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Client Selection

How Lawyers Reflect and Influence Community Values

LYNN MATHER

In "The Oven Bird's Song," David Engel investigates the relationship between law and social change in a rural Midwestern community through an ethnographic study of civil litigation, especially personal injury cases. The evocative title of his article refers to Robert Frost's poem "The Oven Bird," in which the bird/singer responds to perceived disintegration and decay from change in the seasons. The poem is similar, Engel writes, to popular perceptions of personal injury claims in Sander County – perceptions that were strongly influenced by "social changes as local residents experienced them and by the sense that traditional relationships and exchanges in the community were gradually disintegrating."[1] In Chapters 5 and 7 of this book, Marshall and Hans each explore ways in which institutionalized legal practices mediate between people's perceptions of the law and their engagement with law. In this chapter, I focus on lawyers, because lawyers also constitute a crucial set of institutional actors connecting culture, community, and law.

When representing community residents, lawyers articulate their ideas and values while simultaneously translating abstract legal concepts, rights, and procedures for those who need – or want – to use them. Lawyers thus play a significant intermediary role in society. How do they perform this role? The most visible way lies in lawyers' advocacy at trial, through public performances of attorneys arguing before judges and juries on behalf of their clients. But over time, fewer and fewer legal cases in the United States have been resolved by adversary trial. Bench and jury trials constituted only 1.1 percent of all civil case dispositions in federal courts in 2015,[2] and only 4 percent of all civil

[1] David M. Engel, "The oven bird's song: insiders, outsiders, and personal injuries in an American community" *Law & Society Review*, 18 (1984), 551, 556–7.

[2] www.uscourts.gov/sites/default/files/c04mar15_0.pdf.

cases in state courts in 2013.[3] Since most cases are settled by negotiation without trial, a second way to observe lawyers' intermediary role lies in the process of case settlement. For example, what is the "going rate" for a guilty plea in different kinds of crimes or for settling cases in civil law? Such settlements anticipate likely outcomes at trial and are thus bargained "in the shadow of the law."[4] Plaintiffs' lawyers in Sander County, knowing that local judges and juries were hostile to personal injury suits, generally counseled their clients against trials and advised them to accept informal negotiated settlements instead.

Yet even before attorneys engage in negotiations or argue a case at trial, they must agree to represent someone. A lawyer's decision to represent a client or to reject someone's claim constitutes a third way in which lawyers mediate between communities and the law. Claimants or defendants in civil cases proactively seek out legal counsel, but individual lawyers are under no obligation to represent any particular client. The most common reason suggested for rejecting clients is economic: Either clients lack sufficient funds to pay for an hourly fee lawyer or else their cases are unlikely to generate sufficient reward for a contingency fee lawyer. Unlike criminal cases in which indigent clients are legally entitled to a defense lawyer, clients in civil cases in the United States have no such constitutional right. I discuss client selection in this chapter because, although rarely visible, lawyers' discretionary actions in choosing clients are crucial for determining access to the civil legal system. Moreover, such decisions illustrate well how attorneys reinforce community values when they embrace certain cases and reject others. We also see occasions where lawyers seek to challenge and perhaps change those values by representing the claims of "outsiders" – those socially or culturally marginal members of the community.

Engel's study of community and law shows that residents of Sander Country disapproved of formal legal action to recover for personal injuries. Instead, they believed in individual responsibility and self-sufficiency, seeing accidents as just part of life and not wanting to "cash in" on their misfortune by blaming others. Those who did file injury claims were seen as "troublemakers" and often were newcomers to the community – migrants, Latinos, union workers, and so forth. Lawyers reinforced community perceptions by discouraging

[3] Paula Hannaford-Agor, Scott Graves, and Shelley Spacek Miller, "The Landscape of Civil Litigation in State Courts 2015" National Center for State Courts, 20, www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.ashx.

[4] Robert H. Mnookin and Lewis Kornhauser, "Bargaining in the shadow of the law: the case of divorce," *Yale Law Journal*, 88 (1979), 950.

potential plaintiffs and accepting as clients only those with "real, nonfrivolous grievances."[5] Unlike the stereotypical plaintiff attorney who zealously pursues tort litigation, attorneys in Sander County actively discouraged it. The question is: Why? Engel's article suggests three reasons for the lawyers' behavior in client selection: lawyers' economic incentives, social networks, and – most significant in his analysis – shared cultural values. In what follows I will focus on these three, plus a fourth: formal law. Each explanation provides insight into how and why lawyers reflect community values when they agree to represent certain clients. Yet each answer also suggests why some lawyers might challenge or seek to change those traditional community values. For example, lawyers who perceive themselves to be outside of a homogeneous community might select clients who share their outsider status or whose cases could provide an impetus for legal or social change.

