for the overall context of social movement casework, including the lack of available options for people who cannot afford a legal professional, we first take a moment to consider caseworkers' comments on legal aid and its potential influence on the service provision aspect of their work.

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[1] Cummings, Scott L. and Ingrid Eagly, "A Critical Reflection on Law and Organizing" (2001) *48 UCLA Law Review* 443 at 496.

[2] In a recent study, Julie Macfarlane surveyed over 200 self-represented litigants and court staff in Ontario, Alberta and British Columbia about their reasons for self-representation and the needs of self-represented litigants. She reports: "Most court administrators and service providers agree that Legal Aid eligibility is now set so low for family and civil clients that many people genuinely cannot afford a lawyer, yet do not qualify for Legal Aid." Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants: Final Report" May, 2013. Online: http://www.representing-yourself.com/doc/report.pdf (accessed July 16, 2013), p. 40. Macfarlane later suggests that "as the numbers of SRL's continue to rise, we may see some community agencies starting to develop new resources to assist this population." (p. 76).

The Inadequacy of the Private Market and of Legal Aid

When analyzing interview transcripts, comments related to legal aid were grouped under the neutral term "Legal Aid" (see Figure, above). However, it emerges from reading participant quotes that – while no one comments negatively about legal aid *lawyers*, and some of the participants even take legal aid mandates – many feel the system turns away justice seekers who cannot otherwise find casework services because they are excluded from the private services market for financial reasons. Some cite this as a factor in their organizations' workloads. For example, Dana and Evelyn discuss the inadequacy of legal aid and its influence on many of the people who come to their organization for help. Dana states:

> *"So often they are in need of very good services but they don't have the money to pay a lawyer for services and in the province, immigration legal aid mandates are like a joke. They are really, really small. Very few lawyers take on legal aid mandates."*

She goes on to explain that, to the best of her knowledge, legal aid may pay a lawyer a few hundred dollars to complete a Humanitarian and Compassionate Grounds application for a person fighting deportation. The same file takes between 30 and 40 hours for Dana's organization to complete. She estimates the cost of this service, done by a lawyer in private practice, at between $1000 and $3000. This would make legal aid mandates a losing economic proposition for many lawyers. Likewise, Evelyn draws a clear connection between the demand for services of their organization, and the

inability of legal aid to cover all justice seekers or properly compensate lawyers:

> *"[T]he legal aid compensation is so minimal that often people get rejected and they come to our organization. So we often do those services even though the person might be eligible for legal aid for the same purpose. […M]ost of what we do is not covered, except for some exceptions where the fees paid by legal aid are so minimal that lawyers don't invest themselves in those cases."*

Evelyn says she occasionally meets justice seekers who have hired a lawyer, have run out of money to complete the case, and yet remain ineligible for legal aid.[3] In her words, *"five thousand dollars later,"* the individual comes to the organization desperate for assistance. According to Dana, the inadequacy of legal aid eligibility contributes to the already dire situation faced by many justice seekers she meets:

> *"Because people have such a hard time accessing immigration lawyers because of the inadequacy of the legal aid system, I think in this domain especially people are desperate when they get to us, like, 'Please you are the only organization that can take us and you are the only organization that does what you do and there's no way I can afford a lawyer.'"*

Dana contrasts this system, where people are *"falling between the cracks*," against the comparatively "*wonderful*" legal aid regime of a neighbouring province: *"lots more people have access to justice in that system than here, so it's something we would love to have here."* However, this may be a utopian dream. Participants with experience in the province in question

are critical of the system there: Charles states that legal aid offices "*turn people away left right and centre.*" Aaron offers a similar view:

> *"There are thousands of people who are not caught up by the, who are not caught by the legal aid net which is very small and very focused on certain applications, and not much in touch with reality."*

In other conversations, participants raise the strict criteria of access to legal aid as a concern across different types of cases. Anne and Beatrice are lawyers who take legal aid mandates as part of their work. Both state that the financial criteria for legal aid eligibility exclude people who cannot afford a lawyer in private practice and who are forced to look elsewhere for help – even in cases where the justice seeker must appear before a court. Beatrice cites the continuing concern of her own organization over cuts to the legal aid budget. For his part, Christopher situates his organization's work at the heart of cases where people cannot qualify for legal aid, but cannot pay for private legal services. He describes the frustration that some justice seekers express at the presumption that they have "chosen" not to have a lawyer:

> *"When we tell them, 'If you choose to represent yourself, you will become…you are in charge of your file' we often find that they answer: 'It's not a choice, it's because I have no money' or, 'If I had the choice, I would do something else."*

This response is similar to that reported by Julie Macfarlane in her empirical research on self-represented litigants in Ontario, Alberta and British

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[3] This issue among unrepresented litigants is also reported in Macfarlane, *supra* note 2.

Columbia.[4] She has found that, contrary to the assumptions of judges and other officers of the court, self-represented litigants seldom choose to enter legal proceedings without a professional, but are instead forced into it for financial reasons. They also feel resentful of judges and plain-language court guides which tell them that they ought to hire a lawyer, as if this were a real option.[5] In a similar vein, a study of a US legal clinic by Corey Shdaimah concluded that many clients react negatively to lawyer efforts to empower them by handing them greater responsibility for their own files. In her findings, clients exercise a form of "relational autonomy,"[6] preferring to use their decision-making power by choosing to enter a service relationship with a trained professional.

No cause-and-effect relationship between legal aid ineligibility and the caseloads of social movement organizations can be proven empirically based solely on the interviews considered here. However, the anecdotal evidence offered by Dana, Evelyn, Aaron, Charles, Beatrice, Christopher and Anne does suggest that social movement groups which use casework as a tactic simultaneously offer an important service alternative for some justice seekers – regardless of whether those justice seekers wish to work for systemic change. At the very least, the interview responses suggest that some social movement organizations may feel that in making the tactical choice to do

[4] Macfarlane, *supra* note 2.

[5] *Ibid.* at 39 and following.

casework, they also take on the burden of providing legal services for many justice seekers left out of the legal aid system and the private legal services market.

This may have important consequences from an organizing perspective. As Cummings and Eagly have observed, the above scenario is problematic not only from the point of view of individual justice seekers who face a narrow field of service options, but also for groups seeking to organize justice seekers through casework.[7] They remark that it can be difficult for activists to tell the difference between "active members" of a group and individuals who join because it is the sole alternative to self-help or self-representation. Such individually-motivated justice seekers, though equally deserving of a favourable outcome (see Charles' comments above), may represent a waste of effort from a movement perspective if one of the main motives behind service provision is to recruit new activists. Interestingly, Eric Mann writes about the same problem from an organizing perspective. Describing the role of the organizer as "retainer" (a person who encourages people to stay with the organization), Mann explains:

> "…sometimes the job of the retainer is to get the member to reject a 'consumer's' view of the organization through which they approach

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[6] Corey Shdaimah, *Negotiating Justice: Progressive lawyering, low-income clients and the quest for social change* (New York: New York University Press, 2009).
[7] Cummings and Eagly, *supra* note 1 at 496 and following.

> every problem from their individual needs as an outside observer or critic."[8]

This can be a challenge, as explained below.

Tasks and Roles

During the interview, participants were asked about the role of lawyers in their respective organizations, and whether they maintained relationships with lawyers who would assist them from outside. Caseworkers were also asked about the tasks they accomplished in the course of individual service provision, in order to give a picture of what individual casework meant to them.

As suggested in the opening chapter to the thesis, much of the individual casework which takes place in these organizations is not destined for a courtroom, but is instead a matter of navigating administrative processes and negotiating positive outcomes for justice seekers. Eric, who is not a lawyer, first came to his organization as a justice seeker in need of assistance. He offers a vivid picture of how he sees his role in relation to that of a lawyer when conducting a social assistance intervention. Eric explains how he intervenes in a file when a justice seeker has received a negative decision from the social assistance office:

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[8] Eric Mann, *Playbook for Progressives: 16 Qualities of the Successful Organizer* (Boston: Beacon Press 2011) at 23.

> *"But in my case, I try hard to intervene before the* [administrative] *review process, to change the decision of the agent. There, I can do things that a lawyer won't necessarily do. Because I can sit down with the person and really go through the account statements, and find each bill, and find a way to make a document that can be understandable for the agent. You know what I mean…*
>
> Alexandra: *"Even before the decision is made?*
>
> Eric: *"After the decision is made, but before making a request for review, I send a letter that explains all that, and they change their decision without us needing to go to review."*

Asked whether he works with lawyers, Eric replies that when a case is likely to go to a tribunal where only a lawyer is allowed to represent the person, he will generally refer the justice seeker to a lawyer right away. In this case Eric will often prepare the file for the lawyer in order to make it clear and reduce the lawyer's workload. Asked whether lawyers seem to appreciate this service, Eric replies:

> *"I think that there's a feeling of camaraderie in the neighbourhood as activists I think, different community organizations, that we work together. Or that's how I saw it."*

Dana and Evelyn's organization has a supervising lawyer who has more experience with immigration law than either of the two caseworkers. Complex questions are brought to this individual for consultation or to confirm that caseworkers' answers are correct. Evelyn is a lawyer and Dana is not, but in their day-to-day work, they accomplish the same tasks for the organization. Interestingly, both also adhere to the group's internal rule that caseworkers are expected to give legal information, but not advice. Dana

explains that many immigration-related legal tasks can be completed by an unpaid representative who is not a professional, meaning that non-lawyers can do much of the work. She feels that the line between information and advice is difficult to draw in this context, but when training student interns the rule is still reinforced:

> *"So it's kind of in conflict with the* [legislation] *which is like* [in a deep voice and smiling] *"ONLY LAWYERS CAN GIVE LEGAL ADVICE." Obviously, I'm not purposefully giving legal advice but if you are giving a legal argument or I am taking a law and saying "because of this law, this person has access to this" – that's a legal argument. So it's kind of a grey zone, especially in immigration, so that's a challenge. We have training on legal information versus legal advice. We haven't had any problems with students. We do role plays in the training session."*

As a lawyer, Evelyn could in theory give legal advice to justice seekers, but she, too adheres to the "no advice" rule imposed by the organization on its caseworkers. As a follow up to her description of the rule, the researcher asks Evelyn what it means to be an *information* clinic:

> *"Uhm, that's a very good question and we are still struggling with that* [laughs], *but I think it means that our primary goal is to inform the person of their rights and how they fit within the regulatory framework, whatever that may be, and then what their options might be to face whatever situation they are dealing with at that moment. And, that's the information part. Then, when you move a little bit beyond that, sometimes we will actually take on one of those options with the person. But that really depends on whether we have the resources, the capacity at that moment, if the person is going to collaborate."*

Christopher, also a lawyer, abides by a similar directive at his organization. Christopher explains that all of the caseworkers there must be

lawyers, but that the mission of the organization is only to give legal information, not advice. For Christopher, the lawyers-only hiring decision is a good one, because in his view, lawyers are best suited to answering precise questions on civil procedure, and because their professional insurance provides added protection for justice seekers who act on the information they receive:

> *"…it was lawyers that they would hire, even if we don't do any acts reserved to them, because the mission of the organization is legal information. No legal opinions. So it's information on their rights and recourses, but we don't make pronouncements on their chances of success, on the best arguments to use before the court, the best strategies, and we don't revise motions. Except that we go very far in the information, it's still information but it's in all areas of law, it's a lot on procedure, it's a lot on representation before the court. People represent themselves, so they're questions that are fairly precise, so for me it makes sense that we should be lawyers. I think that we can easily become professionally liable when giving legal information and it's more protection for people because we see so many."*

Caseworkers quoted above are aware that there is a difference between being a member of the bar and being a nonlawyer. As explained in the previous section, all of the caseworkers make a distinction between their organizations and a standard private law office or legal aid office. When Eric anticipates that a task reserved to lawyers will be needed in the near future, he refers the justice seeker to a lawyer right away – even if the lawyer and caseworker will collaborate on the preparation of the file. Evelyn and Dana both refer complex questions to their supervising lawyer, who is also the only person at the organization who is authorized to sign documents containing legal arguments. Christopher brings up the importance of lawyers'

professional malpractice insurance for protection of individual justice seekers. He is the only participant to mention insurance.

At the same time, lawyers such as Christopher and Evelyn, who work with organizations which offer information only, not advice, do not report taking on tasks reserved to lawyers. In fact, they describe the lengths they will go to when avoiding those lawyer-exclusive tasks. During the researcher's conversation with Evelyn, she is asked whether she "feels like a lawyer" most of the time at the organization. She replies:

> *"Uhm, for some things yes, for some things no. I think I do more for sort of my reflexes in terms of thinking about a problem or liability issues or professional ethics like those things are still with me, but I don't feel like I am practicing a traditional practice of law at all. Like, I have, so I know what it – I mean I did it in one particular context, there are many different contexts to practice law, but I don't feel like what I'm doing now corresponds to it."*

The caseworkers quoted above give an introductory picture of the roles and assigned tasks of lawyers and nonlawyers in the casework process, and how they can differ from one organization to the next. As mentioned in the Introduction to the thesis, the point in focusing on nonlawyer caseworkers is not to ignore the expertise or professional training and status of lawyers. Instead, the thesis argues that the law and organizing model would be a better reflection of current practice – and better able to address individualization and disempowerment – if it gave greater recognition to the participation of nonlawyers in putting movement legal strategies into action, including

casework. Interview participants' understandings of these roles are instructive to anyone interested in how the line between lawyer and nonlawyer activists is drawn in social movement casework. However, even more instructive are participants' representations of the casework process itself, including opportunities for mobilization, relationships with justice seekers, and the connection between individual casework and systemic change. Below, it will be made clearer that even among nonlawyer caseworkers, concerns about disempowerment and individualization remain.

Involvement of Justice Seekers in the Movement

Jennifer Gordon and the Workplace Project

The dilemma of how to actively engage justice seekers in a movement through casework – without taking advantage of their vulnerability – is important for many interview participants, as will be shown later in this section. In a later paper, Cummings and Eagly review one example of how caseworkers may deal with the issue.[9] Jennifer Gordon is a lawyer who founded the Workplace Project in Long Island, New York shortly after her call to the bar. The organization began as a free legal clinic focused on labour issues, which combined individual service provision with worker organizing.

[9] Jennifer Gordon, *Suburban Sweatshops: The Fight for Immigrant Rights* (Cambridge, 2005: Belknap Press of Harvard University Press). Cummings and Eagly reviewed this book: Scott L. Cummings and Ingrid V. Eagly, "After Public Interest Law" Review of Gordon, op. cit. (2006) 100:3 *Northwestern University Law Review* 1251.

Viewed as a demographic group, the immigrant workers (many of them undocumented) whom Gordon met at the Workplace Project were considered difficult to organize. Joining an activist group and publicly mobilizing against workplace violations represented a significant risk for potential members. However, Gordon writes, "[u]nder harsh circumstances that should have spelled doom for organizing, the Workplace Project built a democratic organization powered by immigrant worker leadership."[10] The organization eventually became strong enough to leave its founder behind, transferring leadership roles from the lawyer to a group of organizers and committee members – all the while continuing to combine individual casework with broader service provision.

Gordon is careful to avoid casting her own detailed narrative as a "model" for how to foster participation through casework.[11] She instead focuses on the complexity of the process, on the tensions inherent in combining casework with other movement tactics, and on several failures in the organizing process which have provoked change in the Workplace Project over the years. It is helpful to compare her account with the descriptions given by caseworkers interviewed for the present project, not just because of the detailed picture Gordon offers of a movement group trying to mobilize new members democratically while offering casework services, but also for the

[10] Gordon, *ibid.* at 112.

[11] *Ibid.* at 117.

conclusions she takes from her experience. Throughout the present section, the reader will find references to two chapters from Gordon's book: "Paths to Participation" in which she describes the means by which the Workplace Project encouraged members to become politically active, and "A Legal Clinic and Organizing" in which she focuses more closely on the tensions which arose between individual service provision and broader mobilization. Both are relevant to the interpretation of participants' interview responses concerning the involvement of justice seekers in their movements.

Gordon's account is also significant for its focus on the casework process, rather than on the professional identity of the lawyer. She approaches the use of casework as a tactic from an organizing perspective. Rather than writing for an audience of lawyers about how they might manage their own roles in an organization, Gordon writes for would-be participants in casework-based mobilization, about how to succeed (and fail) in this endeavour.

One of the ways the Workplace Project encouraged the growth in its membership was by using the prospect of legal services as a means of attracting new people to the group. However, the process by which individual justice seekers were occasionally transformed into active members was complex and difficult. Gordon writes that at one point, while "on paper" her organization counted over five hundred members, only about thirty played leadership roles, while roughly seventy participated regularly "but less intensively," and only a minority of justice seekers who attended an

introductory course stayed on as active members.[12] Yet, one should not discount the success these numbers represent. Organizing justice seekers into active, effective members of a movement group is not easy, especially when the main motivation for many people to first contact the group is an individual problem. Justice seekers who called the Workplace Project for help discovered that they could receive immediate legal assistance, but that as "payment" they would be asked to follow a course on workplace rights and labour history, where an offer of membership would be presented at the end. Membership was not a requirement to receive services – only attendance at the course was mandatory. This was the result of a gradual, reflective process of organizational change where the Workplace Project moved from a traditional legal clinic to a more organizing-focused model of activism.[13] "[…] Project board members decided that the group only wanted members who were truly committed to organizing, rather than those who felt forced to profess such a commitment because they desperately needed help."[14]

To explain the distinction, Gordon uses two metaphors: a *bridge* and a *draw* (meaning a force of attraction). By using casework as a draw, the Workplace Project could attract new members, but this provided no guarantee that members would move on to take active roles in the group. Only when casework could be used as a bridge, bringing new people to organizing, would

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[12] *Ibid.* at 112.

