

2000

Lawyering for Social Change

Karen L. Loewy

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>



Part of the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Karen L. Loewy, *Lawyering for Social Change*, 27 Fordham Urb. L.J. 1869 (2000).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol27/iss6/4>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

LAWYERING FOR SOCIAL CHANGE

*Karen L. Loewy**

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible. Lawyers, as guardians of the law, play a vital role in the preservation of society.¹

INTRODUCTION

Lawyering for social change, often termed political lawyering, can be defined in many ways.² One definition of political lawyering construes the word “politics” in the classical sense of Plato and Aristotle, viewing it “as the art concerned with what it means to be a human being; what is the best life for a human being; and . . . the ways in which we can order our living together so that good human lives will emerge.”³

Another definition focuses on the lawyer’s ability to fight the status quo and to provide redress and representation to the voiceless.⁴ Lawyering for social change is “a form of advocacy that consciously [strives] to alter structural and societal impediments to equity and decency”⁵ as the lawyer works to provide “legal representation to individuals, groups, or interests that historically have

* J.D. Candidate, Fordham University School of Law, 2000; B.A. in Near Eastern and Judaic Studies and Music and certificates in Women’s Studies and Legal Studies, Brandeis University, 1996. I would like to thank Professor Russ Pearce for his editorial comments on early drafts and the Stein Scholars Program for continued support. Special thanks to David S. Widzer for his endless love and encouragement.

1. ABA Model Code of Professional Responsibility, Preamble and Preliminary Statement (1981) in THOMAS D. MORGAN & RONALD D. ROTUNDA, 1998 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY (1998) [hereinafter “Model Code”].

2. This Note uses the terms “political lawyering,” “lawyering for social change” and “social change lawyering” interchangeably.

3. Peter M. Cicchino, *To Be A Political Lawyer*, 31 HARV. C.R.-C.L. L. REV. 311 (1996).

4. See *Preface* to Symposium, *Political Lawyering Conversations on Progressive Social Change*, 31 HARV. C.R.-C.L. L. REV. 285 (1996).

5. *Id.* at 285.

been unrepresented in our legal system, or who are fighting the established power or the established distribution of wealth.”⁶ Social change lawyering refers to those “lawyers whose work is directed at altering some aspect of the social, economic and/or political status quo” and who believe that current societal conditions obstruct the full participation of and sufficient benefits to subordinated people.⁷

Professor Martha Minow also suggests that political lawyering “involves deliberate efforts to use law to change society or to alter allocations of power.”⁸ She examines the meanings of “law,” “social” and “change,” noting that “law” encompasses both the formal rules promulgated by the various branches of government and the customs of authority and opposition that have arisen both around and outside of the public institutions intended to change those rules.⁹ “Social” connotes the essential links between politics and culture through which people shape their awareness of and ambitions for society, and the arenas for deliberation over what morality and economic justice should require.¹⁰ Finally, she posits that “[c]hange’ includes not only specific, discrete alterations, but also processes of renovation and continuing challenge of the status quo.”¹¹

This Note explores the significance, legitimacy and methodology of lawyering for social change. Part I examines the lawyer’s motives for entering into this work, as well as notions of how the lawyer’s role affects her work for social change. This Part also explores theoretical approaches toward political lawyering and the methodologies employed to effect change. Part II examines whether it is justifiable for a lawyer to drive social change, taking into consideration the ramifications of different images of the lawyer’s role and the dangers of a lawyer’s working to further social

6. Debra S. Katz & Lynne Bernabei, *Practicing Public Interest Law in a Private Public Interest Law Firm: The Ideal Setting to Challenge the Power*, 96 W. VA. L. REV. 293, 294-95 (1993-94).

7. Louise G. Trubek, *Embedded Practices: Lawyers, Clients, and Social Change*, 31 HARV. C.R.-C.L. L. REV. 415 n.2 (1996).

8. Martha Minow, *Political Lawyering: An Introduction*, 31 HARV. C.R.-C.L. L. REV. 287, 289 (1996).

9. See Martha Minow, *Law and Social Change*, 62 U. MO. KAN. CITY L. REV. 171, 176 (1993) [hereinafter Minow, *Law and Social Change*].

10. See *id.* at 182. Minow rejects the strict dictionary definition of “social” — “of or relating to human society” — as too vague, claiming that within the context of law and social change, “social” is often treated too narrowly. *Id.* at 176 n.30 (citing WEBSTER’S THIRD NEW INT’L DICTIONARY 2161 (1967)).

11. *Id.* at 182.

change, particularly regarding the lawyer-client relationship and anti-majoritarian uses of the courts. This Part also examines arguments for the legitimacy of this enterprise stemming from the role of the law as an expression of societal values and from the unique access lawyers have to the legal system. Part III argues that it is entirely legitimate for a lawyer to engage in work for social change in order to ensure that the rights of all people are protected. This Part addresses the objections raised to political lawyering, concluding that these objections can either be overcome through various lawyering techniques or can be counterbalanced by the need to ensure protection of legal rights. In addition, this Part puts forth a model of lawyering that incorporates moral activism with a flexibility of ideology and technique, allowing the lawyer to work for the greater good.

I. THE LAWYER'S ROLE AND TECHNIQUE IN WORKING FOR SOCIAL CHANGE

General definitions of the endeavor of lawyering for social change do not really explain why working for social change is specifically an activity for lawyers. These definitions do not directly address the historical context of and the varied reasoning behind the field of lawyering for social change. They do not address the nuances of different models of the lawyer's role. They do not indicate how a lawyer can actually accomplish this goal. This Part examines different conceptions of the lawyer's role, focusing on the notions of lawyers as a governing class and of lawyers as moral activists, in order to illuminate the lawyer's motivations for working for social change. It then explores the theories underlying the use of these models and the use of particular types of efforts in achieving true change.

A. The Lawyer's Role — Or Why It Is a Lawyer's Job to Do This Work At All

The moral doctrines that regulate the legal profession discuss and promote the lofty ideals of informed democracy and the autonomy of every human being.¹² The professional responsibility codes exhort lawyers to protect the system that safeguards individual rights in order to preserve societal values.¹³ Lawyers have an obli-

12. See *Preamble & Preliminary Statement* to Model Code, *supra* note 1.

13. See *id.*; see also *Preamble* to ABA Model Rules of Professional Conduct, A Lawyer's Responsibilities (1997), in THOMAS D. MORGAN & RONALD D. ROTUNDA, 1998 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY (1998) [hereinafter

gation to work for the betterment of the legal system and have a unique role as “guardians of the law.”¹⁴ These ideals would seem to appeal to the moral center of every lawyer’s soul, yet the codes promote a role of the lawyer that only addresses one conception of lawyering — that of lawyers as a governing class. This image views lawyers as a noble assembly that works for the people out of a sense of duty stemming from their superior skills and judgment.¹⁵

Other images of a lawyer’s role, however, promote a different focus. The moral activist model envisions lawyering as a principled endeavor inextricable from the lawyer’s own personal morality.¹⁶ Lawyers enter into their role out of a sense of what is moral and right and are held morally accountable for their actions.¹⁷ This section explores these notions and how they motivate lawyers to engage in political lawyering.

1. *The Governing Class*

In 1905, Louis D. Brandeis addressed undergraduates at Harvard, lamenting the general neglect among lawyers of their ob-

“Model Rules”] (noting that a lawyer has a duty to uphold the legal process and that lawyers “play a vital role in the preservation of society.”); *Preamble to ABA Canons of Professional Ethics* (1908), in THOMAS D. MORGAN & RONALD D. ROTUNDA, 1998 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY (1998) [hereinafter “ABA Canons”]; *Preamble to ABA Torts and Insurance Practice, Lawyer’s Creed of Professionalism* (1988), in THOMAS D. MORGAN & RONALD D. ROTUNDA, 1998 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY (1998) (“As a lawyer, I must strive to make our system of justice work fairly and efficiently.”).

14. *Preamble & Preliminary Statement to Model Code*, *supra* note 1.

15. See, e.g., GEOFFREY HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 1086 (2d ed. 1994); Louis D. Brandeis, *The Opportunity in the Law*, 39 AM. L. REV. 555 (1905); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 102-12 (Henry Reeve trans., 3d ed. 1838). See generally JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976) (examining the responses of elite lawyers to social change in the twentieth century).

16. See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 160-74 (1988) [hereinafter LUBAN, *LAWYERS AND JUSTICE*] (discussing throughout part I the difficulties inherent in the adversary system and advocating a system of lawyer accountability); David Luban, *The Social Responsibility of Lawyers: A Green Perspective*, 63 GEO. WASH. L. REV. 955 (1995); David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717 (1988) [hereinafter Luban, *Noblesse Oblige*]; Paul R. Tremblay, *Practiced Moral Activism*, 8 ST. THOMAS L. REV. 9 (1995); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 643-45 (1985); MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961* (1994) [hereinafter TUSHNET, *CIVIL RIGHTS*]; David R. Esquivel, Note, *The Identity Crisis in Public Interest Law*, 46 DUKE L.J. 327 (1996); Janine Sisak, Note, *Confidentiality, Counseling, and Care: When Others Need to Know What Clients Need to Disclose*, 65 FORDHAM L. REV. 2747, 2759-61 (1997).