The empirical literature on the legal profession – including client selection – has grown enormously since 1984, when Engel's article was published. Interestingly, Engel's provocative analysis anticipates findings that emerged after his pathbreaking study, such as the importance of cultural over economic incentives for lawyers and the lack of any formal law constraining lawyers in client selection. I draw on this recent research to explore how lawyers select clients not only in personal injury cases but in other civil matters as well. I confine my discussion to areas of law with individual (rather than organizational) clients, given the well-known differences in the legal profession between these two hemispheres.[6]

Individuals with claims of personal injury or employment discrimination rarely have funds to pay attorneys an hourly fee and thus depend on lawyers in contingency fee practices. Lawyers in such practices are quite selective, rejecting the majority of clients who contact them.[7] Rates of rejection vary widely, however, depending on a lawyer's specialization, experience, location, case volume, and average case value.[8] Lawyers paid by hourly fees also

[5] Engel, "The oven bird's song," 564.

[6] John Heinz and Edward Laumann, *Chicago Lawyers: The Social Structure of the Bar* (Russell Sage Foundation and American Bar Foundation, 1982).

[7] Herbert M. Kritzer, *Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States* (Stanford University Press, 2004), p. 71.

[8] For comparison of research findings in this area, see Table 2 in Mary Nell Trautner, "How social hierarchies within the personal injury bar affect case screening decisions," *New York School Law Review*, 51(2006–7), 215. Recent research on case selection by employment discrimination lawyers reports their accepting only "a very small percentage" (10 percent or less) of potential clients: see Amy Myrick, Robert L. Nelson, and Laura Beth Nielsen, "Race and representation: racial disparities in representation for employment civil rights plaintiffs," *New York University Journal of Legislation and Public Policy*, 15 (2012), 705–58, 742.

scrutinize individuals seeking their help in order to be assured of payment and to avoid ethical problems such as conflict of interest or malpractice complaints. Divorce lawyers in one study overwhelmingly said that they screened potential clients before agreeing to representation.[9] And considerable bar commentary warns lawyers to choose their clients carefully since, by avoiding difficult clients, attorneys may prevent problems later on in a case. This all suggests, as Trautner notes, that the *process* of client selection may be as important for understanding as the *rate* of client acceptance: "How do lawyers *think* about screening?"[10] The answers below explore the four different perspectives on this question – economic, sociological, cultural, and legal – and in the end they reinforce Engel's insistence on the powerful role of culture for explaining lawyers' behavior.

ECONOMIC INCENTIVES

Although lawyers perform a public service, they also must earn a living. When representing individuals in family matters, torts, real estate, or other civil matters, new attorneys quickly learn that hard work and sympathy for clients only go so far. They don't pay the rent, the phone bill, or a secretary. The most common explanation of how lawyers think about screening centers on economic incentives. For contingency fee lawyers (who earn nothing unless the client wins), what is the likelihood of their "winning" the case? Cases most likely to be accepted should have legal merit and high damages. Kritzer's survey of contingency fee lawyers, for example, found that "lack of liability and inadequate damages (together or singly) are the dominant reasons for declining cases, accounting for about 80 percent."[11] Other researchers, such as Trautner, have found tort lawyers' perceptions of potential damages to be even more important than liability in the decision to accept or reject a case.[12]

Stratification in the plaintiffs' bar produces varying rates of client acceptance due to differences in the lawyers' practices. While many lawyers handle auto accidents or slip-and-fall cases, a smaller group specializes in cases involving more severe injuries or greater complexity (such as medical malpractice). Daniels and Martin distinguish between "bread and butter" plaintiff lawyers and "heavy hitters" according to the average value of their typical cases, and

[9] Lynn Mather, Craig A. McEwen, and Richard J. Maiman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (Oxford University Press, 2001), p. 93.

[10] Trautner, "Social hierarchies," 240.

[11] Kritzer, *Risks, Reputations, and Rewards*, p. 84.