[13] See Gordon, "Paths to Participation" Chapter 3 in Gordon, *supra* note 9.

it truly serve the movement. "We decide that if we ask people to take the Workers Course in exchange for legal services, we will increase the likelihood that the clinic will be a bridge as well as a draw."[15] The group also decided to use traditional organizing tactics (demonstrations, picketing) in its individual casework as an additional "bridge".[16] This was not always successful, both in terms of encouraging participation and avoiding coercion. Gordon admits that people whose cases were resolved before the Workers Course was finished sometimes would not hold up their end of the bargain. She also notes the possibility (as do Cummings and Eagly in their review of her book) that some workers "felt they had no choice but to commit."[17] The process was also not without its critics at the time:

> "One reproving observer said, 'It's as if a church opens up a soup kitchen and advertises that it will feed all comers, but then makes hungry people swear they believe in Jesus before they are allowed to eat.' It would be different, some said, if the demand was made in the context of ample options for representation on a wage claim."[18]

Gordon goes on to acknowledge that for many workers who came to the Workplace Project for casework assistance, legal aid was not an option, nor was hiring a lawyer in private practice. This closely parallels the issue of inadequate legal aid raised by several interview participants and discussed

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[14] Gordon, *supra* note 9 at122.

[15] *Ibid* at 197.

[16] *Ibid.* Note that this is reminiscent of the direct-action casework model described by the Ontario Coalition Against Poverty (OCAP) and cited in an earlier chapter of the thesis.

[17] *Ibid.* at 198.

earlier in this chapter. Gordon thus presents a picture of law and organizing in which casework is used as an organizing tactic with varying success, and where tensions between individual service and collective goals, and between public service and public coercion, are never fully resolved. She concludes:

> "Only if we can remain attentive to the tensions without being beaten down by their persistence or drawn into the illusion that we can resolve them – only if we can find a way to work in their midst – will we realize the rich rewards of the relationship between law and organizing."[19]

The issue of justice seeker involvement in movements is only one way in which these tensions manifest, and as will be shown below, it is a significant concern for most of the people interviewed for the thesis.

Justice Seeker Participation

Active membership is a perennial issue in movement organizations, and it is an important preoccupation for many participants. Encouraging people to mobilize for change is what organizing work is all about. It should not be surprising then, that the involvement, political awareness, and active mobilization of justice seekers is an important topic among caseworkers interviewed for the thesis. During the interview, occasionally the researcher prompted participants to talk about mobilization by asking how justice seekers might become involved in the organization. All of the caseworkers discuss the

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[18] *Ibid.* at 205.

[19] *Ibid.* at 236.

participation of justice seekers in broader mobilization at one point or another, often at length and without prompting.

The mobilization of justice seekers has a varied importance in the different organizations. Aaron, Eric and Charles all speak about how mobilization of affected members of their communities is integral to the casework their organizations do. For Beatrice, Christopher and Anne, involvement of justice seekers is less important to individual cases, but it has a role in broader community organizing. Dana and Evelyn see significant barriers to mobilizing the justice seekers who come to their organization, and seem to have little expectation of people coming to demonstrations and other events. No caseworker spoke of using any coercive measures (such as a total denial of services) to encourage justice seekers to take part in mobilization.

Aaron, Charles, Eric

Aaron, Eric and Charles are the most explicit in their linking of justice seeker involvement, individual casework and mobilization. Earlier in the present chapter, Charles is quoted as saying that, while all welfare recipients deserve to get their cheque, casework is done for political reasons. These three caseworkers each explain how (in theory, at least) they expect justice seekers to play a role in resolving their own cases, and become active in the organization on a broader level. Aaron explains the rationale behind encouraging justice seekers to participate, contrasting it with the scenario of a

caseworker (lawyer, media-savvy activist or politician) handling the case *for* the justice seeker:

> *"What it does is it posits the idea that individual heroes can win things. And that doesn't build collective struggle. That builds the idea that largely white, middle-class men are heroes* [laughs] *and can win things, and that's wonderful for those guys but it really doesn't really reinforce struggle. It goes against struggle."*

Eric offers a different negative contrast, explaining how casework can drain an organization and diminish its political force if there is no encouragement toward active membership among justice seekers. He contrasts his own organization, which freely assists any person in the neighbourhood who is unemployed, with a labour union, in which members must pay dues regularly and may have other obligations as well:

> *"Because it goes together. But when this isn't the case, it means that the more requests for help you have, the more exhausted you get. You don't have a cent more, you don't have any more resources because more people are coming and asking you.* […] *People don't have to be a member. Ok? So, basically in principle we say that we are both, but actually we give service on a charitable basis in reality. It's like charity."*

For Eric and Aaron both, the absence of any obligation to participate creates a problem for an organization seeking to build a movement around a political issue. In this scenario, Aaron sees a lost opportunity to teach about collective struggle. This is reminiscent of Jennifer Gordon's vision for the Workplace Project,

> "that the *experience of service* – the experience that individuals had while resolving the problems that had brought them to the legal clinic – should, to the extent practical and useful to the resolution of the case, be an experience of organizing."[20]

For Eric, if the organization is going to be overwhelmed with casework requests from justice seekers, it should at least be able to turn to these new acquaintances for resources such as work, time, and perhaps even donations.

There is a third concern for caseworkers who have trouble motivating justice seekers to participate in the movement. Eric and Aaron both express concern that an over-emphasis on casework, absent significant justice seeker involvement, may actually change the political orientation of the group over time – with or without an explicit debate on the matter. Eric hints at this when explaining that the group *says* it is both political and service-based, but is actually providing charity.

A similar contradiction emerges in Charles' interview, when we talk about how casework has changed at the organization over the years. Early in our conversation, the political purpose of casework is emphasized:

> *"[…] we work really hard to make it clear that you don't actually deserve this. Like, everyone deserves to get their money from welfare, but we're doing this for political reasons and we're doing it with you."*
>
> […]
>
> "*We're not a service provider. We're a political organization even though sometimes that gets a bit murky.*"

[20] Gordon *supra* note 9 at 200.

The 'murky' aspect of the organization's mission is influenced by the changing role expected of justice seekers, which has been influenced by the organization's success in resolving earlier cases through mobilization. Charles explains that early on in the group's history, caseworkers would emphasize loud demonstrations at government offices. These actions would form a part of almost every casework intervention. Over time, however, as the organization gained name recognition in the neighbourhood, agencies began taking their initial demands seriously and responding without any need for a demonstration. A single letter or telephone call might be enough to resolve an individual case, whereas in earlier years there might have been an action of twenty or more people.

> *"So if we were asking for something that was legitimate it would get dealt with immediately. So, we stopped doing actions in the vast, vast majority of cases. That was a really big change in the organization and in the way we do casework. So now, it's – you start doing casework and it's a lot easier in a lot of ways because you send a letter and you know that like 99.9% of the time, it's going to get dealt with. Whereas, back then, you didn't know that* [laughs]*."*

Although casework has become easier on the caseworkers, Charles can't help but notice the effect that this has had on the group's overall organizing mission:

> *"But generally* [justice seekers] *can just phone the office, and we can never meet them, and you know, whatever they need. Whereas before, there would definitely be at least one face-to-face meeting and people would be expected to come to an action. We would explain the way that we win things, and if people didn't want to do it that way, we would refer them to a legal clinic or you know, and they could go*

> *through the system and it would take six months or a year and maybe they'd win and maybe they wouldn't. So yes, there's been a real shift in our interactions with people. But, certainly I know that when I do casework and I know that's the case for a number of people who do it, we talk to people about politics depending on what's going on in their lives."*

Recall that Charles at first emphasizes that the organization is not a service provider. However, during the above discussion, this changes:

> *"But it also means that we've become much more bureaucratic and those actions were really important for showing people that we can win with direct action instead of simply being a service provider which in some ways the casework part […] has become."* [Emphasis added.]

Aaron has a similar assessment of casework in the absence of active participation of justice seekers (and in the presence of experts – this time on media relations):

> *"We had some people who were really, really good with media, we do have some good relationships with politicians. As a result there was a period where we were doing casework and we were winning cases, and sometimes campaigns more through media and legal means than through mobilization. And I think what it led to was a hierarchicalization in the group, and it led to…it didn't actually lead to us mobilizing more people."*

Again, the experience related by Aaron, Charles and Eric reflects that of the early Workplace Project. Commenting on the downside of legal clinic success in individual cases, Gordon writes:

> "As a result, the Project found itself in the perverse position of trying to persuade workers who had been successfully represented by the clinic that what they had just observed about the efficacy of lawyers was untrue, or at least not as true as the efficacy of collective action – with all evidence being to the contrary."[21]

Gordon describes the experience of justice seekers with the legal clinic as a misguided or unintentional confirmation of the "efficacy of lawyers" – yet neither Charles, nor Aaron, nor Eric is a lawyer. They are all trained, experienced, non-professional caseworkers. Here, as they seem to understand it, the distraction is not "the efficacy of lawyers" but rather the efficacy of individualized casework, regardless of the professional status of the caseworker.

Anne, Beatrice

The organizations represented by Anne and Beatrice have a very different approach to justice seeker involvement from that described above. Recall that Anne and Beatrice both work as attorneys in clinics which combine legal aid work with community mobilization. Asked how justice seekers become involved in the organizing aspect of the group, both describe the organizational structure and the opportunities it offers for members to serve. Both organizations have boards of directors which include members from the community. Anne's organization has a board composed mainly of people with disabilities. Board members help to set the strategic planning for

[21] *Ibid.* at 196.

the organization and can assist in resolving any personal conflicts which might arise between the organization and individual justice seekers. The board of directors at Beatrice's organization decides on new public legal education programs, affiliations with other community groups, and the direction campaigns should take. Positions on Beatrice's board are mostly reserved for people from the neighbourhood served by the organization. There are also spaces for representatives of allied community groups. Within Beatrice's organization, justice seekers can also become involved by attending political events such as marches, information sessions and demonstrations. Information about these events is made available to any interested justice seeker, and through occasional mailings in the neighbourhood.

This is much closer to the traditional community legal clinic model than the experiences related by Eric, Aaron and Charles.[22] Justice seekers in Anne and Beatrice's organizations are able to participate if they wish, but mobilization is not an integral part of the individual casework. The lawyers will still handle individual cases even for people who are not interested in becoming politically aware or active. However, while Anne and Beatrice may appear to occupy a more traditional legal clinic setting, their organizations offer a framework for justice seeker participation in which campaigns are set by boards of directors made up of people who may have no individual cases to resolve. This responds to a caveat voiced by Gordon, based on her experience

[22] For a case study of a traditional community legal clinic, see Shdaimah *supra* note 6.

setting up a non-traditional legal services organization: "a clinic can support a collective strategy, but under most circumstances it should not be the engine for the group's organizing campaigns."[23] She writes that there is a risk that an organization which relies on the legal clinic for campaign inspiration may make bad strategic decisions, as the clinic "absorbs most of the group's organizing resources" and becomes "a tail that wags the dog."[24] Beatrice explains the structure of her board, with its inclusion of community group representatives in similar terms:

> *"It's exactly to get past the case-by-case aspect. Ok, because community organizations have a broader vision.* […] *it's a way to have someone on the board of directors who doesn't have a personal problem – you understand? – who has a broader vision of justice and who can bring different concerns."*

Asked whether justice seekers are required to take part in the organization's activities in order to receive services, Beatrice is adamant that this is not the case. One reason is that when her organization takes on an individual case, it is most often through legal aid, where the justice seeker has a right to service regardless of their level of participation. However, the attitude of non-coercion goes beyond this. Beatrice was not asked directly whether justice seekers had an obligation to participate. The following comments (among others) were made after discussing the board structure and the issue of evictions in the neighbourhood. The researcher asked the

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[23] Gordon *supra* note 9 at 232.

[24] *Ibid.*

following question: *"So, the clients who have files like that, eviction, do they, do they become more involved because of that?"*

> Beatrice: *"But we can't force them, you know, we can just give them the information. Tell them what's happening. And I mean, at the office when they talk about things, we put up notices all the time in the waiting room. We arrange for it to be available."*
>
> […]
>
> *"Because we can't make the service depend on whether people are members of (our organization) or that they participate in our activities. They're two different things. If they want to be members, and they want to have more information, we say that we have a mailing list. We send documents sometimes to give information. We say to them 'do you want to be on the list, do you want more information, or do you know that we are doing this thing? Does it interest you?' If they say, 'look, forget about me, I'm not interested, or yes it would interest me' we leave the choice to them. We don't push it."*

Christopher

Recalling his work with the same organization, Christopher remarks that lawyers will seldom take time during an individual casework interview to promote other organizing:

> *"But it's rare that in the interview with the individual the lawyer will allow him/herself to move out of the individual case to say 'well, come on out to the demo!'* [laughs]. *It's divided – there is a certain distinction. But in general they make an effort to ensure that people know the struggles, there are petitions that are in the office of the receptionist for people to sign, things like that."*

In his current position, Christopher no longer accepts legal aid, but instead offers legal information to justice seekers who are mainly representing themselves. Asked about how justice seekers there might become politically involved, Christopher responds that the lawyers at the organization are aware of a wide array of political causes and organizations. When they realize that an individual justice seeker's problem may have a political (and not strictly juridical) solution, and the person is interested in getting involved, they will refer that person to an activist group working on the problem. While his organization is dedicated to access to justice in a broader sense, it attempts to keep other aspects of its operation "neutral" (in Christopher's words) so that the group can serve the largest possible number of justice seekers in an inclusive way.

> *"It happens when, because of our role in demystifying the system and the role of the system and its limits, but, sometimes we will say to people that this is a political battle and not a legal one, or – if I explain the law and they say, 'that makes no sense, the law has to be changed,' I tell them that it's a political battle. So often we move on from there to say that it takes citizen involvement or you know, sometimes, sometimes it's the workplace and I have the impression that I'm giving a mini course on why it's good to be unionized, or what the role of the union is* […]."
>
> […]
>
> *"When it's political we try to refer them as much as possible. It depends a lot on the person in front of me but it's certain that I will refer when it is possible."*

Though it may stay at arm's length from most political causes, of the organizations involved in the present study, Christopher's group may be – unintentionally – the most coercive when it comes to requiring justice seekers

to participate in resolving their own cases. Its mission is to foster access to justice, but with services limited to offering legal information, listening and research tools. Christopher's organization does not take on justice seekers' cases as a representative. Recall the earlier comment of a frustrated justice seeker at the organization who says that self-representation is not a choice where legal services are unaffordable. The lack of available options for justice seekers means that the refusal of Christopher and other lawyers at the organization to do direct representation of justice seekers (whom they call "clients") has the consequence that those justice seekers have no choice but to be responsible for their own cases or seek out an alternative organization for help. Christopher explains this aspect of the mission as a means of encouraging client empowerment – a topic discussed in greater detail elsewhere in the present chapter.