17. See LUBAN, *LAWYERS & JUSTICE*, *supra* note 16, at 160.

ligation “to use their powers for the protection of the people.”¹⁸ Brandeis raised a call for more “people’s lawyers,”¹⁹ encouraging lawyers to fulfill the obligation created by their specialized training and highly defined sense of judgment.²⁰ He believed that the lawyer’s aptitude for abstract thought and empirical astuteness, her ability to reach conclusions in real time, her keenly honed judgment of people, her tolerance and her practical attitude constituted a unique composite of traits that perfectly suited the lawyer for public life.²¹ He recognized that lawyers enjoy a social status resembling that of a noble class, noting Alexis de Tocqueville’s earlier reference to lawyers as an American aristocracy.²² This model of lawyering traces the lawyer’s obligation to serve the people to this elevated position.²³ The governing class notion posits that because legal education and training emphasize objective reasoning and decision-making, lawyers are better equipped to struggle with the matters of democracy.²⁴ Further, the lawyer’s own interests are

18. AUERBACH, *supra* note 15, at 34-35 (citing Brandeis, *supra* note 15).

19. Brandeis’ notion of “people’s lawyers” stemmed from his belief that lawyers had a duty to use their ability and authority to protect the greater good. “The great opportunity of the American bar is and will be to stand again as it did in the past, ready to protect also the interests of the people.” Brandeis, *supra* note 15, at 559-60. He proposed that in order to rectify the legal profession’s slant toward representing the wealthy, lawyers should advise the large private interests in their private practice, but should also pursue public sector responses to the inequities that result from that slant. *See id.* at 562-63.

20. *See id.*

21. See Luban, *Noblesse Oblige*, *supra* note 16, at 720-21.

22. *See id.* at 718-19 (citing DE TOCQUEVILLE, *supra* note 15, at 102-12). De Tocqueville, having visited the United States, viewed lawyers as an aristocracy, wielding an inordinate amount of power over the dealings of society. *See DE TOCQUEVILLE*, *supra* note 15, at 102-12. De Tocqueville proposed that lawyers, like aristocrats, have a duty higher than mere commercialism and through their public lives, assume responsibility for the common good, that the common good will be attained by decreasing the tyranny of the majority and quelling social freedoms in the name of order, that this will be accomplished by restraining the people, and that lawyers are particularly adapted for this type of work by their training and mental propensities. *See Luban*, *Noblesse Oblige*, *supra* note 16, at 719 (citing DE TOCQUEVILLE, *supra* note 15, at 271-76).

23. *See Brandeis*, *supra* note 15, at 560.

24. *See Russell G. Pearce*, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 253 (1992).

[Lawyers] have a responsibility “to serve as a policy intelligencia . . . and to use the authority and influence deriving from their public prominence and professional skill to create and disseminate, both within and without the context of advising clients, a culture of respect for and compliance with the purposes of the laws.”

Id. at 253 (quoting Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 14 (1988)).

completely divorced from this endeavor, as the lawyer's duty is to promote the common good.²⁵ This image of lawyering pervaded legal culture for years, and to some extent, still does.²⁶

2. *The Moral Activist*

Another image of the lawyer's role is that of moral activism. The moral activist views lawyering as a principled endeavor, seeing attorneys as morally accountable for the legal principles they advocate.²⁷ Professor David Luban describes moral activism as "a vision of law practice in which the lawyer who disagrees with the morality or justice of a client's ends does not simply terminate the relationship, but tries to influence the client for the better."²⁸ Lawyers would decline or withdraw from cases they deem unjust.²⁹

25. See *id.* (tracing the historical roots of the ethical codes to the work of George Sharswood).

[A] lawyer's principle obligation was the republican pursuit of the community's common good even where it conflicts with either her client's or her own interests. Sharswood defined the common good as the protection of order, liberty, and property in order to provide individuals with the opportunity to perfect themselves.

Id. at 241.

26. See HAZARD, *supra* note 15, at 1086; AUERBACH, *supra* note 15, at 307-08; Pearce, *supra* note 24; see also Model Code, *supra* note 1, EC 8-1 ("By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein."); Preamble to Model Rules, *supra* note 13 (linking the lawyer's duty to improve the legal system itself and the access of the powerless to that system to the lawyer's place in society and in the legal profession).

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf.

Preamble to Model Rules, *supra* note 13.

27. See LUBAN, *LAWYERS & JUSTICE*, *supra* note 16, at 160-61.

28. *Id.* at 160.

29. See *id.*; see also Model Rules, *supra* note 13, Rule 1.16(b) (stating that unless ordered to do so by a tribunal, "a lawyer may withdraw from representing a client if . . . a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent"); Model Code, *supra* note 1, EC 2-26 ("A lawyer is under no obligation to act as advisor or advocate for every person who may wish to become his client[.]"); EC 2-30 ("[A] lawyer should decline employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client."); ABA Canons, *supra* note 13, Canon 31 ("Responsibility for Litigation").

Lawyers derive motivation from their personal determinations of what is right and good. Their actions come from their own notions of justice and morality rather than from any duties they owe.

An example of moral activism lies in the work of Charles Hamilton Houston³⁰ and Thurgood Marshall³¹ in the civil rights movement.³² Houston described the type of lawyering he performed as "social engineering."³³ This model advocates that "[a]s social engineers, lawyers [have] to decide what sort of society they [wish] to construct, and . . . use the legal rules at hand as tools."³⁴ Social engineering involves a moral decision about the types of battles worth fighting, followed by the utilization of all the tools at a lawyer's disposal, including the rules of the courts and an awareness of the social setting in which the law operates.³⁵ Houston and Marshall's civil rights crusade stemmed from their own very personal desires to fight discrimination against African Americans.³⁶ They aimed to solve what they saw as crucial social problems.³⁷ This

No lawyer is obligated to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what employment he will accept as counsel, what causes he will bring into Court for plaintiffs, what cases he will contest in Court for defendants.

ABA Canons, *supra* note 13, Canon 31.

30. See Steven H. Hobbs, *From the Shoulders of Houston: A Vision for Social and Economic Justice*, 32 How. L.J. 505 (1989). Charles Hamilton Houston was a prominent civil rights attorney, special counsel for the NAACP, and professor and dean of Howard University School of Law. He worked with Thurgood Marshall on a wide range of landmark civil rights cases. See *id.* at 506.

31. Thurgood Marshall was a prominent civil rights attorney, working as staff attorney for the NAACP Legal Defense and Education Fund, before serving as a judge and eventually becoming the first African American Justice on the United States Supreme Court. See TUSHNET, CIVIL RIGHTS, *supra* note 16; Mark V. Tushnet, *The Jurisprudence of Thurgood Marshall*, 1996 U. ILL. L. REV. 1129, 1131 (1996) [hereinafter Tushnet, *Thurgood Marshall*].

32. See Tushnet, *supra* note 16, at 4-5; Hobbs, *supra* note 30.

33. See TUSHNET, CIVIL RIGHTS, *supra* note 16, at 6.

34. *Id.*

35. See *id.* Tools used by political lawyers include, among others, impact litigation, legislative advocacy, public education, media initiatives, monitoring governmental policies and building coalitions. See, e.g., *About NOW LDEF* (visited Feb. 25, 2000) <<http://www.nowldef.org/html/about/index.htm>>; *About the NAACP Legal Defense Fund* (visited Feb. 25, 2000) <<http://www.igc.apc.org/lctr/ldf-info.html>>.

36. See Hobbs, *supra* note 30, at 509-12; TUSHNET, CIVIL RIGHTS, *supra* note 16, at 4-5.

37. See Tushnet, *Thurgood Marshall*, *supra* note 31, at 1141. Tushnet critiques the notion of social engineering as stemming from the governing class idea of lawyers having specialized knowledge unavailable to the public. This Note suggests, however, that Tushnet mischaracterizes Marshall's utilization of the social engineering model, suggesting that Marshall's personal motivations prevent the assignation of this model to the governing class.

conception of moral activism, while originating in the civil rights movement, continued through the women's, gay and lesbian, and poverty rights movements, among others, encouraging lawyers to use the legal tools at their disposal to work toward these morality-driven goals.³⁸

B. The Models and Methodologies of Lawyering for Social Change

The techniques employed in lawyering for social change vary greatly. One achieves success with a multitude of strategies and efforts. This section explores the theoretical and methodological strategies lawyers may use in working for social change.