[12] Mary Nell Trautner, "Tort reform and access to justice: how legal environments shape lawyers' case selection," *Qualitative Sociology*, 34 (2011), 523–38, 530; see also Myrick et al., "Race and representation," 747.

find the latter to be more selective in choosing clients.[13] High-end lawyers scrutinize potential cases for reassurance that the damages recovered will justify the time they invest. Kritzer, on the other hand, finds that high-volume attorneys reject proportionately more clients than low-volume attorneys do, perhaps because of the different referral patterns.[14] Lawyers handling a large number of cases often rely on mass advertising or client referral for their contacts, while those with fewer cases depend on attorney referrals, which means that some lawyer screening has already occurred. Each of these various personal injury practices rests on its own pattern of risks and rewards.[15]

Hourly fee lawyers also balance risk and reward in client selection. The risks for these attorneys involve investing more time than the client will be able to pay for, not getting paid at the end of a case, taking on too many cases and consequently neglecting some, or being pushed by a client to engage in ethical misconduct. Research on the divorce bar in New England conducted by myself and two co-authors reveals how some lawyers charge low fees and attract a large number of lower-income clients, others charge more per hour and require a modest retainer up front, and high-end divorce attorneys demand a large retainer and charge high fees.[16] We found that the average number of hours lawyers invested in a case, the nature of advocacy, and the length of the divorce process were associated with these different business models of divorce practice. That is, "having clients with few financial assets prompts attorneys to limit sharply what they do in the average case, while having clients with deeper pockets encourages expansion of billable hours and increased use of the formal legal process."[17]

Economic incentives in client selection are also shown in Michelson's study of Chinese lawyers at work. He finds that lawyers' financial insecurity and the conditions of solo legal practice in Beijing lead to their frequent rejection of cases with low fee potential.[18] As noted earlier, the legal merit of a case matters in client selection because it could produce a good financial outcome for both the lawyer and the client. But as Michelson notes, "the boundaries of 'legal merit' are flexible and malleable," reflecting and

[13] Stephen Daniels and Joanne Martin, "It was the best of times, it was the worst of times: the precarious nature of plaintiff's practice in Texas," *Texas Law Review*, 80 (2002), 1781–828, 1789; see also Trautner, "Social hierarchies," and Sara Parikh, "How the spider catches the fly: referral networks in the plaintiffs' personal injury bar," *New York Law School Law Review*, 51 (2006–7), 243–83.

[14] Kritzer, *Risks, Reputations, and Rewards*, pp. 71–2. [15] See ibid for this phrase.

[16] Mather et al., *Divorce Lawyers at Work*. [17] Ibid, p. 142.

[18] Ethan Michelson, "The practice of law as an obstacle to justice: Chinese lawyers at work," *Law & Society Review*, 40 (2006), 1–38.

reproducing cultural stereotypes.[19] Chinese lawyers' aversion to clients with labor disputes (compared to clients with housing or commercial conflicts) underscores Michelson's point. Client characteristics such as attractiveness, credibility, or "likeability"[20] also influence lawyers in client selection, in part because of how such characteristics might influence a judge or jury. As Engel explains in "The Oven Bird's Song," personal injury lawyers evaluate potential clients and negotiate case settlements using their "shared knowledge of the likely juror reaction if the case actually went to trial."[21] Trautner's research comparing client selection in states with tort reform and those without reform strongly supports this argument, showing how "lawyers frame cases in ways they expect to appeal to what they believe the jury will find compelling in the context of their own localized legal cultures."[22] Hence, even when attorneys are thinking about their own self-interest – if and how they will be paid – they are reflecting community values in their predictions about case outcomes.

Attorneys (especially those in solo practice) have considerable autonomy in setting fees, so they can adjust them downward for sympathetic individuals or upward to deter to difficult ones. The category of the "difficult" client emerges frequently in studies of client selection. When divorce lawyers in New England were asked to describe which clients they rejected, about half said those who are "difficult," variously defined as "vengeful, unrealistic, stubborn, or demanding"; "those who won't listen to you"; and "clients I'm not comfortable with."[23] Lawyers in Beijing said they rejected clients "who are unreasonably demanding," "who try to direct my work," or "who won't stop pestering me."[24] Personal injury lawyers interviewed by Kritzer said they sometimes hesitated to represent "high-maintenance" clients or those who engaged in lawyer shopping.[25] And employment discrimination lawyers considered the plaintiff's demeanor when deciding on representation; one lawyer interviewed "said he had a 'sixth sense' for 'difficult' clients, meaning that they would become 'accusatory' or 'whin[y] in the course of the lawyer-client relationship."[26] Since lawyers hesitate to turn away business – even that of difficult or "whiny" clients – they sometimes charge a higher hourly fee or increase the size of their retainer to compensate for the difficulty anticipated in representation. As one divorce lawyer said, "I don't mind a pain if they are going to