There are many possible reasons for why a justice seeker might not wish to become involved in a political movement, even if they are assisted by a social movement group with an individual case. The question posed by Cummings and Eagly, and by Gordon – whether a person is getting organized out of real commitment or because there is no other alternative – is an important one for caseworkers to consider. It may be that most people, given the chance, would rather have a caseworker or lawyer deal with their problem and let them get on with life. Speaking frankly about his efforts to recruit new

volunteers, Eric suggests this may simply be a condition of our present-day society:

> *"I think that most people in society aren't likely to get involved anyway. It's like that in any group in the population. There is a minority of people who are likely to do it. Certainly if you don't make the effort, even they won't get involved* [smiles]. *So, it's worth it to make the effort, but the majority of people come to fix a problem, and once the problem is fixed, it's over. And that's like other areas too. Student associations, unions, people have a grievance but the ones who get involved on a regular basis are always a minority."*

Working with People in Crisis

Eric's understanding may be shared among many who believe that in an inherently individualistic society, it is difficult to encourage collective participation in any long-term political struggle. At the same time, the caseworkers raised another possible explanation for why a person might not be interested in mobilization – even for a cause directly related to the person's individual problem. According to several interview participants, mobilization of justice seekers is impeded by the fact that people who come to the organization are often in the midst of a crisis. They simply do not have the ability to devote any more energy or time to a political cause. For several caseworkers, the very same problems which would attract justice seekers to the organization form important barriers to subsequent participation in the movement. Beatrice and Charles discuss the issue of working with people in crisis in similar terms. Beatrice explains:

> *"People are in difficult situations, and it's urgent because what we do is family law, that's always emergencies and emotions, and it's always something. Or, social assistance law, meaning that people aren't getting the benefits they are supposed to have. It's often that. So, it's the means to make a living and to survive. They don't have any money. They're being cut off. So, we can't say 'I'll take care of it in a week.' He doesn't have his cheque. I have to take care of it now."*

Similarly, in earlier years in Charles' organization, the standard time frame to resolve a case was one week. Any more time, and the case would be considered a failure. Charles discusses how occasionally the politics of the organization must take a back seat to more immediate concerns:

> *"So, sometimes people are in such crisis that there's no way to engage people.*
>
> […]
>
> *You can't fight for band-aid solutions. It's important to fight for widespread change, but at the same time people are in crisis, they don't have food, arbitrary loss of $17 bucks per month for some stupid reason for someone with a welfare cheque can be really devastating."*

For Christopher, *"We're dealing with emergencies, so we're at an individual level,* […] *until there is a new problem."* Aaron puts the issue of individual crisis in even starker terms:

> *"I think by and large people come trying to make sure they can eat tomorrow or they won't, or they and their families won't get removed to poverty or death."*

Both Evelyn and Dana report that justice seekers who come to their organization, often to fight deportation or 'removal' from Canada, are unlikely

to become involved in broader movement activities because of the difficulties experienced in their own lives, and because of the risk of joining. It is a point Aaron understands. In his words, *"joining an organization just makes life more dangerous."* Above, Dana is quoted as saying that justice seekers are often "desperate" when they arrive at the office. Asked whether justice seekers ever become involved in broader organizing, she responds:

> *"People without status, I mean, people who are working toward getting status, they feel more temporary, and in their daily lives they have so much to think about – so many stresses, and also if they are non-status, then going to a* […] *march, I think they are a little scared. Even if it would probably be ok there is still a reluctance to get involved. So, we haven't really pushed that far. I would love to kind of explore that a little bit more."*

Interviewed separately, Evelyn agrees with her colleague:

> "Alexandra- *do clients seem interested in the broader policy? Political stuff?*
>
> "Evelyn- *Not really* [laughs]. *They seem more discouraged and depressed than anything else. They'll never - I've rarely had a client who wanted to enter a discussion."*

Evelyn, Dana, Beatrice, Charles, Christopher and Aaron all express sensitivity to the frustration and fear of justice seekers who require assistance with their problems but are unable to reciprocate the help of the organization by getting involved in the movement. All six caseworkers quoted above seem to understand that they would be demanding too much of justice seekers, were they to require participation in political activities as the price of service. All of the interview participants, regardless of professional status or political

orientation seem to understand the same thing about justice seekers: "*They see themselves as at a dead end and they want someone to help.*"[25]

Caseworkers and Justice Seekers Together

The present chapter does not examine law and organizing from the perspective of justice seekers themselves. Instead, this chapter focuses on conversations in which caseworkers describe their understandings of the work that they do. This process includes discussions of caseworkers' perceptions of justice seeker expectations and the interaction between those expectations, the organizational mission and movement politics. What emerges from these conversations is an image of a caseworker-justice seeker relationship in which both parties are conscious of the power imbalance between helper and helped, but where there is space for negotiation and resistance on the part of justice seekers. Below, issues of trust, negotiation and resistance are examined with reference to an empirical study conducted by Corey S. Shdaimah, which focused on a single community legal clinic in the United States.[26] The following section examines the overlapping themes of justice seeker expectations, empowerment of justice seekers, and interpersonal relations between justice seekers and caseworkers.

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[25] Interview with Aaron.

[26] Shdaimah *supra* note 6.

Corey Shdaimah and Northeast Legal Services

Caseworkers' respect for the inability of many justice seekers to get involved in political work (or even in their own cases) while experiencing a crisis reflects a similar experience related by Shdaimah in her study of progressive lawyers working in the United States. The qualitative study provides a point of reflection and comparison for the understandings of caseworkers, as interpreted in the present thesis. Shdaimah adopts a perspective which is grounded in the experiences of lawyers and clients at a single law office. The overarching themes of *Negotiating Justice* include client autonomy and the ways in which idealistic progressive lawyers may seek to foster that autonomy – at times meeting resistance from clients. Shdaimah explains:

> "In an ideal world, clients would not need lawyers to be heard or to legitimate their positions. Clients in this study, however, bear witness that such is not the case. Having a lawyer gives them leverage and an ability to navigate the legal system more effectively. It is hard, then, to view obtaining and relying upon legal representation as an abdication of autonomy, even though there is certainly loss of control and the danger of manipulation of which attorneys and clients must not lose sight."[27]

Shdaimah interviewed lawyers and clients involved in a low-cost legal services office in the US about their mutual expectations of the lawyer-client relationship. Shdaimah situates her study within the American tradition of progressive lawyering, which emphasizes the importance of client

empowerment, as well as the notion of collaborative lawyering – concepts familiar to law and organizing scholars. The expectation placed on progressive lawyers in the literature is that they will work to demystify legal processes and institutions, and that they will help clients to gain some legal skills during the experience. Jennifer Gordon's ambitions for law and organizing at the Workplace Project, described earlier, reflect this mentality, as do examples cited in earlier chapters of the thesis.[28]

Under a collaborative lawyering approach, lawyers foster empowerment when they downplay their specialized knowledge and ask the client to accomplish certain tasks essential to the resolution of the case. Part of Shdaimah's project was to compare the academic ideal of lawyering for autonomy and empowerment with the grounded practice of lawyers in the field. Her research findings challenge some of the beliefs expressed by progressive legal scholars about how the lawyer-client relationship should operate in a practice serving people with low incomes. Several clients of the legal clinic Shdaimah interviewed explained how happy they were to leave their files entirely in the hands of the lawyer. Lawyers in her study spoke of their need to occasionally take over tasks for the benefit of the individual

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[27] Shdaimah *supra* note 6 at 85.

[28] For examples of collaborative, or "rebellious" lawyering, see e.g. Gerald P. López, "The Rebellious Idea of Lawyering against Subordination" in Susan D. Carle (ed.) *Lawyers' Ethics and the Pursuit of Social Justice* (New York, 2005: New York University Press) 187; Peter Gabel and Paul Harris, "Building Power and Breaking Images: Critical Legal Theory and the Practice of Law" (1982-1983) *N. Y. U. Rev. L. and Soc. Change* 369.

client, rather than treating each case as an opportunity to teach about law. They described the tension that can arise between the collaborative lawyer's mission of client empowerment and the service expectations of clients. Consider, for example, the comments of two lawyers whom Shdaimah interviewed:

> "We talked about a study in [my] professional responsibility [class] that says clients don't want autonomy. They came to you because they don't know what to do and they want you to give them some sort of advice and they want to follow that advice. I don't know that that's true, but I think that's one side of it, that maybe clients don't want this autonomy that somebody's forcing it upon them."[29]

> "'I don't want to do that…You're a lawyer, you do that. That's why I'm calling you.' I think it's perfectly appropriate for me to say no. I'm not going to help you. And part of it, and a piece of it is, this time management thing…and that I don't want to work on this thing…But part of it is the empowerment thing and I'm not going to enable you not to have the experience of being able to solve your own problem and learning from it. Because I think that, I guess I can't really frame it in a nonpaternalistic way. So that's just paternalistic and I'm not sure that just because something's paternalistic it's wrong."[30]

Shdaimah, like Southworth, concludes that it is perfectly rational for a client to prefer handing the case off to a lawyer, rather than working to become more empowered and autonomous. Like the frustrated justice seekers who occasionally approach Christopher at the organization, sometimes people may just wish to have a service like any client with the means to pay. As will be

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[29] "Vicki" - interview participant quoted in Shdaimah *supra* note 6 at 71.

[30] "Pete" – interview participant quoted in *ibid.* at 73.

explained below, the relationship between caseworkers and justice seekers is not unilaterally dictated by the caseworker.

Justice seekers engage in resistance and negotiation with caseworkers over the limits of service and the kinds of tasks the caseworker will do. This is significant for law and organizing scholarship. When justice seekers and their own individual needs and expressed wishes are thrown into the equation, it is unclear how much control caseworkers (lawyers or nonlawyers) have over the service relationship and their own role – beyond the ultimate possibility of refusing service entirely. Both lawyer and nonlawyer caseworkers interviewed for the present thesis described finding themselves in situations where they must adapt their practice style to the expectations and demands of justice seekers, often in order to build trusting relationships.

Building Caseworker-Justice Seeker Relationships

Interview participants spoke not only about conflict and negotiation, but also about the establishment of trusting and respectful relations with justice seekers over time. This process involves understanding the reasons why a justice seeker may prefer to be treated as a recipient of services rather than as a partner in a movement. In the view of some caseworkers, systemic factors such as the inadequacy of social services, as well as prior experiences of justice seekers who have been made to feel powerless by other service providers, can have an influence on initial expectations. This is in line with

Corey Shdaimah's findings in interviews she conducted with clients and lawyers at the legal services office. She suggests that there is empirical research to support the view of caseworkers interviewed for the present thesis, that empowerment, respectful treatment and encouraging the active participation of justice seekers all have political importance:

> "Lawyer-client interactions can be a significant counter-action to the demeaning experiences that clients have with the bureaucracies. […] In addition to the ethical imperative, treating clients with respect may also have broader political significance. According to political learning theory, bureaucracies teach citizens lessons about agency and their ability to influence the political process. […] To the extent that clients in [Shdaimah's] study perceived agencies as responsive to their claims after securing the assistance of an attorney, their experiences with NELS's attorneys may mitigate the lessons taught by capricious, unresponsive or disrespectful agencies."[31]

Beatrice explains this phenomenon from her own perspective, based on her interactions with justice seekers who have had difficult experiences with social assistance and other government agencies:

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[31] *Ibid.* at 117-118. In the omitted passages, Shdaimah describes a study on political learning theory: "In Joe Soss' (1999) research with beneficiaries of two different government benefit programs, Aid for Families with Dependent Children and Social Security Disability Insurance, he found that participants in welfare programs who were treated disrespectfully and arbitrarily had lower estimations of their ability to influence agencies and effect any kind of political or systemic change. These individuals were less likely to challenge caseworkers or lodge complaints and were less active politically as measured by voting behavior." Shdaimah, *supra* note 6 at 117-118, endnote omitted, citing Joe Soss, "Lessons of Welfare: Policy

> *"Often, people come to see us – for example if they had a problem with social assistance or a problem with another government agency – often they are extremely frustrated because they were treated as if they were beggars, or worthless. So they arrive here enraged as if they haven't been heard and are being ridiculed. As soon as you reverse that, then with the person it's more like you can talk between equals. You respect them, they will respect you. And we're able to say 'here you're right, the law says that, but this I can't do.' We outline what we will be able to do and what we won't be able to do. For the rest, it depends. It depends on the people."*

Previous experience with government agencies and lawyers, either in the private market or legal aid, is cited by several caseworkers as an influence on justice seekers' subsequent relationship with them. Anne says conflict between clients and lawyers at her office happens "*all the time*." Explaining that the "*vast majority*" of justice seekers at her organization live in poverty, she continues: "*a lot of our clients have been a bit beaten down by the system – sometimes they'll view us as part of the system, rather than an ally.*"

Christopher describes a similar scenario, where justice seekers from a variety of economic backgrounds (often 'too rich' for legal aid) approach the organization having felt ignored or rejected in other service relationships or when appearing before tribunals. His organization cites empowerment and listening as core parts of its mission to promote access to justice:

Administration, Political Learning and Political Action" (1999) 93 *American Political Science Review* 363.

> "*And they often have the feeling that they have never been listened to by the judge, by their lawyer, by the other party, by the lawyer for the other party, so often it's the first time that they find a listener here. Not because we're so great. It's just that in the legal system…* [we chuckle] *…no, but probably if they went to another place in the community they would be listened to, too. But in the judicial system I think that it is one of the biggest problems, the fact that, in theory we have the right to be heard, but we aren't necessarily listened to. So, here it is the support that we give. It's what I love. The connection with people. It's one of my strengths – before the court I can't say that I'm completely comfortable."*

Aaron, who is not a lawyer, says his groups avoid using the word 'client' to describe justice seekers, for reasons related to the type of experience described by lawyers Anne, Christopher and Beatrice. Aaron believes that there is a hierarchical notion to the word 'client' which places the justice seeker below the caseworker, and that this is part of the overall negative experience which can disempower people who approach government agencies and law offices for help. So, the choice of language matters. Charles also equates the description of justice seekers as 'clients' with a form of disrespect, where 'client' is a "*really clinical and oftentimes demeaning term that removes agency from people.*"

However, the Charles and Aaron's linguistic choice does not necessarily change the way justice seekers see *themselves,* and both caseworkers seem aware of this. Asked how justice seekers might perceive their own status when approaching an activist group for help with a case, Aaron replies:

> *"I think they generally come to us as clients. Feeling as clients. I think that that's what they've dealt with the whole time that they've been here in Canada. Or, if they're Canadians on welfare then that's what they've dealt with. I think they deal with service agencies every day. Some of them have a huge experience, right? Like, some of them…sometimes you'll get people who know the law almost as well as you do just because they've been through the system so long. And I think they see themselves as clients."*

Aaron cites reasons why justice seekers may feel the need to act as clients seeking a service, and why opposing this tendency through collective organizing is a political act in the view of the activist organization:

> *"I think we do have to come at it from a collective organizing viewpoint. Like, we're not here to help you, we're here to work with you, to work on your own case. But even then, sometimes it's so ingrained, like everything's set up like, my God – you know this from doing work with immigrants. We have a machine that just treats them like clients, takes every penny they earn while they're here, then spits them out the other end. And, you know, with some exceptions, but less and less of those exceptions will be ever poor people or working people from the global South. And so I think they get trained in that mentality. And I think…I don't know, I've lived in this country my whole life, but I think just coming from the Global South to the Global North you're also trained in that even back home. And you know, sometimes people just come out of amazing movements and resistance and so they're already here, angry, and you know, or like with the feeling of solidarity or whatever, but I just think the power is so built against them that it's hard to overcome that training."*

Evelyn and Dana offer similar descriptions of justice seekers' early experiences with legal services and their efforts to counter the influence of negative casework relationships. Evelyn explains that justice seekers come to her organization with expectations of how the casework relationship works –

including the relatively short amount of time and attention a lawyer can usually devote to an individual meeting with a justice seeker. Building a trust relationship at Dana and Evelyn's organization involves devoting sufficient time to each case. Evelyn, a lawyer, contrasts her work with other lawyers' approaches:

> *"I guess maybe because they've experienced something else with lawyers already that is maybe different from their experience here. Uhm, because also as I mentioned before, the time spent, because it's not litigation, also, there's not that adversarial approach to things that's often associated with lawyers, so I think that maybe that's, that can also be a part of it."*

At the same time, justice seekers readily assume that Evelyn's answers are correct - regardless of her own degree of confidence - if they happen to learn of her professional status as a lawyer:

> *"But it's true that also when they know that I'm a lawyer sometimes, they'll, I can tell, the trust will come – they'll tend to be more sort of, to think that I must be right* [laughs]. *But I could be wrong. I could make mistakes like anyone. I make mistakes like all the time, like anybody else and I think that people are still very impressed by that title."*

Caseworkers appeared interested in the perceptions of justice seekers who come to them for assistance. Earlier in this chapter, the barriers to participation of justice seekers in social movements were discussed, with particular emphasis on the difficulty of becoming politically mobilized in the midst of a personal crisis. While scholars such as Cummings and Eagly, and Gordon have discussed the role of coercion and incentives in fostering

mobilization, the discussions offered here suggest that relational factors such as respect, trust and justice seeker expectations are also significant.

Asked about the most important things to keep in mind when doing casework, Charles responds as follows:

> *"Well, I think treating people with respect is the primary thing. And not losing the political reason for doing it. And also I think a lot of agencies work to keep their workers from becoming emotionally involved and that's not the way that we approach casework. And I think it's important that we don't approach casework that way, that we become friends with the people that we're doing their cases. Some people – and not everyone obviously and probably not the majority of people – that we know them and we work with them and that there is a mutual respect between caseworkers and the people that are bringing cases forward."*

Evelyn and Dana both describe how relationships of trust develop between caseworkers and justice seekers at their organization. For Dana, who echoes Evelyn's comments above, trusting relationships take more time to develop than is available to lawyers working in the private market or for legal aid:

> *"I think for our clients there has to be…we often go beyond the mandate of giving legal information because we tend to develop trust relationships with our clients over many, many years sometimes. They feel comfortable with us. We give them so much more time than the lawyer would ever, could ever do just because lawyers have crazy caseloads."*

During a discussion about the types of files the organization accepts, Evelyn remarks that they will sometimes take on a Pre-Removal Risk Assessment, even if that is not a task that the organization normally does. This

usually happens, Evelyn explains, when the group is already completing a Humanitarian and Compassionate Grounds application, which *is* within their broad mandate: *"we might just do it because we know the client and they are vulnerable and often we have trust with them. Even though PRRAs aren't really what we do,* […] *we'll do it,"* Evelyn says. As a follow-up question, the researcher asks how trust is established between caseworkers and justice seekers. Evelyn responds in a similar vein to Dana, emphasizing the importance of giving time to the individual:

> *"I guess it takes time and also when they see how hard we work for them and how we go harassing people for letters and I think the time, the fact that we spend two hours with the client. And the time, several times during the application, whereas they're used to having fifteen minutes with the lawyer, or an hour. I think that also helps to build trust. And just diligence, and maybe also the fact that we look at the person – we look at other aspects of their needs. We don't just focus on their question. We might ask them about other stuff in their lives, try to deal with that as well. Try to find housing for them. So, I think that kind of global approach, also it helps to feed the trust and to build trust in the relationship. And maybe the fact that we're free?* [laughs] *I suppose that that's got to be a factor because they see us work so hard and we're not getting any money, so they realize the motivation is not monetary. It comes from another place, and I think that's also a contributing factor. The motivation is basically a sense of justice and compassion and I think that feeds the trust also with them."*

Justice seekers may exercise a degree of autonomy and personal power to push for more extensive services, as Shdaimah has found, but some caseworkers interviewed for the thesis see this desire as the product of disempowering systemic factors which they must oppose as part of their political work. Opposition may take the form of a change of language, as when Charles and Aaron consciously choose *not* to refer to people as clients.