1. Theoretical Models of Lawyering for Social Change

Three ways of approaching the achievement of social change are the notions of "cultural shift," "negotiation of strategy" and "dimensional lawyering." These views are not mutually exclusive, but they are informed by different underlying ideologies.

a. Cultural Shift

The creation of a cultural shift is one view of the way to make true social change.³⁹ Professor Thomas Stoddard suggests that social change and legal change are not always coexistent, that one does not always prompt the other.⁴⁰ Furthermore, attempts at law reform may only succeed on a formal level and may not have any real impact on the larger cultural context into which they fit.⁴¹ The law's traditional mechanisms can be adapted, however, to improve society in extra-legal ways. This use of the law is what Stoddard calls the law's culture-shifting capacity.⁴²

A cultural shift may take place when far-reaching or significant change occurs, public awareness of that change is widespread, the public generally perceives that change as legitimate or valid, and there is continuous, overall enforcement of the change.⁴³ One theory perhaps underlying the notion of cultural shift and its belief that all of these components must occur contemporaneously is that

38. See MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973* 2 (1993).

39. See Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967 (1997).

40. See *id.* at 972.

41. See *id.*

42. See *id.* at 973.

43. See *id.* at 978.

lawyers may not be able to divert the direction of a rule of law very far off course from the beliefs of elected officials.⁴⁴ Without the support of the general public and the enforcement of the change, change cannot really occur. To make major changes in critical social relationships, one must change the way people think about the issue.⁴⁵

A new law that affects a large number of people in fundamental ways creates the potential for culture shifting.⁴⁶ For the shift to have cultural resonance, however, the general public must also perceive the shift. It must be "generally discerned and then absorbed by the society as a whole."⁴⁷ This common awareness must also be accompanied by some sense of public acceptance grounded in a sense of legitimacy or validity, as awareness is never enough to assure compliance.⁴⁸ Finally, unless the rules are enforced, the public will disregard them. Unless a new law promotes public awareness and adherence to the rules, as well as provides appropriate sanction for their disregard, culture-shifting cannot occur.⁴⁹

Professor Nan Hunter suggests an additional requirement for a true cultural shift.⁵⁰ She posits that in addition to the four requirements listed above, some type of public engagement in the effort to change the law must occur.⁵¹ When a change stems from a mobilized public demand, whether through litigation or legislation on state or federal levels, the resulting change has an immediate culture-shifting impact.⁵² She thus places great emphasis on mobilization and empowerment of those seeking legal assistance, and strengthening the represented constituency or community organization.⁵³ This empowerment is valuable because the constituent community will work toward larger, more fundamental change, viewing the law as a tool to accomplish this change as opposed to

44. See James Douglas, *The Distinction Between Lawyers as Advocates and As Activists; And the Role of the Law School Dean in Facilitating the Justice Mission*, 40 CLEV. ST. L. REV. 405, 407 (1992).

45. See *id.*

46. See Stoddard, *supra* note 39, at 978.

47. *Id.* at 980.

48. See *id.* at 982-83 (stating that "[c]ulture-shifting' can never take place in an atmosphere of resistance. It requires, at a minimum, an aura of moral and cultural legitimacy to sustain widespread adherence to any new code of conduct.").

49. See *id.* at 986-87.

50. See Nan D. Hunter, *Lawyering for Social Justice*, 72 N.Y.U. L. REV. 1009, 1019 (1997).

51. See *id.*

52. See *id.* at 1020.

53. See *id.*

viewing the reform of the law as the end goal in and of itself.⁵⁴ Consequently, these communities will not be constrained by the limits of the law and will better serve as repeat players in the scheme of social change.⁵⁵

Professor Chai Feldblum suggests that in order for the public to believe in the legitimacy of a change, whether enacted by the legislature or decided by a court, there must be an engagement with the morality underlying the issue.⁵⁶ She maintains that the moral discourse surrounding the debate of social issues must not be discounted.⁵⁷ While legal commentators have long documented the impact of judicial reasoning on the moral rhetoric surrounding a controversial issue, the legislators' discourse has lacked similar recognition.⁵⁸ Because the surrounding rhetoric is so powerful, it must involve a real engagement with the underlying moral issues, as this grappling will have an impact on the type of culture-shift that occurs.⁵⁹ Because the issues around which social change occur are those that are grounded, at their core, in morality, the more the moral aspects of the issues are emphasized, the greater the impact of the cultural shift.⁶⁰

b. *Negotiation of Strategy*

Other models of social change efforts focus on employing strategies that fit particular situations. Minow suggests that for true change to occur, there must be a negotiation of result-oriented and process-oriented activity.⁶¹ She notes that many problems do not fit the pattern of problem and solution, and therefore, different approaches must be taken to accomplish different goals.⁶² The multi-layered strategies of legal advocacy organizations recognize the necessity for these different approaches.⁶³

54. *See id.*

55. *See id.* at 1020-21.

56. *See* Chai R. Feldblum, *The Moral Rhetoric of Legislation*, 72 N.Y.U. L. REV. 992, 994 (1997).

57. *See id.* at 994.

58. *See id.* at 994-95.

59. *See id.* at 994.

60. *See id.*

61. *See* Minow, *Law and Social Change*, *supra* note 9, at 179-82. Minow generally discusses result-oriented activities as those aimed at discrete, specific changes and process-oriented activities as those aimed at a continuous process of change. *See id.*

62. *See id.* at 181 (citing Ota de Leonardis, *Deinstitutionalization, Another Way: The Italian Mental Health Reform*, 1 HEALTH PROMOTION 151, 153 (1986)).

63. *See, e.g.,* *About NOW LDEF*, *supra* note 35.

NOW LDEF pursues equality for women and girls in the workplace, the schools, the family and the courts, through litigation, education, and public

Professor Cornel West suggests that the impact of progressive lawyers comes from a combination of defensive work against cultural conservatism,⁶⁴ radical legal practice through academic critiques of liberal paradigms⁶⁵ and participation in extra-parliamentary social movements.⁶⁶ Further, West proposes that lawyers have the role of curing society's "historical amnesia," ensuring the preservation of past struggles, and building on "the traces and residues of past conflicts."⁶⁷ By using previous conflicts to provide a framework for their endeavors, lawyers for social change can build on previously earned political ground.

Social engineering, as advocated by Houston and Marshall, is a clear example of negotiation of strategy. As Professor Mark Tushnet notes, "They had to use the legal materials available to them to shape a working solution to the pressing problems of social life that lawyers confronted."⁶⁸ This methodology in addressing the realities of the African American situation paved the way for other social movements, providing a "model for using litigation to change legal and social structures that marginalized a segment of society."⁶⁹ The NAACP Legal Defense and Education Fund's campaign to desegregate public schools served as the prototype for

information programs. NOW LDEF's docket of 70 cases covers a wide range of gender equity issues. NOW LDEF also provides technical assistance to Congress and state legislatures, employs sophisticated media strategies, distributes up-to-the-minute fact sheets, and organizes national grassroots coalitions to promote and sustain broad-based advocacy for women's equality.

Id.

Litigation, the foundation of LDF's strength, remains the central element of LDF's efforts. . . . At the same time, LDF is continuing its tradition of innovation by expanding its efforts outside the courtroom. Monitoring laws and government policies, advocating for change, keeping the general public informed, and strengthening coalitions with other concerned organizations are among the many ways LDF is active today.

About the NAACP Legal Defense Fund supra note 35. *See also About Lambda* (visited Feb. 24, 2000) <<http://www.lambdalegal.org/cgi-bin/pages/about>> ("Lambda Legal Defense and Education Fund is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, and people with HIV/AIDS through impact litigation, education, and public policy work.").

64. *See* Cornel West, *The Role of Law in Progressive Politics*, 43 VAND. L. REV. 1797 (1990). For an example of this kind of work, *see, e.g., Guardian of Liberty: American Civil Liberties Union* (visited Feb. 24, 2000) <<http://www.aclu.org/library/pbp1.html>> (detailing the ACLU's efforts to preserve civil liberties).

65. *See* West, *supra* note 64 (providing an example of such an academic critique).

66. *See id.* at 1799-1801 (1990). Examples of such social movements include the civil rights movement and the poverty rights movements. *See* TUSHNET, CIVIL RIGHTS, *supra* note 16; DAVIS, *supra* note 38.

67. *See* West, *supra* note 64, at 1802.

68. Tushnet, *Thurgood Marshall*, *supra* note 31, at 1141.

69. DAVIS, *supra* note 38, at 2.

the social movements that followed.⁷⁰ Thus negotiation of strategy is a methodology used widely by social movements today.⁷¹

c. Dimensional Lawyering

Professor Lucie White divides the work of social change lawyers into three "dimensions."⁷² The first dimension is an advocacy aimed at making the law more amenable to the social welfare needs of disempowered groups.⁷³ For example, litigation and lobbying can expand or improve welfare programs, their administration and their monitoring.⁷⁴ The second dimension is advocacy that seeks to reconstruct values in the dominant culture, thus encouraging greater sensitivity to the injustices faced by the underrepresented, as well as mobilizing greater resources on their behalf.⁷⁵ An educational or dramatic appearance in court or before a legislature designed to evoke empathy in the audience may achieve these ends.⁷⁶ The third dimension is advocacy focusing on the client community's own political consciousness, which thus empowers them to change their own world.⁷⁷ This last dimension involves "collaborative communicative practice."⁷⁸ By viewing this work in terms of dimensions rather than models, it is possible for any single act to create several different waves of impact. This approach therefore encourages an integrated approach in which every action can have multiple impacts and achieve multiple goals.

2. Approaches Toward and Methods of Lawyering for Social Change

Whichever theoretical underpinning a political lawyer employs, she also has a broad range of methodological options in pursuing this ideology. This section explores these methods, focusing on the

70. *See id.* at 1-2.