[19] Ibid, 5. [20] Trautner, "Tort reform." [21] Engel, "The oven bird's song," 564–5.
[22] Mary Nell Trautner, "Personal responsibility v. corporate liability: how personal injury lawyers screen cases in an era of tort reform," *Sociology of Crime, Law and Deviance*, 12 (2009), 203–30, at 227.
[23] Mather et al., *Divorce Lawyers at Work*, pp. 93–4. [24] Michelson, "The practice of law," 20.
[25] Kritzer, *Risks, Reputations, and Rewards*, p. 86.
[26] Myrick et al., "Race and representation," 744.

pay me!"[27] Similarly, Michelson reports that some Chinese lawyers would tolerate the "risk and the annoyances associated with 'difficult' clients if the fee potential of the case [was] sufficiently attractive."[28]

A small number of divorce lawyers in New England took this rational calculation even further to carve out a market niche for themselves – one that appealed directly to vengeful or unreasonable clients and offered to act as a hired gun for them. Unlike most divorce lawyers, who invoked the norms of reasonableness of their legal communities, these attorneys rejected cooperation and instead embraced a more aggressive "Rambo"-style representation. They knew they could attract clients this way, especially those stubborn or angry clients who were unwilling to listen to attorneys' pleas to be patient and realistic about their divorce.[29]

By pursuing their economic self-interest when selecting clients, lawyers thus reflected community values by predicting jurors' responses to those clients, or by aiding clients in resolving their conflicts in cooperative or adversarial ways depending on the interests of the individuals – and the lawyers.

SOCIAL NETWORKS AND RELATIONSHIPS

The fact that lawyers practice within social networks offers a second explanation for how they select their clients. Lawyers' ongoing interactions and close relationships in a community profoundly shape the way in which they do their work. In "The Oven Bird's Song," Engel explains the local bar's disinterest in filing personal injury claims as due in part to the social network of professional practice: "Sander County lawyers were seen as closely linked to the kinds of individuals and businesses against whom tort actions were typically brought."[30] That is, since lawyers are embedded in a social hierarchy, they are reluctant to accept clients wanting to sue those whom the lawyers generally represent. Indeed, Engel's data from a sample of civil cases confirms this point: Only 12.5 percent of the plaintiffs in tort cases were represented by attorneys from Sander County, in contrast to 72.5 percent of the non-tort plaintiffs who had legal counsel from the county.[31] Thus, local lawyers did not hesitate to represent plaintiffs in other areas of law – it was only the tort cases that they avoided. Consequently, Sander County residents who sought legal help for personal injury claims were often represented by one particular lawyer

[27] Mather et al., *Divorce Lawyers at Work*, p. 95.
[28] Michelson, "The practice of law," 21.
[29] Mather et al., *Divorce Lawyers at Work*, pp. 85–6.
[30] Engel, "The oven bird's song," 565.
[31] Ibid.

who lived just over the county line, a lawyer who readily admitted to Engel: "I'm not part of the establishment."[32]

This lawyer's comment underscores two different aspects of a lawyer's social network. Not only do ongoing relationships constrain lawyers in their work; so also does the hierarchy of the legal community. Van Hoy's research on Indiana lawyers, Parikh's on the Chicago bar, and Daniels and Martin's on the Texas bar reveal a great deal about the role of hierarchy among personal injury lawyers.[33] Each finds substantial stratification shaped by geographic reach, type and volume of cases, and specialization. Parikh notes that this hierarchy is "less obvious to outsiders," although well known within the bar.[34] Ranging from attorneys with a small number of high-value, complex cases to those handling many routine auto accidents, the bar depends heavily on cooperation for referrals. High-end practitioners refer low-value cases down the hierarchy and low-end practitioners return the favor (since the latter lack the resources to handle a specialized case and also could not shoulder that degree of risk). Additional referral partners come from small firms representing individuals on matters outside of personal injury. Parikh finds that the ties among referral partners are long-lasting, involve frequent contact, and are personal (rather than firm-based). These embedded ties among personal injury lawyers, Parikh suggests, not only shape the clientele that each represents, but also reproduce the stratification and hierarchy of the profession as a whole.[35]

Throughout the United States, 63 percent of private practitioners work either as solo practitioners or in small firms of one to five lawyers.[36] That does not mean, however, that these individuals are working entirely on their own, unconstrained in selecting clients or deciding how to represent them. Networks of attorneys, stemming in part from market considerations but also from ongoing social and professional interactions, create informal norms, mutual dependencies, and common standards. These "communities of practice," as my co-authors and I call them, include groups of lawyers practicing in a particular locality and those within a specific legal field such as personal injury or divorce.[37] Our research on divorce lawyers in Maine and

[32] Ibid, 566.