It may involve putting complaint resolution in the hands of community members as in Anne's organization, where complaints are referred to a board of directors composed of members of the disability community. It may be more subtle, less adversarial, as when caseworkers actively demonstrate that they are different from the rest of "the system" – by giving more time, by speaking to justice seekers with respect, by becoming *friends*. These tactics are in line with the political tenets of collaborative lawyering, where the client-lawyer hierarchy is viewed as a politically-charged barrier to be overcome. Considering the responses of the caseworkers quoted above, and in light of Shdaimah's and Gordon's respective findings, it appears that a mismatch of expectations of the caseworker-justice seeker relationship lies at the heart of conflicts over available services. As shown above, this conflict is present whether the caseworker is a lawyer, like Beatrice, Evelyn, Christopher and Anne, or a non-lawyer like Aaron, Dana, or Charles. The comments of the caseworkers cited above are indicative of the continuing challenge they face when they try to shape their relationship with justice seekers. The following sections examine the shape of justice seeker resistance against caseworkers' attempts to offer a different kind of legal service from what they are expecting.

Empowerment and Resistance

Christopher is the only participant who speaks of empowerment explicitly and without prompting during the interview. Empowerment is a central part of the mission of Christopher's organization, and in his opinion, it is fostered when justice seekers who come for guidance are given tools to solve their own cases – rather than the full services of a caseworker representing them. Let us revisit for a moment the quote from Christopher's interview cited partially above – about the frustration justice seekers experience at being told that self-representation is a choice. The context of the excerpted quote recalls the experience of clients and lawyers related in Shdaimah's study. Christopher explains:

> *"Empowerment means that the person remains in charge of their file, so we try to give them tools so that they can represent themselves if it's their decision, and we tell them that we won't play the role of lawyer. It's up to them to know all the rules, that we can do an overview but we won't accompany them in every step of the procedure. So it means that we don't do it for them but we try to give them the tools so they can do it themselves: like models, explanations, all of that, of course when we tell them, 'If you choose to represent yourself, you will become…you are in charge of your file' we often find that they answer: 'It's not a choice, it's because I have no money' or, 'If I had the choice, I would do something else,' But for the moment, it's kind of like that, that we see empowerment and the fact that they can use the computers and afterward put into practice the information we give them."*

There is an evident contrast in this quote, between Christopher's organizational definition of empowerment and the emotions expressed by the person whom the group would like to "empower" through shared legal

information. A similar resistance can occur when Christopher tries to refer justice seekers to outside organizations for more complex cases. Although Christopher's organization sees referral as an important service in itself, some justice seekers perceive it as a way to get rid of people and try to resist being sent to a new organization. The caseworker must in turn adapt the referral process to anticipate this reaction. Christopher explains:

> "*But we refer to someone who would be able* […] *because often, people go all over the place and arrive at our office really unsatisfied because it's already been several calls. If we refer them again, we become just another person who uhm… gets rid of people, so we want people to call us, and to give the right reference. The idea is that either it's the right door, or they'll knock on a second door and it will be done. Sometimes when people call they are frustrated to get a referral, but we say 'call* […] *and if it doesn't work, call us back*.' "

Charles relates another experience of conflicting expectations between justice seekers and caseworkers. Again, let us revisit an earlier quote, now placed in its broader context:

> *"Like, everyone deserves to get their money from welfare, but we're doing this for political reasons and we're doing it with you. You have to do these things that we can't do for you and if you can't then…*[trails off]
>
> Alexandra: *Like what sorts of things?*
>
> *An obvious one is when people want* […] *a benefit you can get if you're moving, or if you need furniture, and there's a set number of circumstances where you can get the money. And so some people demand that we get it for them and we're like 'No. Here's how you apply for it. You apply for it. And if you get told no, call us, and we will work with you and we will try and get you that money.' But we're not going to write your application. We're not going to ask for you. You have to do that yourself, and if you're not going to do that yourself then we're not going to help. Sometimes there are extenuating*

> *circumstances where someone has an intellectual disability or a number of things where we actually will sit down and do that with them, but that's folks that actually need it and it's not about them being entitled to it. It's about mutual aid and us working with people to make sure that they get what they need."*

The researcher infers a different tone in the comments offered by Charles from that expressed by Christopher. While Christopher frames the limitation of services in the positive terms of empowering individual justice seekers, Charles appears prepared to refuse to do certain tasks not in order to foster individual empowerment, but because of an implied belief that justice seekers already have the necessary autonomy to complete the task. Moreover, it is a waste of the organization's resources to do a task which does not assist with collective organizing and the other political ambitions of the group. Charles speaks in terms of mutual aid and an absence of entitlement (and thus an implicit belief that justice seekers are already empowered to a degree), whereas Christopher speaks directly about empowerment, which he sees as fostered by his refusal to go beyond giving people the 'tools' to resolve their cases themselves. Nevertheless, for the justice seeker, the end result is the same: denial of the service that they seek.

Justice Seeker Expectations and Negotiation of Service Terms

One might expect that the ability to withhold or withdraw services would give a caseworker a great deal of power in relation to justice seekers, especially in a climate where few affordable alternatives exist. At the same time, refusal of service does not appear to be an easy option from the point of

view of the caseworkers interviewed here. Caseworkers describe a line which their organizations will not cross in terms of the types of services offered. However, the consistent, unilateral imposition of this line is not always successful. Justice seekers challenge it in various ways. Sometimes resistance may come as an attempt to change the way the caseworker frames the interaction, as in the verbal resistance of justice seekers against Christopher's description of self-representation as a choice. Charles says that some justice seekers threaten to try to get the organization's funding cut, or demand to see "the boss" (Charles assures the researcher that "*There is no boss!*") when they are unhappy with a caseworkers' refusal to do some tasks. A similar resistance emerges in Evelyn and Dana's organization, where caseworkers offer information, but generally will not give legal advice. Justice seekers will still try to tease out a morsel of advice, even after learning of the limitations placed on casework services by the group. Even when the limitation is framed positively as a presentation of options for the justice seeker, this is met with resistance. Dana, who is not a lawyer and therefore is not allowed to give legal advice, explains:

> Dana: *"[O]ften clients will be like, 'just tell me what to do! I'll do whatever you say is right!'* [laughs] *'Well, all of these options are available to you,' so it's a fine line every day."*
>
> Alexandra: *"How do clients respond when you say 'All of these options are available to you?' "*
>
> Dana: *"Yeah. They're still like, 'Tell me which one is the best' "*

Dana insists on letting justice seekers decide their own best course of action, unless they are put in contact with a lawyer who will advise them – but she understands that the mantra of "*legal information only, not legal advice!"* is not what draws people to her organization much of the time. The lawyer Christopher has a similar experience when trying to enforce the information/advice line in his own organization:

> *"We can argue over whether it is a legal opinion. They say, 'no, but I don't want to have your opinion. I just want to know if in general, that's something that works well' and then they ask a different way, and another way. So sometimes it's necessary to say, 'any way you ask me the question, unfortunately it is a legal opinion and I will not answer.'*

Case selection is not always based on clear criteria. This means that there is room for negotiation of the tasks that caseworkers will take on. Just as Charles may prepare certain forms for justice seekers when a disability prevents them from doing so, other caseworkers will sometimes stretch beyond organizational missions to assist a person who asks them for help. For example, Aaron's migrant rights organization has "clear criteria" – but this is not as certain as it first sounds:

> *"We have clear criteria in "ORGANIZATION 2". Which isn't to say we don't have problems and that we may not change that criteria* [laughs]. *Uhm, our criteria in "ORGANIZATION 2" is that the case either needs to be a member, like someone in the group* […] *The other is if they're not within the organization, will the case either forward a campaign, or forward an alliance-building or a relationship with a new community that will forward our organizing."*

While this may at first appear to be a clear outline of case selection and service criteria, it is difficult to see how a case would fail to meet the criterion of forwarding a relationship with a new community. Aaron ruefully admits that the criteria have been a topic of debate in the group, and might be subject to change in the future. When asked to describe the case selection criteria for the other organization, the anti-poverty group, Aaron responds that it is "*more nebulous*" than the criteria of the migrant rights organization. Eric offers an equally ambiguous set of criteria for his organization:

> *"It's not a firm thing, but in general, for example we do* [identifies territory]. *It's not outlined strictly, but in general every organization has its territory, and we put it in our mandate. For example, our mission, the priority is to serve people on social assistance, but also in related situations. Mainly social assistance, mainly* [territory]. *But if we have the time, we work for people outside of that also. If people are members though, even if they are wherever, they will have a priority. The membership is a card for five dollars and you have to support the goals."*

Asked about their own case selection criteria, the community lawyer Beatrice acknowledges that while the group applies legal aid criteria when deciding which cases to take on, they have a *"broad interpretation"* of those criteria. Anne's organization also uses legal aid criteria to determine which cases they will accept, but they leave open the possibility of exceptions to the rule. These exceptions are determined by the board of directors, composed mainly of individuals from the disability community who have a direct interest in the political work of the organization. The board can decide to give an "exemption" to a justice seeker ineligible for legal aid, meaning that the

individual can be represented by a lawyer for free, though they may have to pay for disbursements.

Recall that Dana and Evelyn's organization is staffed by a combination of lawyers and nonlawyer caseworkers. In spite of its core mission as a legal information clinic, the group *does* take on time-consuming individual cases such as Humanitarian and Compassionate Grounds applications and Pre-Removal Risk Assessments, when there is already a trusting relationship with the individual. Nevertheless, when asked near the beginning of the interview what kinds of cases are taken on by the organization, Evelyn responds with seemingly restrictive case selection criteria:

> *"[W]e think it's advisable to see a lawyer in most cases. So that's usually our first reflex. If the person for example is low income, or if the question is fairly simple and the person can't afford a lawyer or it's too simple for being worth hiring a lawyer, we might take it. If there's no other resource available to that person.*

Evelyn and Dana decry the number of justice seekers left out of both the legal aid system and the private legal services market. They are well aware of the proportion of people coming through their doors who have been excluded from both systems. In "restricting" services to only those who have low incomes and have no other legal services available, the group actually is describing the exact profile of the average justice seeker who asks them for help. The conversation continues:

> Alexandra: *Do they ever say "well, you're a lawyer…"*
>
> Evelyn- [She smiles] *Well, they don't necessarily know.* [Alexandra- "OK." And we both laugh] *Sometimes they might ask and I have to explain that we are a legal information clinic, so our priority is to help people to find the information they need to be able to access the resource they need. And that we exceptionally will take on cases. It's sometimes difficult to explain why we make those exceptions for people because everyone feels that they should enter the exception and the criteria is not set in stone. It's not written down, like, anywhere. Well, we have informal policies about the kind of cases that we might take and that we might not take, but it is kind of difficult sometimes to justify not taking a case.*

In this instance, Evelyn's status as a legal professional seems to place her in a more vulnerable position than a caseworker who is not a lawyer. When she states that the justice seeker should probably consult a lawyer, those who know Evelyn's professional identity may see this as an opening to ask her to take on the case. Her response to this possibility, as she coyly explains, is to conceal her status as a lawyer. This is a first line of defence, as it appears from her description of the criteria that case selection is often a matter of negotiation and may even require justification to the justice seeker – who may by this time be desperate for help. Evelyn and Dana's organization is a not-for-profit, independent group with no formal obligation to serve the public. The caseworker is in a position of relative power because of her advanced knowledge of the immigration system and, in Evelyn's case, her professional status. Yet, Evelyn appears to feel vulnerable to resistance on the part of justice seekers who want to push her to do more for their own cases.

As Shdaimah has argued, seeking professional (or in this case experienced and trained, not necessarily professional) help with a case can be an important sign of strength for a person in difficulty.[32] The caseworkers quoted in this section all express a feeling that their services are up for negotiation. Despite their ability to refuse services, they have trouble saying no. Pressure from justice seekers may even extend to the long-term strategic decisions and leadership of the organization. For example, after talking at length about the expectations of justice seekers in his organization, Christopher speaks of the group's mission and how he would like services to expand in the future. Like Dana and Evelyn's group, Christopher's organization does not give legal advice, but he believes a greater variety of services might be possible in the future, including legal advice:

> *"When we were talking about legal advice, I think that could be an interesting example of legal advice that we could do, editing their motion. Because for the moment, we don't edit anything. It's as if it was a ball of fire. We can't touch it because as soon as we get involved in it…it's all messed up! They might have the model* […] *in a lot of cases, the motion is better than it would have been without us, but there are so many things to change, and I think that it could be an important service we could do…layout, making sure the conclusions are in the form of a conclusion and not…You know, not everything is in the models and it's a knowledge that we have, we're capable of doing it. We don't do it just because it's the mission of the organization. But that mission, it comes back to the line from before, which is difficult to draw."*

Meanwhile, Charles speaks of a personal connection with the justice

[32] See discussion of Shdaimah's findings on client autonomy, above in the present chapter.

seeker which makes it difficult for a caseworker to refuse, even when a justice seeker is resisting angrily. Asked whether a particular person in the group handles conflict or complaints, Charles responds:

> *"The caseworker should resolve it and if they can't then, there have been- The most extreme case- There have been a couple of really, really extreme cases where a single man who has, obviously has some mental health issues and that becomes really complicated and really hard, and we try and deal with it the best we can, but there have been times where we've felt like this person is a threat to people in the office's safety, or a specific person in the office's safety. So we mostly just work to deal with that and stop engaging the person at that point, where "Here's a legal clinic and good luck, but we can't help you with this problem once you threaten to kill one of us or refuse to leave the office then…"*

> *"Those are like the really few and far between and the really extreme. I can think of like, three or four people in ten years that that's been the case."*

In the face of the more frequent, less 'extreme' cases of resistance, Charles' group feels the need to build strategies on an organizational level to respond with sensitivity to other threats by justice seekers, like trying to get the group's funding cut, or trying to get a caseworker fired:

> *"And sometimes we'll just hand the phone to someone else in the office who will pretend to be the boss!* [laughs] *To just deal with it. Sometimes that works, but we try and deal with it with that person or that person will ask for help and we'll kind of collectively strategize around it. It gets really dicey sometimes with at what point do you stop engaging with this person, which I think is a lot harder for us than it is for government funded agencies where they have- they don't have a political investment in people and they don't have the same reasons for doing things and so it's really easy to just say no. And because we are doing it because we care about people in a different way than community workers do, it's a lot harder to say no."*

The examples cited immediately above are not instances where service has been refused because a justice seeker would not get involved, either in their own case or in the political movement. They are instances where service is refused because the task demanded of the caseworker does not fit within the mission of the organization – or where an exception is made at the insistence of the justice seeker. Whether their orientation is toward individual empowerment, collective organizing or both, the lawyer and nonlawyer caseworkers quoted above have perceived resistance from justice seekers who expected something different from their caseworker or the organization. No matter how clear the mission or case selection criteria may first appear, justice seekers may still negotiate successfully for services which are supposedly not available, such as legal advice (Evelyn and Christopher), representation before a tribunal (Beatrice, Dana and Evelyn), or help filling out a form (Charles). Corey Shdaimah's work anticipates this resistance:

> "Collaborative lawyering models assume that clients desire participation in the legal process. But is this really what clients want? And if not […], there may be good reason for lawyers to honor client wishes despite their own notions of ideal practice. Many clients do not express a desire to understand the legal process or to achieve future self-sufficiency but instead seek to allocate one of the many burdens they bear. They seek lawyers as professionals who can resolve problems […]. This is often lost on progressive lawyering proponents. As Ann Southworth points out in a critique of Gerald López's rebellious lawyering, the call for greater client involvement in the legal process too often undervalues the contribution of legal expertise."[33]

From this perspective, the collaborative lawyering solutions offered by scholars such as López, and Gabel and Harris, may miss the mark slightly. López in particular focuses on 'lay lawyering' as a way to address the power imbalance between progressive lawyers and justice seekers.[34] Lay lawyering is legal work done by a non-professional who has experience and perhaps some formal training. It can involve a mixture of organizing and negotiation, legal research and offering legal information.

In theory, working with a lay lawyer can be empowering because the lay lawyer has the training and experience to do the job, without all of the privilege and ideological baggage of a legal professional. However, as Scott Cummings has noted, a charismatic and pushy organizer can be just as dominating as an ignorant but well-meaning lawyer. Challenging a common assumption in law and organizing studies, Cummings writes:

> "It has always struck me that, when it comes to concerns about accountability, organizers frequently get the benefit of the doubt in that it is presumed that their actions are perfectly aligned with the community's interests. In contrast, lawyers, by virtue of their training and professional status, are presumed to be more prone to client domination. Yet it is not clear that an organizer with a forceful personality like [Saul] Alinsky does not also pose similar risks of overreaching. Nonetheless, we tend to equate organizing with the

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[33] Shdaimah *supra* note 6 at 100. She then quotes Southworth in the following paragraph.

[34] See "A Lay Lawyer at Work" in Gerald P. López, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (New Perspectives on Law, Culture, and Society) (Westview Press, 1992). See also Wexler, Stephen, "Practicing Law for Poor People" (1970) 79 *Yale L. J.* 1049 at 1057-1058.