71. *See supra* note 63.

72. *See* Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157 (1994) [hereinafter White, *Collaborative Lawyering*].

73. *See id.* This dimension would also encompass work on underrepresented issues.

74. *See id.*

75. *See id.*

76. *See id.* These notions parallel those of a cultural shift requiring acceptance by mainstream society. *See* discussion *supra* text accompanying notes 48-49.

77. *See* White, *Collaborative Lawyering*, *supra* note 72, at 157.

78. *Id.* at 158. *See also infra* text accompanying notes 165-174.

organization's overall disciplinary approach and the actual tools at the lawyer's disposal.

a. Overall Organizational Approach: Exactly What Type of Work Is This?

Regardless of the theoretical model employed in a social movement, most lawyering for social change fits into one of two broad methodological models: 1) doctrinal development or 2) direct client advocacy.⁷⁹ Doctrinal development, also known as impact litigation, focuses on the evolution of a particular novel legal principle and is exemplified by the First Amendment test-case approach of the American Civil Liberties Union ("ACLU").⁸⁰ Organizations such as the ACLU "select cases that will have the greatest impact, cases that will have the potential to break new ground and to establish new precedents that will strengthen the freedoms we all enjoy."⁸¹

Direct client advocacy, on the other hand, involves serving the legal needs of a given client, as illustrated by in-house organizational lawyers or legal services offices.⁸² Legal services offices once encompassed aspects of both models,⁸³ but restrictions on the use of legal services funding have prevented such organizations from engaging in large-scale impact work.⁸⁴ Other hybrids of these models include organizations with in-house legal units functioning as both corporate counsel and law reform units, such as Planned Parenthood Federation of America,⁸⁵ and organizations that provide legal services and perform law reform work while leaving or-

79. See Hunter, *supra* note 50, at 1021.

80. See *id.* Other examples include Lambda LDF's work to secure the right to marry for gays and lesbians, see *About Lambda*, *supra* note 63, and NOW LDEF's work to protect reproductive freedom and secure gender equity, see *About NOW LDEF*, *supra* note 35.

81. *Guardian of Liberty: American Civil Liberties Union*, *supra* note 64.

82. See Hunter, *supra* note 50, at 1021.

83. See *id.*

84. See Symposium, *The Future of Legal Services: Legal and Ethical Implications of the LSC Restrictions*, 25 FORDHAM URB. L.J. 279, 280 (1998) (noting that Congress restricted the kinds of services local legal services organizations receiving federal money could provide, including proscriptions on welfare reform lobbying and participation in class actions (citing Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(7), (16), 110 Stat. 1321 (1996))).

85. See *A History of Protecting Reproductive Health Services in the Courts*, <<http://www.plannedparenthood.org/library/ABORTION/History.html>> (visited Feb. 24, 2000) (detailing Planned Parenthood's work before the United States Supreme Court).

ganizational issues to outside counsel, such as Gay Men's Health Crisis.⁸⁶

b. Methodology: What Are the Tools to Use?

Which tool the lawyer decides to employ at a given time is often a matter of careful interpretation and prediction on the part of the lawyer. The devices available to lawyers working for social change are diverse and varied. With mechanisms such as impact litigation, legislative advocacy, grassroots organizational efforts, public education, media strategies, civil disobedience and narrative at their disposal, the modes of operating vary from cause to cause and lawyer to lawyer.⁸⁷

Several legal theorists have proposed using one method for social change over another. Stoddard suggests that legislative lawmaking is the most effective means for creating social change.⁸⁸ He advocates that it is "the avenue of change most likely to advance 'culture-shifting' as well as 'rule-shifting' — the method of lawmaking most likely to lead to absorption into the society of new ideas and relationships."⁸⁹ He does not completely discount the value of judicial lawmaking — judges announcing new legal formulations — however.⁹⁰ Lawsuits may effectively highlight issues with deep cultural import, thereby forcing government to examine them.⁹¹ Such judicial lawmaking often fails to interest the public, however, because it focuses on the rules that structure society rather than on the issues that underlie those rules.⁹² The public will be concerned with the basic cultural issues that shape society, but not with the legal rules that result from those issues and thus lawsuits, which inherently focus on legal rules, will not gain widespread social support.⁹³

86. See Hunter, *supra* note 50, at 1021; *GMHC at a Glance* (visited Feb. 24, 2000) <<http://www.gmhc.org/aboutus/gmhcmmain.html>> (detailing GMHC's advocacy work in the courts); *GMHC Directory* (visited Feb. 24, 2000) <<http://www.gmhc.org/contact/directry.html>> (detailing GMHC's legal services).

87. See *About NOW LDEF*, *supra* note 35; *About the NAACP Legal Defense Fund*, *supra* note 35; *About Lambda*, *supra* note 63; *Guardian of Liberty: American Civil Liberties Union*, *supra* note 64.

88. See Stoddard, *supra* note 39, at 985.

89. *Id.*

90. See *id.* at 985-86.

91. See *id.*

92. See *id.*

93. See *id.*

Professor Gerald Rosenberg agrees that judicial lawmaking by itself is less likely to bring about social change.⁹⁴ In examining the civil rights, abortion and women's rights, environmental and criminal law reform movements, he concludes that the courts can help produce social change, but that often these judicial decisions are just a part of a long-term multifaceted social movement.⁹⁵ He notes that "[a] court's contribution, then, is akin to officially recognizing the evolving state of affairs, more like the cutting of the ribbon on a new project than its construction."⁹⁶ Patterns of change and sympathetic movements within the larger culture thus serve as the catalysts for successful social change legal battles.⁹⁷

Hunter proposes, however, that effective culture shifting cannot be assigned to a particular legal arena. "Breakthrough moments in law occur rarely but not randomly, regardless of arena. They usually follow long periods of incremental, often nearly imperceptible, social change occurring at a glacial pace. When they do occur, they crystallize what has gone before at the same instant that they propel social structures forward."⁹⁸ She agrees that majoritarian legislative victories can be more politically sound than judicial renderings of the Constitution, despite a statute's being subject to judicial review,⁹⁹ but she also suggests that the most powerful activity within social change lawyering is the use of litigation to obtain enforcement and comprehensive interpretation of statutes.¹⁰⁰ Hunter further maintains that a multitude of complex structural factors determine whether legislation or litigation serve as the dominant force at a given time, including the roles of the state and economic market, the nature of the rights being sought, and the large-scale political climate.¹⁰¹

Minow notes that many studies of law and social change focus solely on the courts, and more specifically, on the Supreme Court.¹⁰² She suggests that this emphasis is an extremely short-sighted view and that an appropriate framework for evaluating social change efforts would focus on all federal and state courts, as

94. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

95. See *id.* at 338.

96. *Id.*

97. See *id.* at 337.

98. Hunter, *supra* note 50, at 1012.

99. See *id.* at 1012.

100. See *id.*

101. See *id.* at 1013.

102. Minow, *Law and Social Change*, *supra* note 9, at 173.

well as state and federal legislation.¹⁰³ Further, she submits that "law" should also include "the norms about which individuals come to have consciousness, whether that consciousness derives from judicial decisions, statutes or more general sources of rights to object to mistreatment[,]"¹⁰⁴ as well as the alternative regimes established by "the concerted voluntary efforts by and on behalf of disenfranchised people to create services and programs denied to them by the formal legal system."¹⁰⁵

Lawyers clearly have a wide range of choices before them in determining how to approach a social change endeavor and what tools to implement in achieving their goals. Organizations across the political spectrum may use the same approach while ideological opposites may employ the same methodology. No matter what choices political lawyers make regarding how to accomplish this work, the end goal is always the same — the successful effecting of social change.

II. THE LEGITIMACY OF LAWYERING FOR SOCIAL CHANGE

Questions remain as to whether the use of these legal tools to effect social change is a legitimate form of legal practice. Scholars support both sides of the debate. This Part examines the various arguments for and against lawyering for social change.

A. Opponents of Lawyering for Social Change

Opponents of political lawyering raise two main contentions. One argument concerns the impact of political lawyering on the lawyer-client relationship.¹⁰⁶ Other issues arise from the anti-majoritarian nature of using the courts to reach goals that could not be attained through ordinary democratic means.¹⁰⁷

1. *The Effect of Political Lawyering on Lawyer-Client Relationship*

The primary concerns raised regarding the lawyer-client relationship focus on how political lawyers can manipulate their clients and

103. *See id.* at 173-74.

104. *Id.* at 174 (citing Frank Michelman, *Law's Republic*, 97 *YALE L.J.* 1493 (1988)).

105. *Id.* at 175.

106. *See* LUBAN, *LAWYERS & JUSTICE*, *supra* note 16, at 303.