[33] Jerry Van Hoy, "Markets and contingency: how client markets influence the work of plaintiffs' personal injury lawyers," *International Journal of the Legal Profession*, 6 (1999), 345–66; Parikh, "How the spider catches the fly"; Daniels and Martin, "Best of times."

[34] Parikh, "How the spider catches the fly," 247. [35] Ibid, 267.

[36] www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2016.authcheckdam.pdf.

[37] Mather et al., *Divorce Lawyers at Work*, p. 6.

New Hampshire, for example, describes a hierarchy among divorce practitioners quite similar to the personal injury bar: High-end attorneys often face each other in two-lawyer divorce cases involving considerable assets, while divorce attorneys with working-class clients rarely face a lawyer on the other side and seek to finalize divorces as quickly and efficiently as possible. We also found among most of the divorce lawyers whom we interviewed a generally shared commitment to being reasonable, sharing information when asked, seeking to settle cases amicably, and avoiding unnecessary litigation. As noted in the previous section, however, a few lawyers in each locality rejected this norm of the reasonable lawyer and sought to carve out a market niche of their own, in some ways acting similarly to the lawyer in Sander County who said he wasn't part of the establishment.

Research on legal practice in small towns and rural areas shows how pervasive and influential these social networks can be. In small, tightly knit communities with ongoing social relationships, lawyers advocate for clients within the confines of those networks. Landon's study of lawyers in rural Missouri shows how lawyers redefined advocacy to avoid excessive zeal, cooperating with other attorneys and tamping down any client expectations of adversarial conflict in order to preserve the social fabric.[38] Recent research by Li on case screening in rural China points to a similar phenomenon – i.e., "relational embeddedness," referring to "concrete and durable relationships among law practitioners, clients, adversaries, and the communities these individuals inhabit."[39] Li's fieldwork in Chinese law offices finds that economic incentives explain some of their decisions on client selection, but she argues that economics was not the overriding determinant. Indeed, this 2016 study provides considerable evidence showing that "when faced with social obligations derived from kinship, friendship, and community membership, legal workers often put monetary interests on the back burner."[40] Some of the crucial non-monetary incentives that influenced client selection include the exchange of favors, the need to uphold moral obligations and show respect, and a desire to avoid social fallout.

Although research on relational embeddedness typically emphasizes its positive benefits for communities, Li draws on her research to point out its negative aspects, namely legal workers' tendency to support the more

[38] Donald D. Landon, *Country Lawyers: The Impact of Context on Professional Practice* (Praeger, 1990).

[39] Ke Li, "Relational embeddedness and socially motivated case screening in the practice of law in rural China," *Law & Society Review*, 50 (2016), 920–52, 921.

[40] Ibid, 935.

powerful party in disputes and thereby reinforce existing social inequalities. By agreeing to represent some clients and reject others, and to give priority to certain types of cases, law practitioners in rural China – like the lawyers in Sander County who would not represent personal injury clients – reinforce dominant community values.

SHARED CULTURAL AND PERSONAL VALUES

In his discussion of lawyers and local values, Engel emphasizes that many of the lawyers he interviewed "were born and raised in the area" and thus "shared the local tendency to censure those who aggressively asserted personal injury claims."[41] Just like the insurance adjusters who downgraded injury claims and the jurors and judges who disapproved of tort cases, lawyers in Sander County grew up in the community and shared its ideas and beliefs. That is to say, even the few attorneys who agreed to represent plaintiffs in injury cases had internalized the community's hostile view of these claims.

In the traditional bar account of lawyers' choices about client representation or advocacy, lawyers' personal values have no bearing on their professional conduct. Instead, the norms of the profession and professional socialization have ostensibly "bleached out" attorneys' personal attributes, based on race, gender, religion, or social background.[42] But the indeterminacy of law and the wide discretion enjoyed by attorneys provide considerable space for lawyers' own personal identities and values to affect their professional decisions. Implicit biases regarding race, religion, or gender also influence lawyers' judgment. Further, the fact that others (judges, opposing lawyers, clients, witnesses, etc.) consciously or unconsciously treat lawyers according to their gender or race may lead – or even in some way oblige – women and minority attorneys to reflect their own personal identities in their professional work.[43]

When seeking an attorney, potential litigants often look for someone with certain personal attributes in addition to the requisite professional qualities. Representation by an attorney of the same gender, race, or ethnicity can promote trust, and some clients believe it may improve the lawyer-client

[41] Engel, "The oven bird's song," 565.

[42] Levinson coined the term "bleached out professionalism" to describe the belief that lawyers' personal characteristics have no bearing on their professional values or conduct. He then critiques that view for Jewish lawyers in various situations. See Sanford Levinson, "Identifying the Jewish lawyer: reflections on the construction of professional identity," *Cardozo Law Review*, 14 (1993), 1577–1612, 1578.