> promise of direct democracy. Lawyers threaten to break this promise by interposing themselves in a mediating role."[35]

It is conceivable that the same issue of disempowerment within the advocacy relationship may arise even where there is no lawyer present. Likewise, lawyer and nonlawyer caseworkers may feel pressure to respond to the concerns of individual justice seekers rather than adhere to case selection rules or long-term organizing strategy. For these reasons, individualization and disempowerment – central concerns of the standard critique of lawyers and social movements – can arguably occur even when the legal expert is, experienced and trained but not a lawyer.

Earlier, Jennifer Gordon's concerns about the role of legal services at the Workplace Project were mapped onto the results of the participants' discussions of justice seeker involvement in the political movement. The same exercise is conducted here with reference to Corey S. Shdaimah's *Negotiating Justice*. Nevertheless, there are two important distinctions to be made between the thesis and these previous studies. First, unlike *Suburban Sweatshops* and *Negotiating Justice*, the present research does not focus on a single organization or cause. The conversations interpreted here suggest that the issues raised by Shdaimah's interview responses and in Gordon's first-hand account are not restricted to one organization or political orientation. Instead,

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[35] Scott L. Cummings, "A Pragmatic Approach to Law and Organizing: A Comment on 'The Story of South Ardmore'" (2008-2009) 42 *J. Marshall L. Rev.* 631 at 632 (Cummings "Pragmatic").

these issues can be understood as part of the casework process whenever an organization seeks to use public service as a political tactic.

The second distinction is that caseworker participation in the thesis is not restricted to legal professionals. The same concerns which are phrased in terms of the lawyer-client relationship in Shdaimah's work, or in terms of the lawyer-organization dynamic in Gordon's study, here are uncovered as part of an ongoing relationship between justice seekers, social movement organizations and skilled, experienced caseworkers who may or may not be members of the legal profession.

Near the end of our interview, the researcher asks Aaron, also not a lawyer, if he has anything to add. In a response which echoes the standard critique of lawyers in social movements, Aaron describes the potential political consequences of the power dynamic linking caseworkers, their organizations and individual justice seekers:

> *"Just that I think that organizations should really think really carefully before doing casework. And I think knowledge is always good, right? But where that knowledge is individualized, it becomes dangerous. And when you look at things like the law where you can't really train…you can do a certain amount of popular education in immigration law, you know, with a group. But to really train someone around the ins and outs of immigration law, that takes years. So, that kind of knowledge, I think, ends up grounded in individuals' heads, and it puts them – you know, the group has to really hold those people accountable because they can lead a group down a wayward path. And for legal professionals, I would say I think you need to be really conscious that you need to be on the flanks of the organization. Like, this is what we used to say about legal support: you hold the flanks. The movement is the vanguard. The movement is the ones who are*

> *going to win, who is going to get the victories and you're holding their flanks. You're making sure when the movement's attacked, you'll kick ass. That you can support a movement but you're not at the forefront. Because I've seen lawyers and legal people wreck organizations. Whether through casework or through just using their privilege in really, really nasty ways."*

Aaron makes a distinction between legal professionals and non-professional activists, admonishing the professionals to remember their place "on the flanks of the organization." He notes that lawyers may serve an important role by protecting the movement when it is attacked, for example when litigation becomes necessary.[36] However, Aaron's first concern is that legal knowledge not be allowed to become individualized, whether in the head of a lawyer or nonlawyer caseworker. Moreover, "*lawyers and legal people*" are on a par when it comes to their relative privilege and their ability to destroy movement organizations and harm vulnerable people. In this context, the concerns of progressive lawyering scholars about domination and power imbalances are relevant to the caseworker-justice seeker relationship. Domination of individual justice seekers by the caseworker is an unfortunate possibility, given the imbalance of knowledge of legal systems between the two individuals, the strength and legitimacy that can come from being part of an organization, and the fact that so many justice seekers approach organizations at moments of crisis in their lives. However, the caseworker

[36] Cummings notes that in worker organizing in Los Angeles, lawyers played an important role by protecting the organizing aspects of the campaign through litigation. See *ibid.* at 635 n. 12, citing Victor Narro, "Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers" (2005-2006) 50 *N.Y.L. SCH. L. Rev.* 465.

need not be a lawyer for the possibility of justice seeker disempowerment to be a concern, and the power is not in the hands of the caseworker at all times.

Based on the interviews related above, the interpersonal negotiation and power dynamics in the social movement casework relationship appear similar regardless of whether the participant is a lawyer or a non-professional. Consider the pressure that the lawyers Christopher and Evelyn feel to go beyond the strict limits of their missions in the face of a justice seeker who demands more. Evelyn goes so far as to avoid mentioning the fact that she is a lawyer in order to avoid conflict. Consider also Charles' statement that the group will not help a person beyond certain limits.

The caseworkers quoted in this chapter present a picture of social movement casework in which a power dynamic is at play between justice seekers and caseworkers. Lawyer and nonlawyer caseworkers alike have the power to set limits on the services they provide, but those limits are often ambiguous. Caseworkers can refuse service – a source of great potential power in relation to a justice seeker who may have zero alternative options. Yet, their desire to build relationships of trust with justice seekers makes caseworkers vulnerable to persuasion. The caseworkers interviewed here may enter the casework relationship already wishing to move beyond the formal selection criteria. Refusal of service may seem counterproductive if the group hopes to build the trust and sense of commitment that are essential to organizing.

Based on caseworkers' comments about legal aid and the private market, the broader service context, may have an important influence as well. It may shape the expectations of justice seekers who come to the activist group for help, making them feel as though they must act out a subordinate role in order to resolve their cases. But this context also may make the caseworker feel she is at fault for the justice seeker's predicament if she refuses certain tasks in the name of fostering autonomy or adhering to the organization's own criteria. The caseworkers interviewed here face resistance on the part of justice seekers who may not feel - or even wish to be - 'empowered' in the sense related by Christopher, but who appear to exercise their own variety of empowerment, in which they may push the caseworker to go as far as possible in offering the assistance they require.

Casework and Systemic Change

This conflict between the expectations of justice seekers and those of the caseworker can be read as a manifestation of the central tension in social movement casework, between the political ambitions of an organization that would use casework as a tactic, and the immediate needs of justice seekers who may see the activist group as their only service option. The following section directly addresses participants' understandings of the relationship between the casework they do in the everyday and the systemic change which is their long-term goal.

Uses of Casework

During interviews, participants were asked what, if any, connection they see between the casework they do and the long-term goal of systemic change. In Chapter 2, various reasons why social movement organizations do casework were examined. These included using legal assistance to attract new members, casework as a form of research, as a way to encourage collective organizing in a community, and as a means of finding "good cases" for impact litigation. In the interviews, the role of casework in the long-term strategies of the participants' organizations varied from one caseworker to another.

Anne is the only caseworker to raise impact litigation as an important purpose of casework. She explains that cases are selected according to legal aid financial criteria, but that the organization has "priority areas" which include law reform issues related to disability. When deciding to take on a case, the organization will apply legal aid criteria, but also ask whether the potential outcome of the case will have a systemic impact, will influence a large number of people with disabilities, or will change organizational practices. Anne mentions the potential for systemic impact of individual cases several times during the interview. She states:

> *"We try to make sure that the cases that we're working on reflect our mandate and reflect our long-term goals.* […] *It's really hard, because you don't always get cases coming through the door that deal with the issues that you're trying to get at."*

> *"We always try to think about the potential for systemic impact of the case and whether it can help us to achieve long-term goals."*[37]

For Eric, Charles, and Aaron, casework is less about setting system-wide precedents and more about building a community organization over time. Charles describes how demonstrations are important for "*showing people that we can win with direct action."* Both Eric and Charles became involved in their movement organizations when they brought their own cases forward for help. In spite of the difficulties mobilizing justice seekers which they describe earlier in this chapter, all three caseworkers involved in anti-poverty work still express a belief that casework is a way to recruit new members and encourage justice seekers to participate in demonstrations, social events and other campaign activities. Eric responds as follows:

> Alexandra: *"Do you see, like, a link between the casework and the issues in a larger sense?"*
>
> Eric: *"Yes but the link, it's that people – the link that we make, it's that people come to see us with an individual problem. You know? They first come with an individual problem, and the reason, the process takes years to see that collectively. But what is collective, is not that*

[37] Although this particular interview was not recorded, several verbatim quotes, including these, were included in the notes of the conversation with Anne.

> *your individual case, the specific case that you have, is shared by lots of people. Because everyone generally has different problems – apart from lacking money, which everyone has in common on social assistance. I mean, but it's more than just a lack of money. It's also social conditions. It's also social status. It's all of that too, which is a reason to become collectively involved. To not just be isolated, not just be a victim. But I tell you that because it's more difficult to encourage activist involvement now than it was before. It's more difficult now than it was in the 80s and 90s. And, among other things, because society is becoming more and more individualistic over the years."*

Christopher explains that the core mission of his organization is to promote access to justice by listening and empowering individuals to take on their own cases and feel confident representing themselves. The group acts as a first entry point into the state judicial and administrative tribunal systems. However the organization does not use cases to engage in the same kind of community mobilization as Eric, Charles and Aaron's groups.

For their part, Beatrice, Evelyn and Dana focus on the use of casework as a way to share knowledge of administrative practices and legal change which can feed into broader campaigns. Beatrice explains:

> *"So for example, if we see constants in the practices of the social assistance office, it allows us to figure out 'ah, they are doing a blitz on this thing. Oh, there has been a change.' And sometimes it allows us to expand the intervention that we will do, saying 'oops, there is a change or there is something going on.' But that means you have to talk. Between us lawyers, in our office to see if we are noticing the same thing. Because it's not written in the meeting book and social assistance won't call us to say they are going to do something."*

Evelyn relates a similar use of casework in relation to government policy changes on refugee and immigration issues:

> *"This work is mostly I think knowledge sharing. So for example going to a group meeting on this issue, or going to* (a group) *that has a presentation on another issue or CIC is presenting new measures, so I'll attend that."*

She also explains how a single case can feed into a broader campaign – even if no precedent is set and no success is met under the criteria of traditional impact litigation:

> *"I mean, I, from a case that I worked on, I started a committee with other people on access to* [redacted at participant's request]*, there's a campaign that's going on. That's just an example. So, sometimes cases can sort of fuel larger policy issues. I have a lot of other examples, so I feel it's important."*

Dana speaks of a similar experience linking cases to campaigns for change. For her, advocacy includes:

> *"identifying a problem that is common to our clients and reaching out into the community. Sort of 'is this problem occurring somewhere else and what can we do about it' so there is a task force put together* […] *We do participate in that kind of advocacy when we can."*

A Loss Can Equal a Win

Given many caseworkers' emphasis on the use of casework as a community building and knowledge sharing process, rather than a way to set good precedents in court or win for individuals, it is perhaps understandable that several participants described situations where a campaign or case that

first looks like a loser actually represents a win. Aaron seemed most enthusiastic when discussing cases which the group had (in his words) *lost*:

> *"We've also had really good casework situations. The* [name] *case was amazing. The* [other name] *case at Christmas, which we lost, was amazing. Both those cases we made ties with new communities that were already mobilizing around the case. We were able to get involved and offer a bit of experience and leadership on how to mobilize and as a result build new relationships with new communities – as opposed to new politicians or new media people or whatever."*

Christopher sounds almost bewildered by the reaction he gets when he must tell justice seekers that after hearing their whole story, he can identify no legal recourse for their predicament:

> *"It's strange because that's the kind of meeting that I have trouble with, I haven't helped at all, because I didn't have a solution to propose, and people leave satisfied because they were listened to, they were understood, and now they understand their situation."*

Eric explains how his organization will occasionally take part in political actions which they know in advance will lose, for reasons other than winning the gain that they are publicly demanding. He describes a demonstration for better public transit, which they knew would be ignored, but they held anyway for other reasons:

> *"So, the action we did* […]*, public transit, raises awareness of the situation of people who can't take public transit. We knew we wouldn't win anything that time. And other times when we will support something, it's because it's a moment in the development of a movement. It's to grow alliances. It's to, in solidarity but we know that it won't win …"*

Even individual cases that have little chance of success are still considered worth a caseworker's time. Charles speaks of taking on cases where the group will inform the justice seeker that there is no hope of winning:

> *"But most of the time it's really important to tell people that we're going to fight as hard as they want to fight and we won't stop, but you know we can't make any promises. And on occasion we say 'we're not going to fight very hard.'* [laughs] *'I'll try, but like, you've got no hope here, buddy.' Be realistic. Occasionally we'll get surprised and win a few grand for somebody who legally isn't entitled to it and that's really awesome."*

Evelyn and Dana's group makes similar choices in the faint hope of winning an unlikely gain, but also as an expression of compassion and a way to maintain trust:

> Evelyn: *"Also we can't take on a case where there's no hope, although we do sometimes (laughs), because we feel for the person for I guess other reasons, so we're still – I mean, honestly it's a struggle. It's an ongoing struggle. And we haven't found a solution to that yet."*
>
> Alexandra: *"Why would you take on a "no hope" case if you think there are very few chances of success?"*
>
> Evelyn: *"Yeah. I guess it's because we feel like no one else is going to do it, and because the person has gone through immense suffering and that is their only chance. I mean, it's a bit of a – I won't say – it's really based on compassion. There's no other way to describe it really. Uhm, it's not very strategic!* [laughs] *It's not very utilitarian. I think it's just, 'cause I mean, it's not a religious organization, but* […] *I think this idea of helping the most vulnerable, and also people who are most marginalized, who have been rejected by society, is also part of what we do. We have cases that are really, really difficult. Multiple, multiple, multiple barriers. The person is facing multiple barriers to obtaining status or integration and yet we'll take it on because there's no other sort of, there's no other resource. And also because sometimes those multiple barriers are your arguments. Like, it's*

> *hopeless in one way, but it's cool the potential arguments in another. It depends on how you look at it."*

Sometimes, Dana and Evelyn's organization relies on other groups to take on the broader campaign work surrounding issues that they deal with every day. Dana explains how this works, through knowledge sharing with organizations which do not do casework:

> *"I think that we kind of like assume that the* [another refugee rights organization which does not do casework] *and those kinds of organizations are able to take the – spearhead those efforts, and we'll come in if we have a little moment or if they are looking for cases for example for a specific campaign. For example, I helped out with, they were looking for cases of people who had applied for* […] *and they were all refused and so I was sharing those kinds of cases with* [them] *so in that way there is that connection. But it would be wonderful to be able to do more of the big picture work."*

While outlining the other "big picture" work taken on by the organization, Evelyn expresses a similar wish:

> *"We participate in a lot of campaigns, we sign a lot of petitions, campaigns. As I mentioned before,* [Dana] *co-signs, co-writes articles on refugee issues. We're active in terms of refugee and immigration laws or reform.* [Supervising lawyer] *went to the Parliamentary sessions on Bill C-31 and gave a presentation at that point, and so I think it's very important. I wish I could do more of it. I feel like I'm a bit limited in how much I can do because of my time constraints, but if I could I would do more. And if I could I would do more* [laughs] *because I consider it part of my job."*

Time and Other Resources

Evelyn and Dana's respective comments point to a common issue raised by participants. Most of the caseworkers interviewed express disappointment at not being able to spend more time working politically in other ways because the responsibilities of casework take up so much of their time. In discussing what relationship there might be between casework and systemic change, they often speak in pragmatic terms, describing a delicate balancing act which they engage in when they incorporate casework into a political movement. Anne explains that there is *"a constant tension*" between casework and other work in the organization, but that at best, *"we try to make it a constant feedback loop"* between individual cases and long-term political goals. Anne explains that the organization needs its people to be constantly vigilant in order to maintain the equilibrium. Aaron explains the risk to organizations which do not learn to manage this balance:

> *"There are just not enough legal supports for people especially without money, there are not enough groups out there that know or are savvy how to do the media, there are very, very, very few sympathetic politicians, so you can easily become overwhelmed. Like I've seen groups organize around casework and just that, they end up doing it 24-7. And it doesn't move anything forward. You can win the cases, but unless you have an actual strategy behind it, the casework doesn't win anything, move anything forward."*

Dana expresses a similar concern:

> *"I think we have a hard time – not a hard time, but it's a challenge to give enough time* […]. *I think we'd like to, we understand that the big picture and the advocacy around the fundamental rights that are in jeopardy would help our casework in the long term* [laughs], *but we're so overwhelmed with the needs of our clients, every day new clients, so we haven't found a way…"*

Even soliciting feedback from justice seekers about their service experience is difficult because, as Dana says, almost apologetically, *"we're always just running to catch our tails."* According to these caseworkers, roughly 95% of their work is based on individual cases, with about 5% devoted to other political tactics. As quoted earlier, Evelyn wishes she could spend more time on the 5%:

> *"*[…] *I wish I could do more of it. I feel like I'm a bit limited in how much I can do because of my time constraints, but if I could I would do more. Because I consider it part of my job."*

Charles similarly describes how the balancing act is difficult, but implies that it can be managed when the organization is conscious of the issue:

> *"You can't fight for band-aid solutions. It's important to fight for widespread change, but at the same time people are in crisis, they don't have food, arbitrary loss of $17 bucks per month for some stupid reason for someone with a welfare cheque can be really devastating. So, doing casework to both help deal with the immediate crises and to support people in communities and to have a very real way of engaging people at the same time as doing mass mobilisation is really important, so we try and keep a balance, but you know sometimes that*

balance will be weighted one way or another. Often, usually it's weighted around the work of mass mobilizing."