107. *See id.* at 303. The critique that this work is anti-majoritarian means that groups who cannot achieve their goals through the usual political channels and seek remedies in court thwart the will of the people. *See id.*

how the lawyer may elevate the interests of the cause over those of the individual client.¹⁰⁸ Professor Richard Wasserstrom suggests that the lawyer's role in the traditional lawyer-client relationship — that of immersion in and embodiment of the client's position in the legal arena — prevents the pursuit of social change.¹⁰⁹

The very essence of the lawyer's institutional role is to submerge himself in his client's position and to represent that interest in the legal arena as forcefully as possible. . . . [B]eing an advocate in our legal system — where one does not or need not choose one's causes — encourages a non-critical, non-evaluative, uncommitted state of mind.¹¹⁰

The traditional model of the lawyer-client relationship of which Wasserstrom speaks is also known as client-centered lawyering.¹¹¹ This model is based on the belief that clients bear the full consequences of their own decisions and are therefore in the best position to understand both the legal and non-legal significance of their choices.¹¹² Consequently, a lawyer counsels her clients most effectively by helping them explore all possible results of their actions so that they may make decisions that best serve their own needs.¹¹³ The American Bar Association ("ABA") has encouraged this type of client-focused model by preventing lawyers from creating their own cases through bans on types of advertising and barratry.¹¹⁴ Although non-profit organizations engaging in litigation as a form of political expression are exempt from these rules on First

108. See *id.* at 317.

109. See Richard Wasserstrom, *Lawyers and Revolution*, in *RADICAL LAWYERS: THEIR ROLE IN THE MOVEMENT AND IN THE COURTS* 74, 80 (Jonathan Black ed., 1971).

110. *Id.*

111. See, e.g., DAVID A. BINDER, ET AL., *LAWYERS AS COUNSELORS: A CLIENT CENTERED APPROACH* 16-24 (1991); Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103 (1992); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987); Nancy D. Polikoff, *Am I My Client?: The Role Confusion of A Lawyer Activist*, 31 HARV. C.R.-C.L. L. REV. 443 (1996); William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213 (1991); Ann Southworth, *Taking the Lawyer Out of Progressive Lawyering*, 46 STAN. L. REV. 213 (1993); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699 (1988) [hereinafter White, *To Learn and Teach*].

112. See BINDER, *supra* note 111, at 17; Polikoff, *supra* note 111, at 458.

113. See BINDER, *supra* note 111, at 19-22; Polikoff, *supra* note 111, at 458.

114. See ABA Canons, *supra* note 13, Canons 27-28; Model Code, *supra* note 1, EC 2-3 to 2-5, 2-8 to 2-10, 2-15, DR 2-101 to 2-104; Model Rules, *supra* note 13, Rules 7.1 to 7.5.

Amendment grounds,¹¹⁵ many who oppose political lawyering view such recruitment of clients as improper.¹¹⁶

When a lawyer has a vested interest in the concerns of the group she represents, as is so often the case in political lawyering, the client-centered model becomes challenging to maintain.

When I feel that I, as a member of the group that my clients represent, also bear the consequences of their choices, it is difficult maintaining my role as a counselor. My feelings of connection to my clients imply that we have a common cause, and unless I am careful, may deny my clients the client-centered assistance that they should receive.¹¹⁷

The handling of test cases or impact litigation is an area in which these difficulties become apparent. Some opponents of political lawyering express concern that the pursuit of such cases serves the political theories of the lawyers rather than the interests of the clients.¹¹⁸ Within the context of a nonprofit organization, the needs of the individual client may conflict with the vision of the organization.¹¹⁹ Whereas the nonprofit organization may see the purpose of the legal program as improving the situation of the client group, this view may require tradeoffs with the service to the individual client.¹²⁰ In addition, the lawyer may have to juggle the organization's procedures with responsibilities to the court.¹²¹ These issues raise potential conflicts of interest between lawyers and their clients under the ABA's ethical codes.¹²² They are also

115. See *In re Primus*, 436 U.S. 412 (1978). See also discussion *infra* notes 155-157 and accompanying text.

116. See LUBAN, *LAWYERS & JUSTICE*, *supra* note 16, at 317.

117. Polikoff, *supra* note 111, at 458.

118. See LUBAN, *LAWYERS & JUSTICE*, *supra* note 16, at 317 (citing CHARLES WOLFRAM, *MODERN LEGAL ETHICS* 940 (1986)).

119. See Trubek, *supra* note 7, at 425.

120. See *id.*

121. See *id.*

122. See Model Code, *supra* note 1, EC 5-2 ("A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice given or services to be rendered the prospective client."), DR 5-101(A) ("Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own . . . personal interest."); Model Rules, *supra* note 13, Rule 1.7.

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities . . . to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.

Model Rules, *supra* note 13, Rule 1.7(b).

antithetical to the lawyer's obligations of zealous advocacy and loyalty.¹²³

In discussing these issues, Professor Dean Hill Rivkin stated:

[W]e question anyone's right to make . . . an attempt to speak for those who have not spoken for themselves. . . . [Lawyers for social change] find it enormously hard not to silence and disable clients through [their] empathy and compassion, much less [their] distance and, yes, despair. There are theories of empowerment, strategies for dealing with differences, empathy training — they help — but the tensions in the lawyer-client relationship in reform litigation . . . persist.¹²⁴

He posits that the clients involved in this type of endeavor are often voiceless and that even if the lawyer implements strategies to level the power differential between the lawyer and the client, the lawyer will still inevitably dominate the client, thus stepping outside the bounds of the client-centered counseling model.¹²⁵

Other scholars suggest that beyond the inability to sustain a client-centered relationship with their clients, political lawyers might even harm the interests of their clients. Professor Nancy Polikoff believes that a lawyer's legal and activist lives must be kept totally separate, particularly when that activism involves civil disobedience.¹²⁶ Behaving as an activist when one is supposed to be acting as an officer of the court de-legitimizes the attorney in the eyes of the court and consequently harms the client.¹²⁷ That legitimacy is needed because it grants the lawyer a level of access to the judicial system that the clients themselves do not have.¹²⁸ The separation between lawyering and activism, therefore, is essential.¹²⁹

Dean James Douglas suggests that a lawyer must logically consider every aspect of an issue, rather than just the side that she is advocating according to both the law and the ethical requirements

123. See Model Code, *supra* note 1, at DR 7-101(A) ("A lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of his client through reasonably available means"); Model Rules, *supra* note 13, Rule 1.3 cmt. 1 ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer"); Rule 1.7 cmt. 4 ("Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client.").

124. Dean Hill Rivkin, *Reflections on Lawyering for Reform: Is the Highway Alive Tonight?*, 64 TENN. L. REV. 1065, 1067-68 (1997).

125. See *id.* at 1067.

126. See generally Polikoff, *supra* note 111.

127. See *id.* at 448.

128. See *id.*

129. See *id.* at 448-49.

of a lawyer to zealously represent her client.¹³⁰ As a result, a lawyer is precluded from engaging in social activism.¹³¹ He submits that because a true social activist operates from emotion-based motives, it is less likely that the lawyer will have the objectivity required to fully explore her opponent's perspective and that without this ability, she cannot adequately represent her client.¹³²

2. *Anti-Majoritarian Use of the Courts*

Another objection to lawyering for social change stems from the perception that it is a way of permitting the courts to supercede the democratic process. These concerns are based on the idea that "[i]t is wrong for groups that are unable to get what they want through ordinary democratic means (pressure-group politics, the legislative process, electing an executive who does things their way) to frustrate the democratic will by obtaining in court what they cannot obtain in the political rough-and-tumble."¹³³ Those supporting this view see clear divisions of labor among the branches of government. The lawyer's job is to litigate rather than to seek legislative-like change through the court system.¹³⁴ Courts should assume a finite position in a democratic system.¹³⁵ When lawyers ask judges to legislate social policy, they are replacing the will of the people with their own.¹³⁶

In furtherance of the lawyers' defined role in the democratic process, Douglas asserts that "a lawyer's role in society is not to change the rules of the game, but to assist in maintaining the rules and to help resolve conflicts under the established rules."¹³⁷ Douglas is concerned that political lawyers' focus on altering the social order rather than on the legal system can be detrimental to the client.¹³⁸ He suggests that lawyers should work within the given

130. See Douglas, *supra* note 44, at 405.

131. See *id.* at 407.

132. See *id.* at 405.

133. LUBAN, *LAWYERS & JUSTICE*, *supra* note 16, at 303.

134. See Tushnet, *Thurgood Marshall*, *supra* note 31, at 1144 (citing JOHN M. JORDAN, *MACHINE-AGE IDEOLOGY: SOCIAL ENGINEERING AND AMERICAN LIBERALISM, 1911-1939* (1994)).

135. See LUBAN, *LAWYERS & JUSTICE*, *supra* note 16, at 358.

136. See *id.*

137. Douglas, *supra* note 44, at 406.

138. See *id.* at 405-06.

Social activists are not concerned with the rule of law; they are, instead, concerned with changing society and the way members of society interrelate with each other. The social activist is therefore, more likely to breach the rule if to do so might result in the accomplishment of the desired goal, a change in society.

legal contexts, rather than try to change those contexts. The creation of this change is a task for activists, not lawyers. The lawyer's task is to describe and maintain the rules that result from the changes in thought prompted by the action of activists.¹³⁹

B. Proponents of Lawyering for Social Change

Scholars who support lawyering for social change advance two main reasons why this position is legitimate. The first relates to the nature of the law as an articulation of social morality, and the second regards the structure of the legal system and the right of all people to gain access to justice.