[43] See, e.g., David B. Wilkins, "Identities and roles: race, recognition, and professional responsibility," *Maryland Law Review*, 57 (1998), 1502; and Mather et al., 2001.

relationship. Thus, regardless of how gender or race-blind the attorney is, or aspires to be, client perceptions and expectations may affect their relationship. At the same time, implicit or explicit biases can influence lawyers' responses to those seeking their services. A large study of employment discrimination claims in federal court found that African-Americans are almost twice as likely as whites to lack legal representation. Part of this may be due to Black plaintiffs' lack of trust in the legal profession (given that nearly all specialist lawyers are white), but part might also be explained by lawyers' implicit biases – their perceptions of Black clients as being more difficult, less credible, or harder to work with.[44]

Women divorce lawyers report that potential clients often contact them because of their gender. Some wives say they feel more comfortable talking to a woman lawyer, while others believe that a woman will better understand their problems and fight harder for them. And some women divorce lawyers admit they prefer to represent wives. Checking the docket records of over 6,000 divorce cases in New England, my colleagues and I found that female attorneys disproportionately represent wives in divorce cases.[45] Some women divorce lawyers we interviewed described their enjoyment of divorce work due to the intimacy and close emotional bond they could forge with a largely female clientele. Women attorneys are also more likely than men to specialize in divorce, and one specialist, for example, extolled the perfect match between her personal values and divorce law: "It was just a very good fit because I love people, and I've always been very interested in human relations, so it's a just a natural."[46]

Research on immigration lawyers reveals the importance of national and ethnic background for this area of practice. Levin's survey of immigration lawyers in New York City found that one-third were immigrants themselves, while the same proportion were born in the US and had at least one parent who was foreign-born.[47] Although these attorneys had many different reasons for initially entering the immigration field, they continued to represent immigrants because this area of practice "resonated with their own history or because of a desire to help others" – especially others like themselves.[48]

Historically, religious identity directly affected lawyers' selection of clients and areas of practice, as Jews and Catholics were barred from elite law firms for much of the twentieth century. Consequently, these attorneys gravitated

[44] Myrick et al., "Race and representation," 720.
[45] Mather et al., *Divorce Lawyers at Work*, pp. 56 and 208 (fn 16). [46] Ibid, 157.
[47] Leslie C. Levin, "Guardians at the gate: the backgrounds, career paths, and professional development of private US immigration lawyers," *Law & Social Inquiry*, 34 (2009), 399.
[48] Ibid, 411.

to personal plight fields of law, representing individuals in criminal cases, personal injuries, or family matters, and contributing to the social stratification of the legal profession still noted today.[49] Lawyers' religious beliefs may affect the selection of individual clients through the particular values of their practice, as, for instance, when Jewish lawyers work for social justice or serve the poor as part of their religious faith,[50] or when Catholic lawyers integrate moral analysis with their legal counseling.[51] But religious values can exert an even stronger influence on attorneys through legal obligation – for example, to canon or Jewish law. During the 1950s, for instance, Catholic lawyers were forbidden by Church doctrine from representing clients in a divorce action without prior approval from their local bishop and any lawyer ignoring this command would be committing "a seriously sinful act."[52] Similarly, some rabbis have ruled that Jewish lawyers should not represent clients as plaintiffs unless they have first sought to resolve their conflicts in a rabbinical court.[53] Levinson notes, however, that the question of the Catholic or Jewish lawyer "is not precisely analogous to questions involving other attributes like gender, race, or ethnicity," since the latter may suggest "distinctive way of looking at the world" whereas the former may in fact involve a matter of competing legal obligation.[54]

Increased diversity in the contemporary legal profession and changing expectations of the lawyer-client relationship pose challenges for a distinct professional identity. For instance, Mah argues that new Latino and Asian-American immigrant communities have social norms and worldviews that are poorly served by the bar, not because of too few Latino and Asian lawyers but because of professional norms such as client autonomy and lawyer neutrality, which clash with the norms of these immigrant communities.[55] Similarly, a detailed analysis of American Indian tribal litigation by Carpenter and Wald underscores the obstacles confronting tribal attorneys when representing their tribes because of professional bar rules that are not well suited for group lawyering.[56] These scholars see great advantage in allowing lawyers to have "thick" professional identities – closely identifying with their clients – but

[49] John P. Heinz et al., *Urban Lawyers: The New Social Structure of the Bar* (University of Chicago Press, 2005).