Eric shares this experience. In spite of his continuing commitment to organizing justice seekers in the community, he explains that the more casework and other tasks he must do, the less time he has to train new volunteers and promote involvement in the group. He describes a vicious circle in which the volume of cases leads to overwork for him as the organization's sole employee, and in turn to a decrease in volunteer resources to do casework and mobilizing:

"[…] *the resources that we have also really influence the participation that we can facilitate. I haven't always been the only employee or in this situation, eh? Before, I was an organizer who worked for the same organization as now, but I didn't have to do fundraising, the…things related to money were not something I had to deal with. In my work I had much more time to meet people, to take time with people and to train them at their pace. I would have more volunteer participation, but now I no longer have the time. I have to do it myself because I don't have time to get people involved and that has an impact. And at a certain point when you are all alone…activists, volunteers, many of them come from the case by case, the caseload. But the volume that you can do also depends on the resources you have. There's a limit."*

Beatrice is straightforward about the time constraints imposed by her own caseload:

"The casework takes an enormous amount of energy. I mean, each of our files, we can work like crazy all week long."

"But it is a hugely complicated challenge, to have one foot in the casework and the other in collective work. In the office, there have always been debates between, opposition between the individual work and the collective work. Sometimes, people who do the individual work

> *have the impression that they are resolving situations, being efficient, advancing toward something, and those who do the collective work, who just do discussions, who are always in meetings, it's just tilting at windmills, as some say. But at the same time it takes both, and the balance between the two is extremely difficult. When we are in it with not enough money and not enough people, that's the challenge. We don't have enough people and we don't have enough money. Otherwise, we could do lots more files or files that are like, test cases for example in the file. But that's it. It's not highly valued though."*

It is interesting that when asked to describe the relationship between casework and systemic change, so many of the caseworkers interviewed here veer into discussion of the relative allocation of resources such as time and money between the casework and other forms of advocacy. Aaron, Anne, Beatrice, Charles, Dana, Evelyn and Eric all mention the difficulty of balancing individual service provision with other activities in their organizations. All of them express concern that casework may take over (or has already taken over) the majority of their resources, and that this may prevent them from engaging in more traditional organizing strategies and long-term policy work. What is absent from these conversations is a sustained engagement with the central concerns of the standard critique of lawyers in social movements – particularly the ideologically based critique of the myth of rights. This absence is discussed further in the conclusion to this chapter.

Conclusion to Chapter 6

In the experiences related above, caseworkers describe their difficulties mobilizing justice seekers, yet still suggest that casework is an important part of their group's movement activities. They describe an inadequate private legal services market and legal aid system. The caseworkers interviewed for the thesis are unanimous in their judgment that current provincial legal aid regimes exclude too many people and may contribute to their own heavy caseloads.

The ideal of the empowered justice seeker who, inspired by the casework experience, joins an organization and becomes an activist (or at least shows up to a demonstration) does not map clearly onto the experiences related by interview participants quoted above. They list barriers to using casework as a mobilizing tool which are out of their control. Many cite prior experience with government agencies and lawyers as reasons why justice seekers may wish to be treated as a client, to have a service provided to them, without taking part in a broader movement or even in their own cases. While some caseworkers may aspire to collaborative models or wish to use casework as a means to attract and train new, militant activists, they know the difficulties of doing so. They speak of the near impossibility of organizing or empowering individuals at a crisis point in their lives.

Participants describe an often stressful relationship in which justice seekers are not active in the movement, yet refuse to passively accept the organization's definition of the casework relationship in their own individual case. The caseworkers feel vulnerable to the arguments and negotiation tactics of justice seekers who want to push them beyond the mission of the organization. Whether lawyers or nonlawyers, to some degree all caseworkers describe attempts to negotiate or threaten, by justice seekers who may see no other service alternatives available. At the same time, most participants speak compassionately about justice seekers' reasons for pressuring them. The difficulty of saying 'no' to a justice seeker in need of help has an influence on some caseworkers' choices in the relationship.

The aggregate pressure to devote more and more time to individual casework is an important theme in all of the interviews. There is a constant tension between individual casework and other movement tactics, as caseworkers try to balance the allocation of resources like time and money between the various activities of their groups. In spite of all of these difficulties, organizations continue to offer casework services to the public as part of a broader commitment to systemic change. Several caseworkers identify winning aspects of even the most 'hopeless' of cases.

Earlier in the thesis, a standard critique of the role of lawyers in social movements was described. Having now examined representations of casework by four lawyers and four nonlawyers – all of whom work with social

movement organizations – and their echoes in two recent empirical studies of single organizations, it is an appropriate point in the thesis to revisit the critique and its place in present-day studies of law and organizing. In the Conclusion to the thesis, the critique will be reviewed, and a proposed modification to the law and organizing model presented.

Figure 1: Theme Overlap between Participants

Theme Label - Number of Participants Who Mentioned Theme

Casework and systemic change-8

Legal aid-6

Involvement of justice seekers-6

Relationship with justice seekers-6

Political orientation-6

Case selection criteria-6

Expectations of justice seekers-6

Media-5

Mobilization-5

A loss can = a win-5

Allocation of resources (casework vs. other)-5

Working with people in crisis-5

Organization training-4

Outreach-4

Lawyer/non-lawyer tasks-4

Empowerment/autonomy/agency-4

Lawyers acting as non-lawyers-4

Staff vs. volunteers-4

Information vs. advice-3

Funding-3

Interdisciplinarity-3

Time-3

Social work tasks-3

Ideal caseworker-3

Membership-3

Use of the word 'Client'-3

Knowledge sharing-3

Relations with outside lawyers-3

Supervising lawyer-2

Risk of movement involvement -2

Confidentiality, ethical issues-2

Lawyers' training/indoctrination-2

Direct-action casework-2

Accessibility of organization-2

Value placed on the work-2

Compassion-2

Casework as research-2

Students-2

Legal fees-2

Public legal education-2

Figure 2: Themes Mentioned by Only One Participant

Surges in demand (example of post 9-11 cases) (Aaron)

Backlash from state officials against cases (Aaron)

Casework success and demobilization (Aaron)

Identity and anti-oppression in organization (Aaron)

Romance of casework (Aaron)

Impact litigation (Anne)

Creativity (Anne)

Hybrid organizations (legal aid/social movement) (Beatrice)

Casework and pluralist/positivist perspectives on law (Beatrice)

Codification of office practices (Beatrice)

Tasks of community organizers (Beatrice)

Right to be heard vs. listened to (Christopher)

Referral and frustration (Christopher)

Neutrality (Christopher)

Professional liability (Christopher)

Rule of law (Charles)

Myth of rights (Charles)

Charitable status (Dana)

Social media and state surveillance (Dana)

Utopian visions of other provinces (Dana)

Volunteer vs. activist (Eric)

Cost of membership (Eric)

Conflicting strategies with other organizations (Eric)

Dignity (Eric)

Figure 3: Frequently-Mentioned Themes

(5 or more participants)

1. Casework and systemic change
2. Legal aid
3. Involvement of justice seekers
4. Relationships with justice seekers
5. Political orientation
6. Case selection criteria
7. Expectations of justice seekers
8. Media
9. Mobilization
10. A loss can = a win
11. Allocation of resources (casework vs. other)
12. Working with people in crisis

Conclusion: Toward a Modified Law and Organizing Model

Nonlawyer Casework and the Standard Critique

Two main concerns arise from the standard critique of the use of legal strategy and lawyers in social movements. First, an emphasis on cases can mask systemic issues, making them look like individual problems. This risks depoliticizing the cause and demobilizing movement participants. The second concern is that lawyers, because of their relative privilege and greater knowledge of legal systems, may disempower individual justice seekers and movement organizations, taking over strategic discussions and forcing the movement into directions that most participants would not normally support.[1] Activists then feel that with the lawyers in charge, they can adopt a passive role. Justice seekers silence their own stories in favour of the lawyer's 'better' version.[2] People turn off and the movement languishes as a result.

Lawyers are assumed to be ill-suited to participation in mass movements for systemic change. They have to work hard to fit in. One response to this critique in the legal academy is the law and organizing model. An important aspect of this model, examined earlier in the thesis, is the renewal of the role of the lawyer in the social movement organization. Law and organizing literature offers a great deal of advice aimed at an audience of

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[1] For a detailed discussion of the standard critique, see Chapter 4 and accompanying notes.

[2] Lucie White, "Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G." (1990) *38 Buffalo L. R.* 1 (Hein Online).

lawyers who would put their expertise to use in social movement groups, in support of empowerment and mobilization.

In Chapter 1, two assumptions of the model were highlighted: legal strategy requires the service of lawyers; and it is up to the lawyer to learn to be a good organizer, or to work well with organizers in order to avoid the problems of individualization and disempowerment. This process involves breaking down the lawyer's indoctrination into the "myth of rights"[3] so that the lawyer can engage with the organization and individual justice seekers in a non-hierarchical way, mindful of the importance of putting the organization's political goals first, and the legal strategy second.

This model of social movement legal practice has been said to create a substitute "myth of organizing" by scholars who advocate caution.[4] Cummings and Ingrid Eagly warn that "we must take care not to romanticize the power of grassroots organizing or unduly downplay the benefits of effective legal advocacy."[5]

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[3] Scheingold, Stuart, *The Politics of Rights: Lawyers, Public Policy and Political Change* (New Haven: Yale University Press, 1974). See also Chapters 1 and 4.

[4] Scott L. Cummings and Ingrid Eagly, "After Public Interest Law" (Book review) (2006) 100 *Northwestern University Law Review* 1251. Online: http://ssrn.com/abstract=834784. Accessed January 15, 2014, at 1275.

[5] *Ibid.* at 1275.

Likewise, Orly Lobel writes that in law and organizing, "[t]he rejected 'myth of the law' is replaced by a 'myth of activism' or a 'myth of exit,' romanticizing a distinct sphere that can better solve social conflict."[6] Arguably one symptom of this romanticism is the notion – present in the law and organizing literature – that by limiting the role of lawyers and legal strategy an organization can avoid the pitfalls of individualization and disempowerment. The present thesis has sought to demonstrate that this is not necessarily the case.

The concerns of the standard critique are relevant to any organization thinking of including casework as part of their tactical repertoire – as emphasized by Aaron in Chapter 6, and as acknowledged elsewhere in the thesis. The standard critique also remains an important part of the progressive lawyer's training.[7] However, contrary to the impression gleaned from law and organizing studies, the problems raised by this critique in the legal academy, about disempowerment (here, by lawyers) and individualization (here, by litigation), do not belong to the legal profession alone. In Chapter 3 it was explained that nonlawyers can provide a variety of services associated with

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[6] Orly Lobel, "The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics" (2007) 120 *Harvard Law Review* 937 at 974.

[7] Even when critically examining the standard critique, for example, Michael McCann and Helena Silverstein acknowledge its influence on their own work. Michael McCann and Helena Silverstein, "Rethinking Law's 'Allurements': A Relational Analysis of Social Movement Lawyers in the United States," in Austin Sarat and Stuart A. Scheingold (eds.)

social movement casework without violating provincial legislation against the unauthorized practice of law.

A parallel to the standard critique in the legal academy, this time in the academic literature on structural social work, was described in Chapter 4. Based, of course, on a different professional history and different disciplinary language, this critique nevertheless holds that members of the social work profession can also be guilty of disempowering vulnerable people. Moreover, the psychotherapeutic approach dominant in clinical social work can individualize problems, potentially overlooking their systemic origins and political solutions. Viewed in this interdisciplinary light, the main concerns of the "standard critique" cease to be only about law and lawyers. Instead, it can be understood as one version of a critique of case-based intervention by experts within social movements. Once we understand the critique this way, we can see how pointing to litigation strategy (and lawyers) as the central "bogeyman of social movements"[8] might hinder the ability of the law and organizing model to both present new advocacy options and accurately reflect current social movement practice.

Cause Lawyering : political commitments and professional responsibilities, (New York: Oxford University Press, 1998) 261.

[8] This term is borrowed from Scott Cummings, "Commentary: A Pragmatic Approach to Law and Organizing: A Comment on 'The Story of South Ardmore'" (2008-2009) 42 *J. Marshall L. Rev.* 631 at 635.

In Chapter 5, a case study was presented of a law and organizing campaign which did not require lawyers for its primary legal strategy. In the Special Diet Campaign, the legal tactics included direct action casework, a choice which many lawyers would hesitate to suggest, given the risk of arrest and the disorderly nature of the protests. This was a campaign run by anti-poverty organizers largely with the help of *medical* professionals. Yet, despite the absence of litigation in the early phase of the campaign, there was still potential for socioeconomic distance between organizers, justice seekers and professionals, as well as the potential for disciplinary sanctions to punish unconventional professional practice. The case of Doctor Roland Wong illustrates this. His case is significant for the contrast noted by the disciplinary body of the College of Physicians and Surgeons, between activist medical practice and the traditional professional approach, a contrast which echoes distinctions between "cause lawyering" and traditional legal practice.

The interpretations of caseworker interviews offered in Chapter 6 also suggest that the issues of individualization and disempowerment are not confined to organizations and campaigns where lawyers and litigation are present. Moreover, these issues, as understood by caseworkers themselves, do not seem based in rights ideology or the professional indoctrination of lawyers. Asked to describe the relationship between casework and long-term political goals, the caseworkers describe a tension rooted in conflicting obligations. Whether they are lawyers or nonlawyers, the caseworkers know

that the individual cases they deal with are manifestations of a broader systemic issue. That is part of the reason that their organizations began doing casework in the first place. However, they are at times forced into a narrow focus on individual cases – not because of an ideological commitment to individual rights (*none* of the caseworkers mentioned the *Charter of Rights and Freedoms*!) – but because of the demands of the justice seeker seated before them. In many cases, the justice seeker knows that few, if any service alternatives exist apart from *this* caseworker at *this* organization.[9] Where case selection criteria are vague or not consistently enforced, justice seekers are able to negotiate for more extensive services in some instances.

A few caseworkers worried that the sheer volume of cases in areas of immigration, social assistance and procedural law might overwhelm a political organization seeking to use individual casework as a tactic, leaving room for little else. This is a topic which calls for further empirical study, but the understandings of caseworkers related here suggest that the individualizing influence of casework may be rooted not uniquely in ideology, but also in organizational and structural issues.

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[9] Scott Cummings anticipates this point when he remarks that law and organizing practitioners (particularly lawyers) today are pushed into a state of "constrained legalism" where their strategic choices are limited by, among other things, a shrinking welfare state. See Scott L. Cummings, "Critical Legal Conscousness in Action" (2007) 120 *Harvard Law Review Forum* 62. Online: http://ssrn.com/abstract=998040. Accessed January 15 2014 (Cummings "Action") at 66 and following.

Disempowerment in the casework relationship is also a real concern. Especially in a context where so few alternative services are available, it may be easy for a caseworker to impose her will on a vulnerable justice seeker in crisis. The justice seeker may defer to the caseworker's authority even if the caseworker is not a lawyer.[10] However, what appears to be the caseworkers' greatest source of power (the ability to refuse service in the absence of alternatives) can be used against the caseworker as well. Lawyer and non-lawyer caseworkers speak of the difficulty they have saying no, excluding justice seekers from their caseloads, imposing limits on their services – and yet they must do so in some instances. There are examples here of lawyers who refuse to do tasks that they are perfectly allowed to do under provincial law. There is even a lawyer (Evelyn) who pretends *not* to be an attorney at times. This is in sharp contrast with the view of lawyers projected by the standard critique, and by the law and organizing model which responds to it.

As one might anticipate from reading studies such as those by Corey Shdaimah and by Jennifer Gordon, the power dynamic between caseworker

[10] The concept of *normative authority* is potentially useful for understanding the source of the caseworker's influence over a justice seeker. See Violaine Lemay, *L'autorité contractuelle : mouvance internationale et interdisciplinaire : Théorie et sociologie d'une intervention publique québécoise de protection de la jeunesse par l'enchâssement législatif d'un outil de travail social* (Sarrebruck, Germany: Éditions universitaires européennes, 2011). This is a form of expert authority which goes beyond recognition of the superior knowledge of the expert, to recognition of the expert's ability to *govern* the person being assisted.

and justice seeker is complex.[11] It does not depend only on a lawyer's professional status, although this does have an influence which cannot be ignored. The power dynamic also appears to be influenced by the availability of accessible casework services elsewhere – regardless of whether the caseworker is a lawyer. It depends as well on the expertise of the caseworker, again whether or not she is a lawyer.

There is significant overlap between the understandings of social movement casework expressed by the lawyers and the nonlawyers interviewed for the thesis, but this does not mean that there is no difference between lawyer and nonlawyer roles, training or status. Some of the caseworkers quoted here express a strong awareness of the distinction. Nevertheless, interview participants demonstrate a shared understanding of important aspects of their work across professional boundaries. These include legal aid and private legal services, the difficulty of mobilizing justice seekers in crisis, the importance of trust and respect in the casework relationship, and the constant balancing act which every organization must do between immediate casework and long-term movement goals.

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[11] Corey Shdaimah, *Negotiating Justice: Progressive lawyering, low-income clients and the quest for social change* (New York: New York University Press, 2009); Gordon, Jennifer, *Suburban Sweatshops: The Fight for Immigrant Rights* (Cambridge, Mass.: Belknap Press of the Harvard University Press).