1. *Law As An Articulation of Social Morality*

According to some scholars, using the law to effect social change is well within the lawyer's authority because the law reflects society's morals and standards.¹⁴⁰ Stoddard notes that "[t]he law is not now, and never has been, simply a set of formal rules; it is also the most obvious expression of a society's values and concerns, and it can and ought to be used to improve values and concerns."¹⁴¹ As a result of this vision of law as a tool for the betterment of society, groups seeking social change have always turned to the law for its promises of due process and equal treatment.¹⁴²

Some scholars view political lawyering, therefore, as a logical extension of the lawyer's personal commitment to social change. For example, Professor Gary Bellow says, "Political lawyering . . . simply describes a medium through which some of us with law training chose to respond to the need for change in an unjust world."¹⁴³ He notes further:

Social vision is part of the operating ethos of self-conscious law practice. The fact that most law practice is not done self-consciously is simply a function of the degree to which most law practice serves the status quo. . . . The kind of political lawyering [I have practiced] is distinguishable from general law work by the degree to which it was fueled by a more dissatisfied and change-oriented self-consciousness than the law practice of most

Id.

139. *See id.* at 407.

140. *See* Stoddard, *supra* note 39.

141. *Id.* at 971.

142. *See* Jane E. Larson, *Introduction: Third Wave — Can Feminists Use the Law to Effect Social Change in the 1990s?*, 87 *Nw. U. L. REV.* 1252, 1252 (1993).

143. Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 *HARV. C.R.-C.L. L. REV.* 297, 309 (1996).

of our contemporaries. . . . It seems enough here to say that "vision-making" work is fundamental to the activist strategies political lawyering inevitably embodies.¹⁴⁴

Lawyers engaged in this work thus use the law to advance their own visions of an ideal society in furtherance of the notion that the law serves as a reflection of societal values.

2. *Structure of the Legal System*

Another reason presented for the validity of this work lies in the unique role that lawyers play in the legal system.¹⁴⁵ Luban notes:

It is an obvious fact . . . that all of our legal institutions . . . are designed to be operated by lawyers and not by laypersons. Laws are written in such a way that they can be interpreted only by lawyers; judicial decisions are crafted so as to be fully intelligible only to the legally trained. Court regulations, court schedules, even courthouse architecture are designed around the needs of the legal profession.¹⁴⁶

Lawyers thus retain a monopoly on legal services.¹⁴⁷ This legal structure obligates lawyers to work for those in need, not merely because of the demand for public services, but because of the implicit right to "Equal Justice Under Law."¹⁴⁸ The notion that all

144. *Id.* at 301-02.

145. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 16.

146. *Id.* at 244. Some would argue that the response to this problem should be the de-regulation of the legal profession. See, e.g., LUBAN, *LAWYERS & JUSTICE*, *supra* note 16, at 269-77; see also Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995) (noting the transformation of law practice from a profession to a business, and suggesting reforms such as permitting nonlawyers to practice and substituting market and government regulation for self-regulation). This Note does not address the merits of this claim, but the de-regulation of the legal system is unlikely to happen any time soon. Until it does, this Note proposes that political lawyering is the best option to ensure that every person has access to the court system.

147. See LUBAN, *LAWYERS & JUSTICE*, *supra* note 16, at 286.

Lawyers . . . retail a commodity manufactured by the state: law. They have, moreover, been granted a monopoly on it, in . . . several ways . . . : through unauthorized practice regulations, through the fashioning of laws and regulations, through the erection of a professionalized system designed in large part around the needs of the law retailers. The adversary system itself is predicated on the monopoly of lawyers.

Id.

148. See *id.* at 248-57. Luban defines this right as implicit, meaning rights granted "by the rules of the game," rather than moral, meaning those rights without which a person is "a mere thing and not . . . a moral agent." *Id.* at 248-49. "Equal Justice Under Law" is carved above the entrance to the United States Supreme Court building. See Nadine Strossen, *Pro Bono Legal Work: For the Good of Not Only the Pub-*

people should be afforded equal justice is one of the fundamental legitimizing principles of the American legal system.¹⁴⁹ This principle implies equal political rights, such as consent to governance, as well as equality of legal rights, meaning that every person has a right to legal redress of injuries through the court system.¹⁵⁰ To gain this access, however, requires the help of lawyers. In order to sustain the legitimacy of the legal system, lawyers must guarantee that legal services are available to all that need them.¹⁵¹

Given these justifications for providing legal services to those otherwise lacking access to them, Luban argues further that representing these clients in a politicized manner in an attempt to reform laws, to further socio-political goals or to alter the social order is also justified.¹⁵² He argues that "on the basis of an adequate theory of democracy, impact work, including class-action suits, lobbying, and organizing by public interest lawyers, is a boon to democratic politics. Impact work deserves not just toleration but support by a community dedicated to a democratic way of life."¹⁵³

III. THE WORK OF LAWYERING FOR SOCIAL CHANGE

Having explored the scholarship regarding political lawyering, this Part argues that lawyering for social change is entirely legitimate. Further, this Part proposes ideological and methodological models for engaging in such work.

A. Lawyering for Social Change is Legitimate

Despite various objections to the endeavor of lawyering for social change, this Note advocates that it is in fact a legitimate enterprise. The notions of the law as a reflection of social morality and the role of the lawyer in the legal profession support the lawyer's engaging in this type of work.¹⁵⁴ In addition, the concerns posited by opponents of political lawyering can be assuaged by taking measures to level power differentials between lawyers and clients and by examining the exceptions to the usual functioning of the democratic system.

lic, But Also the Lawyer and the Legal Profession, 91 MICH. L. REV. 2122, 2139 (1993).

149. See LUBAN, *LAWYERS & JUSTICE*, *supra* note 16, at 252-56.

150. See *id.* at 251-55.

151. See *id.*

152. *Id.* at 238. See generally *id.* at 293-391.

153. *Id.* at 304.

154. See *supra* Part II.B.

1. Responses to Concerns About Client Manipulation

Many arguments raised by opponents of social change lawyering based on the effect of this type of lawyering on the lawyer-client relationship can be overcome by an examination of applicable legal standards. As a threshold matter, recruiting clients for social justice activities constitutes wholly legitimate action.¹⁵⁵ The U.S. Supreme Court has recognized that solicitation in furtherance of social justice causes deserves First Amendment protection because it is a form of political expression.¹⁵⁶ The usual concerns regarding solicitation and advertising focus on attorney pecuniary interest that are not present when these activities are carried out by organizations whose primary goal is to raise and explore social justice issues.¹⁵⁷

Concerns over exploitation of these solicited clients can be addressed by full disclosure of the essential implications, risks and uncertainties involved, as well as the political goals of both the lawyer and the client.¹⁵⁸ The resulting work must be the product of mutual understanding, information sharing and effort on the parts of both lawyer and client.¹⁵⁹ As Luban points out, there are several reasons why a plaintiff may have to be recruited, including ig-

155. See *In re Primus*, 436 U.S. 412 (1978) (holding that solicitation of prospective clients by legal organizations whose primary purpose is to meet political aims constitutes expressive and associational conduct that is entitled to First Amendment protection, thus exempting a lawyer engaging in these activities from disciplinary action).

156. *Id.* at 428 (noting that for the ACLU, "litigation is not a technique of resolving private differences"; it is 'a form of political expression' and 'political association.'" (quoting *NAACP v. Button*, 371 U.S. 415, 429, 431 (1963))); see also *NAACP v. Button*, 371 U.S. 415 (1963) (holding that the activities of the NAACP constitute modes of expression and association which are protected by the First and Fourteenth Amendments, thus exempting them from the Virginia prohibitions on solicitation). In *Button*, the Court held that the solicitation of potential clients in order to further the civil rights goals of the NAACP was within the right "to engage in association for the advancement of beliefs and ideas." *Button*, 371 U.S. at 430 (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)).

157. See *Primus*, 436 U.S. at 429-431, 434-37. The Court held that the other traditional concerns regarding solicitation and barratry, including undue commercialization of the legal profession, are absent when a non-profit organization offers free legal services. See *id.* at 437. The Court noted, further, that as the ethical codes impose an obligation to serve the public interest, the ethical rules have traditionally exempted solicitation via offers of free representation to those with limited ability to obtain legal service on their own from the general bans on solicitation. See *id.* at 437 n.31. See also *Button*, 371 U.S. at 440-41 (noting that "regulations which reflect hostility to stirring up litigation have been aimed chiefly at those who urge recourse to the courts for private gain, serving no public interest" and that "[o]bjection to the intervention of a lay intermediary . . . also derives from the element of pecuniary gain").