[50] Russell G. Pearce, "The Jewish lawyer's question," *Texas Tech Law Review*, 27 (1996), 1259.

[51] Thomas L. Shaffer, *On Being a Christian and a Lawyer* (Brigham University Press, 1981).

[52] Albert L. Schlitzer, "Catholic lawyer and divorce cases," *Notre Dame Law Review*, 29 (1953), 37, 44.

[53] Levinson, "Identifying the Jewish lawyer," 1603. [54] Ibid, 1611.

[55] Liwan Mah, "The legal profession faces new faces: how lawyers' professional norms should change to serve a changing American population," *California Law Review*, 93 (2005), 1721.

[56] Kristen A. Carpenter and Eli Wald, "Lawyering for groups: the case of American Indian tribal attorneys," *Fordham Law Review*, 81 (2013), 3085.

others, such as Spaulding, view such intense identification as "self-interested perversion" of the professional norm of service.[57]

These last points have special resonance in light of Engel's exploration of law and social change in Sander County. When social outsiders in that community – newcomers or those with a different ethnic or religious background – were injured in accidents, they struggled to find help from the local lawyers. But lawyers located outside of the county were willing to represent the injured claimants and to fight in court on their behalf. Being outsiders themselves, these attorneys were less likely to share the cultural values of Sander County.

FORMAL LAW

Interestingly, as Konefsky notes in his chapter about "The Oven Bird's Song," formal law plays little or no role in explaining civil litigation in Sander County. Cultural, social, and economic influences loom much larger in Engel's analysis, both for understanding who uses the court to recover for injuries and for showing how lawyers decide which injury plaintiffs to accept or reject. Indeed, the broader question of how lawyers think about client selection in civil cases is also surprisingly unconstrained by law. Historically, lawyers in the US have enjoyed nearly complete professional autonomy to decide upon client representation. By contrast, barristers in the UK have traditionally followed a "cab-rank" rule in which they are expected to take clients in the order in which they arrive at barristers' chambers. Empirical research, however, shows that this English rule is "widely thought to be honored mostly in the breach."[58]

Professional rules of conduct in the US focus on those whom lawyers *cannot* represent, but the rules impose no conditions on client acceptance. Specifically, ABA Model Rule 1.16 prohibits lawyers from accepting a client if the representation would result in a violation of professional conduct rules, such as a lawyer's conflict of interest. Even if a court appoints an attorney to represent a client, the attorney can refuse the appointment if the client or the cause is "repugnant" to the lawyer.[59] Moreover, once the client is accepted,

[57] Spaulding distinguishes between what he calls "thick" and "thin" professional identity and argues forcefully against the former, i.e., close identification of lawyers with their clients. See Norman W. Spaulding, "Reinterpreting professional identity," *University of Colorado Law Review*, 74 (2003), 1, 6.

[58] W. Bradley Wendel, "Institutional and individual justification in legal ethics: the problem of client selection," *Hofstra Law Review*, 34 (2006), 987, 994.

[59] ABA Model Rule 6.2 (c).

a lawyer can still withdraw if he/she "considers [the client's objectives] repugnant or with which the lawyer has a fundamental disagreement."[60] In short, other than avoiding conflicts of interest or clients who want to commit fraud, attorneys are generally free to reject clients for any reason whatsoever.

Nevertheless, the question of whether lawyers may refuse to represent individuals based on race, ethnicity, religion, gender, or any other protected category – just as other private businesses are legally constrained – has been a controversial subject of debate for decades. The ABA and state bars have wrestled with how best to promote anti-discrimination within the legal profession – whether by the more general state anti-discrimination statutes or by ethical conduct rules specific to the legal profession. Although nearly all states have public accommodations statutes prohibiting discrimination, there is only one case on record applying such law to lawyers – a 2003 Massachusetts court decision against a feminist lawyer who refused to represent a man in a divorce action.[61] Other states have professional conduct rules that prohibit discrimination in the practice of law or within the profession, but these do not apply to client selection. In August 2016, this debate came to a head with a vote by the American Bar Association to add a new paragraph (g) to 8.4 in the Model Rules of Professional Conduct to explicitly prohibit lawyers from knowingly engaging in harassment or discrimination in the practice of law. However, following this statement of prohibition, 8.4(g) adds a qualification: "This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16."[62] In other words, even with this controversial new rule change, it appears that attorneys continue to enjoy professional autonomy to accept or reject clients as they see fit.