A Proposed Modification

What might this mean for the law and organizing model as it is currently depicted in the literature? In Chapter 1, it was suggested that the model is incomplete because it makes two assumptions: 1) that legal strategy requires lawyers; and 2) that disempowerment and individualization concerns can be assuaged by being vigilant with respect to the roles played by lawyers and legal strategy (usually case litigation) in the movement. Without wishing to ignore the continuing relevance of these concerns and of the critique which expresses them, this thesis has argued that 1) legal strategy *sometimes* may require lawyers, but *not always*; and 2) disempowerment and individualization are concerns which may come into play whenever a person with expertise intervenes in an individual case in the context of a social movement.

Having considered the understandings of the caseworkers quoted in Chapter 6, the thesis can now add a final argument: whether they are lawyers or nonlawyers, caseworkers gain valuable knowledge through experience, becoming experts or, to use Marc Galanter's phrase, "repeat players" in their particular domain of practice.[12] This knowledge is valued highly by justice seekers who require help with individual cases, particularly in a context where few affordable legal service options are available. However, the law and

[12] See Marc Galanter, "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 *Law and Society Review* 1, Reprinted (with corrections) in R. Cotterrell (Ed.) *Law and Society* (Aldershot: Dartmouth, 1994) 165.

organizing model as it is currently depicted in the literature seems to underestimate the value and potential power of this knowledge.

Scott Cummings writes that it is important for law and organizing scholars to consider what activists are doing in practice, rather than presuming that the academic theory is accurate. Doing this allows the scholar to discover whether elements such as the standard critique really have an influence on social movement actors. Yet, Cummings phrases the issue in terms which assume that the "law" in "law and organizing" belongs mainly to lawyers:

> "…[i]t is useful to ask: do lawyers identified with the public interest law sector share the critical legal consciousness […]? Though there is no definitive evidence to directly answer this question, there are reasons to think that the academy's concerns about cooptation do not neatly map onto the ideology of activists."[13]

Donald Schön has argued against the idea that professional practice simply consists in applying academic theory to new cases. He writes that practitioners create knowledge in their daily work, and that this knowledge

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[13] Cummings "Action" *supra* note 9 at 63 and 68. This article is a comment on Lobel, *supra* note 5. Here, Cummings makes an argument similar that of Michael McCann and Helena Silverstein (to whom he refers): progressive lawyering practitioners on the ground may have moved beyond the standard critique even as the critique continues to occupy theorists. See Michael McCann and Helena Silverstein, "Rethinking Law's 'Allurements': A Relational Analysis of Social Movement Lawyers in the United States," in Austin Sarat and Stuart A. Scheingold (eds.) *Cause Lawyering: political commitments and professional responsibilities*, (New York: Oxford University Press, 1998) 261.

can in turn influence theory in a reciprocal relationship.[14] With this in mind, the thesis proposes the following modest change to the law and organizing model: 1) that the model should recognize activists' ability to manage the "law" side of law and organizing *without* lawyers in some instances; and 2) that the model should continue to encourage vigilance about the potential for disempowerment and individualization, even in cases where legal strategy is not court-focused, and even when it is directed entirely by nonlawyers.

What is proposed here is a slight shift in the emphasis of the law and organizing model, from lawyers and courts, to law and justice. This is in line with current thinking on access to justice in Canada. Roderick Macdonald has written that access to justice means more than access to courts and other official sites where State law is made and applied. He states:

> "Law is as much the affair of all Canadians, as it is the business of legislatures, courts and lawyers. Citizens know that, however much legislatures, lawyers and courts claim a monopoly on law, it is the unofficial law of their day-to-day lives that underlies a just and respectful society."[15]

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[14] Donald Schön, *Le praticien réflexif: À la recherche du savoir caché dans l'agir professionnel*, Jacques Heynemand and Dolorès Gagnon, trans (Montreal: Les Éditions Logiques, 1994) at 77.

[15] Roderick A. Macdonald, "Justice Is a Noun, but Access Isn't a Verb" speaking notes, Symposium *Expanding Horizons: Rethinking Access to Justice in Canada* (Department of Justice of Canada, Delta Hotel, Ottawa, March 31, 2000). Online: http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/op00_2-po00_2/op00_2.pdf. Accessed January 23 2014 at 47.

Social justice is the long-term goal of most of the movement strategies contemplated by the law and organizing model. However, the model's greater strength may be in its ability to focus our attention on justice in the everyday practices of movement organizations. Just as law is not exclusively the possession of courts and lawyers, here access to justice may be about more than a skeptical attitude to one specific profession – or to the professions in general. Access to justice, both *through* social movement organizations and *within* them, may instead demand a continuing process of reflection[16] among movement participants in positions of authority. If the responses of the interview participants quoted in this study are any indication, among activist caseworkers this process of reflection is already well under way.

[16] See Schön *supra* note 14.

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Saskatchewan

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Appendix I: Ethics Certificate

(Please see next pages.)

Université de Montréal

No de certificat
CPER-10-021-D

Comité plurifacultaire d'éthique de la recherche (CPÉR)
Facultés de l'aménagement, de droit, de musique, des sciences de l'éducation et de théologie et de sciences des religions

CERTIFICAT D'ÉTHIQUE

Le Comité plurifacultaire d'éthique de la recherche (CPÉR), selon les procédures en vigueur et en vertu des documents qui lui ont été fournis, a examiné le projet de recherche suivant et conclu qu'il respecte les règles d'éthique énoncées dans la Politique sur la recherche avec des êtres humains *de l'Université de Montréal.*

TITRE DU PROJET : Alternative Advocacy as a Site of Law Reform

REQUÉRANT : Alexandr[illegible] droit, Université de Montréal, [LAWA05577706]

DIRECTION DE RECHERCHE : Violaine Lemay, professeure adjointe, Faculté de droit, Université de Montréal

MODALITÉS D'APPLICATION
Tout changement anticipé au protocole de recherche doit être communiqué au CPÉR qui en évaluera l'impact au chapitre de l'éthique.

Toute interruption prématurée du projet ou tout incident grave doit être immédiatement signalé au CPÉR.

Selon les règles universitaires en vigueur, un **suivi annuel** est minimalement exigé pour maintenir la validité de la présente approbation éthique, et ce, jusqu'à la fin du projet. Le questionnaire de suivi est disponible sur la page web du CPÉR.

(*Signature*)

François Bowen, président
Comité plurifacultaire d'éthique de la recherche
Université de Montréal

26 / 04 / 2010
Date de délivrance

01 / 05 / 2011
Date de fin de validité

No de certificat
CPER-10-021-D(2)

Université de Montréal

Comité plurifacultaire d'éthique de la recherche (CPÉR)
Facultés de l'aménagement, de droit, de musique, des sciences de l'éducation et de théologie et de sciences des religions

CERTIFICAT D'ÉTHIQUE
- RENOUVELLEMENT -

Le Comité plurifacultaire d'éthique de la recherche (CPÉR), selon les procédures en vigueur et en vertu du formulaire de suivi qui lui a été fourni conclu qu'il respecte les règles d'éthique énoncées dans la Politique sur la recherche avec des êtres humains *de l'Université de Montréal.*

Projet	
Titre du projet	**Pluralist Advocacy as a Site of Law Reform**
Étudiant requérant	**Alexandra LAW** Candidate au doctorat Faculté de droit Université de Montréal
Direction	Violaine LEMAY Professeure adjointe Faculté de droit Université de Montréal
Financement	
Organisme	CRSH
Programme	Bourses d'études supérieures du Canada (doctorat) Joseph-Armand Bombardier
Titre de l'octroi si différent	s.o.
Numéro d'octroi	
Chercheur principal	
No de compte	

MODALITÉS D'APPLICATION
Tout changement anticipé au protocole de recherche doit être communiqué au CPÉR qui en évaluera l'impact au chapitre de l'éthique. Toute interruption prématurée du projet ou tout incident grave doit être immédiatement signalé au CPÉR.

Selon les règles universitaires en vigueur, un **suivi annuel** est minimalement exigé pour maintenir la validité de la présente approbation éthique, et ce, jusqu'à la fin du projet. Le questionnaire de suivi est disponible sur la page web du CPÉR.

(Signature)

Pierre Lapointe, Président
Comité plurifacultaire d'éthique de la recherche
Université de Montréal

16 / 05 / 2012
Date de délivrance*

30 / 06 / 2013
Date de fin de validité

* Le présent renouvellement est en continuité avec le précédent

Appendix II: Interview Guides

Français

Introduction

- Poste occupé dans l'organisation
- Bénévole, salarié ou autre
- Années d'expérience avec l'organisation
- Comment le participant est devenu membre du groupe
- Pourquoi le participant est toujours impliqué
- Appartenance à une association professionnelle

Organisation (buts et activités)

- Décrire le travail de l'organisation, sa raison d'être.
- Mission de l'organisation (officielle ou non).
- Nombre de personnes impliquées dans l'organization.
- Rôles jouées par ces personnes (bénévole, salarié / temporaire ou permanent / temps plein ou temps partiel) et la nature de leurs tâches.

- Structure de l'organisation (conseil d'administration ou autre structure de gouvernance).
- Buts de l'organisation à long terme.

Relations avec la clientèle

- Expliquer comment les clients personnes qui cherchent de l'assistance entrent en contact avec l'organisation et comment le participant présente l'organisation à de nouvelles personnes.
- Par quels mots sont désignées les personnes qui entrent en contact avec le groupe pour avoir de l'assistance ou pour participer dans son travail? Quel serait leur titre et dans quelles façons peuvent-elles participer?
- Discuter le sens du mot 'client'[1] et son applicabilité (laisser pour plus tard si nécessaire)
- Décrire les commentaires/impressions (*'feedback'*) reçus de la part des personnes qui cherchent de l'assistance au sujet de leurs expériences ainsi que les methodes d'obtenir ces commentaires.

[1] Dans les questions qui suivent, le mot 'client' peut être substitué par le mot utilisé par l'organization pour désigner les personnes cherchant de l'assistance et/ou voulant s'abonner.

Travail sur les dossiers individuels

- Temps et ressources de l'organisation destinés à la provision des services aux individus (approximatif).
- Exemples de « cas » typiques sur lesquels l'organisation travaille (sans identifier les clients).
- Décrire une interaction typique avec un client individuel au sujet de son dossier (personnes impliquées, questions posées, développement des stratégies).
- Expliquer comment le groupe choisit les dossiers dans lesquels il va s'impliquer.
- Comment est-ce que les personnes peuvent savoir qu'ils ont une relation avec l'organisation?
- Gestion du conflit entre clients et membres de l'organisation : processus et politiques, personnes qui jouent un rôle de médiateur dans le groupe.
- Enjeux juridiques soulevés dans le cadre des dossiers (selon la définition du participant du mot « juridique »).
- Relation entre le travail sur dossiers individuels et les buts de l'organisation à long terme.
- Relation entre le cas individuel et le travail plus large sur les enjeux politiques ou de réforme du droit.

- Les éléments les plus importants à garder en tête lorsqu'on travaille sur un dossier. Comment est-ce que le participant a appris cela?
- Décrire le processus de formation, manuels et politiques utilisés par l'organisation.
- Qui vous donne des conseils sur le travail aux autres membres de l'organisation? Pourquoi?
- Présence d'avocat(e)s ou autres professionnel(le)s juridiques dans le groupe et comment leur travail est géré.
- Présence des personnes qui ne sont pas des avocat(e)s mais qui ont des connaissances juridiques dans l'organisation et comment leur travail est géré.

Relations entre l'organisation et le barreau de la région

- (Pour les non-professionnels) Comment est-ce que l'organisation sait ou décide qu'il a besoin des conseils d'un(e) avocat(e), s'il y a lieu?
- Relations avec d'autres groupes militants qui incorporent les cas individuels avec leur travail politique.
- Autres organisations ou agences gouvernementaux qui auraient un effet sur le travail du groupe.
- Obligations (devoirs, attentes) de l'organisation envers les clients et vice-versa.

- Comment on assure la conformité, identité de la personne responsable d'y assurer la conformité.
- Implication des clients dans l'organisation à long terme, possibilité pour les clients de devenir membres de l'organisation (bénévoles, salariés ou autre).
- Autres participants potentiels?

English

Introduction

- Position in the organization
- Volunteer, employee or other (specify)
- Years of experience working with the organization
- How participant first became involved with the group
- Why participant stays involved
- Membership in a professional association

Organization (objectives and activities)

- Describe the work of the organization, its reason for being.
- Mission of the group (official mission statement or unofficial).
- Number of people involved with the organization.
- Roles filled by these people (volunteer, employee, permanent, temporary, full/part-time) and the nature of their work.
- Structure of organization (board or other governing structure).
- Long term goals of the group.

Client relations (general)

- Explain how clients people seeking assistance first come into contact with the organization, and how you introduce the group to new people.
- How do you refer to people who come to the group for assistance or to participate in its work? What is their title, and in what ways might they participate?
- Discuss meaning of word 'client' and its applicability (leave until later if necessary).[2]
- Describe feedback received from people seeking assistance on their experiences and methods of gathering feedback.

Casework issues

- Estimated time and resources devoted to individual casework.
- Examples of « casework » in the organization (without identifying clients).
- Describe typical casework interaction with client (people involved, questions asked, development of strategy).
- Explain how the group decides which cases to get involved in.
- How do people know they have a relationship with the organization?

[2] In later questions in this Guide, the word 'client' can be substituted for the term used by the organization to designate those who arrive seeking assistance and/or membership.

- Management of conflict between clients and group members: processes and policies, people who play a mediating role in the group.
- Legal issues raised in casework (participant's definition of « legal »).
- Relationship between casework and the goals of the organization.
- Relationship between the individual case and broader political or law reform issues.
- Most important things to keep in mind when doing casework. How does participant know this?
- Training process, manuals and policies used by the organization.
- Who do you ask for guidance in your work in the group, why?
- Presence of lawyers or other legal professionals in the group and how their work is managed.
- Presence of « lay-practitioners » (non-lawyers with legal knowledge) in the group and how their work is managed. Relationship with local bar associations.
- (For non-professionals) How does the group know or decide they need a lawyer (if ever)?
- Describe relationship with other activist groups which combine individual assistance with political work.
- Other organizations or government agencies which might have an influence on the work of the group.
- Group's obligations (duties, expectations) to clients and vice-versa.

- Enforcement, by whom.
- Long-term involvement of clients, possibility of clients developing into group workers.
- Other potential participants in the study?

Appendix III: Participant Recruitment Letters

Français

ALEXANDRA LAW, candidate au doctorat, Faculté de droit, Université de Montréal

Téléphone (*supprimé)* – Courriel (*supprimé*)

(Nom),

Je suis une étudiante de troisième cycle à la Faculté de droit de l'Université de Montréal. Je fait présentement une étude sur les organizations qui offrent un soutien juridique en combinaison avec des stratégies de mobilisation politique et communautaire.

J'ai commencé ce projet parce que j'ai travaillé comme avocate et bénévole dans plusieurs campagnes qui ont employé le soutien individuel dans le cadre d'une stratégie globale de mobilisation.

Le but de ce projet est d'apprendre sur les perceptions des personnes qui sont impliquées dans des campagnes de réforme du droit et des campagnes de nature politique. J'espère partager des connaissances sur des pratiques efficaces de soutien à travers le pays. Le projet final sera une thèse de doctorat qui peut être préparée pour publication dans une version langage clair.

Je vous écris àfin de solliciter votre participation à cette étude, ce qui implique un entretien d'environ 45 à 120 minutes.

Votre participation à ce projet contribuera à l'avancement des connaissances et à l'amélioration des services offerts dans le cadre des campagnes politiques et de réforme du droit. Les participants trouveront peut-être que l'entretien offre l'occasion pour un reflet sur des accomplissements vécus et le contexte global de leur travail. Afin de vous remercier pour votre temps précieux, une compensation de 20$ sera versée suivant l'entretien.

Si vous êtes intéressé à participer à ce projet de recherche, ou si vous avez des questions concernant la présente, n'hésitez pas à me contacter.

Veuillez agréer, (NOM À INSÉRER), l'expression de mes sentiments distingués.

Alexandra Law

English

ALEXANDRA LAW, Doctoral Candidate, Faculté de droit, Université de Montréal Telephone (*deleted*)– Email (*deleted*)

Dear (Name) ,

I am a doctoral student at the Law Faculty of the Université de Montréal. I am conducting a study of organizations which combine individual legal support with community and political organizing strategies.

I started this project because I have worked as a lawyer and volunteer in several campaigns which used casework as part of a broader organizing strategy.

The goal of this study is to learn about the perceptions of people involved in law reform and political campaigns. I hope to share knowledge of 'best practices' in strategic casework across the country. The final project will be a doctoral thesis, which can be edited for publication in a plain-language format.

I am writing to request your participation, which would involve an interview of between 45 and 120 minutes.

Your participation in this project will help to advance knowledge and improve services offered in the context of political and law reform campaigns. Participants may also find that the interview offers a chance to reflect on past

accomplishments and the broader context of their work. To thank you for your valuable time, a compensation of 20$ will be paid following the interview.

If you are interested in participating in this research project, or if you have any questions regarding the present letter, please do not hesitate to contact me.

Yours truly,

Alexandra Law

Appendix IV: Consent Forms

(Please see next pages)

Français

FORMULAIRE DE CONSENTEMENT

Titre de la recherche : Intervention pluraliste : un site de réforme du droit

Chercheure : Alexandra Law, candidate au doctorat en droit, Université de Montréal

Directrice de recherche : Violaine Lemay, professeure à la Faculté de droit, Université de Montréal

A) RENSEIGNEMENTS AUX PARTICIPANTS

1. Objectifs de la recherche

Le but de la présente recherche est d'examiner comment des organismes répondent aux besoins quotidiens de leurs clients, face au but ultime de leur travail : la réforme systémique du droit.