158. See LUBAN, *LAWYERS & JUSTICE*, *supra* note 16, at 318.

159. See *id.*

norance on the part of potential plaintiffs that they are victims of illegal actions, the high cost of hiring lawyers for law reform activities and the difficulty of litigating against large institutions.¹⁶⁰ Whether the lawyer recruits the client or the client seeks out the lawyer is inconsequential so long as the client is fully informed and willing to undertake the litigation.¹⁶¹

The response to concerns about client manipulation lies in taking measures to level the potential power differential between the lawyer and the client, thereby helping to avoid the feared manipulation, and engaging in collaborative moral discourse. As mentioned previously, the use of a client-centered model of lawyering does not always work effectively in social justice settings.¹⁶² It may not be necessary to eliminate all aspects of this model, however. It is crucial to provide the client with as much information as possible to aid in decision-making, but, as Bellow notes:

[T]he practice of law always involves exercising power. Exercising power always involves systemic consequences, even if the systemic impact is a product of what appear to be unrelated cases pursued individually over time. Lawyers influence and shape the practices and institutions in which they work, if only to reinforce and legitimate them. Clients, similarly, bring to their legal advisers and representatives claims and concerns that arise from and are examples of underlying institutional arrangements and culturally created controls.¹⁶³

This raises the question of how to avoid exploiting this power differential.

Bellow addresses the potential for a lawyer's abuse of power, particularly where the clients being served are in some way vulnerable, and recognizes that choice is never equally allocated in any client-lawyer venture.¹⁶⁴ These power concerns can be addressed by employing some method of collaborative lawyering,¹⁶⁵ entering

160. *See id.*

161. *See id.*

162. *See supra* text accompanying notes 109-125.

163. Bellow, *supra* note 143, at 301.

164. *See id.* at 302.

165. *See, e.g.,* Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747 (1994) [hereinafter Alfieri, *Community*]; Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1987-88) [hereinafter Alfieri, *Antinomies*]; Anthony V. Alfieri, *Speaking Out of Turn: The Story of Josephine V.*, 4 GEO. J. LEGAL ETHICS 619 (1991); GERALD LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992); White, *To Learn &*

into alliances with clients based on mutual commitments and influence, with the respect and mutuality that such relationships entail counterbalancing some of the skewed power issues.¹⁶⁶ Collaborative lawyering aims to obscure the differences between lawyers and lay people and between legal and non-legal tasks, as well as to politicize the clients' efforts and involve the lawyer heavily in the client's work.¹⁶⁷

Lawyers and clients can create these collaborations through diverse methods. Some commentators suggest highly political efforts, focusing on "individual and collective client acts of self-determination in order to broaden social and economic forms of democracy."¹⁶⁸ These efforts would center on organizing, mobilizing and education.¹⁶⁹ Others focus on examining and critiquing the system in developing strategies and approaches in order to stimulate change on a consciousness level.¹⁷⁰ This notion is referred to as "lawyering in the third dimension" and emphasizes raising the client's consciousness in order to obtain a clearer picture of the problems needing solving and appropriate solutions.¹⁷¹ Finally, others suggest teaching self-help and lay lawyering to empower clients to help themselves in traditionally legal contexts.¹⁷² As one

Teach, *supra* note 111; White, *Collaborative Lawyering*, *supra* note 72; Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987-88); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

166. See Bellow, *supra* note 143, at 302-03.

167. See Richard D. Marsico, *Working for Social Change and Preserving Client Autonomy: Is There a Role for "Facilitative" Lawyering?*, 1 CLINICAL L. REV. 639, 654 (1995).

168. Alfieri, *Community*, *supra* note 165, at 1762.

169. See Alfieri, *Antinomies*, *supra* note 165, at 665, 694-95.

170. See White, *Collaborative Lawyering*, *supra* note 72, at 157-58; White, *To Learn & Teach*, *supra* note 111, at 761-62.

171. See White, *To Learn & Teach*, *supra* note 111, at 761. This is a process in which

small groups reflect together upon the immediate conditions of their lives. The groups first search their shared reality for feelings about that reality that have previously gone unnamed. They then attempt to re-evaluate these common understandings as problems to be solved. They collectively design actions to respond to these problems and, insofar as possible, to carry them out. They then continue to reflect upon the changed reality, thereby deepening their analysis of domination and their concrete understanding of their own power.

Id. This methodology is intended to help subordinated communities emancipate their consciousness from internalized oppression, helping bring individual techniques of enduring and confronting their common domination to the surface. See *id.*

172. See LOPEZ, *supra* note 165, at 70.

author posits, “[e]mpowered clients can begin to speak in their own voice — and to solve their own problems — without relying exclusively on the advocacy of lawyers.”¹⁷³ Alliances formed in an effort to bring about social change create more personal bonds and thus view the lawyer and client as partners rather than as hero and victim.¹⁷⁴ Employing some form of collaborative lawyering in a political lawyering context serves to both avoid concerns of lawyer domination and to build a stronger grassroots community.

2. Responses to Emotional Concerns

The claim that emotion clouds the political lawyer’s ability to be a zealous advocate¹⁷⁵ sells lawyer-activists short. Partisanship on the part of a lawyer does not inherently eradicate the lawyer’s ability to examine both sides of a legal issue. The moral activist model of lawyering not only permits personal connection to the lawyer’s work, but requires it.¹⁷⁶ In addition, it is not possible for any person to completely separate emotion and rationality.¹⁷⁷ Emotional detachment is not a prerequisite for moral lawyering.¹⁷⁸ Requiring this measure of separation removes the moral impetus for pursuing the work.

Further, having an emotional commitment to the cause for which the lawyer is working can benefit the client. Being thus motivated, the lawyer is likely to be an even more zealous advocate on his or her client’s behalf. Part of a lawyer’s function is to be partisan.¹⁷⁹ This partisanship does not automatically de-legitimize the lawyer, as Polikoff claims.¹⁸⁰ Working for a cause to which the lawyer is morally dedicated is wholly legitimate.

173. Angelo N. Ancheta, *Community Lawyering*, 81 CAL. L. REV. 1363, 1374 (1993) (reviewing Lopez, *supra* note 165).

174. See Bellow, *supra* note 143, at 303.

175. See *supra* text accompanying notes 130-132.

176. See *supra* text accompanying notes 27-38.

177. See MARY FIELD BELENKY ET AL., *WOMEN’S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND* 134 (1986) (examining the idea of constructive knowledge as the combination of rationality and emotion, as well as the integration of objective and subjective knowledge); see also CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* 69 (1989) (recognizing that moral judgments can be tied to emotion and reasoning).

178. See Sisak, *supra* note 16, at 2764-65 (citing Carol Gilligan, *Moral Orientation and Moral Development*, in *WOMEN & MORAL THEORY* 19, 30-31 (Eva Feder Kittay & Diana T. Myers eds., 1987)).

179. See AUERBACH, *supra* note 15, at 270 (referring to the position of Edgar and Jean Cahn).

180. See *supra* text accompanying notes 126-129.

3. Responses to Democratic Objections

In response to the democratic objections to political lawyering, the generally recognized exception to upholding the will of the majority is when that will infringes upon individual rights, particularly those of a minority group.¹⁸¹ The policies made by the courts are therefore not overt law making, but protection of minority viewpoints.¹⁸² In *NAACP v. Button*,¹⁸³ Justice Brennan's majority opinion noted that "collective activity undertaken to obtain meaningful access to the courts [is] a fundamental right under the First Amendment to the U.S. Constitution."¹⁸⁴ The Court held:

In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. . . . And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.¹⁸⁵

Further, this notion defeats the assertion that a lawyer's job is merely to apply the rules and resolve conflicts under them.¹⁸⁶ Justice Brennan acknowledged that in order to change the rules of a system, one may have to get inside that system, and this ability to gain entry is exactly the kind of access lawyers have to the legal system.¹⁸⁷ Additionally, the preamble to the ABA Model Rules of Professional Conduct states that:

181. See LUBAN, *LAWYERS & JUSTICE*, *supra* note 16, at 358.

The American system of government is built on two basic, counterbalancing principles: 1) that the majority of the people, through democratically elected representatives, governs the country and 2) that the power of even a democratic majority must be limited to insure individual rights. In every era of American history, the government has tried to expand its authority at the expense of individual rights. The American Civil Liberties Union exists to make sure that doesn't happen, and to fight back when it does.

Guardian of Liberty: American Civil Liberties Union, *supra* note 64.

182. See LUBAN, *LAWYERS & JUSTICE*, *supra* note 16, at 358; see also Julius L. Chambers, *Thurgood Marshall's Legacy*, 44 *STAN. L. REV.* 1249, 1249 (1992) (noting that Marshall believed that the courts were the "protectors of the powerless" (citing *Payne v. Tennessee*, 501 U.S. 808, 856 (1991) (Marshall, J. dissenting))).

183. 371 U.S. 415 (1963).

184. Chambers, *supra* note 182, at 1250.

185. *Button*, 371 U.S. at 429-30.

186. See *supra* text accompanying notes 137-139.

187. See *Button*, 371 U.S. at 429-30.

[a]s a public citizen a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. . . . A lawyer should be mindful of deficiencies in the administration of justice and . . . should help the bar regulate itself in the public interest.¹⁸⁸

It contends that lawyers play a crucial role in preserving society and that the realization of this role demands awareness by lawyers of their position in the legal system.¹⁸⁹

Finally, the very monopoly retained by lawyers on the provision of legal services makes it all the more crucial that lawyers continue to work for social justice, championing both under-represented people and ideas. Lawyers are the only people who can ensure that the courts act to protect those whose rights are infringed.