Commenting on this ethical gap in the rules, Professor Allen described the dilemma raised by a student in her Professional Responsibility class: "Wait a minute, are you telling me that after I graduate I could hang out a shingle that says, 'Lawyers for White People'?" Professor Allen acknowledged that numerous websites already advertise gender-based legal services in family law – such as DAWN ("Divorce Attorneys for Women") or Family Law Attorneys for Men.[63] Allen argues in her comments to the ABA that the harm of the current ABA rule and the non-enforcement of most state anti-discrimination laws for client selection by lawyers greatly undermine the legitimacy of the legal

[60] ABA Model Rule 1.16 (b) (4).

[61] *Nathanson* v. *Mass. Commission against Discrimination*, 16 Mass L. Rptr 761 (Mass. Sup. Ct. 2003).

[62] ABA Model Rule 8.4 (g).

[63] Jessie Allen, Comments to ABA Committee on Ethics and Professional Responsibility, March 17, 2016, Re: Proposed Amendment to ABA Model Rule of Professional Conduct 8.4.

system. It is certainly ironic that one's access to legal rights and legal institutions depends on lawyers as gatekeepers choosing to grant such access, and yet the lawyers' own conduct in this process is largely unconstrained by law.

CONCLUSION

Lawyers express and reinforce dominant community values through their screening of potential clients. Engel's article alerted scholars to the importance of this stage of the legal process, and, even more, to the nuance and complexity involved in the process of client selection. Although economic incentives for lawyers are the easiest to observe in screening decisions, when examined more closely by Engel and then by later researchers those incentives often turned out to rest on cultural assumptions – assumptions that are reinforced by social networks. Thus, the emphasis in "The Oven Bird's Song" on the cultural values of residents and lawyers in Sander County to explain client acceptance was prescient. Moreover, Engel's lack of attention to formal law exerting constraints on lawyers remains accurate today, since lawyers are still largely unregulated in their selection of clients.

Let me conclude by suggesting that these same factors that link the process of client selection to community values also point to how and why lawyers may occasionally help to bring about change. That is, by representing marginal voices in society, initiating new kinds of lawsuits, or making new legal arguments, lawyers select clients and present their cases in ways that may influence community values. The process of litigation requires, as Engel writes, that "norms and values that once patterned behavior unthinkingly or unconsciously must now be articulated, explained, and defended."[64] For example, when a criminal lawyer defended her female client for killing her husband after years of his physical abuse, the lawyer introduced *the wife*, not the husband, as the victim, and thereby extended the concept of self-defense to include victims of domestic violence. In so doing, the lawyer asked the community to re-think its norms about violence within families, gender relations, and protections of criminal law. When a lawyer agreed to represent a gay client seeking a marriage certificate, he was challenging taken-for-granted assumptions about the legal definition of marriage and forcing them to be "articulated, explained, and defended."[65] As gay marriage cases made their way through the appellate courts, the traditional defense of marriage as a heterosexual institution broke down against constitutional claims of equal

[64] Engel, "The oven bird's song," 579. [65] Ibid.

protection. Numerous other cases abound in which minority views within a local community (whether liberal or conservative voices) have found expression through litigation and ended up challenging community values and ultimately changing the law.

Why do lawyers agree to represent clients against such overwhelming odds? For the same reasons that lawyers select clients based upon dominant community values. These lawyers may share the cultural ideas of their clients, perhaps seeing themselves as cause lawyers who use law to confront dominant norms. Or, the lawyers may have also experienced the marginal social status of their clients, whether due to gender, sexual orientation, race, ethnicity, or something else within the social hierarchy of the legal profession. Or, the lawyers may be willing to take a risk with certain clients because they see possible economic benefits from representing them. For instance, my research a few decades ago revealed a small number of women divorce lawyers in New England who represented their clients – wives – in ways that challenged the status quo of small-town family law practice, which tended to favor husbands. These women lawyers embraced aggressive legal advocacy because of a commitment to feminist principles (cultural values), their own marginalization by the largely male divorce bar (social network), and recognition of a market niche (economic incentive).[66] Other examples abound in which lawyers marginalized within their own communities, such as lawyers from racial or ethnic minority backgrounds, represent their peers to reflect and confront wrongful treatment or to assert legal rights. While in some cases these practitioners were part of organized political networks seeking legal change, others were simply individual lawyers who felt sidelined in their own communities because of their identities or values and sought to represent clients in order to remedy the situation.

The study of lawyers as they decide whom to represent in litigation may seem at first blush to be an insignificant topic, but "The Oven Bird's Song" showed its importance for understanding the role lawyers play in mediating community values and law. Considerable scholarship since Engel's article has built on and extended his insights. The process of client selection shows how lawyers typically reflect, but on occasion may influence, community values.

[66] Mather et al., *Divorce Lawyers at Work*, p. 127.