2. Participation à la recherche

La participation à cette recherche consiste à rencontrer la chercheure pour une entrevue de 45 à 120 minutes à un moment que vous choisirez et dans un lieu privé. Cette entrevue portera sur votre expérience personnelle, vos attitudes, vos perceptions et vos besoins face à votre rôle dans l'organisme. Avec votre consentement, l'entrevue sera enregistrée par audio, puis transcrite. Si vous ne donnez pas votre consentement à l'enregistrement, la chercheure prendra des notes détaillées pendant l'entrevue.

3. Confidentialité

Les renseignements que vous me donnerez demeureront confidentiels. Les entrevues seront transcrites et les enregistrements effacés. Chaque participant à la recherche se verra attribuer un nom fictif et seul la chercheure aura la liste des participants et des noms qui leur auront été attribués. De plus, les renseignements seront conservés dans un classeur situé dans un lieu fermé et accessible seulement à la chercheure. Aucune information permettant de vous

identifier d'une façon ou d'une autre ne sera publiée. Ces renseignements personnels seront détruits 7 ans après la fin du projet. Seules les données ne permettant pas de vous identifier seront conservées après cette date, le temps nécessaire à leur utilisation.

Malgré le fait que les participants ne seront pas identifiés nominalement, il y a une possibilité qu'un participant venant d'un organisme de petit taille soit reconnu par les autres intervenants travaillant dans son domaine, ou par ses clients.

Afin d'atténuer la risque d'identification des personnes bien connues dans leur domaine, la chercheure va effectuer le recrutement des participants dans plusieurs organismes oeuvrant dans le même domaine de droit. La multiplication des organismes visés par le projet diminue les risques d'identifier un participant. Cette approche sera combinée avec l'utilisation d'un nom fictif pour chaque participant.

Il sera peut-être nécessaire d'identifier la province ou la ville dans laquelle un organisme est actif. Cependant, chaque organisme sera identifié seulement par un code numérique et par son domaine de droit. Puisque l'organisme ne sera qu'un parmi plusieurs oeuvrant dans la province, la confidentialité des participants sera protégée.

Tout renseignement écrit pourrant identifier le participant sera gardé au domicile de la chercheure.

4. Avantages et inconvénients

En participant à cette recherche, vous pourrez contribuer à l'avancement des connaissances et à l'amélioration des services offerts dans le cadre des campagnes de réforme du droit. Votre participation à la recherche pourra également vous donner l'occasion de mieux connaître le contexte de ce travail.

Par contre, il est possible que le fait de participer dans ce projet entraîne certains inconvénients. Pendant l'entrevue, vous allez répondre à des questions sur la nature de votre travail, sans toutefois nuire à la confidentialité des dossiers que vous gérez dans le cadre de ce travail.

5. Droit de retrait

Votre participation est entièrement volontaire. Vous êtes libre de vous retirer en tout temps sur simple avis verbal, sans préjudice et sans devoir justifier votre décision. Si vous décidez de vous retirer de la recherche, vous pouvez communiquer avec le chercheur, au numéro de téléphone indiqué ci-dessous. Si vous vous retirez de la

recherche, les renseignements qui auront été recueillis au moment de votre retrait seront détruits.

6. Indemnité

Afin de vous remercier pour votre temps précieux, une compensation de 20$ en argent comptant sera versée à la fin de l'entretien. Les participants vont signer un reçu comme preuve de paiement. Le reçu sera gardé confidentiel et traité de la même manière que les autres renseignements personnels du participant. Cependant**,** et bien que ce soit peu probable, si jamais il y a un conflit au sujet de la compensation, la chercheure se réserve le droit de montrer le reçu comme preuve de paiement au Comité d'éthique de l'Université.

7. Diffusion des résultats

Les participants seront informés lors de la publication des articles scientifiques basés sur les résultats du projet de recherche, ainsi que lorsque la thèse de doctorat de la chercheure sera complétée.

B) CONSENTEMENT

Je déclare avoir pris connaissance des informations ci-dessus, avoir obtenu les réponses à mes questions sur ma participation à la recherche et comprendre le but, la nature, les avantages, les risques et les inconvénients de cette recherche.

(SIGNATURE)

Après réflexion et un délai raisonnable, je consens librement à prendre part à cette recherche. Je sais que je peux me retirer en tout temps sans aucun préjudice, sur simple avis verbal et sans devoir justifier ma décision.

(SIGNATURE)

Je consens à ce que les données anonymisées recueillies dans le cadre de cette étude soient utilisées pour des projets de recherche subséquents de même nature, conditionnellement à leur approbation éthique et dans le respect des mêmes principes de confidentialité et de protection des informations.

(OPTION OUI/NON et SIGNATURE)

Je déclare avoir expliqué le but, la nature, les avantages, les risques et les inconvénients de l'étude et avoir répondu au meilleur de ma connaissance aux questions posées.

(SIGNATURE de la chercheure)

Pour toute question relative à la recherche ou pour vous retirer du projet, vous pouvez communiquer avec Alexandra Law, chercheure, au numéro de téléphone : (*Supprimé*) ou à l'adresse courriel : (*Supprimé*)

Toute plainte relative à votre participation à cette recherche peut être adressée à l'ombudsman de l'Université de Montréal, au numéro de téléphone (*Supprimé*) ou à l'adresse courriel suivante : (*Supprimé*) **(l'ombudsman accepte les appels à frais virés).**

Un exemplaire du formulaire d'information et de consentement signé doit être remis au participant.

This form is available in English.

English

CONSENT FORM

Title of the study: Pluralist Advocacy as a Site of Law Reform

Researcher: Alexandra Law, Doctoral Candidate in Law, Université de Montréal

Supervisor of the research: Violaine Lemay, Professor, Faculté de droit, Université de Montréal

A) INFORMATION FOR PARTICIPANTS

2. Objectives of the research

The goal of the present research is to examine how organizations respond to the daily needs of their clients in relation with the long-term objective of their work: legal change on a systemic level.

2. Participation in the research

Participation in the present research involves meeting the researcher for an interview of 45 to 120 minutes, at a time you will chose and in a private location. This interview will deal with your personal experience, your attitudes, your perceptions and your needs in relation with your role in an organization. With your consent, the interview will be taped and then transcribed. If you do not wish the interview to be recorded, the researcher will take detailed notes during the interview.

3. Confidentiality

The information you give me will remain confidential. The interviews will be transcribed and the recordings erased. Each participant in the research will be given a false name and only the researcher will have the list of participants and the names which will be assigned to them. In addition, the information will be stored in a filing cabinet situated in a closed location accessible only to the researcher. No information allowing you to be identified in any way will be published. This personal information will be destroyed 7 years after the end of the project. Only information which does not permit you to be identified will be kept after this date, for the time required for the data to be used.

Although participants will not be identified by name, it is possible that a participant from a smaller-sized organization could be recognized by other workers engaged in the same field, or by his or her clients.

In order to reduce the risk of identification of people who are well-known in their fields, the researcher will conduct recruitment of participants in several organizations working in the same area of law. The multiplication of organizations covered by the project reduces the risk of identifying a participant. This approach will be combined with the use of a fictional name for each participant.

It may be necessary to identify the province or city where an organization is active. However, each organization will be identified only with a numerical code and by its area of law. As the organization will only be one from among several working in the province, the confidentiality of participants will be protected.

Any written information which could identify the participant will be kept at the home of the researcher.

4. Advantages and Inconveniences

In participating in this research, you will be able to contribute to the advancement of knowledge and the improvement of services offered in the context of law reform campaigns. Your participation in the study will also give you an opportunity to become better acquainted with the overall context of this work.

However, it is possible that by participating in this research you will experience certain inconveniences. During the interview, you will need to answer questions on the nature of your work, without violating the confidentiality of the files which you manage in your work.

5. Right to withdraw from the study

Your paticipation is completely voluntary. You are free to withdraw at any time by giving verbal notice, without prejudice to your rights and without having to justify your decision. If you decide to withdraw from the research, you can communicate this to the researcher at the telephone number indicated at the end of the form. If you withdraw from the study, the information collected about you by that time will be destroyed.

6. Payment

To thank you for your valuable time, a compensation of $20 in cash will be given at the end of the interview. Participants will sign a receipt as proof of payment. The receipt will be kept confidentially and dealt with in the same way as the participant's other personal information. **However,** in the unlikely event of a dispute over the

compensation, the researcher reserves the right to show the receipt as proof of payment to the university Ethics Committee.

7. Publication of results

Participants will be informed of the publication of journal articles based on the results of the project, and of the completion of the doctoral thesis of the researcher.

B) CONSENT

I declare that I have studied the above information, have obtained the answers to my questions about my participation in the research, and that I understand the goal, the nature, the advantages, the risks and the inconveniences of this research.

After giving it thought and reasonable time, I freely consent to take part in this research. I know that I can withdraw at any time without any prejudice to my rights, on a simple verbal notice and without having to justify my decision.

(SIGNATURE)

I consent to allow the anonymised information collected in this study to be used for subsequent research projects of the same nature, conditional on their ethical approval and the respect of the same principles of confidentiality and protection of information.

(YES/NO OPTION and SIGNATURE)

I declare that I have explained the goal, the nature, advantages, risks and inconveniences of the research and that I have responded to the best of my knowledge to the questions asked.

(SIGNATURE of the researcher)

For any question about the research or to withdraw from the project, you can communicate with Alexandra Law, researcher, at the following telephone number : (*Deleted*) or at the following email address : (*Deleted*)

Any complaint regarding your participation in this research can be addressed to the ombudsman of the Université de Montréal, at the following telephone number : (*Deleted*) or at the following email : (*Deleted*) **(the ombudsman accepts collect calls).**

A copy of the signed information and consent form must be given to the participant.

Ce formulaire est disponible en français.

Appendix V: List of Toronto Star Articles Used for Case Study

- Letter, 'Special' diet has to be authorized, 5 April 2005
- Opinion, Pay now, or pay later, 10 May 2005
- Editorial, City finds it easy to kick poor around, 24 juillet 2005
- Gonda, Gabe, Activists trying to take a bite out of hunger; Loophole allows more people to get extra foodallowance But city officials say OCAP method is going to backfire, 20 juillet 2005
- Gonda, Gabe, City to let nurses okay diet benefit; Welfare recipients can get up to $250 per month extra Food allowance for people with medical conditions 26 juillet 2005
- Letter, Increase rates now, 7 octobre 2005
- Kerry Gillespie and Robert Benzie, Province closes welfare loophole; Tightens rules for $250 supplement MD must specify qualifying illness, 8 novembre 2005
- Kathy Hardill, Debra Phelps and Mimi Divinsky, 'Rogue advocates' for GTA's poor speak out, 25 November 2005
- Letter, Protecting our social programs, 16 March 2006
- Milvi Tiislar, An apple a day CAN keep the doctor away, 3 July 2006
- Letter, Increases amount to no more than a pittance, 9 décembre 2006
- Letter, Recipients have to pay for system's mistakes, 26 July 2007
- Javed, Noor, Rights advocates challenge province's cuts to diet fund, 6 March 2008

- Goar, Carol, Pushing back against the bullies, 9 July 2008
- Editorial, Action needed to avert social catastrophe, 19 March 2009
- Fiorito, Joe, Strike makes victims of the vulnerable, 24 July 2009
- Ferguson, Rob, MD's welfare prescription probed; Doctor in hot water for okaying $250-a-month food bonuses without checking patient restrictions, 10 December 2009
- Editorial, Doctor standing up for poor patients, 11 December 2009
- Monsebraaten, Laurie, Province told to boost special diet allowance; Panel cites inequality in welfare payments, 27 February 2010
- Monsebraaten, Laurie, Food subsidy on chopping block? People on diet allowance for medical problems fear province planning to cut program, 13 March 2010
- Editorial, Don't cut costs on backs of sick, 16 March 2010
- Benzie, Rob, Ontario faces 7 years in red; $24.7 billion deficit might not be erased until 2017 as Liberals will resistmassive cuts in next week's budget, 17 March 2010
- Creek, Mike, A test of Ontario's appetite to fight for poverty reduction 20 March 2010
- Editorial, Nutritious food vital for health, 21 March 2010
- Benzie, Robert, Deficit magically shrinks; Higher revenues mean Duncan will announce new cash for colleges, universities, daycare, 25 March 2010
- Coyle, Jim, Light on new measures, but still plenty to attack, 26 March 2010
- Monsebraaten, Laurie, Anti-poverty advocates decry loss of food help 26 March 2010

- Benzie, Robert, THE BIG FREEZE; Duncan points to deficit as he ends pay raises for about 1 million public sector employees, 26 March 2010

- Monsebraaten, Laurie, Diabetic fears losing special diet allowance; LIVING WITH ILLNESS, 26 March 2010

- Editorial, A way to reduce poverty and health costs, 28 March 2010

- News, Welfare rules tweaked after diet allowance axed, 29 March 2010

- Monsebraaten, Laurie, Needing a place of her own; Woman on disability hopes call for new benefit will mean she can avoid strain of sharing home, 20 April 2010

- Canadian Press, Sit-in ends with activists' arrest; Liberal offices invaded by anti-poverty group, 22 July 2010

- Addison-Webster, Melissa, Save Ontario's diet allowance; Many people coping with disabilities depend on endangered program to buy healthy food, 7 August 2010

- Monsebraaten, Laurie, Tangled up in welfare rules Recommended fixes; Help poor with small, low-cost changes, report urges province, 16 August 2010

- Benzie, Robert, Glen Murray likely to get promoted, 18 August 2010

- Monsebraaten, Laurie, Sick, poor left out of food grant talks; Groups say province promised consultation on new program, 23 August 2010

- Editorial, Don't slash funds for the neediest, 23 August 2010

- Letter, Food supplement needed immediately; Don't slash food assistance, Editorial Aug. 22, 30 August 2010

- Talaga, Tanya, $250 special diet payment stays as welfare reviewed; $3.5M examination of social assistance largest in 20 years, 1 December 2010

- Editorial, Patchwork on program, 2 December 2010

- Goar, Carol, A flurry of announcements but little content, 6 December 2010

- Teotonio, Isabel, Call to combat hunger 'crisis'; Affordable housing, income security top local panel's proposals, 20 December 2010

- Letter, Nutritious food vital for health, 21 March 2010

- Brett Popplewell, Welfare diet cash crackdown; Province's new rules designed to stop fraud, 27 February 2011

- News, correction, 1 March 2011

- Letter, Hunger epidemic is a disgrace; 400,000 rely on food banks each month in Ontario, 30 March 2011

- Monsebraaten, Laurie, Ontario budget streamlines tax credits for low-income families, 30 March 2011

- Talaga, Tanya, Ex-StatsCan chief to lead welfare reform; Dr. Munir Sheikh and Frances Lankin make up Ontario panel, 30 November 2010

Appendix VI: Codes and Definitions for Case Study

Name	Definition
Cost of program	• Mentions the cost of the SDA program, including the Auditor General's report, comments from politicians and comments from activists • Can include expressions of worry over the cost or simply a Statement of fact • Includes words like "funding" "cost" "audit" "budget" "taxpayers"
Cheating	• Allegation that SDA applicants (or many of them) are abusing the system or acting illegally • Includes words like "cheat" "abuse" "fraud" "illegal" "false" "fake"
Advocacy Tactics (negative)	• Characterizes the SDA *campaign* in a negative light, critical of OCAP and anti-poverty groups in particular, criticism of direct action casework • Includes words/phrases like "violence" "intimidation" "threat" "poverty pimp" • Note that "disruption" and its variants are neutral (used by critics and activists) so the word should be coded according to the context in the article
Advocacy Tactics (positive)	• Describes the SDA *campaign* positively, praises anti-poverty advocates and/or direct action casework • Includes references to "defending rights"

	"protecting the vulnerable" "gets the goods" "justice" "mobilization" • See note on "disruption" above
Justification for SDA applications	• Emphasizes the impact of the SDA on household incomes, inadequacy of welfare rates, necessity of applying for the allowance • Includes personal testimonials from people who have received the SDA, justifications based on necessity, general criticism of the welfare rates with the implication that low rates make the SDA necessary for all
Medical Professionals (neutral)	• Mentions that medical professionals have a role in making people eligible for the SDA, without commenting favourably or unfavourably • Passing mention of complaint against Dr. Wong is included here, if no negative/positive implications made
Medical Professionals (negative)	• Expresses suspicion of doctors, nurses, nutritionists who sign SDA forms or otherwise participate in the campaign • Specific mention of Dr. Wong in a negative light is included here
Medical Professionals (positive)	• Praise for medical professionals involved in the campaign or who sign SDA forms • Specific mention of Dr. Wong in a positive light is included here • Note that where Dr. Wong is interviewed in the media, his quotes will not be coded – only the surrounding article will be. There are two interviews in the list of articles.

State action (positive)	• Expresses a positive opinion of an act taken by the State (municipal, provincial or federal government)
State action (negative)	• Expresses a negative opinion of an act taken by the State (municipal, provincial or federal government)
Neutral mention of SDA campaign	• Mentions campaign and/or tactics without specific judgment of legitimacy. • Includes neutral mentions of the Human Rights Tribunal decision.