It thus becomes clear that lawyering for social change is a legitimate expression of the democratic protection of the marketplace of ideas and the rights of those who face unfair treatment because they belong to a minority group, express unpopular opinion or are otherwise excluded from the political process.

B. Contextual Lawyering as a Methodology for Social Change — The Social Engineering/Moral Activist Model as Prototype¹⁹⁰

The Social Engineering/Moral Activist Model (“SEMA Model”) most accurately addresses the issues involved with lawyering for social change. This model has its roots in moral activism and incorporates a broad range of theoretical and methodological approaches to the work of lawyering for social change. Because this model is based in moral activism, it provides both a personal moti-

188. Model Rules, *supra* note 13, Preamble, § 5.

189. *Id.* Preamble, § 12.

190. This Note combines the notions of social engineering and moral activism to portray this model because neither image alone encapsulates the motivating source and methodology of these movements. Moral activism, as discussed by eminent philosophers, focuses on the moral justification of the lawyer’s role. See Tremblay, *supra* note 16, at 11. It requires the lawyer to accept moral responsibility for her actions rather than hiding within the traditional conception of the lawyer’s role and to seek justice as a matter of vindicating legal ideals. See *id.* at 22-24 (citing LUBAN, *LAWYERS AND JUSTICE*, *supra* note 16, at 125; William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1083-84, 1090 (1988)). The moral activist notion’s focus on accountability is not mutually exclusive from the governing class notion, however. A lawyer can accept moral accountability even when working from an idea that serving the people stems from special duties arising out of privilege. That is why the model this Note advocates combines the moral drive of moral activism with the ideals and methodology of social engineering. A lawyer employing this model works from a moral base, accepts moral accountability for her actions, and uses the legal machinery at her disposal to work toward that morally derived goal.

vation for the lawyer and an ethical imperative to be true to the mission of the legal endeavor. Because the SEMA Model incorporates elements of multiple approaches, it enables the lawyer to be responsive to both the needs of the client and the legal undertaking.

1. *Failure of the Governing Class Model*

The governing class model¹⁹¹ promotes a hierarchical, unrealistic ideal that going to law school and practicing the law grants lawyers a measure of honed insight above and beyond that of the average citizen. Further, it posits that this advanced ability in decision-making elevates lawyers in society and therefore creates a duty for lawyers to serve the general public. These notions do not truly reflect today's cadre of lawyers. Law school certainly equips lawyers with some of the keys to open the doors of the legal system, but this knowledge is entirely unrelated to a higher ability to make judgments. It simply teaches students what legal mechanisms must be used to fight certain legal battles.

In addition, most lawyers do not necessarily associate a duty to perform pro bono work with being a member of the privileged legal profession.¹⁹² The participation of lawyers in pro bono services to the poor is extremely low. According to surveys conducted at the beginning of the 1990s, approximately eighty percent of the bar engages in no pro bono activity.¹⁹³

Further, none of the definitions of lawyering for social change discussed in this Note¹⁹⁴ fit within the governing class ideal. They all involve moral determinations as a starting point, such as what the best life is for humans, whether there is value in fighting the status quo and in representing the voiceless, and whether value exists in equality. These definitions involve moral motives rather than dutiful ones. These notions do not require special judgment, but they encourage using legal tools to work for moral causes.

191. See *supra* notes 15, 18-26 and accompanying text (discussing the governing class conception of lawyering).

192. Some lawyers do see a duty arising out of the monopoly lawyers have on the legal system. See *supra* text accompanying notes 145-151.

193. See Tigran W. Eldred & Thomas Schoenherr, *The Lawyer's Duty of Public Service: More Than Charity?*, 96 W. VA. L. REV. 367, 389-90 (1993) (citing A.B.A. CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, 1990 DIRECTORY OF PRIVATE BAR INVOLVEMENT PROGRAMS 146-47 (May 1990); COMMITTEE TO IMPROVE THE AVAILABILITY OF LEGAL SERVICES, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (April 1990)); Steven Wechsler, *Attorneys' Attitudes Toward Mandatory Pro Bono*, 41 SYRACUSE L. REV. 909 (1990)).

194. See *supra* text accompanying notes 3-11.

2. *Law as a Reflection of Social Values*

The definitions of political lawyering all point to the importance of working for a substantively better society.¹⁹⁵ They establish the meaning of lawyering for social change firmly within the SEMA Model, as the lawyer works to alter the social order to reflect the values to which she is morally committed. These definitions suggest that the use of legal tools to work for the moral good is the ultimate goal of lawyering. As a result, the SEMA Model serves to legitimize the practice of working for social change.

3. *Additional Client Safeguards Within the SEMA Model*

The SEMA Model provides an additional way to address concerns regarding lawyer domination of clients. The issue of elevating the lawyer's political goals over the client's individual goals loses relevance when the lawyer and client engage in a relationship of full disclosure and honesty.¹⁹⁶ Because the lawyer has a personal investment in the success of the pursuit, the lawyer has an incentive to try to establish the parameters of the representation in advance in order to prevent such a scenario.¹⁹⁷ Once potential con-

195. See Esquivel, *supra* note 16, at 329-30 (arguing that "procedure-based conceptions of justice fail to provide an adequate framework for public interest law because the pursuit of a substantively better society is an essential component of any movement for legal reform or enforcement of pre-existing rights").

196. See, e.g., Model Rules, *supra* note 13, Rule 1.7(b).

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, *unless*: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) *the client consults after consultation*.

Id. (emphasis added); Model Rules, *supra* note 13, Rule 1.7 cmt. 4 ("Consideration should be given to whether the client wishes to accommodate the other interest involved."); Rule 1.8(f) (noting that a lawyer may be paid by a source other than the client so long as the client knows about this arrangement and consents and so long as the arrangement does not compromise the lawyer's independent professional judgment); Model Code, *supra* note 1, DR 5-107 (allowing the lawyer to be paid by a third party so long as the client consents after full disclosure); ABA Canons, *supra* note 13, Canon 6 ("It is unprofessional to represent conflicting interests, *except by express consent of all concerned given after a full disclosure of the facts.*") (emphasis added).

197. See, e.g., Model Rules, *supra* note 13, Rule 1.2(c) ("A lawyer may limit the objectives of the representation if the client consents after consultation.").

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

Id. cmt. 4.

flicts are out in the open, both the client and the lawyer have the right to accept them and continue the representation, or to renegotiate or terminate the representation.¹⁹⁸ Thus, the SEMA Model encourages moral discourse, through which the issue of power can be diffused.

4. *Methodology Under the SEMA Model*

The causes and ideals embraced by lawyers for social change are extremely diverse; so too are the details, political issues, community concerns and underlying themes associated with them. None of these aspects is extricable from another. As a result, the best strategy for achieving social change can change from moment to moment. The SEMA Model suggests that a lawyer engaged in a political struggle must keep all available options at her disposal and consider a multitude of different ideologies. This strategy is the best way to ensure progress.

Achieving successful social change requires long-term, dedicated, incremental work, utilizing every available tool to address the demands of the situation. The conditions of the political climate are not easy to read, and therefore such determinations must be made carefully. The political lawyer must monitor social and political sentiment closely to determine which method will be most effective at a given point in time. As Hunter notes, “[s]tructural factors determine whether legislation or litigation dominates an equality movement at any given moment: the roles of the state and the market as allies or foes; the nature of the rights being sought; and the broader political climate in each arena.”¹⁹⁹ Further, she indicates that

Other factors complicate any brightline distinction between legislative and litigation arenas. Discursive communities arise in the interstices of courts, legislatures, and enforcement agencies. The lawyers and others who work in, and against, and back and forth between these institutions create and disseminate understandings of the law that then circulate in all those institutions and in the broader society.²⁰⁰

In addition, grassroots work within communities, negotiations with administrative agencies, public education and use of the media, and coalition-building are all additional effective means of addressing social needs. To limit the work of a political lawyer to a particular

198. See *supra* notes 28-29 and accompanying text.

199. Hunter, *supra* note 50, at 1013.

200. *Id.* at 1014.

genre would effectively tie her hands. The SEMA Model encourages the lawyer to use all of the tools at her disposal to reach the end goal.

CONCLUSION

The work of a lawyer for social justice is some of the noblest work that can be done. It provides underrepresented people and ideas with a voice in the legal arena. Political lawyering works to ensure that our legal system protects the rights of all. Even the ethics codes recognize the importance of doing this work.

Rules of law are deficient if they are not just, understandable, and responsive to the needs of society. If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, he should endeavor by lawful means to obtain appropriate changes in the law. He should encourage the simplification of laws and the repeal or amendment of laws that are outmoded.²⁰¹

Throughout their endeavors, political lawyers should be morally engaged and accountable. Morality-based social engineering results in vibrant, creative enterprises, as lawyers work to further the goals they have deemed morally worthy. Whether through litigation, public education seminars, rallies, lobbying or writing for scholarly journals, the work of a lawyer for social justice is never done. But it is always crucial.

201. See Model Code, *supra* note 1, EC 8-2.

